

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Darlington County

Thomas A. Russo, Circuit Court Judge

RECEIVED

APR 26 2013

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

DOUGLAS GREGG, III,

APPELLANT

APPELLATE CASE NO. 2012-213545

ANDERS BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in failing to grant a mistrial after a prospective juror during voir dire disclosed that appellant was charged with stabbing and killing his father when such disclosure put appellant's character into issue and brought up a prior bad act similar to the murder charge for which appellant was on trial?

STATEMENT OF THE CASE

Appellant was convicted of the following offenses after a jury trial held before the Honorable Thomas Russo in Darlington County on December 3 – 5, 2012, with respective sentences as follows:

Indictment

875	Kidnapping	30 years consecutive to 877, 878, 879, 880, 881, 882
876	Possession of a weapon	5 years
877	Petit larceny	30 days consecutive to 875, 878-882
878	Grand larceny	5 years consecutive to 875, 877, 879-882
879	Murder	life without parole consecutive to 875, 877, 878, 880-882
880	Armed robbery	30 years consecutive to 875, 877, 878, 879, 881, 882
881	Possession of a weapon	5 years consecutive to 875, 877, 878, 880, 882
882	Failure to stop for a blue light	3 years consecutive to 875, 877, 878, 879, 880, 881

Richard Jones, Esquire, Julie Wooten, Esquire, and Christy Wise, Esquire, represented appellant. John Holt, IV, Esquire, and Patti Parker, Esquire, represented the State.

This appeal follows.

ARGUMENT

The trial court erred in failing to grant a mistrial after a prospective juror during voir dire disclosed that appellant was charged with stabbing and killing his father when such disclosure put appellant's character into issue and brought up a prior bad act similar to the murder charge for which appellant was on trial.

Appellant was charged with going on a crack cocaine addicted crime spree to feed his addiction. One of the charges against appellant was for murder where he was accused of stabbing to death Levi Gregg. During jury qualification, the trial judge asked the prospective jurors if any of them knew anything about the charges against appellant or anything about the facts and circumstances surrounding the case. He asked them to come up individually if any of them knew anything. The following transpired with one juror:

BAILIFF: Juror Number 131.

THE COURT: Mr. Smith. What is it that you know?

MR. SMITH: My father was stabbed back in 2008, and this David Gregg, they said he was responsible. But it never did come to a judge or to a trial.

THE COURT: Let me ask you this. The fact that you have experienced this, would that affect your ability to be fair and impartial?

MR. SMITH: No.

THE COURT: Now, I want to make sure that I understand. What went on. Your father back in 2002 was murdered allegedly by this defendant? Mr. Gregg was charged with it?

MR. SMITH: That is what I was told.

THE COURT: Did it ever come to trial?

MR. SMITH: They did not contact me for trial.

MR. HOLT: Was your father his uncle?

MR. SMITH: (No response.)

THE COURT: Mr. Smith, I am going to excuse you from the trial of this case. I am going to ask you to have a seat. Don't have any conversation with anyone about anything that we have discussed about Mr. Gregg and all. But, I am going to excuse you from this trial. But, if you will have a seat, I will deal with you when I deal with the rest of the jurors. Thank you, sir.

(Tr. p. 19, line 14 – p. 20, line 13).

At no time did the court reporter note that any of this conversation was outside the hearing presence of the prospective jurors. If any of the prospective jurors did hear this, appellant's character was put into issue. In Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989), the court wrote:

In a criminal case, the **State** cannot attack the character of the defendant unless the defendant herself first places her character in issue. State v. McElveen, 280 S.C. 325, 313 S.E.2d 298 (1984); State v. Swords, 279 S.C. 554, 309 S.E.2d 750 (1983); *189 State v. Gamble, 247 S.C. 214, 146 S.E.2d 709 (1966). Further, evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate that the accused is a bad person. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987). Counsel's failure to object to the introduction of this character evidence constituted ineffectiveness.

In State v. Ross, 272 S.C. 56, 249 S.E.2d 159 (1978), the court noted that “[c]haracter evidence is so highly prejudicial that it is usually excluded under hard and fast rules.” In State v. Johnson, 306 S.C. 119, 125, 410 S.E.2d 547, 551 (1991), the court spoke on prior bad acts:

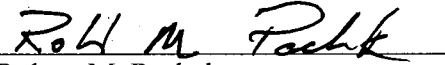
It is well settled that evidence of other crimes is generally inadmissible to prove the bad character of the accused to show that he acted in conformity therewith. Such evidence is admissible, however, when it tends to establish (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan or (5) identity. State v. Lyle, 125 S.C.406, 118 S.E. 803 (1923). Even if the evidence is deemed admissible, however, “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” State v. Alexander, 303 S.C. 377, 401 S.E.2d 146, 149 (quoting Fed.R.EVID. 403).

In State v. Gore, 283 S.C.118, 322 S.E.2d 12 (1984), the court said “[w]hen, as here the previous alleged bad act is strikingly similar to the one for which the appellant is being tried, the danger of the prejudice is enhanced.”

CONCLUSION

Appellant's convictions should be reversed.

Respectfully submitted,

Handwritten signature of Robert M. Pachak in cursive script, written over a horizontal line.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of April, 2013.

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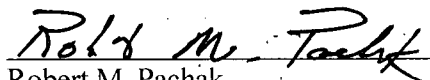
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Douglas Gregg III states:

1. He is 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 Thomas A. Russo, which was held on December 5, 2012, 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 Douglas Gregg III.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of April, 2013.

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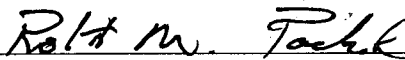
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

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

- (1) True-billed indictment(s);
- (2) Entire Trial Transcript (December 3-5, 2012)

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

April 26th, 2013



Robert M. Pachak
Appellate Defender

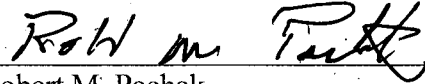
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PO Box 11589
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(803) 734-1343

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 August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

April 26, 2013



Robert M. Pachak
Appellate Defender

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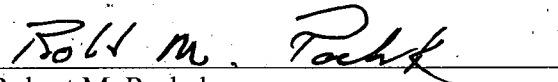
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CERTIFICATE OF SERVICE

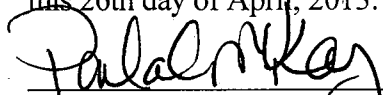
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a true copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Douglas Gregg, III, #137038 at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 26th day of April, 2013.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of April, 2013.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.