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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Orangeburg County
Honorable Carmen T. Mullen, Circuit Court Judge
Appellate Case No. 2012-212989

RECEIVED
JUL 23 2014
SC Court of Appeals

The State,

Respondent

v.

Jeffrey E. Morton,

Appellant

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. The Trial Court erred in allowing testimony of prior bad acts when the prior bad act was not established by clear and convincing evidence by ruling that the unfair prejudice of the prior bad act testimony was substantially outweighed by its probative value.

II. The Trial Court erred in refusing to grant Appellant a directed verdict on the attempted murder charge when there was no direct evidence of malice and where the circumstantial evidence was not substantial, but rather was sufficient only to raise mere suspicion of guilt.

STATEMENT OF THE CASE

On February 8, 2012, Jeffery E. Morton, was indicted by the Orangeburg County Grand Jury for (1) one count of Attempted Murder in violation of S.C. CODE ANN. § 16-3-29.

Morton was tried before the Honorable Carmen T. Mullen, and a jury on September 8-9, 2012. Morton was represented by Doug Mellard and Peggy Hinds, and the State was represented by Assistant Solicitor Dan Sorenson.

The jury returned with a verdict of guilty of the lesser included offense of Assault and Battery of a High and Aggravated Nature in violation of S.C. CODE ANN. § 16-3-600 (B). The Trial Court sentenced Morton to twenty years provided upon the service of 12 years and probation for 5 years to follow.

Morton timely filed and served his Notice of Appeal.

STATEMENT OF FACTS

The victim is married to the Appellant's ex-wife. Morton, who is the appellant, went to the victim's residence on the night of the incident at approximately 4:30 a.m. Morton had a pocket knife with him. Morton did not enter the victim's residence. Morton did not attempt to enter the victim's residence. Victim walked outside as he normally does when he wakes up and when he did he heard a person over behind the vehicles. (Tr. 97, ll. 10-13; R. p. 9, lines 10-12). The victim reached down to pick up something heavy, like a brick and yelled to his Wife to call 911. (Tr. 97, ll. 21-24; R. p. 9, lines 22-24).. The victim testified that the person looked like they were going to run. (Tr. 97, ll. 24-25; R. p. 9, lines 24-25). The victim then called for his wife to get his gun. (Tr. 98, ll. 5-6; R. p. 10, lines 5-6). A fight ensued.

When the police arrived, they found Morton and the victim tangled together and Morton had a knife. (Tr. 127, ll, 15-22; R. p.17, lines 15-22). The victim told the officers that Morton was there to slice his tires. (Tr. 128, ll. 19-20; R. p. 18, lines line 20).

Morton testified that he had previously been married to the victim's wife and they had twin daughters together. (Tr. 182, ll. 4-10; R. p. 29, lines 4-6). Morton further testified that he went to the victim's residence because he got a distressing text from his daughter. (Tr. 184, ll. 16-17; R. p. 31, lines 16-17). When the victim came outside and saw Morton, Morton tried to run from the victim. (Tr. 187, ll. 4-7; R. p. 34, lines 4-7).

Morton was ultimately charged attempted murder. The jury found him guilty of assault and battery high and aggravated nature. (Tr. 266, ll. 20-21; R. p. 36, lines 20-21).

ARGUMENT

I. The Trial Court erred in allowing testimony of prior bad acts when the prior bad act was not established by clear and convincing evidence and in finding that the unfair prejudice of the prior bad act testimony was substantially outweighed by its probative value.

Morton's attorney made a motion *in limine* to exclude testimony of prior bad acts. The court ruled that it would allow the testimony to prove intent and that it was not an accident or mistake. (Tr. 55, ll. 21-22; R. p. 4, lines 21-22). The Court went further to find that the probative value outweighs the prejudice. (Tr. 56, ll. 5-6; R. p. 5, lines 5-6). Although Morton was not convicted of previous threats to the victim, the Court failed to find that there was clear and convincing evidence of the prior bad act. Morton's specific objection was that evidence of the prior bad act did not rise to the level of clear and convincing. (Tr. 55, ll. 5-9; R. p. 4, lines 5-9). Morton argued that the text could have came from anybody and nobody could show where the text came from. *Id.* The Court stated "the victim can say he was threatened by who he believes to be Mr. Morton, coming from Mr. Morton's cell phone, threatening him. I think that's fair game. It does show intent." (Tr. 55, ll. 10-14; R. p. 4, lines 10-14).

The victim went on to testify about this prior bad act during the trial and Morton contemporaneously objected. (Tr. 90, ll. 13-17; R. p. 7, lines 13-17).

South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged except 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). Evidence that a defendant has committed other unrelated crimes

or bad acts is inadmissible to prove the defendant's propensity to commit the crime with which he is charged. *Id.* The evidence of prior bad acts must be clear and convincing to be admissible. *Id.* Further, even though the evidence is clear and convincing and falls within an exception, a trial judge must exclude it 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 (1991); see also Rule 403, SCRE.

In this case, evidence of the prior bad act was not clear and convincing. There was no forensic person who reviewed the cell phone records and testified with any degree of certainty that Morton was the one who sent the text or even that it came from Morton's phone. Further, this evidence proved Morton's propensity to commit the crime for which he was charged, which is clearly forbidden in South Carolina. Without this evidence, the jury would not have known of any prior incidents and would have been forced to make its decision based only on this incident. The evidence is not overwhelming and without this inadmissible prior bad act testimony, the jury most likely would have found Morton not guilty. Under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than upon prior criminal or immoral acts. State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984).

It is only in exceptional cases that another crime or bad act is relevant to an issue other than the accused's character. Such exceptions to the general rule which permit the admission of evidence of other crimes or bad acts are applicable only where the prior bad act directly supports some substantial element of the State's case or is relevant to establish a material fact or element of the crime charged. State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990), *cert. denied*, 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990).

In State v. Campbell, 317 S.C. 449, 454 S.E.2d 899 (Ct. App. 1994), this Court held that the trial court improperly admitted testimony from an informant about previous drug purchases from the defendant in a case where the defendant was charged with distribution of crack cocaine. The court held that the informant's testimony did not fit the Lyle exception for a common scheme or plan and that "[b]y introducing the prior bad acts, the State was not trying to prove a common scheme but to convince the jury that because [the defendant] sold crack cocaine in the past, he was selling crack cocaine on this occasion. This is precisely the type of inference that Lyle prohibits." Campbell, 317 S.C. at 451, 454 S.E.2d at 901.

The Campbell court further remarked that "[w]hen the prior bad acts are strikingly similar to the one for which the appellant is tried, the danger of prejudice is enhanced." Id. at 451-52, 454 S.E.2d at 901 (internal citations omitted).

Subsequently, in State v. Carter, 323 S.C. 465, 476 S.E.2d 916 (Ct. App. 1996), this Court held in another distribution of crack cocaine case that evidence of a drug transaction involving the defendant and a cooperating government witness four days before the transaction giving rise to the charge against the defendant was not admissible for any proper purpose. In so holding, this Court observed "[i]n the prosecution of one crime, proof of another direct substantive crime is never admissible unless there is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact in issue." Id. at 467, 476 S.E.2d at 917.

While the trial court does have discretion to determine whether the testimony clearly and convincingly established whether the text was sent from Morton, the trial court failed to exercise this discretion and made no finding that the testimony rose to such level. In fact, the Court stated "I think that's fair game. That does show intent." (Tr. 55, ll. 13-14; R. p. 4, lines 13-14). So the

trial court did not concern itself with whether there was clear and convincing evidence that the prior bad act actually happened.

Furthermore, even if this Court finds that the Court below found the evidence met the clear and convincing standard, the testimony was so prejudicial that it outweighed any probative value. Without this particular evidence, the only facts the jury would know were the facts that both sides presented which pretty much mimic each other, with only slight variations. The victim and Morton both state that Morton did not come into the house nor even attempt to charge at the Victim. In fact, the victim testified that the person looked like they were going to run. (Tr. 97, ll. 24-25; R. p. 9, lines 24-25).

II. The Trial Court erred in refusing to grant Appellant a directed verdict of acquittal on the attempted murder charge when there was no direct evidence of malice and where the circumstantial evidence was not substantial, but rather was sufficient only to raise mere suspicion of guilt.

The criterion for denying a directed verdict motion in South Carolina is well established. A case should be submitted to the jury if there is any direct evidence or any substantial circumstantial evidence that reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced. However, the defendant is entitled to a directed verdict if the state fails to produce evidence of the offense charged. In ruling on a motion for directed verdict, the trial court is concerned only with the existence or nonexistence of evidence, not its weight. A directed verdict motion should be granted when the evidence merely raises a suspicion of the accused's guilt. *State v. Dantonio*, 658 S.E.2d 337, 376 S.C. 594 (S.C.App. 2008).

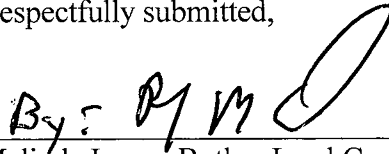
In the State's case in chief, the State failed to present any evidence of malice, an essential element of Attempted Murder. S.C. Code § 16-3-29. The only reference to even

remotely resemble malice presented in the State's case-in –chief was the alleged statement of Morton, that Morton stated, "I didn't come to stab your tires, I came to take care of you." (Tr. 99, ll. 15-16; R. p. 11, lines 15-16). At the time this alleged statement was made, Morton was already in handcuffs and as Morton's counsel alluded to her closing argument, at this time this statement was mere "puffery." The evidence presented was enough to raise only a mere suspicion of Morton's guilt and as such the case should not have been submitted to the jury. This is even more established by the fact that the jury did *not* find Appellant guilty of the crime which required malice, attempted murder, but only guilty of the lesser included offense, which did not require malice. Although the jury was charged, without objection, that malice may be inferred by the use of a deadly weapon, the testimony of both the victim and Morton was that the knife was not intended to be used to hurt the victim. The victim told the officers that Morton was there to slice his tires. (Tr. 128, ll. 19-20; R. p. 18, lines 19-20).

CONCLUSION

For the reasons set forth herein, Appellant Jeffery E. Morton respectfully requests that his conviction be reversed and the case be remanded for a new trial or a judgment of acquittal entered.

Respectfully submitted,



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This 23rd day of July, 2014.

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Appellant,

CERTIFICATE OF COUNSEL

The undersigned hereby certify that the Final Brief of Appellant complies with Rule 211 (b), SCACR.

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July 23, 2014

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PROOF OF SERVICE

I certify that two copies of the within Final Brief of Appellant in the above referenced case has been served upon J. Croom Hunter, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rdday of July, 2014.

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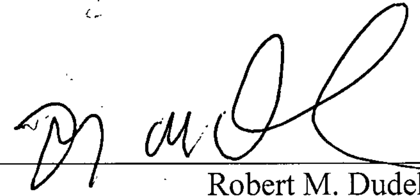
I further certify that all parties required by Rule to be served have been served. This 23rd day of July, 2014



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Sworn to before me this 23rd day of
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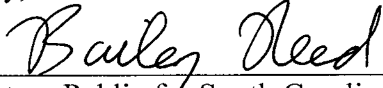

Notary Public for South Carolina
My Commission expires: October 24, 2021