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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Anderson County

J. Cordell Maddox, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN FITZGERALD KENNEDY,

APPELLANT

APPELLATE CASE NO. 2013-002621

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in allowing a photographic lineup into evidence that contained mug shots because it let the jury know appellant had a prior record and deprived him of a fair trial?

STATEMENT OF THE CASE

Appellant was convicted of murder after a jury trial held before the Honorable J. Cordell Maddox on December 2 – 5, 2013, in Anderson County. A thirty (30) year sentence was imposed. Andrew Potter, Esquire, was the trial attorney. Catherine T. Huey, Esquire, was the assistant solicitor.

This appeal follows.

ARGUMENT

The trial court erred in allowing a photographic lineup into evidence that contained mugshots because it let the jury know that appellant had a prior record and deprived him of a fair trial.

The indictment charging appellant with murder alleged that he did on or about March 20, 2012, kill Claud Schaffer Scott by means of blunt force trauma. At trial, Kimberly King testified that the victim was married to her grandmother many years ago and she's always known him as her grandfather. She lived nearby the 75 year-old victim. He sold used cars. She checked on him once or twice a day because his health was not good. She would help him clean and do chores around the house. On March 30, 2012, Julie Moore stayed in the trailer with the victim. Appellant stayed in a camper behind the trailer. (R. p. 146, line 13 – R. 148, line 7). She checked on the victim that day around noon. Julie was there, but was getting ready to leave. Appellant was in the yard working on a car. Between 5 – 6 PM, she went to check on the victim again. The front door was locked. Usually at that time, the door was open, or if it were closed, it would be unlocked. She thought that was strange. She knocked on the door and appellant came from the back of the trailer and said the victim was asleep. Appellant was real sweaty and looked "weird." She asked if the back door was locked and appellant said it was not. Then appellant hurried around and locked the back door. She went back around to the front and started beating on the door. Appellant had the key to one of the victim's cars and drove away. (R. p. 150, line 12 – R. 153, line 18).

Kimberly continued to beat on the door. The victim finally opened the door and she could see he was badly beaten and he fell back in the doorway. She immediately called

9-1-1. (R. p. 154, line 22 – R. 155, line 2). When she looked inside, she could see the furniture had been moved like there was a struggle. There was a frying pan laying next to the victim. His phone was laying next to him broken, and he was bloody from head to toe. (R. p. 156, lines 1 – 7). While she was calling 9-1-1, a neighbor, David Evans, came over to help. (R. p. 157, line 21 – R. 158, line 4).

David Evans testified next. He knelt over the victim and asked him what happened. The victim said John the black guy hit him. (R. p. 178, lines 4 – 25).

Deputy Dunn said he responded to the hospital where the victim had been taken. The emergency room staff asked the victim who hurt him and he said John did it. (R. p. 201, lines 20 – 25; R. p. 204, lines 1 – 7).

Detective Bearden testified that she also responded to the hospital.[1] She asked the victim if he knew who done it and he said John done it. (R. p. 208, lines 1 – 6). She went back to the office and prepared a photo lineup. Because Kimberly King had told the police appellant was at the scene, Detective Bearden included him in the lineup. When she put together the display, she used a program called the "Mug Web" where you can put in a suspect's name, and you can pick a picture out of a lineup if they have been arrested before. Then the program will pull up similar pictures. She took the display to Ms. King and she picked out number four, which was appellant. (R. p. 208, line 23 – R. 212, line 2).

When the State sought to introduce the photo lineup, defense counsel objected. Outside the presence of the jury, he said it was clear the pictures were not from driver's license photographs. They were all mug shots and appellant was one of them. He said it was unduly prejudicial and under Rule 403, SCRE, prejudicial. The trial court thought the

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[1] The victim died at the hospital.

photos were from driver's licenses. The assistant solicitor said they could have been, but they were from mug shots in this case. The trial court told defense counsel he was protected for the record, but he was going to admit. (R. p. 212, line 19 – R. 214, line 12). A little later, defense counsel was allowed to put on the record that the testimony was that the detective took the photographs from booking photos. The evidence implied appellant had been arrested before and had a prior record and was prejudicial. The trial court again said defense counsel was protected for the record, but it was admissible. (R. p. 222, line 2 – R. 223, line 6).

After the State rested, defense counsel renewed his objection to the photo array. (R. p. 371, lines 8 – 20). It put appellant's character in issue and was prejudicial. The trial court said it wished the pictures were driver's license pictures, but again ruled against appellant and said he was protected. (R. p. 374, line 18 – R. 375, line 23).

It was error to admit the mug shot photo lineup. In State v. Tate, 288 S.C. 104, 341 S.E.2d 380 (1986), the Court wrote:

> This Court has held that the introduction of a "mug shot" is reversible error unless it is shown that: (1) The state had a demonstrable need to introduce the photograph; and (2) the photographs themselves, if shown to a jury, must not imply that the defendant had a prior criminal record; and (3) the photograph must not be introduced in such a manner to draw attention to the source or implication of the photograph. *State v. Robinson*, 274 S.C. 198, 262 S.E.2d 729 (1980); *State v. Denson*, 269 S.C. 407, 237 S.E.2d 761 (1977); *citing United States v. Harrington*, 490 F.2d 487 (2d Cir. 1973).

In Tate, the first two prerequisites were not met and the prejudicial effect of the photographs outweighed any probative value.

In appellant's case, the State didn't even need a lineup because Ms. King already knew who appellant was. The assistant solicitor even admitted the photos could have come

from driver's license photos, but she chose to use the mug shots. She even went so far as to tell the jury the photos came from a "Mug Web" where people had previously been arrested. She either didn't know what the law was on mug shots or didn't care. The photograph was introduced in such a manner to draw attention to the source of the photograph. So all three prerequisites are met in this case. The prejudicial effect of the photograph outweighed any probative value.

Rule 403, SCRE, provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice..." Unfair prejudice "means an undue basis to suggest decision on an improper basis." State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991) (citation omitted). The mug shot placed appellant's character 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); *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.

In State v. Ross, 272 S.C. 56, 249 S.E.2d 159 (1978), the Court noted: "Character evidence is so highly prejudicial that it is usually excluded under hard and fast rules." (citation omitted). The mug shot also suggested prior bad acts. In State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987), the Court elaborated on the subject:

> It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual. *See, e.g., State v. Gregory*, 191 S.C. 212, 4 S.E.2d 1 (1939). Evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged. *See, United States v.*

> *Johnson*, 610 F.2d 194 (4th Cir.1979); *State v. Byers*, 277 S.C. 176, 284 S.E.2d 360 (1981); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). Even if evidence of other crimes is deemed relevant and admissible, the evidence may still be excluded if its probative value is substantially outweighed by the danger of undue prejudice or misleading the jury. *See*, *State v. Wilson*, 274 S.C. 635, 266 S.E.2d 426 (1980). Implicit in the rules of evidence which permit the introduction of prior bad acts or crimes into evidence is the prerequisite that they establish some element, i.e., intent or motive, of the crime charged. *See, e.g..*, *State v. Lyle, supra*; *State v. South*, 285 S.C. 529, 331 S.E.2d 775 (1985); and *State v. Huggins*, 285 S.C. 361, 329 S.E.2d 759 (1985).

293 S.C. at 324-325, 360 S.E.2d at 319.

The defense in this case was that this case was based on "circumstance, assumptions, and speculation." (R. p. 137, lines 23 – 25). The investigation was flawed. (R. p. 139, line 7 – 24). And someone else lived with the victim. (R. p. 140, lines 10 – 15). Appellant was not the one who committed the crime. The admission of mug shot evidence in this case was deliberate and prejudicial as it placed appellant's character into issue with a prior arrest. The wrongful admission of this evidence requires reversal.

CONCLUSION

Appellant's conviction should be reversed.

Respectfully submitted,

Robert M. Pachak
Appellate Defender

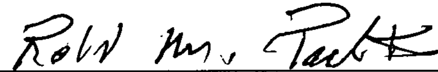
ATTORNEY FOR APPELLANT

This 20th day of November, 2014.

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 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."

November 20, 2014



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