ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

Honorable R. Scott Sprouse, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JEREMY RENARD WEBB,

APPELLANT

APPELLATE CASE NO. 2018-002131

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred in appellant's trial for breaking into an automobile when it admitted evidence appellant had broken into another automobile several years earlier, since the offenses were not sufficiently similar to qualify for admission under the Rule 404(b), SCRE exception for common scheme or plan, and where the danger of unfair prejudice substantially outweighed the probative value of the prior bad act?

STATEMENT OF THE CASE

On August 21, 2018, a Pickens County Grand Jury indicted appellant for the offense of breaking and entering a motor vehicle. R. p. *. On November 26, 2018, appellant was tried before the Honorable R. Scott Sprouse, and a jury. Tr. 1. John DeJong represented appellant. Tr. 1. Megan Owen represented the state. Tr. 1.

Appellant was convicted as indicted and he was sentenced to five years of incarceration. Tr. 133, ll. 2-6; Tr. 138, ll. 11-14.

This appeal follows.

STANDARD OF REVIEW

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. *State v. Whitner*, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Whitner*, 399 S.C. at 557, 732 S.E.2d at 866.

In order to admit evidence of bad acts not resulting in conviction, the trial court must, "[a]s a threshold matter, ... determine whether the proffered evidence is relevant." *Clasby*, 385 S.C. at 154, 682 S.E.2d at 895; *see State v. Wallace*, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). "If the trial judge finds the evidence to be relevant, the judge must then determine whether the bad act evidence [is admissible under the terms] of Rule 404(b)" to show, *inter alia*, the existence of a common scheme or plan. *Clasby*, 385 S.C. at 154, 682 S.E.2d at 895. If the testimony is relevant and proffered for a permissible purpose, the trial court must next conduct a balancing test, pursuant to Rule 403; where the testimony's probative value is substantially outweighed by the danger of unfair prejudice, the trial court may exclude it. *See State v. Gillian*, 373 S.C. 601, 611, 646 S.E.2d 872, 877 (2007); *see also* Rule 403, SCRE ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ...").

ARGUMENT

The court erred in appellant's trial for breaking into an automobile when it admitted evidence appellant had broken into another automobile several years earlier, since the offenses were not sufficiently similar to qualify for admission under the Rule 404(b), SCRE exception for common scheme or plan, and where the danger of unfair prejudice substantially outweighed the probative value of the prior bad act.

The prior bad act evidence was not sufficiently similar to qualify for admission under the common scheme or plan exception. The similarities between the offenses were scant and generalized—only that both crimes were automobile break-ins committed at night, in the same city, while appellant had facial hair.

Relevant facts

In appellant's 2018 trial, the solicitor moved to admit "prior bad act" evidence about an offense underlying appellant's conviction in 2014 for breaking into a motor vehicle. Tr. 34, l. 19 – 35, l. 3. According to the solicitor, the offenses were "so similar in nature and conduct" that the prior bad act should be admitted "based on common scheme or plan." Tr. 34, ll. 4-9. The solicitor also said she intended to call the victim in the 2014 case as a witness about the prior bad act. Tr. 35, ll. 3-4; Tr. 39, ll. 22-25.

The solicitor argued the offenses were similar because both offenses were committed by appellant, who was a thin black man with facial hair. Tr. 35, ll. 23-24; Tr. 36, ll. 12-15. The solicitor further argued the offenses were similar because both occurred within the city limits of Clemson, "about two miles apart," and both occurred "late in the evening or early morning." Tr. 36, ll. 17-19.

According to the solicitor, appellant's common scheme or plan was that he went "to someone's house, down their driveway, open[ed] car doors to take items from a car." Tr. 36, l. 23 – 37, l. 1.

Defense counsel responded that there were only so many ways one could break into a car and observed that most automobile break-ins occurred at night. Tr. 37, ll. 6-9. Defense counsel said, "[H]ow many ways are there to break into a motor vehicle?" Tr. 37, ll. 7-8. "It takes more . . . tha[n] there was an automobile broken into to make it a prior bad act." Tr. 37, ll. 9-11. Counsel also noted the offenses were different because in the case at hand, nothing was stolen, while items had been stolen in the 2014 case. Tr. 37, ll. 18-22.

Counsel argued the fact that the offenses occurred years apart weighed in favor of excluding the prior bad act. Tr. 37, ll. 23-24. Counsel further pointed out there were likely "many auto break-ins in the City of Clemson." Tr. 38, ll. 6-8. "I just do not see that this is similar nature." Tr. 38, ll. 8-9.

The court ruled the evidence was admissible. "[I]n listening to argument from counsel and looking at the brief[1] filed by the State, I find that it does classify as a bad act and would be admissible. Mr. DeJong, your objection is noted for the record." Tr. 40, ll. 17-21.

Pursuant to the court's ruling, two witnesses told the jury the details of appellant's 2014 automobile break-in case. The victim from the 2014 case, Karen Edwards, testified that on May 19, 2014, someone came into her garage and went inside her car. Tr. 56, l. 19 – 58, l. 1. Edwards said she did not witness the automobile break-in, but she watched a surveillance video of it, and the suspect was a tall, thin man. Tr. 57, ll. 5-11.

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[1] No such brief or motion was entered into the record as an exhibit. Tr. 3. Undersigned counsel contacted the Pickens County Clerk of Court's Office and was told that there was no such document in the Clerk of Court's file. Therefore, it was not before the court as part of the lower court record.

Sergeant James Peppers testified that he had watched the video from the Edwards case, and identified appellant as the man in the video from that 2014 case. Tr. 59, ll. 7-13. Peppers said that there was also a surveillance video of the current incident, and that upon watching it, he recognized and identified appellant as the suspect. Tr. 62, ll. 7-9. The surveillance video from the instant offense was State's Exhibit #1 and is on file with this Court. The video was nine seconds long, and the suspect's face was blurry during the only time he looked directly at the camera. State's Exhibit #1. No forensic evidence connected appellant to the crime and appellant did not confess.

The jury deliberated for less than twenty minutes before finding appellant guilty. Tr. 131, l. 25 – 132, l. 19.

Discussion

"Evidence of other bad acts is generally inadmissible to prove a defendant's guilt for the crime charged; however, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. Rule 404(b), SCRE." *State v. King*, 424 S.C. 188, 199, 818 S.E.2d 204, 210 (2018).

"In determining whether the common scheme or plan exception is applicable to a particular set of facts, the trial court must first determine if evidence of a prior or subsequent bad act bears a sufficiently close similarity or connection to the crime." *State v. Patrick*, 318 S.C. 352, 356, 457, S.E.2d 632, 635 (Ct. App. 1995). In *Patrick*, the state introduced prior bad act evidence that the defendant had committed a similar crime in Georgia within two weeks of the instant offense. In both cases, "the suspects used the same disguises (gloves, wigs, bandanas) and the same tools (walkie-talkies, flashlights). They cut telephone lines in the same manner. They

generally carried the same type of weapons." *Id.* This Court found that on those facts, the similarities between the two acts were sufficiently close to warrant admission.

In contrast, the South Carolina Supreme Court found insufficient factual similarities to admit prior bad act evidence in *State v. Parker*, 315 S.C. 230, 433 S.E.2d 831 (1993). In *Parker*, the defendant was tried for beating the victim to death with a baseball bat in a parking lot, and the state introduced evidence that Parker had been in a prior physical altercation with the victim in the same parking lot. *Id.* at 232, 433 S.E.2d at 832. Finding error, the Supreme Court explained that the facts were only of "general similarity, and thus [we]re insufficient to support the common scheme or plan exception." *Id.* at 234, 433 S.E.2d at 833.

"A common scheme or plan concerns more than the commission of two similar crimes; some connection between the crimes is necessary." *State v. Timmons*, 327 S.C. 48, 52, 488 S.E.2d 323, 325 (1997). "The trial judge must clearly perceive the connection between the other crimes and the crimes charged." *Id. See State v. Cheeseboro*, 346 S.C. 526, 546, 552 S.E.2d 300, 311 (2001) (substantial connection between prior bad act and current offense made admission proper). Here, the crimes were not connected.

Nor was the crime charged sufficiently similar to the prior bad act since they both shared only a few general features. In *Timmons*, *supra*, the South Carolina Supreme Court found the similarities between the crime and the bad act were too general to warrant admission where both crimes: occurred on the weekends; involved more than one defendant; "all-night establishments were targeted; customers in the stores were also robbed; and the stolen cars were recovered bearing 'fruits of the crimes.' **These features are too general.**" (emphasis added). *State v. Timmons*, 327 S.C. at 53, 488 S.E.2d at 326.

Here, like in *Timmons*, the features of the two offenses had only general similarities, not specific—the offenses were committed in the same city, during the nighttime, by opening car doors. As defense counsel noted, most automobile break-ins are likely to occur at night. There was nothing unusual about how the cars were entered: the doors were simply opened. The locations were two miles apart. The offenses were remote in time—the prior bad act occurred three and a half years before the current offense and four and a half years before appellant's trial. Although the solicitor argued appellant was a thin black man who had facial hair when he committed both offenses, there was nothing to indicate this was a disguise and not his natural and typical appearance. The admission of the prior bad act was error, since it was not sufficiently similar to the crime charged for the two offenses to constitute a common scheme or plan.

"Once bad act evidence is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE."[2] *State v. Wallace*, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009); *accord State v. Spears*, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013). "Courts must weigh the probative value of evidence of prior bad acts against its prejudicial effect. Such evidence is inadmissible unless the close similarity of the charged offense and the previous acts enhances the probative value of the evidence so as to overrule the prejudicial effect." *State v. McClellan*, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) (internal quotations and alterations omitted). The court must determine "whether the probative value of

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[2] *See State v. Brooks*, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000) (even where evidence falls within a *Lyle* exception, "it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice"); *State v. Patrick*, 318 S.C. 352, 356, 457, S.E.2d 632, 635 (Ct. App. 1995) ("the court must determine that the probative value of the prior acts evidence outweighs its prejudicial effect); *State v. King*, 424 S.C. at 200, 818 S.E.2d at 210 ("other bad act evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice").

the evidence is substantially outweighed by the danger of unfair prejudice." *State v. King*, 424 S.C. 188, 200, 818 S.E.2d 204, 210 (2018).

Here, the trial court did not conduct an analysis of the prior bad act's probative value vis-à-vis the danger of unfair prejudice. In *Spears*, *supra*, this Court held that where it was not implicit or apparent from the record whether the trial court considered whether the probative value of a prior bad act was substantially outweighed by unfair prejudice, "the trial court erred by failing to conduct an on-the-record balancing test." *State v. Spears*, 403 S.C. at 254, 742 S.E.2d at 881.

Had the court conducted an analysis of probative value and prejudicial effect, the evidence would have failed the test for admission, as the probative value of the bad act evidence was low. There was nothing unusual about how the crimes were accomplished—the unlocked car doors were simply opened. Both offenses appear to have been mundane, run-of-the-mill automobile break-ins. The primary purpose of admitting a bad act under the common scheme or plan exception is to prove the suspect's identity.[3] While Sergeant Peppers testified that he recognized appellant in the surveillance footage of the prior bad act, there was nothing about that prior recognition that pointed to appellant as being the perpetrator in the case at hand—other than criminal propensity. Sergeant Peppers did not solely know appellant from the 2014 video—Peppers said he had known appellant for over ten years, as they had both grown up in Clemson. Tr. 69, ll. 9-14.

Here, the probative value of the prior bad act evidence lay chiefly in a forbidden purpose—to convince the jury appellant was guilty based on his propensity to break into cars.

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[3] In *State v. Jenkins*, 322 S.C.414, 416, 472 S.E.2d 251, 252 (1996), the South Carolina Supreme Court noted that, "As the *Lyle* Court pointed out, the latter two exceptions [identity and common scheme or plan] are interrelated because evidence of a common scheme or plan essentially goes to prove the identity of the perpetrator."

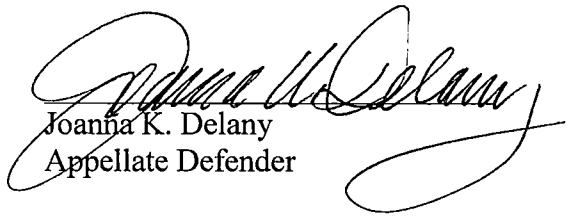
The prior bad act evidence was, for that very reason, explosively prejudicial. "Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence." *State v. Lyle*, 125 S.C. at 406, 118 S.E. at 807.

Moreover, "[w]hen the prior bad acts are similar to the one for which the appellant is being tried, the danger of prejudice is enhanced." *State v. Brooks*, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000). The prior bad act here was the exact same type of charge for which appellant was on trial—breaking into a motor vehicle. This further enhanced the prejudice to appellant.

The error was not harmless. "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." *State v. King*, 424 S.C. at 201, 818 S.E.2d at 211 (quoting *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006)). The state relied on the prior bad act evidence because its only other evidence was a surveillance video in which the suspect's face was blurry. In light of these facts, it cannot be said the bad act evidence was harmless beyond a reasonable doubt.

CONCLUSION

Based on the foregoing argument, appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of August, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Jeremy Renard Webb, #249500, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 15th day of August, 2019.

Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 15th day of August, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 26, 2028