ORIGINAL

RECEIVED
JUN 08 2016
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARVIN BROCK JOHNSON,

APPELLANT

APPELLATE CASE NO. 2014-002435

FINAL BRIEF OF APPELLANT

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARVIN BROCK JOHNSON,

APPELLANT

APPELLATE CASE NO. 2014-002435

FINAL BRIEF OF APPELLANT

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court erred in failing to exercise its discretion where it refused to accept an *Alford* plea in Appellant's case and where Appellant would have only been required to serve an additional one month and ten days incarceration pursuant to the State's plea offer and was instead sentenced to six years following his conviction by the jury?

II. Whether the trial court erred in admitting Appellant's alleged prior bad acts, specifically that Appellant shoplifted at the Belk department store on two prior Fridays, as evidence of common scheme or plan and intent and erred in finding that the probative value of the prior acts was not substantially outweighed by the danger of unfair prejudice?

III. Whether the trial court erred in admitting Appellant's alleged prior bad acts where the State failed to prove the acts by clear and convincing evidence?

STATEMENT OF THE CASE

On October 6, 2014, the Aiken County grand jury indicted Appellant Marvin Brock Johnson with one count of shoplifting, third offense. R. 171.

On November 4, 2014, Johnson proceeded to trial before the Honorable R. Knox McMahon and a jury. Johnson was represented by D. Grant Gibbons, and the State was represented by assistant solicitors Jay Slocum and Cassie Hall.[1] R. 1. The jury found Johnson guilty of the charged offense. R. 162, l. 16 – 163, l. 6. Judge McMahon sentenced Johnson to six years incarceration. R. 169, ll. 1-4.

This appeal follows.

[1] The cover page of the trial transcript reflects Kevin Molony as the assistant solicitor and attorney for the State. However, the body of the transcript reveals that Mr. Slocum and Ms. Hall represented the State at trial.

STATEMENT OF FACTS

Appellant Johnson was accused of shoplifting items from the men's department at the Belk Department store located in Aiken County. The solicitors presented testimony from Patsy Singletary, the Loss Prevention Officer ("LPO"),[2] who alleged that Johnson entered the Belk store, selected several items from the rack, placed them inside of his duffle bag, and proceeded toward the exit door.[3] As she approached him, Johnson began removing items from his bag and placing them on the floor. R. 67, l. 18 – 70, l. 3; R. 74, l. 14 – 76, l. 3. Over defense counsel's objection, the State elicited further testimony that Johnson had shoplifted at the store on the two prior Fridays but was able to leave the store before Singletary could catch him. R. 70, l. 6 – 74, l. 12; R. 87, ll. 5-17; R. 105, l. 20 – 107, l. 17. Singletary also alleged that Johnson confessed to the prior shoplifting incidents in front of her and Maura Carstens, but she admitted that she failed to mention either of the alleged prior incidents or the "confession" to law enforcement. R. 94, l. 3 – 95, l. 15; R. 99, ll. 12-24; R. 111, ll. 1-25; R. 113, l. 1 – 114, l. 7; R. 122, ll. 3-20.

---

[2] Singletary worked as an LPO at Belk for fourteen months. R. 63, ll. 15-20. She made approximately sixty-five apprehensions for shoplifting at Belk and testified in approximately sixty shoplifting trials. R. 65, ll. 1-11.

[3] Singletary testified at the pre-trial motions hearing that Johnson was "at the door" and an "area right by the home exit door" when she approached him. R. 28, ll. 13-21. She changed her testimony during the trial to indicate that Johnson's back was on the exit door when she approached, though she altered her testimony again to say that he was "heading out the door." R. 69, ll. 6-8; R. 76, ll. 9-19. Singletary later clarified that Johnson was initially at the exit door with his back towards her but that he saw police approaching, turned around and removed the items before proceeding to exit again. R. 91, l. 19 – 92, l. 18. Officer Terry testified that Singletary was escorting Johnson to the loss prevention office when he arrived. R. 116, ll. 17-20; R. 120, ll. 13-20. Johnson testified that Singletary was between him and the exit door when she confronted him. R. 130, ll. 11-16; R. 133, ll. 9-11.

Johnson testified in his defense and admitted to entering the department store with the thought of shoplifting. However, he never placed the items he picked up in his bag and ultimately changed his mind and put the items down elsewhere in the same department. He did not see the LPO until after he had set the items down and gone toward the exit door, where she blocked him from leaving. R. 128, l. 18 – 140, l. 11.

Though the incident was recorded on the store's closed circuit video system, the LPO made an error in copying the footage to CD for law enforcement. The footage copied was from approximately one hour and fifteen minutes after the incident.[4] The error was not discovered until after the ninety day retention period on the store's video equipment had passed and the footage erased from its system.[5] R. 35, l. 3 – 36, l. 13; R. 44, l. 11 – 46, l. 110; R. 79, l. 6 – 81, l. 3; R. 87, l. 23 – 88, l. 10; R. 102, l. 7 – 103, l. 18 ; R. 117, l. 7 – 119, l. 19; R. 123, l. 24 – 124, l. 7. No footage of the alleged prior shoplifting incidents involving Johnson were ever viewed by law enforcement or copied to CD. R. 37, l. 24 – 39, l. 7; R. 40, l. 13 – 41, l. 14.

---

[4] Defense counsel noted the inconsistency in the LPO's testimony that she prepared the CD immediately following the incident at 11:30 a.m., while she showed the footage to the responding officer, and her testimony that the footage copied was from one hour and fifteen minutes after the incident. R. 144, l. 10 – 145, l. 1. Notably, Officer Terry indicated that he arrived as Johnson was being escorted to the loss prevention office and that approximately fifteen to twenty minutes passed prior to his receiving the CD and leaving. R. 120, ll. 15-17; R. 122, l. 22 – 123, l. 8.

[5] Officer Terry testified that he viewed the relevant footage at the store and observed Johnson "kneel down on the floor, take clothing items from the shelves and conceal them inside of a camouflage bag, head towards the front of the store where he was stopped by complainant Singletary after he had removed the clothing items and attempted to leave the store." R. 125, l. 20 – 126, l. 3.

Plea Offer

Following jury selection, information was put on the record regarding the plea negotiations in Johnson's case. The State offered a plea of four years, suspended to one year, with credit for time served and drug treatment during probation. If accepted, Johnson would have only had approximately one month and ten days left to serve. By going to trial, Johnson faced a potential sentence of ten years. R. 4, l. 4 – 6, l. 5. Johnson addressed the court and explained that he had taken guilty pleas in the past because he knew he was wrong. However, in this instance, he was "right" and was not guilty. R. 6, ll. 7-18. The court reminded Johnson that "there's a lot at stake between the jury trial and potentially getting out December 14th." He also said "You'll be out and back home before I'll be back home." R. 7, ll. 1-4.

Motion in Limine on Prior Bad Acts Evidence

The court conducted a pre-trial hearing to determine the admissibility of the solicitors' proposed prior bad act evidence under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) and its progeny and under Rules 403 and 404, SCRE. R. 23, l. 24 – 56, l. 13. The State proffered that the testimony would be that Johnson shoplifted from the store on the two prior Fridays, May 10th and May 17th. R. 24, ll. 4-12. The solicitor then called two witnesses to testify at the hearing, LPO Patsy Singletary and Belk employee Rebecca Powell.

Singletary testified that she was monitoring the Belk closed circuit television when, at approximately 11:20 a.m. on May 24th, she saw Johnson enter the men's department. He selected several items and concealed them in a camouflage bag. Singletary then left the loss prevention office and saw Johnson "heading towards the exit door." R. 27, l. 6 – 28, l. 9.

She claimed that she approached him at the exit door near the clearance and home sections of the store. She identified herself as an LPO and observed Johnson "removing merchandise from the bag." R. 28, ll. 10-25.

According to Singletary, she observed Johnson "two Saturdays[6] in a row prior, same time, same scenario." She claimed that on both occasions she saw Johnson enter the men's department, select merchandise, place them into a bag, exit quickly, and get into a green van that was backed into a parking space near the main exit door. He used a purple laundry bag on May 10th. On May 17th, she was alerted to Johnson by Rebecca Powell, another Belk employee. She observed him over the video surveillance system place merchandise into a bag. On both occasions Singletary was unable to confront Johnson before he drove away. She was also unable to identify what specific items were allegedly taken on the 10th and 17th, but she later indicated they were "stacks" of shirts. R. 29, l. 1 – 31, l. 23; R. 33, l. 19 – 35, l. 2; R. 48, ll. 5-18.

Singletary admitted on cross-examination that she did not mention any prior incidents involving Johnson in her written statement for police. R. 46, l. 12 – 47, l. 14. She also did not get a license plate from the green van on May 10th and she only "got a partial plate or something" on May 17th. R. 47, ll. 15-24. No evidence was presented to link the partial plate alleged obtained to the vehicle actually driven by Johnson on May 24th.

The other witness, Powell, was shopping after her shift ended on May 17th when she allegedly observed Johnson on the sales floor exhibiting "suspicious behavior." She saw him throw three or four items over his arm "without regard for size" and without looking at

---

[6] While there was testimony that the incident occurred on a Saturday, this Court can take judicial notice that May 10th, 17th, and 24th, 2013 were all Fridays.

the price tags. She alerted Singletary via text message and did not have anything else to do with the May 17th incident. R. 50, l. 16 – 51, l. 22.

Defense counsel argued that there was no documentation or photographic evidence related to the alleged prior bad acts. Johnson was not apprehended on either of the two prior occasions and was thus never properly identified as the perpetrator. He also argued that the prior acts should be excluded under Rule 403, SCRE, because they were more prejudicial than probative. R. 53, ll. 6-23. The solicitor argued that the witnesses positively identified the defendant as being the same person they saw during the prior incidents. He argued that it was "very probative of common plan or scheme" and "probative to prove what his intent was." R. 53, l. 25 – 54, l. 12.

The trial judge found that the State had shown clear and convincing evidence of the prior bad acts under Rule 404(b), SCRE. He further found that the events of May 10th, 17th, and 24th were similar in that that they all involved the same victim and occurred during the weekend at approximately the same time of day in the men's department. The same green van was also involved and the same type of items taken by the same modus operandi. R. 54, l. 14 – 55, l. 20.

The judge then engaged in the Rule 403, SCRE, analysis of balancing unfair prejudice versus probative value. He found "a very high degree of probative value" both as to a common scheme or plan and intent. He found that the danger of unfair prejudice was "substantially outweighed by the high probative value in the case," thus finding the prior acts were admissible. R. 55, l. 20 – 56, l. 9.

Defense counsel renewed his objection to the prior bad acts testimony during the trial. R. 70, ll. 6-11.

The solicitor argued in her closing:

> You heard Ms. Patsy [Singletary], what she saw that day, what she did that day, what she saw the two Saturdays prior to that. What makes sense? Does it make sense that she would sit there and make up a story about a guy the same Saturdays before and lo and behold the third Saturday it just happened to be Mr. Johnson? What's the smart rational thing; what does your common sense tell you?
>
> ...
>
> Ms. Patsy talking about the purple bag on the first incident and where he was, where he knelt down and -- with this bag and threw the shirts out right before law enforcement got there after he tried to get out the door.

R. 147, l. 25 – 148, l. 17.

> [T]he only reason he [Johnson] wasn't able to get those shirts is because he finally got caught on the third time. Ms. Patsy said the first two times he was too fast for her. The third time she got to him before he got to the door.

R. 149, l. 22 – 150, l. 1.

Attempt to Plead Guilty

Following the court's ruling on the motion in limine, Johnson indicated his desire to plead guilty. In response to the court's questions, Johnson advised that he was fifty-five years old, had a ninth grade education, and worked in landscaping, painting, carpentry, plumbing and as a short order cook. R. 56, l. 21 – 58, l. 24. After some additional questioning by the court, the following exchange took place:

> THE COURT: Understanding then the nature of the charge, shoplifting 3rd or subsequent, and the potential punishment, how do you plead to that charge, guilty or not guilty?
>
> THE DEFENDANT: I plead guilty.
>
> THE COURT: Are you guilty?
>
> THE DEFENDANT: I'm not guilty, but I'm pleading guilty. I'm not guilty.

> THE COURT: Well, I'm not going to take your plea. Thank you very much. Thank you. Thank you, Mr. Johnson.
>
> MR. GIBBONS: Your Honor, would you entertain an *Alford*[7] Plea.
>
> THE COURT: No, sir. I don't, I don't, I don't typically take -- I very rarely take *Alford* pleas unless there is some showing of factual foundation that there is no memory of -- of the offense.

R. 58, l. 25 – 61, l. 13. The jury then entered the courtroom and the State began the presentation of its case.

[7] North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970).

ARGUMENT

I. The trial court erred in failing to exercise its discretion where it refused to accept an *Alford* plea in Appellant's case and where Appellant would have only been required to serve an additional one month and ten days incarceration pursuant to the State's plea offer and was instead sentenced to six years following his conviction by the jury.

Initially, the trial judge encouraged Johnson to consider accepting the State's plea offer by telling him "[t]here's a lot at stake between the jury trial and potentially getting out December 14th. You'll be out and back home before I'll be back home." R. 7, ll. 1-4. Johnson explained that he could not accept the plea offer because he did not believe he had done anything wrong. R. 6, ll. 9-18. However, after the judge ruled that the prior bad acts evidence would be admissible, Johnson expressed his desire to plead guilty. Johnson answered questions about his age, education, and background. He confirmed that he was not under the influence of any medications, drugs, or alcohol, and that he understood the proceedings, charges, and rights that he was giving up by pleading guilty. R. 56, l. 23 – 60, l. 21. When asked how he pled, Johnson said "guilty." R. 60, l. 22 – 61, l. 1. But, when asked if he was guilty, Johnson responded "I'm not guilty, but I'm pleading guilty. I'm not guilty." R. 61, ll. 2-4. Judge McMahon responded that he was not going to take his plea. Defense counsel asked the judge if he would "entertain an Alford plea," but the judge responded that he only takes Alford pleas if "there is some showing of [a] factual foundation **that there is no memory of [] the offense**." R. 61, ll. 8-13 (emphasis added).

The trial judge failed to exercise any discretion in determining whether to accept Johnson's plea after Johnson maintained his innocence. Instead, Judge McMahon referenced a policy of rarely taking Alford pleas and only if there is a "factual foundation that there is no memory of [] the offense." R. 61, ll. 8-13. The trial judge's policy

contradicts the purpose of an Alford plea, which allows a defendant to enter a plea of guilty while maintaining his innocence after assessing the State's case against him and reasonably determining that it is more practical to avoid trial and be sentenced. There is no doubt that a defendant with no memory of a crime could plead guilty even prior to the court's decision in Alford. See State v. Tahash, 116 N.W.2d 666 (Minn. 1962) (affirming acceptance of guilty plea where defendant appeared convinced of his guilt but had "no definite recollection of details of crime" because of his use of alcohol). However, it is axiomatic that a lack of memory would greatly impact a defendant's ability to properly evaluate the legal alternatives in his case. Thus, the requirement that a defendant have "no memory" of the crime as a prerequisite to acceptance an Alford plea misapprehends the reasoning of Alford. See Alford, 400 U.S. at 38, 91 S.Ct. at 168 ("The prohibitions against involuntary or unintelligent pleas should not be relaxed, but neither should an **exercise in arid logic** render those constitutional guarantees counterproductive and put in jeopardy the very human values they were meant to preserve." (emphasis added)). Johnson was prejudiced by the refusal to accept his plea because he received a sentence of six years in contrast to the forty days of active incarceration that he would have served pursuant to the plea negotiations.

Purpose of *Alford* Pleas

In Alford, the United States Supreme Court determined that an "express admission of guilt" was "not a constitutional requisite to the imposition of criminal penalty." 400 U.S. at 37, 91 S.Ct. at 167. "An individual accused of [a] crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is **unwilling or unable** to admit his participation in the acts

constituting the crime." Id. (emphasis added). The Alford Court noted the reasoning of several jurisdictions that historically allowed the entry of such pleas, which included that "they should not force any defense on a defendant in a criminal case, particularly when advancement of the defense might end in disaster;" "since guilt, or the degree of guilt, is at times uncertain and elusive, an accused, **though believing in or entertaining doubts respecting his innocence, might reasonably conclude a jury would be convinced of his guilt and that he would fare better in the sentence by pleading guilty**;" and "reasons other than the fact that he is guilty may induce a defendant to so plead, and he must be permitted to judge for himself in this respect." Id. at 33-34, 91 S.Ct. at 165 (emphasis added).

With respect to Alford's case in particular, the Court found that the defendant "intelligently conclude[d] that his interests require entry of a guilty plea." Id. at 37, 91 S.Ct. at 167. The record contained a strong factual basis for the plea, as there was strong evidence of guilt. Id. at 37-38, 91 S.Ct. at 167-68. Thus, Alford had "nothing to gain by a trial and much to gain by pleading." Id. Further, Alford clearly expressed his desire to enter a guilty plea despite his professed belief in his innocence. Id. Similarly, in the present case, the trial court heard a majority of the evidence against Johnson during the pre-trial motions, which provided the requisite factual basis for the plea. As evidenced by the disparity of five years of active incarceration between the negotiated sentence pursuant to a plea versus the sentence following the trial, Johnson also had much to lose from proceeding to trial.

In United States v. Gaskins, 485 F.2d 1046, 1047-48 (D.C. Cir. 1991), the D.C. Circuit Court reviewed the trial court's rejection of Gaskins' plea because Gaskins was

unwilling to give an unequivocal confession of guilt to unlawful entry, instead contending that he entered because "some dude pointed a gun at me and told me to go in the house." The Gaskins court recognized that Alford did not impute an absolute right to the defendant to have his guilty plea accepted by the court and noted that a court has discretion in deciding whether to accept a plea. Id. at 1048. However, the court held that "it is an abuse of discretion to refuse a guilty plea solely because the defendant does not admit the alleged facts of the crime."[8] Id. (citing McCoy v. United States, 363 F.2d 306, 307 (D.C. Cir. 1966) (finding that Fed. Rule Crim. Proc. 11 "'resposes a discretion' in the court to refuse a guilty plea, but add[ing], 'the plea should not be refused without good reason.'")).

The Gaskins court also noted the importance of the plea bargaining process, which is "as essential component of the administration of justice." Id. at 1049. Defendants plead guilty for a variety of reasons. See Brady v. United States, 397 U.S.

---

[8] The Gaskins court explained that the following procedure should be followed when the court is asked to accept an Alford plea:

> When a defendant seeks to plead guilty while protesting his innocence, the trial judge is confronted with a danger signal. It puts him on guard to be extremely careful that his duties under [Federal] Rule [of Criminal Procedure] 11 are fully discharged. It highlights the importance of his obligation under Rule 11 to assure that there is indeed a factual basis for the plea and that the defendant is clearly advised not only of the penalties to which he is exposed but of the fact that his plea waives any defenses to the charge. But after fully satisfying himself of the factual basis for the plea, and that the presentation of pertinent facts discloses no plain legal defense, the trial judge errs in insisting on trial merely because the defendant refuses to accompany his plea to lesser charges with an admission of the guilt indicated by the other evidence presented to the court.

485 F.2d at 1049.

742, 756, 90 S.Ct. 1463, 1473 (1970) ("Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted."); McCoy v. United States, 363 F.2d 306, 308 (D.C. Cir. 1966) (" An accused, though believing in or entertaining doubts respecting his innocence, might reasonably conclude a jury would be convinced of his guilt and that he would fare better in the sentence by pleading guilty; or for other reasons he might wish to avoid further contest.... guilt, or the degree of guilt, is at times uncertain and elusive"); State v. Kaufman, 2 N.W. 275, 276 (Iowa 1879) ("Reasons other than the fact that he is guilty may induce a defendant to so plead, and thereby the state may be deprived of the services of the citizen, and yet the state never actively interferes in such case, and the right of the defendant to so plead has never been doubted. He must be permitted to judge for himself in this respect.").

Our Supreme Court recognized that the decision to plead guilty is based on a weighing of the evidence and potential penalty and does not allow withdrawal of a guilty plea based on an error in the defendant's risk assessment. See Jamison v. State, 410 S.C. 456, 765 S.E.2d 123 (2014) ("A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that **his calculus** misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." (quoting Brady, 397 U.S. at 757, 90 S.Ct. at 1473) (emphasis added)).

Distinguishing *Paris* from the Instant Case

Inevitably, Respondent will cite State v. Paris, 354 S.C. 1, 578 S.E.2d 751 (Ct. App. 2003), for this court's rejection of Gaskins. However, Paris is not dispositive in this case.

In Paris, the defendant attempted to plead nolo contendere to a charge of criminal sexual conduct with a minor in the first degree. 354 S.C. at 2, 578 S.E.2d at 752. During the plea colloquy, the defendant said that he had not committed the offense but was not contesting the charge because he did not want to put his child through a trial. Id. The judge refused to accept the plea until Paris admitted that he committed the crime, which Paris refused to do. Id. Paris was then tried and convicted by a jury and sentenced to ten years, suspended upon the service of five years with five years of probation. Id.

The Paris Court "reject[ed]" Gaskins and held "that a trial court can indeed reject a guilty plea because the defendant protests innocence." Id. at 3, 578 S.E.2d at 752. The court cited the First Circuit Court of Appeals' reasoning in United States v. Bednarski that "a conviction affects more than the court and the defendant; the public is involved.... [T]he public might well not understand or accept the fact that a defendant who denied his guilt was nonetheless placed in a position of pleading guilty and going to jail...." Id. (quoting United States v. Bednarski, 445 F.2d 364 (1st Cir. 1971)). However, the Bednarski court went on to say that:

> We may agree that a court must seriously consider accepting a tendered plea if it is fully satisfied, even though the defendant asserts his actual innocence, and commend this obligation to the district courts. At the same time, we believe the defendant's burden to show an abuse of discretion in refusal should be heavier than the court apparently felt in such cases as *Griffin v. United States*, 1968, 132 U.S.App.D.C. 108, 405 F.2d 1378, and *McCoy v. United States*, 1966, 124 U.S.App.D.C. 177, 363 F.2d 306, 307.

445 F.2d at 366. Thus, even if a plea court may refuse to accept an Alford plea, the plea court must still exercise its discretion in deciding whether to accept or reject the plea.

In the present case, there was no "serious consideration" given to the acceptance of the plea. There was instead an immediate refusal to accept the plea based on the plea

judge's personal policy. See McCoy, 363 F.2d at 308-09 ("An inflexible standard for accepting a guilty plea, in order to serve the desirable purpose of avoiding a subsequent motion to withdraw the plea, leads to an undesirable consequence, namely, a requirement that in order to be able to plead guilty and accept sentence without trial an accused must not only enter the plea voluntarily and with full knowledge of the nature of the charge as required by [Federal] Rule [of Criminal Procedure] 11, but must publicly resolve all doubts as to guilt against himself."). It is the failure to exercise discretion that was error here. See State v. Smith, 276 S.C. 494, 280 S.E.2d 200, (1981) ("It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly. We call to the attention of the bench and bar that the mere recital of the discretionary decision is not sufficient to bring into operation a determination that discretion was exercised. It should be stated on what basis the discretion was exercised.").

Prejudice to Appellant

With respect to prejudice, the Paris Court found that the trial court was not required to accept the State's recommendation of five years active incarceration followed by probation. 354 S.C. at 3-4, 578 S.E.2d at 752. Here, the trial judge's discussion with Johnson regarding that offer reflected his intention to abide by the negotiation. He told Johnson: "there's a lot at stake between the jury trial and potentially getting out December 14th." He also said "**You [wi]ll be out and back home before I'll be back home.**" R. 7, ll. 1-4 (emphasis added).

The Paris Court also found that Paris got "essentially the same sentence the State had agreed to recommend to the trial court." 354 S.C. at 4, 578 S.E.2d at 752-53. Unlike

Paris, there was an appreciable disparity in the recommended sentence and the sentence ultimately imposed in Johnson's case. The sentence imposed after trial was six years. R. 169, ll. 1-4. The solicitor offered Johnson four years, suspended to one year, with credit for time served and drug treatment during probation. R. 4, l. 4 – 6, l. 5. With credit for time served, Johnson would have been released in a little more than one month, if only he would have said that he "was guilty" in addition to that he was "pleading guilty." He would have been home for Christmas in 2013, just as the judge indicated. Instead, according to the Department of Corrections, Johnson's projected release date is June 27, 2017.

Therefore, the plea judge erred in failing to exercise discretion in determining whether to accept Johnson's Alford plea. Johnson was prejudiced by the lengthier sentence that he received following his conviction by the jury.

II. The trial court erred in admitting Appellant's alleged prior bad acts, specifically that Appellant shoplifted at the Belk department store on two prior Fridays, as evidence of common scheme or plan and intent and erred in finding that the probative value of the prior acts was not substantially outweighed by the danger of unfair prejudice.

The admission of the unreliable testimony that Johnson shoplifted from the Belk store on two prior Fridays was in error because its purpose was to show that because Johnson shoplifted from Belk in the past, he shoplifted from Belk on May 24, 2014. The trial court erred in finding the common scheme or plan and intent exceptions to Rule 404(b), SCRE, were applicable. Further, even if one of the exceptions for admission did apply, the probative value of the prior acts was substantially outweighed by the danger of unfair prejudice.

"In the prosecution of one crime, proof of another direct substantive crime is never admissible unless there is some legal connection between the two upon which it can be said that one tends to establish the other or some essential fact in issue." State v. Carter, 323 S.C. 465, 467, 476 S.E.2d 916, 917 (Ct. App. 1996). "Perhaps no tenet of evidence law in the context of 'prior bad acts' is more firmly established than the principle that propensity or character evidence is inadmissible to prove the specific crime charged. State v. Tuffour, 364 S.C. 497, 502, 613 S.E.2d 814, 817 (Ct. App. 2005), *vacated on other grounds by* 371 S.C. 511, 641 S.E.2d 24 (2007).

> That contention is grounded upon the familiar and salutary general rule, universally recognized and firmly established in all English-speaking countries, that evidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged ... [p]roof 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. It ... 'raises a variety of issues, and thus diverts the attention of the jury from the one immediately before it.'"

Id. (quoting State v. Lyle, 25 S.C.406, 415–16, 118 S.E. 803, 807 (1923) (internal citations omitted).

The process of analyzing bad act evidence begins with Rule 401, SCRE. Pursuant to Rule 401, the trial court must determine whether the evidence is relevant. Upon determining the evidence is relevant, the trial court must then determine whether the bad act evidence fits within an exception of Rule 404(b) as interpreted by South Carolina jurisprudence. Rule 404(b), SCRE, provides:

> 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.

(emphasis added). Even if the prior acts fall under one of the exceptions, they must be excluded if the probative value is substantially outweighed by the danger of unfair prejudice to the defendant. See State v. Campbell, 317 S.C. 449, 451, 454 S.E.2d 899, 901 (Ct. App. 1994) (In deciding to apply the *Lyle* exception for the admission of prior crimes evidence, the court must always determine if the probative value of the prior acts evidence outweighs its prejudicial effect."); State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001); Rule 403, SCRE. The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case. State v. Fletcher, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008).

Common Scheme or Plan Exception

"The connection between the prior bad acts and the crime must be more than just a general similarity; there must be a close degree of similarity or a connection between the prior bad acts and the crime." State v. Campbell, 317 S.C. 449, 451, 454 S.E.2d 899, 901 (Ct.App. 1994). In Campbell, the trial court admitted testimony of prior drugs sales that Campbell made to the confidential informant in Campbell's trial for one count of distribution of crack cocaine. This Court found that "the methodology of prior sales is not relevant to prove this transaction." Id. "By introducing the prior bad acts, the State was not trying to prove a common scheme but to convince the jury that because Campbell sold crack cocaine in the past, he was selling crack cocaine on this occasion. This is precisely the type of inference that *Lyle* prohibits." Id; see also State v. Carter, 323 S.C. 465, 476 S.E.2d 916 (Ct. App. 1996) (finding that "the State was not trying to prove a common scheme or plan, but was instead trying to convince the jury that because Carter sold crack cocaine to Stamps on January 14th, he was selling crack cocaine on January 18th.").

In the present case, the trial court pointed to similarities in the three incidents, including: it involved the same victim, Belk; it occurred on a weekend at approximately the same time of day; similar items were taken, all from the men's department; the same green van was driven; the same modus operandi was used, i.e. concealing items in a bag; and there was a "race to [the] exit." R. 54, l. 14 – 55, l. 20. At first glance this "laundry list" of similarities may appear sufficient. However, the use of same green van merely corroborates the testimony that the prior acts were committed by the same person. Its use was not essential to commit or prove the crime. Additionally, the "same modus operandi"

and "race to [the] exit" are reflective of nearly any shoplifting incident and not anything particularized to Johnson. Further, Campbell involved prior drug sales to the same informant, reflecting that the fact that the incidents all involved theft from the men's department of the Belk Department store on a weekend is not dispositive. Thus, the similarities noted here did not rise to the level of a "close degree of similarity or connection" between the prior bad acts and the charged crime to fall under the "common scheme or plan" exception. Moreover, Johnson was charged with only one count of shoplifting; thus, the showing of a common scheme or plan was not essential to the State's case against him.

Even if the evidence did fall under the common scheme or plan exception, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The South Carolina courts "have repeatedly held in non-sexual offense cases that, 'the mere presence of similarity only serves to enhance the potential for prejudice.'" State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009) (Pleicones, J., dissenting) (quoting State v. Tuffour, 364 S.C. 497, 613 S.E.2d 814 (Ct. App. 2005) *vacated on other grounds* 371 S.C. 511, 641 S.E.2d 24 (2007)); see also State v. Gore, 283 S.C. 118, 120, 322 S.E.2d 12, 13 (1984). (concluding that when "the previous alleged bad act is **strikingly similar** to the one for which the appellant is being tried, the **danger of prejudice is enhanced**" (emphasis added)).

Here, the alleged crime was almost identical to the prior incidents, except that Johnson did not exit the store. The State was trying to imply that because Johnson had shoplifted in the past that he shoplifted on May 24th. This classic use of propensity evidence to prove conformity therewith was improper.

Intent Exception

The intent element required to prove shoplifting is "the intention of depriving the merchant of the possession, use, or benefit of the merchandise without paying the full retail value" or "the intention of depriving the merchant of the full retail value of the merchandise." S.C. CODE ANN. § 16-13-110. "Evidence of other crimes, even if logically relevant to prove intent, is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); see also Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

In State v. Micko, 393 N.W.2d 741 (N.D. 1986), the North Dakota Supreme Court found error in the admission of the defendant's statement that he was a "professional shoplifter" in his trial for two counts of theft of property over $500, both in connection with mall thefts. The Micko court found that even if relevant to the defendant's intent, a balancing of the probative value versus the prejudice caused by its admission should have led to its exclusion. 393 N.W.2d at 745. The Micko court noted the "prejudicial, misleading and cumulative" nature of the evidence, which violated the purpose behind Rules 403 and 404(b); that the evidence was unnecessary in light of Micko's other specific admissions about the thefts that were submitted to the jury; and that the purpose for admission was not to reveal his intent, but rather to characterize Micko as a professional shoplifter who had acted in conformity with his past actions. Id. at 745-46.

In the present case, State's witness, Maura Carstens, testified that she asked Johnson why he would shoplift in a store with cameras. Johnson allegedly replied: "You got to do what you got to do sometimes... to make ends meet." R. 111, ll. 1-8. Johnson himself admitted that when he initially entered the Belk store that day he had the intention of taking some shirts. However, he never put the items in a bag; he picked them up and then put them down. R. 130, ll. 9-13; R. 132, l. 16 – 134, l. 12; R. 135, l. 14 – 136, l. 2. The State essentially argued that Johnson could not abandon his intent to steal once he had placed the items in a bag or to another area of the store. R. 148, l. 18 – 149, l. 12; R. 149, l. 21 – 150, l. 1. Thus, the State's case hinged on whether Johnson transferred the items to another department of the Belk store or placed the items into a bag, not his intent.[9] As such, the prior acts evidence was unnecessary, cumulative evidence where the solicitor presented other evidence regarding Johnson's intent. The risk that the jury would convict Johnson based on his alleged prior conduct rather than based on his actions on the date of the charged offense was great.

[9] "Basically, a person is guilty of shoplifting if the person (1) takes, carries away, or transfers to another person or store area any merchandise with the intention of depriving the merchant of the possession, use, or benefit of the merchandise without paying the full retail value; (2) alters, transfers, or removes any label or price tag of any merchandise and attempts to purchase the merchandise at less than full retail value with the intention of depriving the merchant of that value; or (3) transfers any merchandise from its container [to any other container] with the intent to deprive the merchant of its full retail value." State v. Shaw, 328 S.C. 454, 456 n. 3, 492 S.E.2d 402, 403 n. 3 (Ct. App. 1997); see S.C. CODE ANN. § 16-13-110. There was no allegation that Johnson removed any tags from the items, so Johnson's conviction rested either upon the first or third provision of the statute. There was a factual dispute under both theories because Johnson testified that he set the property down on another table within the men's department and that he never placed the items in a bag. R. 130, ll. 9-13; R. 132, l. 16 – 134, l. 12; R. 135, l. 14 – 136, l. 2.

"Under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than prior criminal or immoral acts." State v. Gore, 283 S.C. at 120, 322 S.E.2d at 13. "Furthermore, where bad acts did not result in a conviction, guilty plea, indictment, or arrest of the appellant, [our Supreme] Court has limited the State's use of the evidence." Id. Here, the trial court allowed the introduction of testimony from an overzealous loss prevention officer who never actually made any contact with Johnson during the prior alleged incidents. The spurious nature of the evidence weighs against its probative value, particularly in the Rule 403 analysis. See discussion infra, Issue III. The danger of unfair prejudice was great given the similarity of the alleged prior conduct and the charged offense. Further, the evidence served to improperly bolster the State's case after the surveillance footage from Belk was discovered to be of the incorrect time period. The solicitor referenced the prior acts during her closing argument, implying that because Johnson had shoplifted previously, he had done so on the 24th. R. 147, l. 25 – 148, l. 17; R. 149, l. 22 – 150, l.

Additionally, the trial court's instructions to the jury regarding the prior bad acts were inaccurate. The judge instructed the jury:

> Prior record. You have heard evidence **that the defendant was convicted of a crime in the past** other than the offense of which he is presently on trial for. This testimony, **if you consider it is true**, may only be considered by you, the jury, **on the question of intent, common plan and scheme, and for no other reason and no other purpose**. You may give this evidence the weight and value, if any, which you find it should have on those sole issues of intent and common scheme and plan. You must not consider evidence -- the commission of another offense as proof that the defendant is guilty of the charge we are trying today.
>
> A person who has a past criminal record is competent to testify during a trial. A past record does not affect the ability of the witness to testify. However, a past record may be considered by you, if at all, **only in determining the believability of the witness.**

R. 156, l. 19 – 157, l. 10 (emphasis added). These instructions were improper and likely confusing to the jury because the prior bad acts in the case were not the defendant's prior convictions, which should have only been considered as to Johnson's credibility. The evidence that could, under the trial court's ruling, be considered for intent and common scheme or plan, were the uncharged shoplifting incidents that allegedly occurred on May 10th and 17th. See State v. Timmons, 327 S.C. 48, 54-55, 488 S.E.2d 323, 326 (1997) ("[W]hen evidence of other crimes is admitted for a specific purpose, the judge is required to instruct the jury to limit their consideration of this evidence for the particular purpose for which it is offered."); State v. Smalls, 260 S.C. 44, 47, 194 S.E.2d 188, 189 (1974) ("[W]here the evidence of other crimes is admissible only to impeach an accused when he testifies, the court, particularly on request, should instruct the jury that such evidence shall be considered by the jury only on the question of the credibility of the accused, and not to show his guilt).

Therefore, the trial court erred in applying the common scheme or plan and intent exceptions to allow admission of the prior bad act testimony against Johnson. Even if either of the exceptions did apply, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice to Johnson.

III. The trial court erred in admitting Appellant's alleged prior bad acts where the State failed to prove the acts by clear and convincing evidence.

Appellant Johnson maintained his innocence because he did not remove the items from the men's department and did not put them into a bag. Loss prevention officer Singletary failed to properly preserve the one piece of evidence that would have conclusively shown whether Johnson placed any items into a bag or removed them from the men's department on May 24th. Her failure to record the proper block of time was, at best, incompetent. This was apparently not the first time that Singletary copied the wrong portion of the video surveillance footage related to a charged incident. R. 85, ll. 13-17 (Defense Counsel: "Do you usually pick the right time?" Singletary "Sometimes – sometimes, just depends.").

Appellant Johnson also denied committing the alleged shoplifting incidents on the prior Fridays. R. 136, l. 3 – 138, l. 7. Singletary, again, failed to preserve any video evidence of the prior alleged shoplifting incidents. Her lack of understanding of the need to preserve the video of the prior incidents was incredulous, especially given her law enforcement experience. Singletary also failed to mention either of the prior incidents to law enforcement and did not produce the partial license plate number from the green van that she allegedly wrote down. Thus, the license plate seen on May 17th was never confirmed to match the van driven by Johnson on May 24th. R. 46, l. 15 – 47, l. 24; R. 25, l. 7 – 26, l. 6; R. 97, ll. 8-16. The green van was the one, allegedly common, link between the perpetrators of the three incidents, as Singletary never made contact with Johnson on May 10th or 17th.

Evidence of other crimes is supposed to "be put to a rather severe test before admission." State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998). The first,

most basic step prior to its admission is the presentation of evidence of the prior bad act. "If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008). "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal." Id. at 24, 664 S.E2d at 483.

This standard has been diluted by the court's use of an "any evidence" standard to review the trial court's finding of clear and convincing evidence. See State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) ("[W]e do not review a trial judge's ruling on the admissibility of other bad acts by determining *de novo* whether the evidence rises to the level of clear and convincing. If there is any evidence to support the admission of the bad act evidence, the trial judge's ruling will not be disturbed on appeal."). Most challenges to prior bad acts upon the sufficiency of the evidence are now rendered futile where the State presents at least one witness who "links" the defendant to the prior alleged act.

The Wilson Court noted that though a standard of review in the context of bad act evidence had not previously been articulated, courts had applied an "any evidence" standard in prior cases. Id. at 6 n. 3, 535 S.E.2d at 829 n. 3. The court then cited several decisions where it found evidence of prior acts inadmissible where there was no evidence connecting defendant to the alleged prior conduct. Id. However, all that those prior cases showed was that "no evidence" does not meet the standard of clear and convincing evidence. See State v. Pierce, 326 S.C. 176, 178, 485 S.E.2d 913, 914 (1997) ("The State

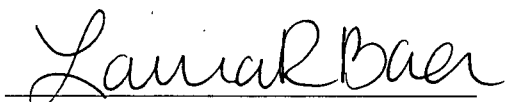
failed to offer any proof that appellant inflicted these injuries."); State v. Smith, 300 S.C. 216, 218-19, 387 S.E.2d 245, 247 (1989) ("The proof appellant committed that crime is not clear and convincing; in fact, there is no evidence placing him at the scene of the murder."); State v. Conyers, 268 S.C. 276, 281, 233 S.E.2d 95, 97 (1977) ("There was **very little evidence**, however, to establish that appellant poisoned her first husband other than the fact that she was his wife and he had some life insurance. This evidence alone was insufficient to establish the identity of appellant as the actor in poisoning her first husband." (emphasis added)); State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998) ("The evidence is insufficient to establish that appellant was the actor in Parker's death or Asher's injuries and we hold the trial judge erred in admitting this evidence").

It seems axiomatic that more than "any" evidence is necessary to find proof by clear and convincing evidence. The weight of the evidence must be considered by the trial court and should be subject to review by the appellate courts. Here, no one from the Belk store made any contact with the perpetrator of the shoplifting incidents on May 10th or 17th. No video evidence was preserved for review and the license plate of the van was not recorded. Johnson is certainly not the only African-American male in Aiken County who drives a green van. Therefore, the prior bad act evidence should have been excluded because it was not proven by clear and convincing evidence.

CONCLUSION

Based on the foregoing, Appellant Marvin Brock Johnson respectfully requests this Court reverse his convictions and either allow entry of an Alford plea and sentencing pursuant to the plea bargain (Issue I) or grant him a new trial (Issues II and III).

Respectfully submitted,



Laura R. Baer
S.C. Bar No. 101067
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of June, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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."

June 8th, 2016

Laura R. Baer
Appellate Defender

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

RECEIVED
JUN 08 2016
SC Court of Appeals