

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

VAR SHEEN ANTUAN SMITH,

APPELLANT

APPELLATE CASE NO. 2018-000373

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by ruling evidence that Monte Ver'mon Steve was found murdered weeks after the kidnapping in this case was admissible, where it was undisputed the decedent Steve was not present when the victim, Frazier, was allegedly kidnapped, appellant was not charged for Steve's murder, and evidence of Steve's murder was not admissible as part of the *res gestae* or under State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923), and defense counsel correctly predicted evidence of the murder would subsume relevant evidence of the unrelated kidnapping if admitted to appellant's considerable undue prejudice?

STATEMENT OF THE CASE

Appellant was indicted at the March 2016 term of the Beaufort County Grand Jury for the offenses of kidnapping, possession of a handgun by a person convicted of a violent crime, and possession of a weapon during the commission of a violent crime. The alleged victim of kidnapping was Andre Frazier. Again, Monte Ver'mon Steve was the murder victim. R. 400 – 405.

Appellant's case was called to trial on February 21, 2018, before the Honorable Brooks P. Goldsmith and a jury. The assistant solicitors were Mary Jones and Kimberly Smith. Courtney Gibbes represented appellant. R. 1 – 2.

At the conclusion of the trial on February 22, 2018, appellant was found guilty on all three charges. R. 323, ll. 13-20. Judge Goldsmith sentenced appellant to twenty-five years for kidnapping, and he imposed five-year concurrent terms on the firearm convictions. R. 335, ll. 3-24.¹

This appeal follows.

¹ Jury selection occurred on February 20, 2018. R. 338 – 399.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003). This Court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000). This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases. Wilson, 345 S.C. at 6, 545 S.E.2d at 829; State v. Bowie, 360 S.C. 210, 600 S.E.2d 112 (Ct.App.2004). The appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence. Mattison, 352 S.C. at 583, 575 S.E.2d at 855.

If there is any evidence to support the admission of bad act evidence, the trial court's ruling will not be disturbed on appeal. State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct.App.2004); State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct.App.2004). In order for an error to warrant reversal, the error must result in prejudice to the appellant. See State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000); see also State v. Wyatt, 317 S.C. 370, 453 S.E.2d 890 (1995) (error without prejudice does not warrant reversal).

If the testimony is relevant and proffered for a permissible purpose, the trial court must next conduct a balancing test, pursuant to Rule 403; where the testimony's probative value is substantially outweighed by the danger of unfair prejudice, the trial court may exclude it. See State v. Gillian, 373 S.C. 601, 611, 646 S.E.2d 872, 877 (2007); see also Rule 403, SCRE (“[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ...”).

ARGUMENT

The court erred by ruling evidence that Monte Ver'mon Steve was found murdered weeks after the kidnapping in this case was admissible, where it was undisputed the decedent Steve was not present when the victim, Frazier, was allegedly kidnapped, appellant was not charged for Steve's murder, and evidence of Steve's murder was not admissible as part of the *res gestae* or under *State v. Lyle*, 125 S.C. 406, 118 S.E.2d 803 (1923), and defense counsel correctly predicted evidence of the murder would subsume relevant evidence of the unrelated kidnapping if admitted to appellant's considerable undue prejudice.

Relevant Facts

Prior to trial, assistant solicitor Jones asked the court to make a ruling that evidence about the disappearance and murder of Monte Steve was admissible as part of the *res gestae* and/or pursuant to Rule 404(b), SCRE, and *State v. Lyle*, 125 S.C. 406, 118 S.E.2d 803 (1923) in this kidnapping case. R. 5, ll. 3-14. The court then heard the pre-trial testimony of the alleged victim, Andre Frazier, and investigator George Erdel.

Andre Frazier lived in Beaufort County. He knew appellant from living in the area. He remembered on October 25, 2015, "It was a bad day for me . . . I had a gun pulled on me. Pretty much I was kidnapped." He claimed appellant was responsible for the kidnapping. R. 6, ll. 1-16.

Frazier said that the incident occurred at the home of his best friend, Monte Steve, on Greene Street in Beaufort on October 25, 2015. That was also the last day that Frazier saw Monte Steve. Appellant had been living with Monte around this time. There would be evidence that Monte let appellant live with him, but Monte was allegedly trying to get appellant to move out by claiming he – Monte – was going to be evicted. For example, as part of Monte's

deception, a "For Rent" sign was nailed to a tree in front of the house. R. 6, l. 22 – 7, l. 5. To say Frazier's testimony was difficult to follow without the grace of hindsight was an understatement.

Frazier went by the Monte Steve Greene Street address early that evening, and appellant allegedly said he "caught you [Frazier] slipping, I got you . . . he be saying things like, (sic) You snitch. Got your snitching ass." Appellant also allegedly asked Frazier where Monte was at the time. R. 7, l. 6 – 8, l. 10. Frazier said he told appellant he had talked to Monte. "He said, What did he say? I said, He didn't say nothing. I told him that I was coming here. Like that."

Frazier said appellant told the other man with him, Tyrone Wallace, to tie Frazier up inside the Greene Street home. He claimed appellant put a gun to the back of his head while Wallace tied him up and told him to get on the floor. While all this was going on, unbeknownst to Frazier, the police had arrived in the area on a "noise" infraction dispatch. R. 9, l. 7 – 12, l. 20. Appellant and Wallace allegedly let Frazier leave upon spotting the police. However, they told him, "You better not say nothing. And, shit, I didn't say nothing." R. 12, l. 21 – 13, l. 1.

Frazier explained that earlier that day he went to the Buffalo Wild Wings with Monte Steve to watch the Dallas Cowboys and the New York Giants football game which started around 4:15 p.m. Monte did not like sports, so he left about five minutes after the game started because there was only one female at the Buffalo Wild Wings to flirt with that day. R. 13, l. 8 – 16, l. 15.

Frazier said he called Monte before he left the Buffalo Wild Wings as promised, and he told Monte he was on the way to his house. Frazier said when he arrived at Monte's house, Monte was not there. This is when Frazier alleged that appellant abducted him, had him tied up

by Wallace, and released him a short time later when he saw the police in the area. R. 17, l. 3 – 22, l. 12.

Investigator George Erdel testified during the pre-trial hearing that he was assigned to the missing persons case of Monte Steve. Erdel said that Andre Frazier told Monte's mother about the "kidnapping incident," and the mother reported to the police that Monte had not come home that day as usual. The date of the alleged Frazier kidnapping was October 25, 2015, and the decedent's body was found on November 16, 2015, on St. Helena Island. Appellant and Tyrone Wallace were charged in the kidnapping of Andre Frazier. Tyrone Wallace was the only person charged with the murder of Monte Steve. Appellant, Dominique Cook, and Taquan Lampkin were charged as accessories after the fact in the murder of Monte Steve. R. 23, l. 3 – 26, l. 18.

The solicitor argued that under the legal theory of the *res gestae*, and pursuant to State v. Lyle, that this evidence of the Monte Steve murder was admissible. As for Lyle, the solicitor claimed it went to "motive" for the kidnapping, or it was all a "common scheme or plan." The solicitor claimed there was no way to *not admit* evidence of Monte Steve murder evidence in this kidnapping case. "It finishes the story. There's no way to explain the kidnapping without getting into the disappearance of Steve. And when I look at Lyle, it's essentially the same argument." R. 27, l. 12 – 31, l. 17.

"The State does not contend that he pulled the trigger that ended Mr. Steve's life. He assisted in the dumping of Mr. Steve and the burning of his remains on Pea Patch Road. That takes more evidence, more witnesses, more testimony than we would be prepared to present today at this trial. That is why I said that it was two separate circumstances." R. 30, l. 20 – 31, l. 24.

The solicitor also claimed that the disappearance and ultimate murder “of Monte [was] necessary to prove why this happened to Andre. And if it doesn’t, the State will be forced to fragmentize our case and I’ll be deprived of the opportunity to fully present the facts to the jury.” R. 31, l. 18 – 32, l. 7.

Defense counsel argued that the state’s theory of the case was apparently that appellant and Wallace were at Monte Steve’s home “to confront him about the rumored eviction and murder him. Based on that, I don’t know why -- it sounds like they are trying to also convict my client for murder as well in front of the jury. He is obviously not charged with that. It is the only way for her to prejudice my client in front of the jury.” R. 32, l. 16 – 34, l. 21.

Defense counsel argued the evidence was not admissible as part of the res gestae, Rule 404(b), SCRE, or under State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923). R. 32, l. 16 – 34, l. 21. Defense counsel further argued that evidence about the murder was simply not necessary to convict appellant of kidnapping. The solicitor responded that she would make it clear appellant was not charged with the murder of Monte Steve but that all of the other evidence was admissible. R. 36, l. 13 – 39, l. 3.

The judge ruled that he was granting the state’s motion and that he would admit the Monte Steve murder evidence. R. 39, ll. 4-25. Appellant can respectfully forthrightly argue that it was never shown how this alleged kidnapping of Frazier was part in parcel of the Monte Steve murder, or even how it somehow advanced it, or was even related to it. As argued infra, it was not part of the res gestae of the murder, it was not the motive for the kidnapping, and the kidnapping was not part of a common scheme or plan since it was an isolated event that was not repeated.

As will be seen infra, however, defense counsel correctly argued that evidence regarding the murder and disappearance of Monte Steve would overwhelm the evidence of the kidnapping of Andre Frazier for which appellant was on trial.

Trial Evidence

Armed with the trial judge's ruling that evidence of the Monte Steve murder was admissible, the solicitor told the jury in her opening statement that appellant allegedly asked the victim, Andre Frazier, "Where's Monte, have you talked to Monte, where is he? I'm trying to get in touch with him." R. 54, ll. 8-13.

Appellant and Tyrone Wallace allegedly then forced Frazier inside the house. They tied him up and appellant allegedly held a gun on him. R. 54, ll. 14-22. The solicitor further told the jury in opening that Monte Steve was never seen after October 25, 2015. His "remains were found on November 18, 2015. He had been shot. He had been burned and he had been discarded on a rural road on St. Helena Island." R. 56, ll. 12-22. The solicitor said that the jury would view a videotape of appellant's interview with the police, but, she alleged: "That interview is riddled with lies." R. 57, l. 21 – 58, l. 6.

Defense counsel Gibbes told the jury in her opening that this case was not about the murder of Monte Steve. She asserted the solicitor was using the Monte Steve murder to acquire a verdict based on sympathy. While the Steve family deserved sympathy, she tried to remind the jury that the victim in this case was Andre Frazier, who claimed he had been kidnapped by appellant. R. 60, l. 14 – 61, l. 9.

Sheriff's Deputy Heidi Light was the state's first witness. She was with the Beaufort Police Department and she testified that Janice Steve, Monte Steve's mother, told Light on October 25, 2015 that she was concerned "about her son who was missing." The police therefore

went to his residence at 1406 Greene Street to see if he was there. Janice Steve was then able to file a missing person's report on Monte Steve. R. 64, l. 14 – 67, l. 9.

Janice Steve testified she had met appellant, who was living with her son at the time he disappeared. R. 69, ll. 2-6. Ms. Steve testified that Andre Frazier called her on October 26, 2015, the day after Monte disappeared, and said, "Monte is missing and I think something bad has happened." Ms. Steve said Frazier was upset and, in her opinion, "afraid for himself." As seen, she filed a missing person's report on Monte. R. 70, l. 18 – 73, l. 13.

Andre Frazier then testified and repeated his pretrial testimony in the presence of the jury. He told the jury how he had watched a football game at Buffalo Wild Wings, that Monte left early, and Frazier later called him and said he was "on the way." R. 86, l. 9 – 90, l. 24. Frazier said when he pulled into the driveway at Monte's house, he was met by appellant and Tyrone Wallace. R. 93, ll. 10-17. Frazier now said that he asked appellant where Monte was, and that appellant said that "Monte [is] in the house." R. 95, l. 15 – 97, l. 18.

Frazier then asserted that he was tied up and held at gunpoint by appellant. Tyrone Wallace was appellant's alleged accomplice in the kidnapping. Frazier said appellant told Wallace to give Frazier his personal items back after he had tied him up, stating, "I'm not robbing you." R. 97, l. 24 – 107, l. 9.

Frazier further added that when appellant came back into the room a second time, after seemingly seeing the police in the area, "He didn't look evil then. Not that evil." R. 107, ll. 13-16. Frazier said he was released but told not to talk to the police as ordered by appellant. R. 109, l. 3 – 112, l. 6.

The state presented other evidence that on the last day Monte Steve was seen, October 25, 2015, that there was a shots-fired complaint in the area of Greene Street. Officer Bill

Wadman said police had had major problems in this neighborhood -- this two to three block square area -- and they took the call very seriously. Tr. 193, l. 2 – 195, l. 16. A silver Yukon became a suspect vehicle, and there were insinuations the vehicle was responsible for the shots fired call, and that appellant was somehow linked to the vehicle. R. 195, l. 7 – 198, l. 22.

Investigator George Erdel testified that Andre Frazier's statement was consistent with what other witnesses told him, which corroborated Frazier's statement.² R. 206, l. 22 – 207, l. 14. Erdel confirmed that Monte Steve's body was found on November 16, 2015, on St. Helena Island. R. 209, l. 23 – 210, l. 6. Tyrone Wallace was charged in that murder. R. 210, ll. 8-9.

The state also presented an abundance of evidence about appellant's alleged flight.³ Shabonda Milledge testified that she had dated Frazier in the past, and that appellant tried to have a relationship with her. R. 243, l. 25 – 246, l. 2.

Milledge said she talked on the phone to appellant between October 26 and November 16, 2015. She said she asked him repeatedly "if he wasn't guilty of what they were accusing him of, why was he running. He asked me more questions about Andre [Frazier]." Milledge said appellant would never tell her on the phone where he was at the time. R. 246, l. 7 – 247, l. 15.

Investigator Joshua Dowling testified that appellant was arrested in Georgia on November 16, 2015, about three weeks after the kidnapping and the disappearance of Monte Steve. R. 255, l. 12 – 256, l. 9.

The state's final witness, Pam Burris, the Beaufort County Clerk of Court testified that appellant had a burglary second conviction from March 21, 1994. R. 257, l. 22 – 259, l. 9.

² There was no objection to this testimony which clearly was meant to convey that the police interviewed other witnesses who did not testify, and those witnesses led police to believe Frazier was being honest with them.

³ Although defense counsel objected to this evidence of flight pre-trial, there was no objection to the flight evidence at trial.

There was no limiting instruction on how the jury could properly consider evidence appellant's second-degree burglary conviction.

In her closing argument, the solicitor argued that appellant was "an evil man." "This evil man who finds all of this comical for another person's nightmare is just a laugh to him. He is an evil man and he is a guilty man." R. 286, ll. 1-17. There was no objection to appellant, who did not testify or place his character at issue, being called "an evil man."

Discussion

The solicitor argued that the evidence of the Monte Steve murder was admissible as part of the *res gestae* pursuant to State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996).⁴ However, State v. Adams is readily distinguishable. In State v. Adams, Appellant Adams and a few others were smoking crack cocaine on the morning of June 17, 1992. At about 5:30 am, they decided they needed more money for crack so they robbed a Circle K convenience store. They immediately used the money from the robbery to purchase more crack cocaine which they smoked immediately.

When they ran out of crack cocaine again at about 6:00 am, they decided to rob Johnny's Grocery Store so they could get more money for more crack cocaine. While robbing Johnny's Grocery Store, the owner's husband entered the store, a shot was fired, and the owner's husband was killed. Adams was tried for murder and armed robbery in connection with the Johnny's Grocery Store robbery.

The Supreme Court found that the evidence of crack cocaine use and the prior robbery were admissible as part of the *res gestae*, and held that the trial court also properly admitted the evidence pursuant to State v. Lyle, 125 S.C. 406, 416, 118 S.E.2d 803, 807 (1923).

⁴ Overruled on other grounds in State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014).

As stated, State v. Adams is a much different case, since Adams and his cohorts were smoking crack cocaine and immediately robbed a store to get more money for more crack cocaine. They then smoked the crack cocaine and robbed another store to get more money for crack cocaine. The crimes and drugs were inextricably entwined in Adams.

Here, Monte Steve's body was not discovered on St. Helena Island until almost three weeks after the alleged Frazier kidnapping. It was undisputed that Monte Steve was not at home at the time of the Frazier kidnapping. There were only very broad insinuations that Monte Steve may have been abducted in the area that same day, and that appellant may have been involved. This evidence therefore was not clear and convincing pursuant to State v. Lyle, 125 S.C. at 416, 118 S.E.2d at 807, and that was another reason for it being inadmissible.

Moreover, defense counsel correctly argued that the evidence should be excluded because its probative value was substantially outweighed by its danger of unfair prejudice to the defendant. See State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991); Rule 403, SCRE.⁵ Defense counsel here correctly predicted that if admitted, the evidence of the Monte Steve murder would unfairly subsume the relevant inquiry in this case, which was whether appellant kidnapped Andre Frazier.

The evidence of the murder did not provide a motive for the kidnapping, it was an isolated incident that was therefore not part of any common scheme or plan, and it was not admissible under State v. Lyle. As for the res gestae, the Supreme Court respectfully could not have envisioned State v. Adams being used as precedent for what occurred here.

Given this serious evidentiary error which allowed evidence of the Monte Steve murder to dominate this kidnapping trial, appellant should be granted a new trial.

⁵ While defense counsel did not cite Rule 403, SCRE, or State v. Alexander, it is clear in context that was her "prejudice" argument.

CONCLUSION

By reason of the foregoing argument, appellant's convictions should be reversed, and this case remanded to the Beaufort County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of January, 2019.

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IN THE COURT OF APPEALS

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THE STATE,

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VARSHEEN ANTUAN SMITH,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Varsheen Antuan Smith states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Brooks P. Goldsmith, which was held on February 21 - 22, 2017, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Varsheen Antuan Smith.

Respectfully Submitted,

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 30th day of January, 2019.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable Brooks P. Goldsmith, Circuit Court Judge

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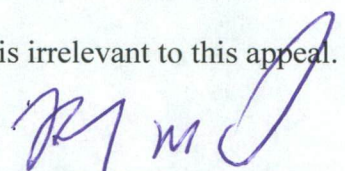
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictments;
- (2) Trial Transcript dated February 21-22, 2018;
- (3) Jury Selection Transcript dated February 20, 2018.

I certify that this designation contains no matter which is irrelevant to this appeal.

January 30, 2019


Robert M. Dudek
Chief Appellate Defender

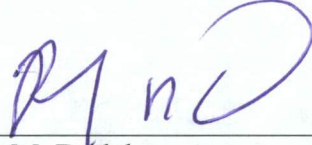
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ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

January 30, 2019.



Robert M. Dudek
Chief Appellate Defender

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has 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 Anders Brief of Appellant and Designation of Matter have been served on Varsheen Antuan Smith, 211467, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 30th day of January, 2019.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 30th day of January, 2019.

Courtney Powers (L.S)

Notary Public for South Carolina
My Commission Expires: May 2, 2027.