STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Marion County

Honorable William H. Seals, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RUSSELL LEVON JOHNSON,

APPELLANT

APPELLATE CASE NO. 2017-002393

INITIAL BRIEF OF APPELLANT

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse his discretion by admitting evidence of unindicted domestic violence that occurred in Dillon and Marlboro Counties as proof of the first degree domestic violence offense for which Appellant was indicted and tried in Marion County, particularly where the trial judge failed to give a limiting instruction to the jury that it could only consider this evidence as proof of kidnapping, and where Appellant was undoubtedly prejudiced because it is unclear from the record whether the jury found Appellant guilty based on the indicted conduct which occurred in Marion County or the unindicted conduct which occurred in Dillon and Marlboro Counties?

STATEMENT OF THE CASE

A Marion County Grand Jury indicted Appellant on February 9, 2017 for domestic violence first degree and kidnapping. R. *. His case was called to trial on November 13, 2017 before the Honorable William H. Seals, Jr., and a jury. Tr. 1. Assistant Solicitors John Holt and Patti Parker represented the state, and Scott Floyd represented Appellant. Tr. 1.

On November 15, 2017, the jury acquitted Appellant of kidnapping, but found him guilty of domestic violence first degree. Tr. 178, ll. 17-25. He was sentenced to ten years imprisonment. Tr. 181, ll. 12-13.

This appeal follows.

STANDARD OF REVIEW

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)) (internal quotation marks omitted). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. (quoting Pagan, 369 S.C. at 208, 631 S.E.2d at 265) (internal quotation marks omitted).

STATEMENT OF FACTS

Appellant and Tonya Richburg, who knew each other since high school, lived together in Longs for four years. Around August 2016, the pair separated and Richburg ultimately moved to Mullins in Marion County with her children. Tr. 65, l. 4 – 67, l. 1; Tr. 125, ll. 13-23. On September 15, 2016, Appellant showed up at Richburg's new house and asked her to ride to the store with him so the two could talk. Richburg agreed. In the car, Appellant told Richburg that he heard she was "moving on" and accused her of cheating on him and stealing money from him. Tr. 67, ll. 2-25.

As they were driving, Richburg asked Appellant to take her home so she could get her children. However, according to Richburg, Appellant refused. Richburg claimed Appellant grabbed her phone and took the battery out. He also took the battery out of his phone and told Richburg, "[N]obody's gone get in contact with you or me." Tr. 68, ll. 4-21.

Appellant then drove Richburg to a wooded area in Dillon County. They stood outside and talked. Appellant continued to accuse Richburg of cheating on him and stealing money from him. Tr. 68, l. 15 – 69, l. 15. After stopping in Dillon, Appellant drove to a store and bought a beer. Richburg claimed Appellant then drove her "down some back roads" and "a long dirt road" to another wooded area in Clio, which is in Marlboro County. Tr. 69, l. 21 – 70, l. 5; Tr. 72, l. 20 – 73, l. 7.

Appellant "made his own path through" the woods with the car and parked. Richburg claimed Appellant then got out of the car, walked to the trunk, and grabbed "a long metal stick" with a sharp end. She alleged Appellant stabbed her in the chest with this metal object as she was sitting in the car. Tr. 73, ll. 7-13. According to Richburg, Appellant then pulled her out of the car and onto the ground where he kicked and punched her in the face and on her side. Once

she was on the ground, Appellant grabbed a hammer from the trunk and struck her in the back of the head twice. He continued to accuse her of cheating on him and stealing money from him. Tr. 73, l. 13 – 74, l. 9.

Despite allegedly telling Richburg that "nobody would ever find" her in the woods, Appellant eventually helped Richburg get back in the car and drove her back to Mullins. Tr. 73, l. 18 – 74, l. 1; Tr. 75, ll. 1-12. On the way, the two stopped at a church where Richburg used the bathroom outside and a store where Appellant bought another beer. Tr. 75, l. 11 – 76, l. 20. During these stops, Richburg never tried to run away or find help. Tr. 76, ll. 21-25. Appellant even offered to take Richburg to the hospital. However, Richburg refused the offer because she "didn't want to get him in trouble." Tr. 94, l. 20 – 95, l. 7.

The pair eventually arrived at the Imperial Motel in Mullins, which is in Marion County, where Appellant rented a room. Tr. 77, ll. 4-8. Once in the room, Richburg claimed Appellant stood behind her and "tried to pop my neck." He allegedly told her, "[T]onight is going to be your last night here. And when I kill you, I gone turn around and kill myself." Tr. 77, ll. 18-25.

Appellant ultimately laid down on the bed and fell asleep. When Richburg noticed Appellant was sleeping, she ran out of the room and knocked on the door of the nearest room. She asked the occupants to take her home. However, once they saw her condition, they said they were going to call the police and Richburg ran from them. Tr. 78, ll. 1-6. She claimed she ran because she "didn't want to get him [Appellant] in trouble" and "didn't want him to go to jail." Tr. 78, ll. 8-11. Finally, Richburg ran into a police officer that was at a store nearby. She was taken to the hospital by ambulance. Tr. 78, ll. 6-15.

The state failed to present any evidence from the medical professionals who treated Richburg that morning and in the subsequent days regarding the extent of her injuries and any

necessary treatment. Richburg claimed her arm was broken in two places and that she received stitches to treat a wound on her arm. Tr. 79, ll. 1-18.

Appellant gave a statement to law enforcement after his arrest in which he admitted to picking Richburg up in his car that day and to being in the motel room with her. However, he "said he did not know how her injuries happened." Tr. 142, ll. 14-23.

The jury struggled to reach a verdict. Minutes after the trial judge gave the jury an Allen[1] charge, it returned with a verdict acquitting Appellant of kidnapping, but finding him guilty of domestic violence first degree. Tr. 175, l. 9 – 178, l. 25.

---

[1] Allen v. United States, 164 U.S. 492 (1896).

ARGUMENT

The trial judge abused his discretion by admitting evidence of unindicted domestic violence that occurred in Dillon and Marlboro Counties as proof of the first degree domestic violence offense for which Appellant was indicted and tried in Marion County, particularly where the trial judge failed to give a limiting instruction to the jury that it could only consider this evidence as proof of kidnapping, and where Appellant was undoubtedly prejudiced because it is unclear from the record whether the jury found Appellant guilty based on the indicted conduct which occurred in Marion County or the unindicted conduct which occurred in Dillon and Marlboro Counties.

Motion and Ruling

Appellant moved pretrial to exclude any evidence of domestic violence that allegedly occurred in counties other than Marion County where Appellant was indicted and tried. Defense counsel explained that Richburg alleged Appellant committed acts of domestic violence in Dillon and Marlboro Counties in addition to Marion County where he was indicted. Specifically, counsel moved to "limit any testimony about any domestic type abuse that she alleges occurred in those counties because this court doesn't have jurisdiction to hear allegations of domestic violence that occurred outside of the county." Tr. 41, ll. 13-25.

Citing State v. Ziegler, 274 S.C. 6, 260 S.E.2d 182 (1979), the assistant solicitor argued kidnapping is a continuing offense and that the evidence of domestic violence that occurred in Dillon and Marlboro Counties is admissible as evidence of kidnapping. Tr. 42, ll. 2-9. He argued, "And the State feels that the jury cannot get a full and fair accurate view of what happened if we can't present evidence to show why she did not want to get away from this gentleman." Tr. 42, ll. 9-13. *The solicitor clarified that Appellant was only being prosecuted for*

the domestic violence that allegedly occurred in the room at the Imperial Motel in Marion County, but the state sought to admit the other evidence of domestic violence that took place in Dillon and Marlboro Counties *to prove kidnapping*. Tr. 42, ll. 13-21 (emphasis added). He also argued this evidence was part of the *res gestae* of the crime. Tr. 42, ll. 17-21.

Defense counsel then clarified his objection. He asserted, "There's two separate counts on this indictment (domestic violence first degree and kidnapping). And what my concern is, Your Honor, is *if they're [the witnesses are] allowed to testify about acts of domestic violence that occurred in another jurisdiction, I don't know how they're [the jurors are] going to separate that out when they come to deliberate on whether or not he committed domestic violence here in Marion County.*" Tr. 43, ll. 10-21 (emphasis added).

The trial judge took a short break to read State v. Ziegler, 274 S.C. 6, 260 S.E.2d 182 (1979), which was cited by the state. Tr. 44. ll. 23-25. In Ziegler, the defendant was indicted and tried for kidnapping, first degree criminal sexual conduct, and armed robbery for conduct that allegedly took place in Richland County and on Fort Jackson. Ziegler, 274 S.C. at 8, 260 S.E.2d at 183. On appeal, Ziegler argued the Court of General Sessions in Richland County did not have jurisdiction over criminal actions that took place on Fort Jackson, which was owned by the federal government. Id. Our Supreme Court agreed. It held "the lower court was without jurisdiction to try offenses within the boundaries of Fort Jackson. Id. at 9-10, 260 S.E.2d at 184. In so holding, the Court emphasized, "[W]e have evidence of a kidnapping taking place off the fort and continuing onto the fort property. We also have evidence of sexual misconduct and of armed robbery both off and on the fort premises." Id. at 9, 260 S.E.2d at 182. The Court concluded its holding did not warrant a new trial on the kidnapping or armed robbery convictions because kidnapping is a continuing offense and because "the robbery of some, if not all, of the

items alleged to have been taken, was complete while the parties were in Richland County outside the fort." Id. at 10-11, 260 S.E.2d at 184-185. However, the Court asserted, "At the same time, we conclude that the likelihood of prejudice as relates to the sexual misconduct charge is sufficient to warrant a new trial on this count. *There is evidence of two separate incidents of sexual misconduct, one on the fort property, and one off the fort property. We cannot ascertain from the record which of the incidents was charged in the indictment and accepted by the jury as a basis for conviction.*" Id. at 12, 260 S.E.2d at 185 (emphasis added).

After reviewing Ziegler, the trial judge expressed his concern with the admission of the unindicted acts of domestic violence. Tr. 44, l. 23 – 45, l. 20. While noting the Supreme Court in Ziegler held kidnapping was a continuing offense, the judge also emphasized the last paragraph of the opinion concerning the prejudice as relates to the sexual misconduct conviction. Tr. 45, ll. 7-17. He stated, "That would lead me to believe that they're trying to isolate the CSC to Richland County as opposed to the fort, even though they allowed the kidnapping to go around." Tr. 46, ll. 17-20.

The assistant solicitor continued to assert that the state only sought to introduce the evidence of unindicted acts of domestic violence to prove kidnapping, not as substantive evidence of first degree domestic violence for which Appellant was indicted. The solicitor suggested the trial judge give the jury a limiting instruction explaining that the evidence of the unindicted domestic violence can only be considered by the jury as proof of kidnapping. Tr. 46, ll. 4-16.

When asked by the trial judge about a limiting instruction, defense counsel continued to object. He asserted, "[B]ack to my original point, I don't think there's anyway for the jury to separate all this out of their minds . . ." Tr. 48, l. 20 – 49, l. 3.

The trial judge ultimately took the matter under advisement. Tr. 53, ll. 4-6. During Richburg's testimony, the judge ruled that the evidence of unindicted domestic violence that occurred in Dillon and Marlboro Counties was admissible. He stated, "What I'm going to do is I'm going to allow events that happened in other counties in this trial. The State v. Ziegler allows that in regard to the kidnapping anyway. Furthermore, in regards to domestic violence, I'm going to allow events that happened in other counties only to prove kidnapping. Otherwise, I'm going to give a clear charge that to prove domestic violence in this case it must be from evidence that happened in Marion County. Any of the domestic violence acts that happened in another county can only pertain to the kidnapping and not domestic violence." Tr. 71, ll. 9-20.

Richburg then testified as to the allegations of domestic violence that occurred in Dillon and Marlboro Counties in addition to what allegedly occurred in Marion County. Defense counsel properly renewed his objection when the trial judge admitted State's Exhibit Nos. 1-6, which were photographs that depicted injuries and conduct that occurred outside the indictment. Tr. 102, l. 17 – 103, l. 11; Tr. 105, l. 10 – 106, l. 5.

After the state rested, the trial judge unexpectedly rescinded his prior ruling and held the evidence of domestic violence in Dillon and Marlboro Counties was admissible outright and not limited to merely proof of kidnapping. Tr. 144, ll. 9-10. Citing to S.C. Code Ann. §§ 17-21-10 and 17-21-20, which concern the proper venue for the prosecution of murder when the injury and death occur in different counties, the judge concluded "if the elements of the offense took place in more than one county [then] each county has concurrent jurisdiction." The judge also cited to State v. Allen, 266 S.C. 468, 224 S.E.2d 881 (1976) and State v. Gethers, 269 S.C. 105, 236 S.E.2d 419 (1977) in support of his ruling. Confusing the nature of Appellant's objection to the admission of this evidence, the judge asserted, "In this case, we have domestic violence and

kidnapping in Marion and possibly Dillon and possibly Marlboro. So I think *venue* is proper here in Marion." Tr. 144, ll. 9-23 (emphasis added).

Defense counsel renewed his objection to the court's ruling. He argued S.C. Code Ann. §§ 17-21-10 and 17-21-20 do not apply in this case, particularly where those statutes deal with murder. Tr. 145, ll. 1-10.

Due to the trial judge's ultimate ruling, he never gave the jury a limiting instruction that the evidence of unindicted domestic violence which allegedly occurred in Dillon and Marlboro Counties could only be considered by the jury to prove kidnapping. Consequently, the jury was permitted to consider the evidence of unindicted acts of domestic violence during its deliberations.

Discussion

The trial judge abused his discretion by admitting evidence of alleged acts of domestic violence which occurred in Dillon and Marlboro Counties because these acts fell outside the scope of the indictment. As defense counsel argued below, it was impossible for the jurors to separate the unindicted conduct "out when [it came time] to deliberate on whether or not he [Appellant] committed domestic violence here in Marion County," particularly where the trial judge failed to give a limiting instruction. Tr. 43, ll. 10-21. The trial judge ultimately confused the objection to the admission of this evidence and based his ruling on whether venue was proper. This was error.

As discussed at trial and above, in State v. Ziegler, the defendant was indicted and tried for kidnapping, first degree criminal sexual conduct, and armed robbery for conduct that allegedly took place in Richland County and on Fort Jackson. 274 S.C. at 8, 260 S.E.2d at 183. On appeal, Ziegler argued the Court of General Sessions in Richland County did not have

jurisdiction over criminal actions that took place on Fort Jackson, which was owned by the federal government. Id. Our Supreme Court agreed. It held "the lower court was without jurisdiction to try offenses within the boundaries of Fort Jackson. Id. at 9-10, 260 S.E.2d at 184. In so holding, the Court emphasized, "[W]e have evidence of a kidnapping taking place off the fort and continuing onto the fort property. We also have evidence of sexual misconduct and of armed robbery both off and on the fort premises." Id. at 9, 260 S.E.2d at 182.

The Court concluded its holding did not warrant a new trial on the kidnapping or armed robbery convictions because kidnapping is a continuing offense and because "the robbery of some, if not all, of the items alleged to have been taken, was complete while the parties were in Richland County outside the fort." Id. at 10-11, 260 S.E.2d at 184-185. However, the Court asserted, "At the same time, we conclude that the likelihood of prejudice as relates to the sexual misconduct charge is sufficient to warrant a new trial on this count. *There is evidence of two separate incidents of sexual misconduct, one on the fort property, and one off the fort property. We cannot ascertain from the record which of the incidents was charged in the indictment and accepted by the jury as a basis for conviction.*" Id. at 12, 260 S.E.2d at 185 (emphasis added).

Here, it is impossible to determine whether the jury found Appellant guilty for the conduct covered in the indictment, which allegedly occurred at the Imperial Motel in Marion County, or the unindicted conduct, which occurred in Dillon and Marlboro Counties. The trial judge abused his discretion by admitting this evidence, particularly where his reasoning for doing so concerned venue, which confused Appellant's objection. The judge's error was compounded by his failure to give the jury a limiting instruction.

"[E]vidence of other crimes or bad acts is generally inadmissible to prove the crime charged." State v. Nelson, 331 S.C. 1, 6, 501 S.E.2d 716, 718 (1998). However, that is precisely

what occurred in this case. The state was permitted to introduce evidence of uncharged conduct to prove the first degree domestic violence for which Appellant was indicted.[2] Without a limiting instruction to the jury, it is certain the jury considered this evidence when it convicted Appellant.

Accordingly, the trial judge abused his discretion by admitting evidence of unindicted acts of domestic violence. Appellant was undoubtedly prejudiced because it is impossible to determine from the record whether the jury found Appellant guilty based solely on the conduct alleged in the indictment or for the uncharged acts of domestic violence that occurred in Dillon and Marlboro Counties, which fell outside the scope of the indictment. Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

---

2 The evidence of uncharged acts of domestic violence also should have been excluded pursuant to Rule 404(b), SCRE, State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923), and Rule 403, SCRE.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of July, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Marion County

Honorable William H. Seals, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RUSSELL LEVON JOHNSON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case have been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served upon Russell Levon Johnson, #374557, at Wateree River Correctional Institution, P.O. Box 189, Rembert, SC 29128-0189, this 26th day of July, 2018.

Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of July, 2018.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.