ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Cherokee County

Honorable J. Mark Hayes, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILLIAM D. PENNINGTON,

APPELLANT

APPELLATE CASE NO. 2018-001619

INITIAL BRIEF OF APPELLANT

ADAM SINCLAIR RUFFIN
Appellate Defender

ROBERT M. DUDEK
Chief Appellate Defender

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

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred in allowing Appellant's son, Rocky Pennington, to testify that Appellant allegedly discharged a gun in the general direction of the alleged victim months before her death where such prior bad act evidence was not admissible under the absence of mistake or accident exception of Rule 404(b), SCRE, and even if it was, such evidence still was not admissible because its probative value was substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE?

2.

Whether the court erred in allowing Rocky Pennington to testify that Appellant threatened to kill Rita prior to her death where the probative value of this testimony was substantially outweighed by the danger of unfair prejudice?

3.

Whether the court erred in allowing Rita's daughter-in-law, Lynn Swofford, to testify that Appellant made indirect threats to kill Rita on two separate occasions prior to her death where the probative value of this testimony was substantially outweighed by the danger of unfair prejudice?

STATEMENT OF THE CASE

Appellant was indicted by the Cherokee County grand jury for murder and possession of a weapon during the commission of a violent crime. R. p. *. Appellant's jury trial was held before the Honorable J. Mark Hayes, II. Tr. 1. Appellant was represented by Trent Pruett and Dean Cook, and the state was represented by Matt Kendall and Kim Leskanic. Tr. 1.

Appellant was convicted as charged, and Judge Hayes sentenced him to thirty years imprisonment for murder and five years imprisonment for the weapon charge.

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.

STATEMENT OF FACTS

On June 21, 2014 at 8:04 a.m., Appellant called 911 and reported that he accidentally shot and killed his wife, Rita Pennington ("Rita"). State's Ex. 1 (911 call on file with this Court). Appellant told the 911 dispatcher that he was cleaning his shotgun when it accidentally discharged and shot his wife in the head. State's Ex. 1.

Dr. Janice Ross performed an autopsy on Rita and determined that the cause of death was a shotgun wound to her head. Tr. 173, ll. 7 – 15. Ross further opined that because there was some stippling around Rita's wound that the muzzle of the firearm would have been between two and four feet away from her. Tr. 173, l. 23 – 174, l. 16. She testified regarding the direction of the wound: "It went in from the front of the left forehead and it went very slightly to the right and backward and maybe slightly [downward]." Tr. 174, l. 22 – 175, l. 4.

Ross admitted on cross-examination that if Rita had her hands up in a defensive posture, she would have likely had stippling or gunshot residue on her hands and arms, which was not found in this case. Tr. 181, l. 21 – 182, l. 10. Ross further admitted that there were no other external injuries to Rita and that she could not determine the exact position of the shooter in terms of whether they were sitting or standing. Tr. 182, l. 11 – 183, l. 8.

When Officer Nick Federico arrived on the scene, he found Rita laying on the floor on her back at the foot of the bed and the shotgun laying disassembled on the bed. Tr. 190, l. 21 – 191, l. 10; tr. 193, ll. 2 – 9. Federico also found a can of gun cleaner and noted that the shotgun appeared to be coated with the cleaner when it was found. Tr. 192, ll. 9 – 21. Six unfired shotgun shells were recovered that were laying on the bed, and one fired shotgun shell was also recovered from the bed. Tr. 326, ll. 21 – 25; tr. 328, ll. 10 – 12.

Chad Smith, who was a firearms examiner with SLED, testified that he received and reviewed the shotgun that was found at the scene that day. Tr. 211, ll. 17 – 23; tr. 213, l. 25 – 214, l. 3. The shotgun was a Mossberg 500 12-gauge pump action shotgun. Tr. 215, ll. 1 – 2. It had a pistol grip as opposed to a traditional stock, and it also had a pistol grip forehand. Tr. 217, ll. 3 – 5.

Smith testified that after testing the shotgun he found it to be in proper working condition. Tr. 220, ll. 1 – 13. Smith also described the disassembly screw on the shotgun: "Basically what it does is when you unscrew it, it would loosen the barrel so you are able to remove the barrel from the receiver in order for maintenance, cleaning, etcetera." Tr. 220, ll. 17 – 21. Smith admitted that based on his testing he was able to determine that this shotgun would still fire even with the disassembly screw fully loosened and with the barrel still in place. Tr. 220, l. 22 – 221, l. 1. The trigger pull weight of the shotgun was measured to be six and a quarter pounds. Tr. 221, l. 24 – 222, l. 11. The maximum capacity of the shotgun was six total rounds, including five in the magazine and one in the chamber. Tr. 245, ll. 15 – 18.

Investigator Tracy Fowler took a written statement from Appellant on the scene the day of the incident. Tr. 258, ll. 6 – 10. Appellant's written statement said, in relevant part:

> I told Rita I was going to clean my gun before we left. I just shot the gun Thursday or Friday evening before dark. I sat on the bed on the left side facing the headboard. I ejected the shells out of the gun by pumping the forearm of the gun. I counted six shells on the bed. The gun holds five shells . . . in the tube, one in the chamber. I removed the screw from the front end of the gun to take . . . the barrel off. The barrel was still on the gun loose as I was oiling it and wiping it down with a rag. The stock was resting on my leg with the barrel up at an angle. I was facing the chest of drawers, not the headboard. As I was wiping the gun down it fired. The barrel came out a little bit. I could see the shell. I pulled the barrel up and took the shell out. I heard Rita fall and saw blood on the floor. I got some towels and tried to stop the bleeding, but I wasn't able to. I tried to pick Rita up but I couldn't. I pulled Rita away

from the wall and moved her legs from under the bed. I ran out to the camper in the front yard and knocked trying to get my son Rocky. No one answered, so I went back to the house and called 911.

Tr. 260, ll. 2 – 22.

ARGUMENT

1.

The court erred in allowing Appellant's son, Rocky Pennington, to testify that Appellant allegedly discharged a gun in the general direction of the alleged victim months before her death because such prior bad act evidence was not admissible under the absence of mistake or accident exception of Rule 404(b), SCRE, and even if it was, such evidence still was not admissible because its probative value was substantially outweighed by the danger of unfair prejudice under Rule 403, SCRE.

Relevant Facts

The state made a pretrial motion to introduce several instances of prior bad acts by Appellant, including testimony from Appellant's son, Rocky Pennington. Tr. 16, ll. 11 – 15. In Rocky's proffered testimony, he stated that he witnessed Appellant shooting a firearm at Rita in the past. Tr. 40, ll. 9 – 12. Rocky stated:

> They were out in the back yard about I'm going to say maybe a month or two before I moved down and . . . I was coming around the side of the house and he was back there and they were arguing and he come around the house shooting the gun towards – that direction the way my momma walked, but, you know, she had done walked on off. He was shooting in the ground.

Tr. 40, ll. 14 – 22. The assistant solicitor asked Rocky if Appellant was aiming at Rita or "popping shots off" to which Rocky said that Appellant was just "[p]opping shots off" in Rita's general direction. Tr. 40, l. 23 – 41, l. 3. Rocky also testified about another incident in which Appellant allegedly shot at Rita out of a window. Rocky said:

> Like momma chicken pen where she had animals and stuff, they were outside towards where his window was and he would take the gun and shoot out towards that direction when she was out there feeding the chickens.

> Or there have been times my little brother came over, I came over, we would be out in the yard talking and we would get out of the house. You know, we didn't want to be inside. We would get out there and talk and he would shoot off out through the window.

Tr. 41, ll. 5 – 13.

The assistant solicitor argued that these prior shootings were admissible to show absence of mistake. Specifically, the solicitor argued that Appellant is "regularly shooting at his wife, or . . . in her direction, at least. It would seem to negate his sort of idea that . . . he is doing it accidentally . . ." Tr. 75, l. 25 – 76, l. 9. However, the state acknowledged that these alleged incidents, where Appellant was supposedly shooting "at" Rita, were not actually threatening towards her. The assistant solicitor admitted:

> I wasn't actually using this to show his behavior with regards to her in the context of an argument. In this instance they weren't . . . arguing. He just want[ed] something, he would just . . . fire off shots kind [of] in her direction. These were a little bit different, in that these weren't directly threatening to her . . . This is more like he's wanting something and he's just shooting out the windows and stuff like that. I think it shows more towards the absence of mistake and that he's highly irresponsible with firearms is what he's doing. He's not – you know, he knows how to use them. He just doesn't use them responsibly. He's out shooting guns out windows and kind of shooting in people's general directions . . .

Tr. 82, l. 18 – 83, l. 7. The court stated that it would "probably allow it in" but told defense counsel to make an objection if he felt like he needed to, and the court might change its mind. Tr. 84, l. 23 – 85, l. 8.

Prior to Rocky being called to the stand in front of the jury, defense counsel renewed his objection to the testimony regarding Appellant allegedly shooting towards Rita prior to her death. Tr. 424, l. 15 – 425, l. 21. Defense counsel argued that it was improper under Rule 404(b), SCRE, because it did not fall under one of the exceptions and that it was also irrelevant under Rule 401, SCRE, and further that it was unfairly prejudicial under Rule 403, SCRE. Tr.

425, l. 21 – 426, l. 8. Counsel further argued that the prior bad act had not been established by clear and convincing evidence. Specifically, counsel pointed out that these prior bad acts were disclosed less than a week prior to the commencement of Appellant's trial, even though the case had been pending for several years, and that Rocky's testimony was uncorroborated. Tr. 427, l. 12 – 428, l. 22.

The assistant solicitor again admitted that the prior incidents involving Appellant allegedly shooting "at" Rita were not indicative of Appellant intentionally trying to shoot her, but still argued that it negated the defense of accident. Tr. 427, ll. 2 – 5. The court ruled that these prior shootings were admissible and allowed Rocky to testify to them over Appellant's objection. Tr. 429, ll. 11 – 15.

Rocky testified before the jury that a "couple of months" prior to Rita's death, Appellant fired a .22 caliber rifle "towards the ground of the path that [Rita] had walked." Tr. 441, ll. 12 – 21. Rocky admitted that during this incident, Appellant was not aiming at her but just shooting near her. Tr. 441, l. 22 – 442, l. 1.

Discussion

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." If the prior bad act which the state seeks to introduce against the defendant is not the subject of a criminal conviction, then "evidence of the bad act must be clear and convincing." State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009). However, even if there is clear and convincing evidence of the prior bad act, admission of the evidence is still subject to Rule 403, SCRE. Id. Rule 403, SCRE, permits relevant

evidence to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013).

Here, the assistant solicitor argued that the prior shootings by Appellant negated his defense of accident. However, the solicitor at the same time admitted that these shootings were not intentionally aimed at Rita. The solicitor even said that Appellant knew how to use firearms but "just doesn't use them responsibly." Tr. 82, l. 18 – 83, l. 7. This ran directly contrary to the state's position at trial, which was that Appellant intentionally and maliciously murdered Rita. Since this was the state's theory, the prior shootings did not negate Appellant's claim of accident. Therefore, the prior shootings were not probative or relevant because the evidence did not make any fact of consequence more or less probable, i.e. whether Appellant killed Rita with malice or not.

Instead, these prior shootings were pure propensity evidence, exactly the kind of evidence that Rule 404(b), SCRE, was designed to exclude. The state sought to show that Appellant was hot-headed and a loose cannon who would fire his guns for any number of reasons. For example, the assistant solicitor stated that Appellant would fire his guns just because he was "wanting something." Tr. 82, l. 18 – 83, l. 7. Admission of the allegation of the prior shooting was extremely and unfairly prejudicial to Appellant because it allowed the jury to convict on an improper basis. "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. 118, 120, 322 S.E.2d 12, 13 (1984).

The jury was more likely to convict Appellant simply because this propensity evidence improperly suggested to them that, because Appellant had intentionally fired a gun in the general direction of Rita in the past, he could not have acted accidentally *in this case*. See State v. Spears, 403 S.C. 247, 258, 742 S.E.2d 878, 884 (Ct. App. 2013) (noting that a jury could have determined defendant was guilty on improper basis by relying on evidence that defendant in murder case had previously shot the victim one month earlier in a different altercation). In other words, the jury was less likely to give Appellant the benefit of the doubt, as was required by their oath, but instead would hold his prior conduct against him in assessing whether the state had proven his guilt for the current charged offense, murder. In State v. King, 422 S.C. 47, 69-70, 810 S.E.2d 18, 29-30 (2017), the Supreme Court found the admission of a profanity-laced jail call between the defendant and another individual was error. Specifically, the Court found that admission of the jail call was improper, in part, because it included impermissible references to alleged prior bad acts by King which defense counsel had argued were too similar to the crimes which King was currently on trial for. Id.

In State v. Braxton, 343 S.C. 629, 635, 541 S.E.2d 833, 836 (2001), the Supreme Court found that it was error for the trial court to permit testimony that the defendant had been in an argument with his brother and went to draw his pistol the night before the victim was murdered.[1] In this case, the prior bad acts were much more remote and invited the jury to render a verdict on a spurious and improper basis. Specifically, the prior bad acts alleged in this case involved Appellant *intentionally* firing a gun in an irresponsible manner. The assistant solicitor wanted

[1] The Braxton Court found this error to be harmless because it was cumulative to other evidence of the defendant's violent character. State v. Braxton, 343 S.C. 629, 635, 541 S.E.2d 833, 836 (2001).

the jury to make the logical leap that, because Appellant had *intentionally* fired his guns in an irresponsible manner in the past, he could not have fired his gun *accidentally in this case*.

However, the prior bad act of shooting at Rita as presented by the state was that, while Appellant intentionally pulled the trigger, his intent was not to cause harm to anyone. Instead, according to the assistant solicitor, Appellant was just "wanting something" when he fired his gun. Tr. 82, l. 18 – 83, l. 7. Introduction of this prior shooting did nothing to make Appellant's defense of accident less probable. Instead, it only painted Appellant as a bad person.

The court abused its discretion in admitting this propensity evidence over Appellant's objection because it was not relevant, it did not negate the defense of accident, and any probative value was substantially outweighed by the danger of unfair prejudice. Appellant's convictions should be reversed. See Rule 401, SCRE; Rule 403, SCRE; Rule 404(b) SCRE; State v. Braxton, 343 S.C. 629, 635, 541 S.E.2d 833, 836 (2001); State v. Spears, 403 S.C. 247, 742 S.E.2d 878 (Ct. App. 2013).

2.

The court erred in allowing Rocky Pennington to testify that Appellant threatened to kill Rita prior to her death because the probative value of this testimony was substantially outweighed by the danger of unfair prejudice.

Relevant Facts

The state sought to introduce testimony through Rocky Pennington that Appellant threatened to kill Rita two weeks prior to her death. During the pretrial hearing regarding the prior bad act evidence, Rocky testified that two weeks prior to Rita's death, he came home and witnessed her and Appellant arguing. Rocky alleged that Appellant grabbed a gun and screamed "I'll kill you" at her. Tr. 38, l. 23 – 39, l. 13.

Immediately prior to Rocky's testimony before the jury, defense counsel objected to this evidence, arguing that the relevance was far outweighed by the prejudicial effect. Tr. 426, ll. 9 – 17. The court allowed Rocky to testify to this incident over defense counsel's objection. Tr. 439, l. 22 – 441, l. 5.

Discussion

Rule 403, SCRE, provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ." As noted above in Issue 1, "[u]nfair prejudice means an undue tendency to suggest [a] decision on an improper basis." State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013).

Rocky's testimony that Appellant threatened to kill Rita was unduly prejudicial. During the pretrial hearing, Rocky claimed this threat was made about two weeks prior to Rita's death. Tr. 38, l. 23 – 39, l. 13. However, when Rocky testified before the jury, he said that this threat

was made some two months prior to Rita's death but then again went back to claiming it was two weeks prior to her death. Tr. 439, l. 22 – 441, l. 5.

Regardless of whether this alleged threat was made two weeks or two months prior to Rita's death, its prejudicial effect cannot be overstated. Rocky specifically testified that he witnessed Appellant grab his gun and scream "I'll kill you" at Rita. This testimony tended to allow the jury to convict on an improper basis of a purported state of mind *at least* two weeks prior to the killing. The jury was asked not to determine what Appellant's state of mind was two weeks prior to Rita's death but instead what it was the day of the killing.

The court erred in allowing Rocky to testify about an irrelevant prior threat made by Appellant against Rita, which had little probative value as to his state of mind and intent on the day of the killing. Furthermore, any probative value was substantially outweighed by the danger of unfair prejudice. Therefore, Appellant's convictions should be reversed. See Rule 403, SCRE; State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013).

3.

The court erred in allowing Rita's daughter-in-law, Lynn Swofford, to testify that Appellant made indirect threats to kill Rita on two separate occasions prior to her death because the probative value of this testimony was substantially outweighed by the danger of unfair prejudice.

Relevant Facts

The state called Rita's daughter-in-law, Lynn Swofford, to the stand during its pretrial motion. Tr. 52 – 58. Swofford testified at the pretrial hearing about an occasion, in which she made a phone call to Rita and Appellant picked up the phone. Swofford claimed that when Appellant picked up the phone, he was "chattering away, and he just was talking about how he had a gun pointed at her head all night long and he could just shoot her whenever he wanted to and she couldn't do anything about it." Tr. 53, l. 21 – 54, l. 6.

Swofford also claimed that approximately two months before Rita's death, Appellant came over to her house and said he was going to kill Rita. Tr. 54, l. 15 – 55, l. 7. Swofford later clarified that this incident took place around November of 2013, which was closer to eight months prior to Rita's death. Tr. 57, ll. 3 – 19.

Defense counsel argued that both incidents were too remote to Rita's death and therefore were irrelevant to the case. Tr. 85, l. 21 – 86, l. 3. The court ruled that both incidents were admissible, finding that the probative value outweighed the prejudicial effect. Tr. 87, ll. 6 – 18. Prior to Swofford's testimony, counsel again renewed his objection, arguing that both incidents were too remote to be relevant, and the court again ruled that both were admissible. Tr. 431, l. 5 – 434, l. 21.

Swofford testified before the jury, over defense counsel's objection, that Appellant came to her house sometime in November 2013, eight months prior to Rita's death, and threatened to kill Rita for "being stupid." Tr. 464, l. 22 – 465, l. 17. Swofford also claimed that Appellant told her that "he had laid there in the bed at night and he had a gun pointed to her head, and he said while she was sleeping she would never know it, he could blow her head right off her shoulders and she would never know it." Tr. 467, ll. 8 – 15. Swofford claimed that she could not remember the exact time of this alleged statement but that she believed it was around the same time as when Appellant came to her house. Tr. 467, ll. 16 – 21.

Discussion

Here, the threats to kill that Swofford alleged to have heard Appellant make were remote and extremely inflammatory. Swofford was unclear as to when these alleged threats were made by Appellant. While she originally testified that they were two months prior to Rita's death, she later admitted they were as much as eight months prior to her death. Tr. 57, ll. 3 – 19. Her testimony that Appellant claimed to have held a gun to Rita's head "all night" and that "he could blow her head clean off her shoulders and she would never know" served only to inflame the passions and prejudices of the jury and permit them to convict on an improper basis. Such a statement, even if true, had very little probative value to Appellant's actions some eight months later. But see State v. Lee, 255 S.C. 309, 178 S.E.2d 652 (1971) (stating "[t]he general rule is that evidence of previous threats and hostile declarations by the accused against the deceased is admissible to show malice . . .").

Swofford's testimony that Appellant threatened to kill Rita simply painted a negative image of Appellant's character as a husband, while doing little to show what his motivations were *at the time of the killing*. The jury's job was not to determine whether Appellant was a

good husband or whether he previously made off-the-cuff remarks about killing Rita. Instead, their job was to determine whether the state had proven beyond a reasonable doubt that Appellant acted with malice *at the time Rita was killed.* The jury's job was made more difficult when extraneous and inflammatory comments were allowed to taint their deliberations by suggesting that, because Appellant may have made comments about killing Rita in the past, he could not have killed her accidentally on the day in question.

The court erred in allowing Swofford to testify about irrelevant prior threats made by Appellant against Rita, which had little probative value as to his state of mind and intent on the day of the killing. Furthermore, any probative value was substantially outweighed by the danger of unfair prejudice. Therefore, Appellant's convictions should be reversed. See Rule 403, SCRE; State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013).

CONCLUSION

By reason of the foregoing argument, Appellant's convictions should be reversed, and this case remanded to the Cherokee County Court of General Sessions for a new trial.

Adam Sinclair Ruffin
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

This 4th day of November, 2019.

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Cherokee County

Honorable J. Mark Hayes, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILLIAM D. PENNINGTON,

APPELLANT

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 Melody J. Brown, 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 William Dean Pennington, #377557, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 4th day of November, 2019.

Adam Sinclair Ruffin
Appellate Defender

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of November, 2019.

Mary Allgood (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.