STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
MAY 29 2018
S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY

The Honorable John C. Hayes III, Circuit Court Judge

Appellate Case No. 2017-000057

DEMETRIUS SIMMONS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

BRIEF OF RESPONDENT PURSUANT TO WHITE V. STATE

ALAN WILSON
Attorney General

DESHAWN H. MITCHELL
Assistant Attorney General
SC Bar No. 101813

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

Petitioner's argument that the trial court erred in allowing the 911 recording into evidence is not preserved for this Court's review because no argument about prior bad acts or crimes was made at trial. Regardless of preservation concerns, the trial court properly admitted the 911 recording into evidence because its significant probative value was not substantially outweighed by the danger of unfair prejudice. Moreover, assuming the trial court erred in admitting the 911 recording, any error is harmless because it had no impact on the jury's verdict.

STATEMENT OF THE CASE

Petitioner is currently incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. Petitioner was indicted by the October 2013 term of the Greenville County Grand Jury for one count of Resisting Arrest (2013-GS-23-004562), one count of Breaking and Entering a Motor Vehicle (2013-GS-23- 004563), two counts of Larceny/Breaking into a Motor Vehicle (2013-GS-23-004564, -004565), one count of Grand Larceny (2013-GS-23-004566), and two counts of Burglary, First Degree (2013-GS-23-004567, -004568). Joey Maxwell, Esquire, and Sarah Henry, Esquire, represented Petitioner.

On December 11, 2013, Petitioner was tried in his absence before the Honorable Victor Pyle, Jr and jury. Petitioner was found guilty as indicted on all charges except the two counts of Larceny/Breaking into a Motor Vehicle. Judge Pyle sealed Petitioner's sentence. On October 16, 2014, Petitioner appeared before Judge Pyle for a sentencing hearing during which Judge Pyle unsealed his sentence of confinement for one year for Resisting Arrest, five years for Break and Entering a Motor Vehicle, thirty days for Grand Larceny, and fifteen years on each count of Burglary, First Degree. The sentences were set to run concurrently. Petitioner did not appeal his conviction or sentence.

On September 17, 2015, Petitioner filed a PCR application with the Greenville County Office of the Clerk of Court. App. 204-214. Respondent filed a return dated July 7, 2016, requesting that an evidentiary hearing be held. App. 215-220. A PCR hearing was convened on December 9, 2016, at the Greenville County Courthouse before Judge John C. Hayes, III. App, 222-253. Petitioner was present at the hearing and was represented by R. Mills Ariail, Jr., Esquire. Respondent was represented by Patrick Schmeckpeper, Esquire, of the South Carolina

Attorney General's Office. On December 20, 2016, Judge Hayes signed an Order of Dismissal denying Petitioner's PCR application. App. 255-261.

Petitioner filed a timely notice of appeal and a Johnson[1] Petition for Writ of Certiorari was filed on his behalf. On November 27, 2017, this Court issued an Order requiring Petitioner to file a merit Petition for Writ of Certiorari and brief pursuant to White v. State[2] in the case. Petitioner submitted both on January 26, 2018. This Brief of Respondent follows.

[1] 294 S.C. 310 (1988)
[2] 263 S.C. 110 (1974)

STATEMENT OF FACTS

Petitioner was tried in absentia on two burglaries charges and other related charges from a break-in that occurred at the Tintinger's residence. Only three witnesses testified at trial on behalf of the state: Mr. Tintinger, Mrs. Tintinger, and the arresting police officer.

Susanne Tintinger testified that on the morning of January 31, 2013, she entered her car parked in the garage of her home and noticed that it had been rummaged through ("trashed") and that after she saw that the console and glove compartment had been opened up and that her garage door remote was missing, she then saw also that the right garage door (which had not been operating properly) was partially opened from the bottom. Also, their green mountain bike that was parked in the garage was missing. Mrs. Tintinger stated that she called the police and reported this while driving to work on that morning. (App. 38,1. 9 - p. 69,1.11.)

Kenneth Tintinger (husband) testified that he stayed home on that morning. He testified police showed up at his residence after his wife had made the first 911 call. He testified he gave the police a report containing what was missing from the garage which included his green mountain bike. Shortly thereafter the police leaving, he heard the garage door go up and looked out to see a male wearing a green hooded sweat top pulling a box out of their garage. He called 911 and within minutes, the perpetrator, who was later identified as Petitioner, was apprehended in the neighborhood and arrested. App. 70,1. 22-p. 108,1. 6; App. 110,1.4-p. 121,1. 5.

In this case, police received two 911 calls: one call from Mrs. Tintinger and one call from Mr. Tintinger. Mrs. Tintinger called 911 while commuting to work on the morning of January 31, 2013, to report the break-in while Mr. Tintinger stayed at home; but while he was home, he called 911 just hours later on the same morning when the second garage break in occurred.

Prior to trial, the agreement was reached by all parties to have the following words/phrases muted (redacted) from the 911 tape (see Tr. 27,1. 24 - Tr. 28,1. 18) as follows: 1.)

The portion where the 911 dispatcher that said "the same guy's back" presumably when Mr. Tintinger called to report the second break in; and 2.) The portion where the 911 call includes a statement about a "streak of break-ins" apparently in the area.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006); State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Pagan, 369 S.C. at 208, 631 S.E.2d at 265; State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000). "A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

ARGUMENT

Petitioner's argument that the trial court erred in allowing the 911 recording into evidence is not preserved for this Court's review because no argument about prior bad acts or crimes was made at trial. Regardless of preservation concerns, the trial court properly admitted the 911 recording into evidence because its significant probative value was not substantially outweighed by the danger of unfair prejudice. Moreover, assuming the trial court erred in admitting the 911 recording, any error is harmless because it had no impact on the jury's verdict.

Petitioner asserts the trial judge erred in allowing a prior crime 911 recording into evidence at trial that suggested that Petitioner, who was being tried on two burglary charges from the same residence and had been seen when the second break-in occurred at the homeowner's garage, presumably broke into that garage hours earlier, which was when the first break-in occurred, because this prejudicial information that likely led the jury to hand down their guilty findings based on an improper basis. First, the issue on appeal is unpreserved because Petitioner's argument on appeal forms a different basis than the one offered at the time of trial. Second, the evidence's significant probative value was not substantially outweighed by the risk of unfair prejudice or confusing the jury. Third, any error is harmless because it had no impact on the jury's verdict

Petitioner's argument that the trial court erred in allowing the 911 recording into evidence is not preserved for this Court's review because no argument about prior bad acts or crimes was made at trial.

When a court rules upon the admissibility of a piece of evidence *in limine*, proper issue preservation requires an objection contemporaneous to its introduction. State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001). A motion to exclude evidence made at the beginning of trial does not preserve an issue for review because a motion *in limine* is not a final determination. *Id.* The moving party must make a contemporaneous objection when the evidence is offered for introduction before the jury. State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996).

The aggrieved party must also consistently object to the challenged evidence upon the same legal basis in order to preserve the objection for appellate review. "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). "[A]n objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge." State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001).

Moreover, an issue will be precluded from appellate review when the substance of the objection at trial does not comport with the specific issue raised on appeal. State v. Dickman, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000); State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995). "A party may not argue one ground at trial and an alternate ground on appeal." State v. Dunbar, supra; State v. Prioleau, supra.

Prior to opening statement being made and the jury being sworn the following exchange between the solicitor (Ms. Tessitore), Petitioner's trial counsel (Mr. Maxell) and the trial judge took place: (App.p.27-28)

> Mr. Maxwell: The 911 dispatcher said the same guy's back. Did you hear that a second ago? I'm just kind of concerned about the inference the 911 call operator's making when she has no observation of who was there, who wasn't.
>
> Ms. Tessitore: She's getting the information from the two callers.
>
> Mr. Maxwell: We don't know that. I mean, it's not the guy (victim) saying the same guy's back, she's saying it.
>
> The Court: Well, can you mute it when that comes out?
>
> Mr. Maxwell: We've agreed to redact similar stuff.
>
> Ms. Tessitore: I redacted one comment that one of the victims says -- apparently, there was a streak of break-ins, so we've taken that out. But to

actually make it without that statement would be time consuming, so if we can just mute that part.

The Court: Just mute it, that's what I'm saying. You know when it's coming up.

Ms. Tessitore: Yeah, it's right at the beginning.

Mr. Maxwell: At the very beginning, yeah. So I'll just mark at what point I should turn it on.

The Court: Yes.

On direct examination of one the victims Mr. Tentinger, the following exchange took place while the 911 call was being published to the jury: (App.p.95-98)

Mr. Maxwell: Objection, Your Honor.

The Court: Hold on, hold on. Yes, sir.

Mr. Maxwell: Your Honor, we had agreed to exclude certain parts --

Ms. Tessitore: Your Honor, can we approach?

The Court: All right. (whereupon, a bench conference was held.)

The Court: Take the jury out for a minute, please. (whereupon, the jury left the courtroom at approximately 2:07 p.m.)

The Court: Okay, Mr. Maxwell, what's your objection?

Mr. Maxwell: Yes, Your Honor, before trial we had approached and we had agreed to exclude any kind of comment about referring back to he's coming back, you know, referring to this Defendant was once there and he's come back. You know, at the very beginning solicitor redacted it and now she's playing it.

Ms. Tessitore: Well, just to clarify that, the issue arose when I was playing the 911 call, which you've had a chance to listen to and review beforehand. And I had approached the public defender with the fact that there was this initial statement that -- where the victim says, apparently, there was a streak of break-ins. So I had gone ahead and taken that statement out so that there wouldn't be any reference to other break-ins. And then Mr. Maxwell heard the 911 call we were playing and at the very beginning of it is the county dispatcher saying -- the dispatcher is stating, the same guy came

back. And she's relaying information from, perhaps, the victims or officers or whatever it is. Because the dispatcher is not here to cross-examine and because that could be potentially prejudicial, we agreed to start it at the 30-second mark, which would take out those other voices. And at this point, it's contained to what Mr. Tintinger has said, which is that the same guy came back. That's this witness's out-of-court statement that was made under the stress of the event. It's clearly an excited utterance. He's relaying events as they're occurring, so it's a presence sense impression. So it's admissible in all of those ways. It's his conclusion that it's the same guy. And Mr. Maxwell would certainly be able to cross-examine the witness about why he thought that and what basis he had for thinking that. And has, you know, obviously full abilities to ferret that out for the jury to decide. You know, it's not offered for the truth of the matter, but rather --

The Court: Okay. All right.

Mr. Maxwell: Your Honor, I'm not necessarily objecting to the hearsay aspect of it. I'm not waiving that either at this point. But my contention is that at the beginning, she did approach me about trying to exclude certain things and we even talked about it in front of Your Honor about excluding this one statement from the 911 operator about he's coming back. You know, so maybe I would just -- under false impression or something like that, but that's my basis for the objection is that I was under the impression that all these type statements would be excluded or redacted. Now, as far as hearsay goes, I don't know if it's an excited utterance or not. It is a conclusion. It's not an observation of what he's observing. But Your Honor, I would just ask

The Court: All right, subject to the objection, I'm going to allow that. I think that's a matter you can take up on cross-examination.

Mr. Maxwell: Thank you, Your Honor.

On appeal, Petitioner argues the prior bad evidence (911 call) introduced made it seem as though Petitioner, who was arrested based on the description given from the second break-in, was guilty of the first break in as well in addition to other burglaries in the neighborhood. Petitioner made no argument about prior bad acts or crimes as a basis for his objection at trial. Because Petitioner cannot argue one issue at trial and another on appeal, Petitioner failed to

preserve the issue presented for appellate review.

The 911 Tape's Probative Value Was Not Substantially Outweighed by Unfair Prejudice.

The crux of Petitioner argument rests on the notion that the admission of the 911 call from Mr. Tintinger, the second call made that morning to police, contained prior bad evidence that made it seem as though Petitioner who was arrested based on the description given from the second break-in, was guilty of the first break in as well in addition to other burglaries in the neighborhood.

Even if relevant, evidence must be excluded from trial if its probative value is **substantially outweighed** by the danger of unfair prejudice. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); see Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). The determination of the probative value of evidence relative to its potential prejudicial effect must be based on the entire record and the result generally hinges on the facts of each particular case. State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007).

Probative value is the measure of the importance of a piece of evidence's tendency to prove or disprove some fact or issue relevant to the outcome of a case. State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012), rev'd on other grounds, 409 S.C. 524, 763 S.E.2d 22 (2014). Meanwhile, unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000); see Old Chief v. United States, 519 U.S. 172, 181 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the

factfinder into declaring guilt on a ground different from proof specific to the offense charged."). However, unfair prejudice does **not** mean damage to a defendant's case that results from the legitimate probative force of a piece of evidence. State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998). That is true because all evidence introduced by the State in a criminal trial is meant to be prejudicial to the defendant, and it is only unfair prejudice that must be avoided. Id.

When ruling on the comparative probative value and potential prejudicial effect of evidence, trial judges have "particularly wide discretion[.]" Collins, 398 S.C. at 209, 727 S.E.2d at 757. As a result, a trial judge's ruling on such a matter should be afforded great deference on appeal and should only be reversed in exceptional circumstances. State v. Lyles, 379 S.C. 328, 339-340, 665 S.E.2d 201, 207 (Ct. App. 2008). Importantly, "[a] trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593-94 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." Id. at 358, 543 S.E.2d at 594.

Further, evidence of other bad acts is not admissible to prove the defendant's guilt except to show motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). When there is a close degree of similarity between the crime charged and the prior bad act, both this Court and the South Carolina Court of Appeals have held prior bad acts are admissible to demonstrate a common scheme or plan. See e.g., State v. Gaines, 380 S.C. 23, 30, 667 S.E.2d 728, 731 (2008).

"When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity." State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277-78 (2009). "When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." Id. Evidence of prior bad acts must logically relate to the charged offense, and the probative value of the evidence must outweigh any danger of unfair prejudice. State v. Holder, 382 S.C. 278, 293, 676 S.E.2d 690, 698 (2009). "The acid test of admissibility is the logical relevancy of the other crimes." State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998).

"Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." State v. Clasby, 385 S.C. 148, 150, 682 S.E.2d 892, 896 (2009) (citing Rule 403, SCRE; Gaines, 380 S.C. at 29, 667 S.E.2d at 731; State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007)). "The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case." Id. (citing State v. Fletcher, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008)).

In Petitioner's case, the trial judge did not abuse his broad discretion by admitting portions of the recording of the 911 call. As was noted by the solicitor, the recording made by the victim (Mr. Tintinger), was his out-of-court statement that was made under the stress of the event and that he was relaying events as they were occurring. The call gave the jury an idea of what was going on giving the evidence an exceptionally high probative value. While Petitioner claims the tape was prejudicial because some of Mr. Tintinger statements were "speculative," that speculation was readily apparent to the jury and Defense Counsel had the ability to cross-

examine Mr. Tintinger regarding his statements to the 911 dispatcher being speculative or without foundation.

Any prejudice to Petitioner stems from the evidence's substantial probative value and did not suggest a decision on an improper basis. While Petitioner claims the tape was prejudicial because Petitioner was portrayed as having the criminal disposition and propensity to commit burglaries and the prejudice came into play because the jury was presented with the assumption that Petitioner was guilty of the first burglary based on the prior bad acts evidence. However, that assumption or speculation was readily apparent to the jury and Defense Counsel had the ability to cross-examine Mr. Tintinger regarding his statements being an assumption or speculative. The 911 recording was properly admitted as the evidence's probative value was not substantially outweighed by the risk of unfair prejudice.

Additionally, the 911 call was introduced for the purpose of showing the *res gestae* and providing the full context of the event. Evidence of other crimes is admissible under the *res gestae* theory when the other actions are so intimately connected with the crime charged that their admission is necessary for a full presentation of the case." Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003); State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004) (finding temporal proximity of other acts to the charged crime is important in determining admissibility). "When evidence is admissible to provide this full presentation of the offense, there is no reason to fragmentize the event under inquiry by suppressing parts of the res gestae." State v. McGee, 408 S.C. 278, 288, 758 S.E.2d 730, 735-36 (Ct. App. 2014) (internal quotation marks omitted) (quoting State v. Preslar, 364 S.C. 466, 474, 613 S.E.2d 381, 385 (Ct. App. 2005)). Accordingly, the 911 recording was properly admiited.

Any error in admitting the 911 recording is harmless because it had no impact on the jury's verdict.

Notwithstanding, even assuming the trial judge erred in admitting the 911 tape, Petitioner did not suffer the requisite prejudice to require a new trial. Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). An error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008); see also State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) ("Engaging in this harmless error analysis, we note that our jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict."). Any error with respect to the admission of the 911 call was harmless because it could not have reasonably affected the verdict. The portion of the recording that makes references to "the same guy's back" was not a critical piece of the State's evidence. The State presented the same testimony Mrs. Tintinger, who testified she reported to the police that her garage remote had been stolen out of her car that night. Additionally, once police arrived at the home, Mr. Tintinger in giving a police report testified his green mountain bike had been stolen. After police had left, Mr. Tintinger observed a black male enter his garage after hearing the motor of the garage door open. The black male was wearing a green hoodie. Mr. Tintinger then called the police. Shortly thereafter the police apprehended a black male suspect wearing a green hoodie riding a green mountain bike that was later identified as belonging to Mr. Tintinger. Here, Petitioner was found riding the stolen green mountain bike that had been identified as being stolen prior to Mr. Tintinger making his 911 call to police. Additionally, the stolen garage door remote was found in the direction Petitioner was traveling when he left after being spotted by Mr. Tintinger. Since this information was presented to the jury, Petitioner could

not reasonably have been prejudiced by the admission of the 911 recording which presented the same allegations against Petitioner. Petitioner's convictions and sentences should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DESHAWN H. MITCHELL
Assistant Attorney General
SC Bar No. 101813

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

May 29, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
MAY 29 2018
S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY

The Honorable John C. Hayes III, Circuit Court Judge

Appellate Case No. 2017-000057

DEMETRIUS SIMMONS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Brief of Respondent Pursuant to White v. State**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Wanda H. Carter, Esquire
SC Commission of Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211

This 29th day of May, 2018

CAROLINE COLLINS
Administrative Coordinator