STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Roger M. Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BELVIN MAURICE PAGE,

APPELLANT

Appellate Case No. 2012-213143

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. The trial judge erred in allowing a confidential informant to testify that appellant made over one hundred drug sales in the past because this was prior bad acts evidence that should not have been admitted at trial since the prejudicial value of the same outweighed the probative value in the case.

II. The trial judge erred in denying appellant's motion for a mistrial after juror Mark Kuhn revealed that he recognized Manzi (confidential informant) as one who was treated for drug addictions at the prison where he worked, and that the other jurors knew of his contact with Manzi, because this meant that the jury verdict was subjected to outside influences and therefore tainted.

STATEMENT OF THE CASE

Appellant Belvin Maurice Page was convicted of distribution of crack cocaine per a jury trial held during the September 2012 term of the Charleston County General Sessions Court before Judge Roger M. Young. Appellant was sentenced to imprisonment for a period of fifteen years. Charles Cochran and Victoria Anderson represented appellant at trial.

Appellant appealed his conviction and sentence. This brief follows.

QUESTION I

The trial judge erred in allowing a confidential informant to testify that appellant made over one hundred drug-sales in the past because this was prior bad acts evidence that should not have been admitted at trial since the prejudicial value of the same outweighed the probative value in the case.

At trial, Charleston County Police Officer Matthew Euper testified that on July 22, 2012, he received a call from a SLED agent in Georgetown reporting that there was a confidential informant available who would be able to buy drugs from appellant. Officer Euper stated that he contacted confidential informant Francis Manzi thereafter and began to set up an undercover controlled drug buy. On that same date, Manzi was given $650.00 to buy drugs from appellant. Detective Kathleen McLean, who posed as Manzi's girlfriend, drove Manzi to Johns Island where he met appellant and purchased crack cocaine from appellant. R. 54, l. 23 – p. 67, l. 6.

Francis Manzi testified that he called appellant on July 22, 2010, and asked about purchasing drugs from him, and then went to appellant's residence on John's Island and bought crack cocaine from him (appellant). R. 128, l. 17 - p. 139, l. 3; R. 148, l. 24-p. 149, l. 1; R. 140, l. 17-21.

Manzi testified that he had done a lot of wrong and a lot of drugs and that he knew appellant. Manzi went on to describe in detail how he came to know appellant via the following testimony:

> Solicitor: Did you know [appellant]?
>
> Mr. Manzi: Yes, ma'am.
>
> Solicitor: Tell the jury a little bit about that. How long have you known Mr. Page?
>
> Mr. Manzi: Probably over **eight** years; seven, **eight** years.
>
> Solicitor: How did you know him? Were you friends, neighbors?

Mr. Manzi: No, unfortunately, I haven't had the greatest, like, past. I did a lot of wrong and I did drugs, and I met him through people when I moved here, and I bought drugs from him.

Solicitor: Now, how many times would you say that you bought drugs or hung out with Mr. Page?

Defense Counsel: Objection.

The Court: What is your objection?

Defense Counsel: Bring up prior conduct or alleging prior conduct.

Solicitor: How many interactions have you had with [appellant]?

Manzi: **Over 100.**

Solicitor: Did these interactions happen at your house, at his house, at a parking lot?

Mr. Manzi: I would say probably **50** percent at this house and then other spots.

Solicitor: So how many times would you estimate you've been over to his house?

Mr. Manzi: I mean, at least **60** times.

Solicitor: Okay. Did you go over socially?

Defense Counsel: Objection. Same as before.

The Court: Well, that question itself is not objectionable. Go ahead.

Solicitor: Were some of these occasions social?

Manzi: No not really. They were basically to buy drugs.

R. 133, l. 10-p. 134, l. 22.

Note that prior to trial, defense counsel requested that the solicitor not bring out any other drug transactions into evidence other than the July 22, 2010, transaction for which appellant was on trial. R. 30, l. 6 – p. 32, l. 13.

Evidence of prior bad acts is inadmissible to show that the accused is a bad person or has the propensity to commit the crime charged. State v. Peake, 302 SC 378, 396 S.E. 2d 362 (1990). State v. Smith 309 SC 409, 419 S.E. 2d 816 (1992). Also, even if prior crimes are considered under the Lyle[1] exceptions; nonetheless, the value of the priors must outweigh the prejudicial value, i.e., the prior crimes cannot be used to show that the accused is a bad person. State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008). Moreover, the danger of prejudice is enhanced when the prior crimes or bad acts are similar to the crime for which the defendant is on trial. State v. Gore, 283 S.C. 118, 322 S.E.2d 13 (1984); State v. Wilson, 274 S.C. 635, 266 S.E.2d 426 (1980). There is heightened prejudice in admitting prior crimes that are similar to the one for which the accused is on trial. State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000); State v. Elmore, 368 S.C. 230, 628 S.E.2d 271 (2007); State v. Gore, 283 S.C. 118, 322 S.E.2d 13 (1984); State v. Wilson, 274 S.C. 635, 266 S.E.2d 426 (1980). Admitting priors similar to the crime for which the defendant is on trial would constitute evidence that is more prejudicial than probative because would suggest that the defendant had the propensity to commit the crime charged against him. State v. Smith, 309 S.C. 409, 419 S.E.2d 816 (1992).

In the case, at bar, the jury was apprised of the staggering number of prior drug-related contacts (**100 times**) Manzi had with appellant over an **eight**-year period. The jury learned that Manzi's had gone to appellant's residence approximately **60 times** and that his visits there were not social, but rather to purchase drugs from appellant. There was no mistaking this prior bad act testimony in question as a depiction of appellant as a serial drug dealer and seller who habitually sold drugs to Manzi and probably others for years and years (an **eight**-year period) prior to the July 22, 2010, drug sale that occurred in this case. This prejudiced appellant's case. The message was

[1] Prior crimes can only be used in order to show motive, intent, identity, absence of mistake or accident or common scheme or plan. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

undoubtedly clear that appellant was predisposed to sell drugs by trade and/or habit, and as a result, the inference was that he was certainly guilty of selling Manzi the drugs in question on July 22, 2010.

There is no question that Manzi's history of his many prior drug connections with appellant constituted prejudicial and inadmissible prior bad act evidence that sullied appellant's character and was far more prejudicial than probative in the case. Compare the Court's reversal in State v. Tuffour, 364 S.C. 497, 613 S.E.2d 814 (2005), where the court found error where the prior bad act of the defendant's sale of crack cocaine to an undercover operative on several prior occasions in the past was not relevant to the charge of trafficking for which the defendant was on trial. See also the reversal in State v. Campbell, 317 S.C. 449, 454 S.E.2d 899 (Ct. App. 1994), where the court held that the state's introduction of evidence of the defendant's prior cocaine sales was an attempt to demonstrate that because he had done so in the past, then he was guilty on the charge of distribution of crack cocaine for which he was being tried. In State v. Carter, 323 S.C. 465, 476 S.E.2d 916 (1996), the Court reversed and held that testimony concerning a prior sale of crack cocaine to a certain person by the defendant on January 14, 1994, was not necessary to establish the defendant's guilt regarding the January 18, 1994 sale of crack cocaine that was made to the same person. In State v. Bostick, 307 S.C. 226, 414 S.E.2d 175 (1992), the court reversed and held that since the defendant was being tried for distribution of crack cocaine, evidence that the defendant made prior drug sales from the same location was held to have been more prejudicial than probative. In State v. Garner, 304 S.C. 220, 403 S.E.2d 63 (1991), the Court held that the defendant, who was convicted of trafficking in cocaine, was prejudiced by the admission of portions of a taped conversation between him and another regarding negotiations for a future sale of a kilo of cocaine.

Clearly, the prior bad act drug testimony in this case portrayed appellant as a confirmed drug dealer who was probably guilty of the cocaine drug sale charge for which he was on trial. Likewise, there was no question that the prejudicial value of this prior bad act testimony outweighed any probative value.

In summary, the trial judge's error in allowing into evidence the prior bad act testimony in question violated appellant's right to a fair trial guaranteed under the Fourteenth Amendment to the United States Constitution and article, 1, §3 of the South Carolina State Constitution.

QUESTION II

The trial judge erred in denying appellant's motion for a mistrial after juror Mark Kuhn revealed that he recognized Manzi (confidential informant) as one who was treated for drug addictions at the prison where he worked, and that the other jurors knew of his contact with Manzi, because this meant that the jury verdict was subjected to outside influences and therefore tainted.

During the jury selection, defense counsel moved to strike venireman Mark Kuhn for the following reasons:

> Defense Counsel: Move to strike for cause for this gentleman. He works at the Charleston Center and at the jail, Charleston Center in terms of drug treatment, and specifically does those things at the jail.
>
> The Court: He didn't say anything about being uncomfortable doing it.
>
> Defense Counsel: I just felt compelled to do that, and the fact that he specifically deals with drugs.
>
> The Court: I'm not going to strike him for that.

R. 20, l. 10-19.

Prior to the jury selection process, Kuhn did not state that he knew Manzi when the names of the witnesses in the case were read out loud to the venirepersons. R. 4, l. 11 – p. 5. l. 4. Ultimately, Kuhn was seated on the petit jury in the case. Kuhn was not stricken by the defense

because all five strikes had been used when Kuhn was presented for a seat on the petit jury. R. 13, l. 13-p. 17, l. 10.

Then, after Manzi testified, Kuhn informed the Court that he knew Manzi because he (Kuhn) worked as an administrator at a prison where inmates received drug counseling and that he recognized Manzi as one who was at that prison at one point in time. R. 152, l. 24-p. 154, l. 6. Nonetheless, Kuhn stated that he could be an impartial juror and would not believe or disbelieve Manzi's testimony based on what he knew about Manzi. R. 154, l. 7-p. 155, l. 15. However, Kuhn advised the trial judge that somehow the jurors were aware of the fact that he knew Manzi. R. 156, l. 1-25. Counsel moved for a mistrial on the following grounds:

> Defense Counsel: Well, your Honor, I would move for a mistrial, just based on him knowing him personally, that's sort of related to this as somebody receiving drug treatment and the allegation is that he's purchasing drugs.
>
> The Court: Well, it does seem that he didn't know him very well because he didn't know his name. He had, it sounds like, a minimal amount of contact with him and it was a number of years ago, and he did say what contact he had with him would not affect his decision on how to trust – on how to judge his character adversely or didn't' add any additional – it didn't add any additional, I suppose, level of trust in what he had to say, nor did it take away from it, so I'm going to deny the motion for a mistrial.
>
> Defense Counsel. If I could not for the record, Your Honor, this is a juror that I did move to strike for cause.
>
> The Court: I believe you did.
>
> Defense Counsel: Thank you, Your Honor.

R. 157, l. 13-p. 158, l. 13.

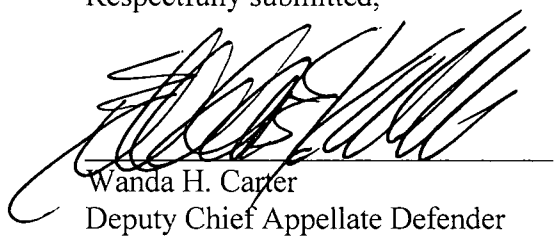
Kuhn remained on the petit jury at trial. The Sixth and Fourteenth Amendments guarantee a defendant a fair trial by a panel of impartial jurors. State v. Bryant, 354 S.C. 390, 581 S.E.2d 157 (2003), citing to Estelle v. Williams, 425 U.S. 5011 (1976). In order to protect this safeguard, a jury verdict must be free from outside influences. State v. Cameron, 311 S.C. 254, 428 S.E.2d 10

(1993); State v. Carlson, 363 S.C. 586, 611 S.E.2d 283 (2005). In both Cameron and Carlson, the question raised was whether communications between the jury and a bailiff were "harmless and could not have affected the verdict." Although Kuhn stated that he was unaffected by his recognition of Manzi, it was entirely possible that since the other jurors knew of Kuhn's contact with Manzi, there might have been some influence on the other jurors and their verdict. At the very least, a hearing should have been held in order to determine how the other jurors knew of Kuhn's contact with Manzi and what the effect this information had on them and their verdict. See State v. Bryant, supra, citing to Smith v. Phillips, 455 U.S. 209 (1982), where it is suggested that a hearing should be held in cases where a juror's partiality is questioned after a trial so that the defendant can show actual juror bias. The trial judge erred in denying appellant's motion for a mistrial due to juror misconduct in the case.

CONCLUSION

Based on the following argument, appellant's case should be reversed and remanded to the lower court for a new trial

Respectfully submitted,



Wanda H. Carter
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ATTORNEY FOR APPELLANT

This 5th day of September, 2013.

CERTIFICATE OF COUNSEL

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

September 5, 2013

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Christina Catoe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 5th day of September, 2013.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of September, 2013.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.