

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

DEMETRIUS SIMMONS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2017-000057

Appeal from Greenville County

Honorable John C. Hayes, Circuit Court Judge

Opinion No. 2019-MO-012

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SC Court of Appeals

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, counsel for petitioner would petition for rehearing regarding this Court's no error finding on the prior bad act evidence admitted at trial because this Court might have overlooked the overwhelming unfair prejudice connected to the prior bad act evidence and how greatly the same outweighed any probative value, particularly where the prior bad act was an alleged prior burglary, for which petitioner was already on trial, and where petitioner was also on trial for a second burglary that allegedly occurred a few hours later on the very same date and at the very same residence where the prior burglary occurred. In support of this petition, counsel would direct this Court's attention to the following points.

1.) The issue raised on direct appeal in this case follows:

The trial judge erred in allowing a prior crime 911 recording into evidence at trial that suggested that [petitioner], who was being tried on two burglary charges from the same residence and had been seen when the second break-in occurred at the homeowner's garage, presumably broke into that garage hours earlier, which was when the first break-in occurred, because this prejudicial information likely led to the jury to hand down their guilty findings based on an improper basis.

2.) The Court of Appeals held as follows on the issue:

Petitioner was convicted of committing two burglaries that took place within hours of each other at the same residence. During the second burglary, the victim saw Petitioner enter his garage and gave police a physical description of Petitioner. Soon after, Petitioner, who matched the description given by the victim, was found in the area in possession of a bicycle stolen during the first burglary. Petitioner argues the trial court erred by admitting into evidence a portion of the 911 call made by the victim during the second burglary in which he stated "the same guy came back." Petitioner contends the statement should have been excluded as improper prior bad act evidence. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]."); *id.* At 142, 587 S.E.2d at 693-94 ("Issues not raised and ruled upon in the trial court will not be considered on appeal."); *id.* at 142, 587, S.E.2d at 694 ("A party may not argue one ground at trial and an alternate ground on appeal."); 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. 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. King*, 424 S.C. 188, 200, 818 S.E.2d 204, 210 (2018) ("If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." (quoting *State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d 204, 210 (2018) ("If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." (quoting *State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008))); *State v. Kirton*, 381 S.C. 7, 27, 671 S.E.2d 107, 117, (Ct. App. 2008) ("A close degree of similarity or connection between the prior bad act and the crime for which the defendant is on trial is required to support admissibility under the common scheme or plan exception." (quoting *State v. Cheeseboro*, 346 S.C. 526, 546, 552 S.E.2d 300, 311 (2001))); *King*, 424 S.C. at 200, 818 S.E.2d at 210 ("Nevertheless, this other bad act evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant.")

¹ 263 S.C. 110, 208 S.E.2d 35 (1974).

3.) To the contrary, this Court apparently overlooked the fact that the overwhelming prejudice of the prior bad act evidence heard by the jury at trial clearly outweighed any possible probative value because the prior was used to bootstrap petitioner as guilty on both burglary charges. Petitioner was tried in absentia on two burglary charges and other related charges emanating from a break-in that occurred within hours of each other on the same date at the Tintinger residence located in Greenville, South Carolina. Only three witnesses testified at trial on behalf of the state: Mr. Tintinger, Mrs. Tintinger, and the arresting police officer.

Susanne Tintinger testified that on the morning of January 31, 2013, she entered her car parked in the garage of her home and noticed that it had been rummaged through (“trashed”) and that after she saw that the console and glove compartment had been opened up and that her garage door opener was missing, she then saw also that the right garage door (which had not been operating properly) was partially opened from the bottom. Also, their mountain bike that was parked in the garage was missing. Mrs. Tintinger stated that she called the police and reported this while driving to work on that morning. App. 38, l. 9 – p. 69, l. 11.

Kenneth Tintinger (husband) testified that he stayed home on that morning, but shortly thereafter he heard the garage door go up and looked out to see a male wearing a green hooded sweat top pulling a box out of their garage. He called 911 and within minutes, the perpetrator, who was later identified as petitioner, was apprehended in the neighborhood and arrested. App. 70, l. 22 – p. 108, l. 6; App. 110, l. 4 – p. 121, l. 5.

In this case, police received two 911 calls: one call from Mrs. Tintinger and one call from Mr. Tintinger. Mrs. Tintinger called 911 while commuting to work on the morning of January 31, 2013, to report the break-in while Mr. Tintinger stayed at home; but while he was home, he called 911 just hours later on the same morning when the second garage break in occurred.

Prior to trial, the agreement was reached by all parties to have the following words/phrases muted (redacted) from the 911 tape (see Tr. 27, l. 24 – Tr. 28, l. 18) as follows:

- 1.) The portion where the 911 dispatcher that said “the same guy’s back” presumably when Mr. Tintinger called to report the second break in; and
- 2.) The portion where the 911 call includes a statement about a “streak of break-ins” apparently in the area.

However, when the 911 tape was played and there was a statement made on the 911 tape (allegedly by Mr. Tintinger) to the effect that the “same guy came back,” the defense objected, but the trial judge overruled the objection. Tr. 95, l. 11 – p. 98, l. 3.

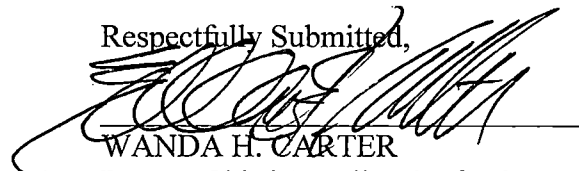
4.) Generally, prior crimes or bad acts cannot be presented to show that the defendant had the propensity to commit the crime charged, i.e., that he is a bad person. State v. Peake, 302 S.C. 378, 396 S.E.2d 362 (1990). State v. Smith, 309 S.C. 409, 419 S.E.2d 816 (1992); State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (2008). Also, even if prior crimes are considered under the Lyle¹ exceptions, nonetheless, the value of the priors must outweigh the prejudicial value. State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008). Moreover, there is a heightened prejudice in admitting a prior crime that is strikingly similar to the one for which the accused on trial because it suggests that defendant had the propensity to commit the similar crime charged. State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000). Prior crime evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. State v. Spears, 403 S.C. 247, 742 S.E.2d 878 (2013). Unfair prejudice results when there is an undue tendency to make a decision on improper basis, and also prejudice comes into play when jury’s verdict influenced by the challenged evidence. State v. Martucci, supra.

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.2d 803 (1923).

5.) In the case at bar, the prior bad evidence made it seem as though petitioner, who was arrested based on the description given from the second Tintinger break-in, was guilty of the first break in as well, in addition to other burglaries in the neighborhood. As a result, petitioner was portrayed as having the criminal disposition and propensity to commit burglaries and the prejudice came into play, again, because the jury was presented with the assumption that petitioner was guilty of the first Tintinger burglary based on the prior bad acts evidence, and that he was guilty as charged on the second Tintinger burglary, and all of the other offenses charged against him combined. Although Mr. Tintinger witnessed a perpetrator (not identified as petitioner at that time) committing the second burglary, there were no eyewitnesses to the first Tintinger burglary, but nonetheless, the prior bad acts evidence on the second burglary was used to link petitioner to the first burglary. This error violated petitioner's right to a fair trial via the Fourteenth Amendment because there was no probative value in the prior crime evidence, and even if probative value existed (arguably), the prejudicial value outweighed any probative value, especially since it was highly likely that the prior bad crime evidence contributed to the jury's guilty verdicts which meant that the admission of the same cannot be considered harmless error. See State v. Charping, 313 S.C. 147, 437 S.E.2d 88 (1991), citing to Chapman v. California, 386 U.S. 18 (1967). Also, the issue was preserved via objections at trial for appellate review.

WHEREFORE, based on the foregoing points, counsel for petitioner would request a rehearing on the issue above in connection with this Court's holding on appeal.

Respectfully Submitted,



WANDA H. CARTER
Deputy Chief Appellate Defender

This 1st day August, 2019

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable John C. Hayes, Circuit Court Judge

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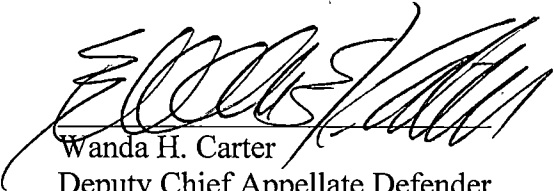
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STATE OF SOUTH CAROLINA,

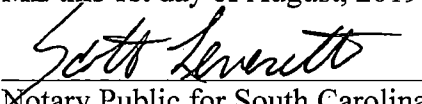
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Taylor Z. Smith, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Demetrius Simmons, ##283195, at Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847, this 1st day of August, 2019.


Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 1st day of August, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.