STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
R. Knox McMahon, Circuit Court Judge

THE STATE,

Respondent,

vs.

JOHNNIE LEE LAWSON,

Appellant.

Appellate Case No. 2015-002467

STATE'S PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, the State now petitions for a rehearing on the following points that this Court may have overlooked or misapprehended:

I. In its published opinion, this Court found the trial court erred in allowing the State to elicit testimony that was necessary to properly authenticate the ten-print card used as the known standard for comparison to prints found on the victim's vehicle shortly after the suspect attempted to break into the vehicle.

The testimony about how the ten print card was created and where it was created was necessary. In State v. Rich, 293 S.C. 172, 359 S.E.2d 281 (1987), the Supreme Court found the State did not sufficiently authenticate a print from a police file because no testimony was presented "as to

when and by whom the card was made and that the prints on the card were in fact those of this defendant . . ." Id. at 173-174, 359 S.E.2d at 282 (quoting State v. Foster, 200 S.E.2d 782 (N.C. 1973)) (internal quotations omitted). Because the State needed to authenticate the ten-print card, evidence as to the origin of the card was relevant and probative evidence.

In State v. Anderson, 386 S.C. 120, 124, 687 S.E.2d 35, 37 (2009), a SLED agent testified the ten-print card was a SLED record taken of Anderson by "a law enforcement agency." The latent print examiner testified "that when a person is arrested, the police or jail personnel roll the person's fingerprints onto a ten-print card." Id. Importantly, the Supreme Court noted defense counsel agreed to allow the witness to use the term "law enforcement agency" in lieu of identifying the record as originating from a correctional facility and noted no issue was raised as to potential prior bad act evidence at trial. Id. at 124 n.2, 687 S.E.2d at 37 n.2. The Supreme Court noted its prior holding in Rich that "testimony regarding the police fingerprint records [are] inadmissible without evidence as to when and by whom the card was made and that the prints on the card were in fact those of the defendant." Id. at 127, 687 S.E.2d at 39 (citations and internal quotation marks omitted). Ultimately, the Supreme Court held it was not necessary to have the person who actually took the prints testify, and the Supreme Court found the testimony elicited met authentication requirements. Id.

In the instant case, Agent Haftoglou testified the print was created July 23, 2003, and the print originated at Kirkland Correctional Institute. Agent Haftoglou did not say whether it was an employee print or an inmate print. Tr. p. 248, lines 18-24.

Rich remains controlling law that was not altered by Anderson. Therefore, the State was still required to show when and how the ten-print card was created in order to authenticate it as a record.

While in general, the burden to authenticate is not high, Rich set the specific standard as far as the admission of fingerprint records that are to be used as known standards. Note Lawson never made an offer to stipulate that the ten print card was created by a law enforcement agency as in Anderson. Further, in its footnote in Anderson, the Supreme Court expressly resisted a determination as to whether reference to the origins of the ten print card and other evidence referencing appellant's arrest was impermissible evidence of a prior bad act. See generally, Wade v. State, 348 S.C. 255, 559 S.E.2d 843 (2002) (finding reference to Inmate Litigation Act (ILA) in Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000) **was dicta** before finding ILA was inapplicable to post-conviction relief actions).

II. This Court suggests the State could have merely agreed to Lawson's offer to stipulate. The general rule is the prosecution cannot be forced to accept stipulations. State v. Simmons, 352 S.C. 342, 356-57, 573 S.E.2d 856, 864 (Ct. App. 2002). This Court may have overlooked the environment this offer to stipulate was made: As noted by the prosecutor, Lawson's counsel referenced an unrelated incident, another car breaking, during opening argument despite a prior agreement and ruling by a different judge a week earlier to keep out evidence of the incident. Tr. p. 27, lines 14-21; p. 28, lines 19-22. The prosecution may understandably not trust that opposing counsel would not use the absence of evidence attained through a stipulation as a sword against the State. Further, the State justifiably may not wish to water down its case in light of the already demonstrated defense tactics. The United States Supreme Court noted "the familiar standard rule that the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it." Old Chief, 519 U.S. 172, 186-87 (1997). The prosecution

should not have been forced to stipulate in lieu of specific evidence proving the known standard was Lawson's prints given the limited danger of unfair prejudice from the testimony elicited.

III. This Court focuses its analysis on Rule 404(b), SCRE, which concerns evidence of prior bad acts. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b). However, the State was not eliciting the testimony to prove Lawson's character, but to authenticate a record. Therefore, Respondent respectfully submits the applicable provision therefore is whether the probative value of the evidence was outweighed by the danger of unfair prejudice under Rule 403, SCRE.

"Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126-27, 606 S.E.2d 508, 513 (Ct. App.2004). Relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE; State v. Pagan, 369 S.C. 201, 210, 631 S.E.2d 262, 266 (2006). A trial court's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App.2004). Determination of relevancy is largely within the discretion of the trial court and will not be reversed absent an abuse of that discretion. State v. Sweat, 362 S.C. at 127, 606 S.E.2d at 513. In the instant case, the origin of the fingerprint record was relevant pursuant to Rich and Anderson.

Further, Respondent respectfully submits reliance on State v. Tate, 288 S.C. 104, 341 S.E.2d 380 (1986) is misplaced. In Tate, the appellant's mug shot photograph was used in a photographic lineup. The picture showed the appellant wearing a small board around his neck showing the date of

the photograph, which was a year prior to trial, and "SPTBG. CO. SHERIFF." The Supreme Court found the markings clearly indicated the appellant had a prior criminal record. In contrast, in State v. Stephens, 398 S.C. 314, 321, 728 S.E.2d 68, 72 (Ct. App. 2012), this Court found a photograph without any markings, but merely showing the defendant's head and neck with a black background did not imply a criminal record.

Tate is inapposite to the present case because in Tate, the board, which presumably could have been redacted from the picture, was unnecessary for the State to prove its case. In the present case, it was necessary to show the origin of the ten print card pursuant to Rich, and therefore, reference to the correctional facility was necessary and therefore probative, unlike the sign the appellant wore in Tate.

In the present case, Lawson's identity as the perpetrator was proved solely by fingerprint evidence. Therefore, the efficacy of the known standard used for comparison – the ten-print card – was probative to prove the element of identity. It was highly probative.

IV. Additionally, Lawson was not prejudiced by the reference to a correctional institute. Several cases note that vague references to prior arrests, incarceration, or similar contacts with the law generally insufficient to warrant a new trial or mistrial. See State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999) (finding no prejudice resulted from the admission of testimony establishing that law enforcement already had Council's fingerprints on record at the time of his arrest for the charged offense); State v. Singleton, 284 S.C. 388, 392, 326 S.E.2d 153, 156 (1985) (finding an arresting officer's vague references to prior crimes in the jury's presence did not warrant the granting of a mistrial) *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Robinson, 238 S.C. 140, 150-51, 119 S.E.2d 671, 676 ((1961) (finding testimony by a

witness that Robinson told him that he was on the way to the probation office did not create an inference that Robinson was convicted of another crime) *overruled on other grounds by* Torrence; State v. Thompson, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003) ("[A] vague reference to a defendant's prior [crimes] is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes."). In the present case, the State's case rested solely on the fingerprint evidence and it is extremely unlikely the jury was focused on any other issue but the efficacy of the fingerprint evidence. The vague reference to a correctional facility where Lawson may have been incarcerated (or as far as the jury knew, where he may have applied for employment) over a decade ago simply was unlikely to affect the result of the trial.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests this Court to grant the State's petition for rehearing and affirm the conviction and sentence.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

BY: _____
DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

June 20, 2018

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PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within State's Petition for Reharing on Appellant by delivering to his attorney of record, Laura R. Baer, Esquire, SCCID, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.
This 20th day of June, 2018.

Anne Mueller

Anne A. Mueller
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ALAN WILSON
ATTORNEY GENERAL

June 20, 2018

Laura R. Baer, Esquire
SCCID, Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

Re: The State v. Johnnie Lee Lawson
Appellate Case No: 2015-002467

Dear Ms. Baer:

Enclosed please find two copies of the State's Petition for Rehearing in the above-referenced case.

Sincerely,

David Spencer
Senior Assistant Attorney General
S.C. Bar No: 68571

DS/aam
Enclosures

cc: The Honorable Jenny A. Kitchings (with original and 6 copies)
Victim Advocacy Division