STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Greenwood County

Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILLIE THOMAS GRAY,

APPELLANT.

RECEIVED
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SC Court of Appeals

APPELLATE CASE NO. 2017-000160

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to redact from the emergency room chart notations that the victim expressed fear of her partner, appellant, that she has "been hit or shoved," verbally abused and was in a threatening relationship with appellant, since this highly prejudicial "history" was not automatically admissible because the document was a business record, and the document itself going to the jury unduly emphasized this irrelevant history which should have been redacted?

STATEMENT OF THE CASE

Appellant was arrested for criminal domestic violence for allegedly beating the victim, his girlfriend. The solicitor later had appellant indicted for attempted murder. R. 250 – 251.

Appellant's case was called to trial on January 17, 2017, before the Honorable Donald B. Hocker, and a jury. Janna Nelson and Elizabeth Able represented appellant. Elizabeth White and Carson Penny were the assistant solicitors. R. 1.

On January 19, 2017, the jury found appellant guilty of assault and battery of a high and aggravated nature (ABHAN). R. 210. Judge Hocker sentenced appellant to fifteen years imprisonment. R. 217.

This appeal follows.

ARGUMENT

<u>The court erred by refusing to redact from the emergency room chart notations that the victim expressed fear of her partner, appellant, that she has "been hit or shoved," verbally abused and was in a threatening relationship with appellant, since this highly prejudicial "history" was not automatically admissible because the document was a business record, and the document itself going to the jury unduly emphasized this irrelevant history which should have been redacted.</u>

Introduction

Appellant's girlfriend, Janice Holloway, testified that she had been dating appellant for six years, that they were living together on the date of the July 3, 2014, incident, and that they were still living together at the time of appellant's January 17, 2017 trial. R. 42, ll. 2-13. Holloway said appellant did not come home on July 2, 2014, that they had already been arguing about him having a relationship with another woman, and she "actually caught him and her having sex." Holloway told the jury: "I told him that I would get even with him." R. 42, l. 20 – 43, l. 6.

Holloway recalled that as a result of catching appellant with another woman, she went to Greer Street to a "girl named Keisha's apartment" and "we was all drinking and doing drugs and there was an altercation over some drugs. Me and two girls got into it. Then me and a guy got into it about some drugs. We all got to fighting . . . me and the two girls got to fighting." R. 43, l. 9 – 44, l. 8.

Holloway remembered the fight was actually "two against one," and that she was badly beaten. She remembered "somebody said they were going to call the police, so that's how that went." R. 44, ll. 2-24.

The following occurred on direct examination of Janice Holloway:

> Q: Okay. What happened from there?
>
> A: I was walking home and I met Mr. Gray coming down the Street. And he was trying to apologize for the whole situation. And I hollered, go on and leave me alone. And then whenever he was trying to get me and take me home and I told him to go on, I hollered again, go on and leave me alone. I don't want to be bothered with you. And that's when the police rolled up.
>
> Q: So were you standing up when the police rolled up?
>
> A: Yes, I was. I was actually walking down the street.
>
> Q: Did you tell the police the story you just told me?
>
> A: No, I didn't.
>
> MS. NELSON: Objection. Objection, Your Honor. A matter of law.

R. 45, ll. 5-18.

The judge ruled that Holloway was a hostile witness, and under current law, Rule 607, SCRE, that the state did not have to show surprise to impeach their own witness. This impeachment was admissible as substantive evidence of appellant's guilt. R. 47, l. 20 – 51, l. 19; R. 54, l. 7 – 55, l. 9.

Holloway then repeated that she ran into appellant on Holloway Street when she was going home after already being beaten at the party, and that she yelled at appellant because she was very angry with him. Holloway acknowledged that she told Police Officer Crisp when she was found injured on the street that appellant had hit her with a pipe. R. 59, l. 15 – 60, l .1.

Holloway stated she did not remember telling Nurse Johnson at the emergency room that she was scared of appellant, that she was in a frightening relationship, nor that she felt controlled by him. R. 62, ll. 5-17.

Holloway admitted she probably did tell Detective Gary that appellant jumped on her, that he was drunk and mad because she was not home. Holloway explained: "I was mad at him and I am very vindictive when I get upset and mad and hurt. I will do anything I can to hurt anybody." R. 66, l. 21 – 67, l. 15. She repeated that she was angry and wanted to get revenge against appellant for having sex with another woman. R. 73, ll. 11-19.

Holloway acknowledged that she did suffer a broken arm but it was not because appellant hit her with a pipe as she stated on the day of her injury. R. 75, ll. 6-23. As for Detective Gary, she repeated: "I told him that Willie hit me with a pipe, which I know was a lie. Like I said, I was trying to get back at him. I was trying to hurt him like he hurt me." R. 82, ll. 11-18.

Emergency Room Chart

Prior to the testimony of the custodian of hospital records, Solicitor White told the judge that they had "agreed to some redactions." However, defense counsel Janna Nelson wanted the history redacted also, where it stated that Holloway said her boyfriend not only hit her with a lead pipe but where she said she was in an abusive verbal and physical relationship, where she was controlled and hit. The defense wanted that alleged relationship history redacted from the emergency room chart as well. R. 89, l. 5 – 90, l. 16.

The judge asked whether the document being a business records act made any hearsay objection irrelevant, or if "trumped" any objection on those normal grounds. The solicitor said she thought that it did, and that only "expert opinions" needed to be redacted from a business record. The state maintained the history was admissible as impeachment evidence, and as statements given for a medical diagnosis. R. 90, l. 17 – 91, l. 24.

Defense counsel Nelson continued to object to the specifically un-redacted emergency room chart, noting that just because the document was a business record did not make everything

noted in it automatically admissible. Defense counsel Nelson also stated that the document "actually being in black and white in front of the jury I think is a different matter" – an additional objection even if there was verbal testimony about it. R. 92, l. 6 – 93, l. 23. The judge stated he was not going to redact the history and that the written document itself would be admitted for the jury's consideration if it had the proper foundation as a business record. R. 93, l. 24 – 94, l. 25.

Sheryl Haupfear testified she was the custodian of the medical records at Self Regional Hospital. She had been the custodian of the medical records for the past thirty-six and a half years. R. 95, l. 14 – 96, l. 18. She had been asked "to pull" the hospital records of Janice Holloway for emergency room visits from 2012 forward as a result of the state's subpoena. R. 96, ll. 10-18.

Over the defense's previous objections, the emergency room chart was admitted as State's Exhibit 24. R. 97, ll. 17-24. On page two of the emergency room chart, the confidential medical record, under "Nursing Assessment, General," it states, "Expresses fear of partner. Patient reports being in a threatening relationship. Overly protective significant other. Reports feeling controlled. Having been hit or shoved. Reports verbal abuse." It was dated July 3, 2014 at 2:15 am. R. 221.

The judge then instructed the jury as to State's Exhibit 24, the emergency room chart, that those portions which were blacked out or redacted could not be given any significance, or considered. The portions that were not redacted were for the jury to consider as relevant evidence. R. 98, l. 11 – 99, l. 4.

Other evidence

Emergency room physician Dr. John Short testified he could only recall what happened from reading the emergency room chart. R. 102, ll. 5-7. According to the chart, he testified that

Janice Holloway did not suffer life threatening injuries, that she had a history of using steroids, and he thought that the injuries she suffered where she said she was hit with a pipe were defensive wounds. R. 108, ll. 15-25.

The emergency room nurse, Shirolyn Fredette, testified, over a repeated defense objection, that the Emergency Room records stated Janice Holloway was afraid of her partner, she was in a threatening relationship, her partner was overly protective, she had been hit or shoved, verbally abused, and she reported feeling controlled. R. 122, ll. 11-19.

In her closing argument, the solicitor asked the jury if Janice Holloway looked like a "woman scorned" to them. White claimed that battered women -- while naming celebrities as alleged examples, often changed their story and said they started the fight or it did not happen at all. R. 164, l. 10 – 166, l. 3. The solicitor essentially told the jury that Janice Holloway lied to them under oath during the trial.

Defense counsel Nelson argued to the jury that appellant hurt Holloway on July 3, 2014 by having an affair with another woman where Holloway caught them having sex but that he did not abuse her. Defense counsel noted that Holloway's testimony was at times contradictory and conflicting, but her testimony under oath that appellant did not assault her on July 3, 2014 should be believed, and appellant found not guilty. R. 177, l. 24 – 193, l. 8. The jury found appellant guilty of ABHAN, which appears to be a compromise verdict, which appellant strongly submits lends additional credence to the discussion below.

Discussion

Portions of the Emergency Room Chart were redacted so any argument that a business record never had to be redacted because it was a business record should fail on its face. See

State's Exhibit 24 at p. 4. R. 223. The judge also instructed the jury to ignore the redactions but that the remainder of the document was relevant evidence.

In a violent crime case, as here, it is readily apparent that evidence the defendant and the victim had a verbally and physically violent relationship was going to be explosively prejudicial. Rule 404(b), SCRE states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). See, also, State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007). Evidence the defendant was a wife or woman beater – on its own – may secure a conviction.

Further, defense counsel here correctly argued that there was a difference between **oral** testimony before the jury from a business record -- the emergency department chart -- and *the business record itself, going to the jury in "black and white"* where it contained un-redacted highly prejudicial hearsay assertions about the victim's allegedly abusive relationship with appellant. Again, State's Exhibit 24, at page 2, stated under the nursing assessment that Holloway expressed fear of her partner, appellant, she reported being in "a threatening relationship," that she was controlled, that she was hit or shoved, and verbally and physically abused. R. 221. Cf. State v. Owens, 378 S.C. 636, 664 S.E.2d. 80 (2008), where the prior bad acts were witnessed by prison staff, and where State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996) held that these types of prison disciplinary records were admissible at the sentencing phase of a capital trial under the Uniform Business Records as Evidence Act, S.C.Code Ann. § 19–5–510 (the Act).

The jury in this case was called on to decide which version of what Holloway said happened was the truth. The emergency room chart on appellant being an abusive person and him having beaten Holloway in the past was extraordinarily prejudicial because it could have tipped the balance to the jury deciding that even if appellant did not abuse Holloway on July 3, 2014, that he was a woman abuser and he needed to go to jail on some lesser charge. Here, fifteen years for ABHAN.

In State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982), the Supreme Court noted that the trial judge correctly allowed testimony about the patrolman having been shot. The Court wrote:

> "During trial, the State presented testimony that Patrolman Murphy returned to his patrol car and radioed patrol headquarters that he'd been shot and needed help. The radio communication was recorded and transcribed. Donald Ray Lane, the highway patrolman who received the call, testified about the conversation, as did the Highway Department telecommunications supervisor. The tape was also played in court. We find no error in the admission of this evidence as part of the *res gestae* exception to the hearsay rule.
>
> However, we hold that the judge abused his discretion in allowing the jury to take the transcript of the tape into the jury room because it unduly emphasized that evidence. See State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980)."

State v. Gulledge, 277 S.C. at 371-372, 287 S.E.2d at 490.

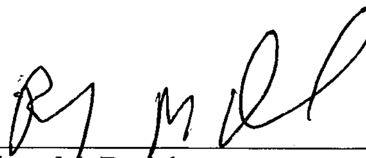
The refusal to redact from the emergency department chart the hearsay portions about appellant being abusive in general, that Holloway was allegedly fearful of appellant, and that appellant had physically and verbally abused her in the past was extraordinarily prejudicial. Defense counsel correctly argued that this document, State's Exhibit 24, should have been redacted to remove that allegedly abusive history. Further, defense counsel also correctly argued

it was error for the document itself to go to the jury room to be read and viewed "in black and white" during deliberations.

This is a highly unusual case, and the refusal to redact the objectionable "abusive history" notations, and allowing the emergency room chart itself, to be sent to the jury, was prejudicial error. State v. Gullege, supra. Appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed, and this case remanded to the Greenwood County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

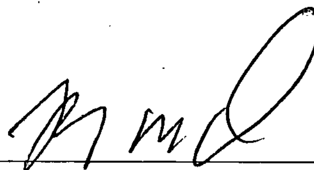
ATTORNEY FOR APPELLANT

This 10th day of July, 2018.

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."

July 10, 2018



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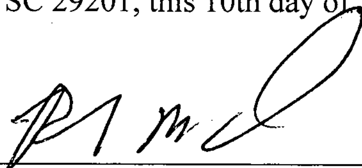
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 10th day of July, 2018.



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 10th day of July, 2018.

____________________ (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.