STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County

Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TERRY WILLIAMS,

APPELLANT

APPELLATE CASE NO 2015-001727

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUE ON APPEAL

In this murder trial involving the fatal shooting of the Appellant's wife's boyfriend and shooting of the wife, did the trial judge err in allowing the State, on re-direct examination, to question the wife about two prior domestic violence incidents between Appellant and the wife, both involving a firearm?

STATEMENT OF THE CASE

In 2014, the Williamsburg County Grand Jury indicted Appellant Williams for murder, assault and battery of a high and aggravated nature [ABHAN], and possession of a firearm during the commission of a violent crime, indictment #2014-GS-45-0001. On July 27, 2015, Appellant proceeded to jury trial before the Honorable R. Knox McMahon. Shaun C. Kent and Ryan Schwartz represented Appellant at trial. Kimberly V. Barr and Julie R. Swilley prosecuted the case. The jury found Appellant guilty of the lesser included offense of voluntary manslaughter, ABHAN and possession of a firearm during the commission of a violent crime. Judge McMahon sentenced Appellant to thirty (30) years for voluntary manslaughter, twenty (20) years concurrent of ABHAN and five (5) years concurrent for the weapons charge. Appellant served a timely notice of intent to appeal on August 7, 2015. This appeal follows.

ARGUMENT

In this murder trial involving the fatal shooting of the Appellant's wife's boyfriend and shooting of the wife, the trial judge erred in allowing the State, on re-direct examination, to question the wife about two prior domestic violence incidents between Appellant and the wife, both involving a firearm.

On November 10, 2013, Larry Moore was fatally shot outside Viola's Place, a nightclub in Greeleyville. The club is also known as Celestine's. (R. p. 227, lines 21-25). Larry Moore was Reva McFadden's boyfriend. (R. p. 322, lines 18-25). Reva McFadden is Appellant's wife. (R. p. 321, line 22 – p. 322, lines 1-14). On the night of the shooting Moore and McFadden went to Celestine's to shoot pool. (R. p. 351, lines 11-19). At some point in time Appellant came inside the club. (R. p. 352, lines 5-7). McFadden testified that she saw Moore's expression change and when she looked up she saw Appellant walking out of the club. (R. p. 352, lines 10-25). McFadden testified that Moore stated that he was tired of Appellant "mean mugging" him. (R. p. 353, lines 1-25). McFadden then testified, "And I said, '[D]on't worry about that, he done gone. He going out the door. He didn't say nothing to you, leave it alone.' He said, '[N]o,I'm going outside, I'm tired of him, I'm gonna ask him what's up, what do you want to do." That's when the altercation and argument came among us." (R. p. 354, lines 1-6). McFadden argued with Moore and tried to convince him to stay inside the club. (R. p. 354, lines 8-17; p. 239, lines 7-15).

Despite McFadden's plea to stay inside the club, Moore went outside after Appellant. (R. p. 391, lines 3-23). Tabitha Greene, a witness who was outside of the club on the night of the shooting testified, "And Terry [Appellant] was sitting there drinking his beer. I think if I'm not mistaken I may have had a beer then too. Larry came out the club. Maybe about three minutes

after him and Reva left, went to the truck, went back in the club, it was probably about three minutes when he came back outside and he just stood there." (R. p. 503, lines 19-25). Greene then testified, "And then that's when Mr. Williams asked him, what the fuck are you looking at; and Terry told him, Larry told him, these are my fucking eyes, I can look where I want to look." (R. p. 505, lines 8-11). At this point Appellant dropped his head and walked off." (R. p. 505, lines 22-24). Moore then told McFadden to go back inside the club. (R. p. 506, lines 17-24). Greene decided, after Moore told McFadden a third time to go back inside the club, that she would go back inside the club. (R. p. 506, lines 24-25). Three minutes after going inside, Greene heard gun shots. (R. p. 508, lines 1-5).

McFadden testified, "Well, when I walked out I heard, like I said, Larry was saying, what you want to do, I'm tired of you, I'm tired of seeing you everywhere I go, I'm tired, what you want to do. But my husband was standing in the driver's door with the door open saying, you know, back up, just back up, don't come close to me, back up." (R. p. 367, lines 3-9). McFadden testified that she saw Appellant with a gun and tried to walk in front of Moore. (R. p. 368, line 14 – p. 369, lines 1-18). According to McFadden, however, Appellant began shooting. (R. p. 370, line 21- p. 371, lines 1-4). Moore was fatally shot and McFadden was shot in the foot. (R. p. 377, lines 21-25).

During pre-trial motions Appellant specifically objected to the State making reference before the jury to domestic violence incidents that had been referenced in a prior Duncan[1] hearing. (R. pp. 177-178). The trial judge noted that the State should request an in camera hearing before attempting to introduce Lyle evidence. (R. p. 179, lines 1-6). During trial the

[1] State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011).

State asked McFadden on direct examination, "And was there an incident that occurred between you and the defendant a week before Mr. Moore was killed?" (R. p. 335, lines 10-12). Appellant objected. (R. p. 335, lines13-14). Outside of the presence of the jury the State explained that the question was designed to address the fact that Appellant was weak and obsessed with McFadden and had nothing to do with criminal domestic violence. (R. p. 337, lines 6-11). The State told the judge, "Judge, it's not my intent to get to any, to do direct examination with regard to this witness and any domestic violence incidents between her and the defendant." (R. p. 337, lines 20-23).

Still outside of the presence of the jury the judge then noted, "I think it's a different slice of cake as far as a gun is concerned." (R. p. 337, lines 24-25). The judge then excused witness McFadden from the courtroom. (R. p. 340, lines 10-17). The State then explained, "Yes, sir, judge. I only, I only intend to question the witness about a statement as to whether or not she told a doctor that her husband with whom she separated shot her boyfriend with an AK-47. I would only bring up the notion about her prior knowledge of an AK-47 because at one point she owned one, and so she had have the ability to know what an AK-47 looks like." (R. p. 340, line 20 – p. 341, lines 1-2).

Appellant then asked, "Just to make sure, just the ruling for the record, we are not going to be getting into criminal domestic violence or Lyle type evidence just for the record so I got that covered." (R. p. 343, line 24 –p. 344, lines 1-3). The State agreed and the judge stated, "And I think that is correct and I think not only based on my ruling, but based on the Solicitor's statement as far as its case in chief will not get into criminal domestic violence." (R. p. 344, lines 6-9). When the jury returned the State asked McFadden, "While you and your husband Mr. Williams were living together as man and wife did you ever purchase an AK-47 assault rifle?"

(R. p. 345, lines 3-5). McFadden answered, "Yes." (R. p. 345, line 6). No weapons were recovered in this case.

During the cross examination of McFadden counsel for Appellant asked her why Appellant was scared prior to the shooting. Counsel asked, "He [Appellant] was scared. Tell me why he [Appellant] was scared based upon the person, you know, for 15 years, knowing when he's happy, when he's sad, things of that nature." (R. p. 396, lines 10-12). McFadden answered, "Because he, he really never been in a confrontation in his whole entire life with anyone in an argument. He tries to stay away from people 'cause he's scared, and that's why when I say he always take his gun because he be scared." (R. p. 396, lines 13-17). On re-direct examination the following took place between the State and McFadden:

> Q. Now you said that your husband was not known to get into any confrontations, right?
>
> A. Not that I know of, no.
>
> Q. Is that your sworn testimony that's he's not known to get into any confrontations that you know of?
>
> A. Yes.
>
> Q. That's your testimony?
>
> A. Yes.

(R. p. 414, line 24 – p. 450, lines 1-8). The State then sought, outside of the presence of the jury, to introduce evidence of prior domestic violence incidents between Appellant and McFadden. (R. pp. 415-428).

Counsel for Appellant objected stating:

> I do not want the witness to have an opportunity to basically purger [sic] herself or mislead the jury in an effort to whatever her effort was to try to do. That being said, my objection would still be for the record that Mr. Williams is the only one

> prejudiced in this situation 'cause the state will then be allowed to bring in a criminal charge, one of which was – he had two prior CDV charges, one of which was dismissed. My understanding was this witness herself had a conviction for CDV against Mr. Williams, and then there was one which he pled guilty to. That being said, that in light of the fact that it was a 30 day misdemeanor, in light of the fact that there is an allegation that a gun charge was used in those – I think you heard that bit of testimony—that they would not be subject if he chose to take the stand, one because a 30 day misdemeanor is not a crime of dishonesty; and more importantly, because it's nexus and relationship with this being a gun case.

(R. p. 422, line 13 – p. 423, lines 1-8). Earlier, counsel, as a possible explanation for McFadden's answer, noted that McFadden had been present in the courtroom when the trial judge ruled that the prior domestic violence incidents were not admissible. (R. p. 419, lines 15-21). Counsel for Appellant asked the judge to limit the questioning of McFadden. Counsel noted, "It's not to punish Mr. Williams. And so the questioning should be tailored just to impeach this witness for telling something that was not true. (R. p. 423, lines 12-22). Counsel for Appellant further argued that the underlying facts and circumstances of the CDV incidents should not be admitted. (R. p. 424, line 19 – p. 425, lines 1-9).

The judge ruled, "Well, I take it also as 404(b) testimony where the Solicitor's required to show clear and convincing standard of clear and convincing as to purpose, motive, intent, common plan and scheme. It could be a common plan or scheme when you take assault weapons and point it at an individual when has a, when he as a confrontation with them." (R. p. 425, lines 10-17). Counsel for Appellant objected to the admission of the domestic violence incidents pursuant to Rule 404(b), SCRE, because McFadden's testimony opened the door to impeachment evidence **not** 404(b) evidence. (R. p. 425, line 18 – p. 426, lines 1-6).

The State then argued that the criminal domestic violence incidents should come in pursuant to Rule 404(a)(1), SCRE. (R. p. 426, line 16 – p. 427, lines 1-6). Counsel for Appellant objected to the admission of the domestic violence incidents pursuant to Rule

404(a)(1), based on the fact that Appellant had not offered evidence of a pertinent character trait. (R. p. 427, lines 7-13). McFadden was called as a witness by the State and the cross examination was not designed to illicit character trait evidence. Rather, the questioning was designed to show that Appellant was scared. The judge ruled that evidence of the domestic violence incidents was admissible pursuant to Rule 404(a)(1) and 404(b). (R. p. 427, line 14 – p 428, lines 1-22). The trial judge erred.

When the jury returned the following took place between the State and McFadden:

Q. Ms. McFadden, when we left off I asked you was it your sworn testimony that your husband was never known to get in any kind of confrontation with another person during his entire life in your response to me. Was that your testimony, correct?

A. When I said that I was meaning with someone else otherwise me.

Q. Oh, okay. So you want to clarify that again. We want to make further clarification.

A. Can I?

Q. Yeah. In fact, he got into a confrontation with you about six months before the shooting, right? Didn't your husband –

A. Most likely, we always stayed in confrontation, me and him.

Q. May the 13th of 2013 you got into a confrontation with your husband, correct?

A. Could have.

Q. Okay. If I showed you a statement would that help your memory as far as dates?

A. Yes.

Q. May 13th, 2013, you got into a confrontation with your husband?

A. Yes.

Q. You called the police as a result of that confrontation, correct?

A. Yes.

Q. Your – you told the police at that time that your husband presented a weapon, a firearm to you, correct?

A. We had a firearm. We were fighting over it, both of us.

Q. I am not talking about that one. I am talking about this one.

A. (Reads document.) Yes.

Q. Okay. And that wasn't an incident where ya'll were fighting over a firearm, was it? That was something else.

A. This was, this is something else.

(R. p. 439, line 13 – p . 430, 431, lines 1-3). The State then asked about a separate incident in December of 2012, when McFadden told the police that Appellant presented a firearm. (R. p. 431, lines 17-23). Counsel for Appellant asked to approach the bench and a bench conference was held off the record. (R. p. 431, line 25 – p. 432, lines 1-5). McFadden confirmed the December 2012, incident involving a firearm. (R. p. 432, lines 7-16).

Outside of the presence of the jury, counsel for Appellant placed the objections made at the bench conference on the record. (R. p. 478, line 18 – p. 479, 480, lines 1-12). Counsel argued:

> Once Ms. McFadden came back in to testify I think immediately what she had said, of course, nobody was there to talk to her, she clearly said, oh, yes, I do remember what you're talking about, something of that nature. I remember what you're talking about, I thought you were talking about other people, but me, and me and Terry Williams had had problems with one another. Nobody was there to interrupt her. Nobody was there to talk to her so that was something she said on her own. At that point in time I wanted to renew my objection to more specifically as that my understanding is now that the witness has given a specific answer, yes, and does not deny what she had said earlier – and I don't know if it's denial what she said earlier – just make sure I don't say it incorrectly – I don't think it would be proper under the rules to use extrinsic evidence at that point in time to attempt to impeach.

(R. p. 478, lines 23 – p,. 479, lines 1-17).

The judge again overruled the objection. (R. p. 482, line 4 – p. 483, lines 1-8). The trial judge erred. When asked on cross examination why Appellant was scared, witness McFadden answered, "Because he, he really never been in a confrontation in his whole entire life with anyone in an argument. He tries to stay away from people 'cause he's scared, and that's why when I say he always take his gun because he be scared." (R. p. 396, lines 13-17). This response did not open the door to allow the State to introduce prior bad act evidence pursuant to Rule 404(b) and did not open the door to allow the State to rebut any character evidence pursuant to Rule 404(a)(1) as Appellant did not place his character in issue. Instead, McFadden's testimony allowed traditional impeachment, by the State, pursuant to Rule 607, SCRE. Pursuant to Rule 613(b), SCRE, once McFadden admitted that she and Appellant had been in confrontations, the questioning by the State should have ended. The error in allowing the prior incidents of domestic violence involving a firearm between Appellant and McFadden was not harmless, especially in light of the fact that McFadden was the victim of the ABHAN charge, the deceased was dating McFadden and there was evidence in the record that Appellant acted in self-defense.

First, McFadden's response did not open the door to Rule 404(b) evidence. In State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006), the South Carolina Supreme court wrote:

> Evidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged. Such evidence is, however, admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. State v. Beck, 342 S.C. 129, 135–36, 536 S.E.2d 679, 682–83 (2000). 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. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001).

The State did not seek to admit the prior incidents of domestic violence to show common scheme or plan or absence of mistake or accident until after McFadden testified on cross-examination and the State was seeking to impeach her testimony. As a result there was not a hearing in regard to admitting the evidence pursuant to Rule 404(b). The admission of the prior incidents of domestic violence under Rule 404(b), without a hearing, was error. While there was some testimony about the prior incidents during the Duncan hearing, there was not enough information for the trial court to conduct a proper Rule 404(b) analysis, especially in light of the fact that one of the incidents was not the subject of a conviction. The trial court failed to make any findings pursuant to Rule 403 as to whether the prejudicial effect of the evidence outweighed its probative value.

Second, McFadden's response did not open the door to allow the State to rebut any character evidence as Appellant did not place his character in issue. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion. Rule 404(a), SCRE. An exception to this rule exists for evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same. Rule 404(a)(1). In State v. Nelson, 331 S.C. 1, 6, 501 S.E.2d 716, 718 (1998), the South Carolina Supreme Court wrote, "In a criminal case, the State cannot attack the character of the defendant unless the defendant first places his character in issue. Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989) (per curiam)." McFadden was called as a witness by the State. On cross examination counsel for Appellant asked her why Appellant was scared prior to the shooting as a means to support the self-defense claim, not to place Appellant's character in evidence.

McFadden's response did not place Appellant's "peacefulness" in issue. While she responded that Appellant had never been in a confrontation with anyone, after the judge ruled that the prior incidents of domestic violence were inadmissible, she also stated that Appellant was scared and always took his gun with him, arguably an unpeaceful trait. The prior incidents of domestic violence constituted improper character evidence and should not have been admitted pursuant to Rule 404(a) and did not meet the exception found in 404(a)(1).

The trial judge erred in relying on Rules 404(b) and 404(a)(1) to admit details about two prior domestic violence incidents between Appellant and his wife. McFadden's testimony on cross examination simply allowed traditional impeachment by the State pursuant to Rules 607 and 613(b). Rule 607, SCRE, provides that the credibility of a witness may be attacked by any party, including the party calling the witness. Rule 613(b), SCRE, provides in pertinent part:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible.

In State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App. 2004), the South Carolina Court of Appeals discussed Rule 613(b), SCRE, writing:

> The South Carolina rule differs from the federal rule in that a proper foundation must be laid before admitting a prior inconsistent statement. It is mandatory that a witness be permitted to admit, deny, or explain a prior inconsistent statement. Under Rule 613(b), extrinsic evidence of the statement is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made. Rule 613(b) explicates the procedure for impeachment by a prior inconsistent statement and requires laying the foundation. See State v. Sierra, 337 S.C. 368, 523 S.E.2d 187 (Ct.App.1999).

Based on McFadden's response that Appellant had never been in a confrontation with anyone, the State could properly question McFadden about prior confrontations with Appellant. Pursuant to Rule 613(b), however, once McFadden admitted that she and Appellant had been in confrontations, the questioning by the State should have ended. The State should not have been able to ask about the police being called or the fact that a weapon was involved. The admission of prior incidents of domestic violence, including information that the police were called and firearms were involved constitutes a prejudicial abuse of discretion requiring reversal.

CONCLUSION

Based on the above argument, this Court should reverse Appellant's convictions and sentences and remand for a new trial.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of June, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

June 14th, 2017

Kathrine H. Hudgins
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ATTORNEY FOR APPELLANT

This 14th day of June, 2017.

STATE OF SOUTH CAROLINA

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 14th day of June, 2017.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 14th day of June, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022