

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County

Honorable William P. Keesley, Circuit Court Judge

Opinion No. 2019-UP-075 (S.C. Ct. App. Filed February 13, 2019)

2015-GS-10-02966

THE STATE,

RESPONDENT,

V.

GERALD JARROD ANCRUM,

PETITIONER

APPELLATE CASE NO 2017-001335

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

RECEIVED
APR 15 2019
SC Court of Appeals

INDEX

INDEX i

CERTIFICATE OF COUNSEL1

QUESTION PRESENTED.....2

STATEMENT OF THE CASE.....3

ARGUMENT

The Court of Appeals erred in holding that the trial judge did not err in denying a mistrial motion when prior bad acts testimony surfaced at trial because this was inadmissible evidence that prejudiced petitioner’s case.....4

CONCLUSION.....10

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that pursuant to the South Carolina Court of Appeals' Opinion issued in this case on February 13, 2019, a Petition for Rehearing was filed on February 28, 2019, which was denied by the South Carolina Court of Appeals on March 21, 2019.

QUESTION PRESENTED

The Court of Appeals erred in holding that the trial judge did not err in denying a mistrial motion when prior bad acts testimony surfaced at trial because this was inadmissible evidence that prejudiced petitioner's case.

STATEMENT OF THE CASE

Petitioner Gerald Jarrod Ancrum was tried by jury on two indicted charges of distribution of crack cocaine and distribution of heroin during the May 2017 term of the Charleston County General Sessions Court before Judge William Paul Keesley. Petitioner was convicted on the heroin distribution offense only¹ and received a sentence of imprisonment for a period of fifteen years. Melissa Gay represented petitioner at trial, and Assistant Solicitors Stephanie B. Linder and Whitt Sowards appeared on behalf of the state.

Petitioner appealed his conviction and sentence. On February 13, 2019, the South Carolina Court of Appeals affirmed petitioner's conviction and sentence. See State v. Ancrum, 2019-UP-075 (S.C.Ct.App filed February 13, 2019). App.1-2. On February 28, 2019, petitioner filed a Petition for Rehearing in the case. App. 3-11. On March 21, 2019, the South Carolina Court of Appeals denied the Petition for Rehearing. App. 12. This petition requesting a review of the Court of Appeals' decision in this appeal follows.

¹ The trial judge declared a mistrial on the crack cocaine offense charged due to a hung jury on the same. R. 186, l. 24 – R. 187, l. 22.

ARGUMENT

The Court of Appeals erred in holding that the trial judge did not err in denying a mistrial motion when prior bad acts testimony surfaced at trial because this was inadmissible evidence that prejudiced petitioner's case.

Petitioner Gerald Jarrod Ancrum was tried by jury and convicted of distribution of heroin. Petitioner appealed his conviction and sentence. On appeal, petitioner raised the following issue:

The trial judge erred in failing to declare a mistrial when the state elicited prior bad acts testimony from the confidential informant that drug purchases from petitioner were made previously because this resulted in the admission of prejudicial and improper evidence in the case.

This Court held as follows:

We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *State v. White*, 371 S.C. 439, 443, 639 S.E.2d 160, 162 (Ct. App. 2006) (“The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion amounting to an error of law.”); *State v. Howard*, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988) (“Among the factors to be considered in ordering a mistrial are the character of the testimony, the circumstances under which it was offered, the nature of the case, and the other testimony in the case.”); *State v. Harris*, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009) (“A mistrial should only be granted when absolutely necessary, and a defendant must show both error and resulting prejudice in order to be entitled to a mistrial.”); *id.* (“The granting of a motion for a mistrial is an extreme measure that should only be taken if an incident is so grievous that the prejudicial effect can be removed in no other way.”); Rule 404(b), SCRE (“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”); *State v. Walker*, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct. App. 2005) (“Generally a curative instruction is deemed to have cured any alleged error.”); *State v. Smith*, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986) (“An instruction to disregard incompetent evidence is usually deemed to have cured the error unless on the facts of the particular case it is probable that, notwithstanding the instruction, the accused was prejudiced.”).

The Court of Appeals erred in not finding that the trial judge in fact abused his discretion in denying the motion for a mistrial because the error here was an error of law that resulted in prejudice, all of which established that the mistrial was warranted in this case. See State v. Harris, 382 S.C. 107, 674 S.E.2d 532 (Ct. App. 2009).

This case involved a controlled heroin buy set up by Charleston police. Confidential informant Tessa Morris testified that she met petitioner at Dunkin Donuts in Charleston on February 5, 2015, and purchased crack cocaine and heroin from him (petitioner) at that time. R. 55, l. 20 – R. 64, l.9. Petitioner did not testify at trial and did not present any witnesses on his behalf.

Prior to trial, the following colloquy occurred regarding the issue of prior bad acts:

Defense Counsel: And, then we have prior bad acts, which we've had some discussion on prior to this and a prior conviction which we also had some discussion on.

Solicitor: [A]s far as the prior bad acts...we don't intend to go into anything on the defendant ... until he testifies and opens the door.
R. 2, l. 19 – Tr. 6, l. 1.

The Court: Okay. There's no intent to go into any prior bad acts. There's no intent to go into any convictions unless the defendant takes the stand. The prior bad acts would only come in if the defendant in some way opened the door to that.
R. 6, l. 6-12.

On cross examination of informant Morris, defense counsel asked Morris if she had a sexual relationship with petitioner in the past. R. 70, lines 1-16. At the close of this cross examination, the solicitor moved outside of the jury's presence to question Morris about her "relationship" with petitioner as the door was opened in order to show that her relationship with petitioner was based on prior drug sales transactions only. R. 74, l. 21 – R. 75, l. 14; R. 76, l. 19 – R. 77, l. 3. Defense counsel argued that the sex inquiry had nothing to do with prior drug sales,

but rather a credibility matter in effect to verify how she knew petitioner. R. 75, l. 16 – R. 76, l.

17. The trial judge ruled as follows:

You (solicitor) can ask about how long she had known him...but I am not going to let you get into drug transactions. R. 77, l. 4-6.

On redirect, the following testimony was elicited from Morris by the solicitor:

Q: How long overall had you known the defendant; a week, a month, a year?

A: I've known him for several years.

Q: You were not in a sexual relationship with him

A: No we were never.

Q: But you knew him for several years

A: From purchasing drugs

Q: And in fact, you knew him through your boyfriend

A: Correct. R. 79, l. 21 – R. 80, l. 12.

Trial counsel objected to the “for purchasing drugs” comment in violation of the Judge’s instruction to “keep the testimony away from prior bad acts,” and the pre-trial admonition to avoid prior bad acts testimony also, and moved for a mistrial based on the error. R. 80, l. 13-17; R. 86, l. 5 – R. 87, l. 10.

The solicitor requested a curative instruction to resolve the issue. R. 80, l. 19 - R. 81, l. 2. The defense argued that this was “highly prejudicial” and could not be corrected by a curative instruction. R. 81, l. 3-7; R. 82, l. 23 – R. 83, l. 10; R. 86, l. 8 – R. 86, l. 11; R. 92, l. 17 – R. 93, l. 13. The defense in effect reminded the court that this issue was addressed during pretrial deliberations. Indeed, prior to trial, the defense moved to exclude any prior bad acts evidence (presumably drug related) at trial. R. 6, lines 6-12.

The trial judge ruled that a curative instruction would suffice because the state's witnesses testified that Morris identified targets for police to pursue, which meant these people were therefore certainly involved in prior drug transactions. R. 83, l. 11 – R. 84, l. 12; R. 101, l. 1 – R. 107, l. 8. The trial judge denied the mistrial motion. R. 92, l. 12-16. The trial judge's curative instruction follows:

Now, the instruction is this, ladies and gentleman. The law does not allow evidence of other crimes, wrongs or acts to be admitted to prove the character of an accused in order to show action in conformity with that character. In other words, if an accused was involved in a prior wrongful or bad act, that cannot be used as evidence that he committed either/or both of the crimes for which he is now on trial. You must disregard the statement that this witness made that in any way implied or suggested that she knew this defendant from other activities involving drugs. That portion of her testimony is stricken from your consideration. It must not be used in any way whatsoever against the defendant. R. 88, l. 22 – R. 89, l. 9.

Clearly, the information that petitioner apparently had a history of drug selling to the informant (and presumably others) constituted prejudicial prior bad acts testimony that obviously portrayed petitioner as a habitual drug seller who was predisposed to commit the drug distribution acts for which he was on trial.

Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis. State v. Stearns, 403 S.C. 247, 742 S.E.2d 878 (Ct. App. 2013). Moreover, evidence of prior bad acts is inadmissible to suggest that the accused 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). Prior bad acts evidence is not admissible to show that the accused is a bad person. Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989). Also, even if prior crimes are

considered under the Lyle² 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).

Additionally, 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 this suggests 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).

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

² 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).

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 admissions of portions of a taped conversation between him and another regarding negotiations for a future a sale of kilo of cocaine.

Also, a defendant's character cannot be attacked unless the defendant first places his character in issue. Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989). Also, evidence of a person's character trait cannot be admitted for the purpose of proving action in conformity therewith on a particular occasion. See State v. Holden, 382 S.C. 278, 676 S.E.2d 690 (2009), citing to State v. Nelson, 331 S.C. 1, 501 S.E.2d 716 (1998); State v. Brown, 344 S.C. 70, 543 S.E.2d 552 (2001). In Brown, the defendant was convicted of murder and the court held it was error to admit the defendant's wife's testimony that she knew that her husband became violent when he became angry because this "indicated petitioner's general propensity to become violent" and the likelihood that he would commit such a crime as murder. Character evidence can only be admitted if it can reasonably lead to an inference of guilt by a chain of logic that does not include an inference implicating the bad character of the defendant. State v. Nelson, *supra*. 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).

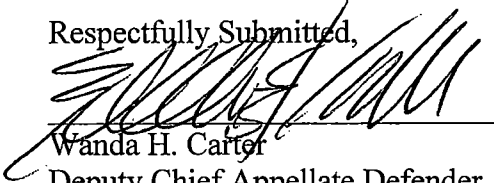
Clearly, the prior bad act drug testimony in this case portrayed petitioner as a confirmed drug dealer who was probably guilty of the drug charges for which he was on trial; and clearly, there was no question that the prejudicial value of this prior bad act testimony outweighed any probative value.

This Court of Appeals erred in holding that the trial judge did not abuse his discretion in denying the motion for a mistrial where error of law and prejudice occurred after inadmissible prior bad act testimony surfaced at trial.

CONCLUSION

Based on the foregoing argument, counsel for petitioner requests that this Court grant this petition and allow full briefing on the above raised points.

Respectfully Submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 15th day of April, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Charleston County
Honorable William P. Keesley, Circuit Court Judge

Opinion No. 2019-UP-075 (S.C. Ct. App. filed 2/13/2019)
2015-GS-10-02966

RECEIVED
APR 15 2019
SC Court of Appeals

THE STATE,

RESPONDENT,

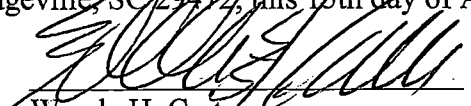
V.

GERALD JARROD ANCRUM,

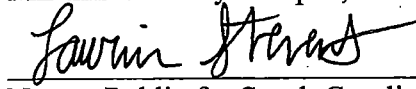
PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Scott Matthews, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Gerald Jarrod Ancrum, #267401, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 15th day of April, 2019.


Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 15th day of April, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.



SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

April 15, 2019

 COPY

Scott Matthews, Esquire
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

RECEIVED
APR 15 2019
SC Court of Appeals

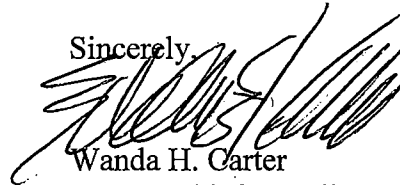
Re: The State v. Gerald Jarrod Ancrum

Dear Mr. Matthews:

Enclosed are two copies of the Petition for Writ of Certiorari and the Appendix in the above case that I have filed with the South Carolina Supreme Court today.

If you have any questions concerning this matter, please contact me.

Sincerely,



Wanda H. Carter
Deputy Chief Appellate Defender

WHC/lis

Enclosures

cc: Court of Appeals