STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Orangeburg County

Honorable Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TYQUIN TERRELL JENKINS,

APPELLANT

APPELLATE CASE NO 2019-000284

INITIAL BRIEF OF APPELLANT

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Whether the trial court erred in finding that Appellant's counsel "opened the door" to the elicitation of portions of Appellant's statement to law enforcement, where the state questioned a law enforcement witness during redirect examination about Appellant's prior convictions, where the prior convictions were similar in nature to the crimes for which he was on trial, where the resulting unfair prejudice substantially outweighed any possible probative value, and where the trial court failed to give a curative instruction when requested?

STATEMENT OF THE CASE

An Orangeburg County grand jury indicted Appellant on January 16, 2019 for criminal sexual conduct in the first degree and kidnapping. R. __ (Indictments). On February 11, 2019, Appellant appeared before the Honorable Maite Murphy and a jury for trial. Skyler Hutto represented Appellant; Ashley Cornwell appeared on behalf of the state. After a four-day trial, the jury found Appellant guilty as indicted. Tr. 508, l. 22 – Tr. 509, l. 4. Judge Murphy sentenced him to thirty years' incarceration on each charge, concurrent. Tr. 517, ll. 5 – 23.

This appeal follows.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id. at 6, 545 S.E.2d at 829. The admission and exclusion of evidence is largely a matter of trial judge discretion and his rulings will not be overturned on appeal unless he manifestly abuses his discretion and the defendant suffered prejudice as a result. State v. Thompson, 305 S.C. 496, 502, 409 S.E.2d 420, 424 (Ct. App.1991).

ARGUMENT

The trial court erred in finding that Appellant's counsel "opened the door" to the elicitation of portions of Appellant's statement to law enforcement, where the state questioned a law enforcement witness during redirect examination about Appellant's prior convictions, where the prior convictions were similar in nature to the crimes for which he was on trial, where the resulting unfair prejudice substantially outweighed any possible probative value, and where the trial court failed to give a curative instruction when requested.

Relevant facts

Tori Montgomery testified about an alleged sexual assault that took place on January 6, 2015. Tr. 92, l. 25 – Tr. 102, l. 7. She was out walking following a fight with her boyfriend. Tr. 151, l. 12 – Tr. 152, l. 9. She testified that a man began speaking with her and asked to use her cell phone. Tr. 93, l. 4 – Tr. 94, l. 22. Soon thereafter, the man supposedly pulled out a gun and told Montgomery to follow him across the street to behind a building. Id. Montgomery claimed the man assaulted her behind a building in the late night or early morning hours. Tr. 98, l. 4 – Tr. 102, l. 5. After the incident, Montgomery described the assailant's clothing but not the assailant to law enforcement. Tr. 169, l. 19 – Tr. 170, l. 7; Tr. 176, ll. 5 – 23. Aiken Still, an officer with the Orangeburg Public Safety Department, was the responding officer. Tr. 167, ll. 19 – 24. Still did not find any physical evidence at the building Montgomery described. Tr. 173, ll. 8 – 16. No fingerprints were located on Montgomery's phone. Tr. 198, ll. 2 – 9.

More than two years later, Montgomery was contacted by law enforcement and told that her case was being reopened. Tr. 110, l. 19 – Tr. 111, l. 2. She was told by law enforcement and the solicitor's office about Appellant's trial and informed that he was in custody "for something

else prior." Tr. 115, ll.. 20 – 23. While meeting with an officer, she picked Appellant out of a lineup. Tr. 112, l. 16 – Tr. 113, l. 20. Montgomery also identified Appellant at trial as the man who allegedly sexually assaulted her. Tr. 116, ll. 22 – 25.

The subject of Appellant's prior convictions were the topic of a pre-trial motion *in limine*. Tr. 11, l. 15 – Tr. 12, l. 6. The assistant solicitor referenced a conversation in the judge's chambers and stated in no uncertain terms that any prior bad acts or criminal record would not come in unless Appellant took the stand:

> As far as prior bad acts or criminal records the State agrees that those will not come in unless the defendant takes the stand and they will need to be used for impeachment purposes. I will get with counsel overnight to make sure that all of those convictions would be under [Rule] 609 [SCRE] but we do agree that those don't come in unless they're used for impeachment purposes and as far as any victim impact testimony regarding the assault in this matter the State stipulates that we will not get into impact statements until the moment arises if sentencing is necessary.

Tr. 12, l. 19 – Tr. 12, l. 4. The trial judge inquired of defense counsel whether that was correct, and counsel confirmed. Tr. 12, ll. 5 – 6. Counsel had previously stipulated that Appellant's statement was voluntarily made but maintained that the above portions were objectionable and should not be mentioned to the jury. Tr. 9, ll. 8 – 15.

On the morning of the third day of trial, the assistant solicitor opined that defense counsel, during opening statements, opened the door to discussing the statement Appellant gave to law enforcement. Tr. 230, l. 7 – Tr. 233, l. 19. In particular, the assistant solicitor sought to question witnesses on prejudicial matters which are typically inadmissible:

> Obviously, the State feels like that opened the door to get into the statement in its entirety including the prior convictions, prior bad acts that are referenced throughout that statement and the fact that he was not being truthful in his statement, that there are prior convictions of crimes against women and that that evidence should be allowed in under [Rule] 106 now and also through State v. Jackson and State v. Carrera Pena which allows any party to put in a complete record of a statement when a statement is introduced. It's the State's position that

> since the door has been opened we should be able to show the statement in its entirety including all the prior convictions, not as prior bad acts however but as impeachment testimony to rebut the statement that the defense has already made to the jury.

Tr. 231, l. 19 – Tr. 232, l. 10. In response, defense counsel noted that opening statements are not evidence and referenced the prior motion *in limine*. Tr. 232, l. 12 – Tr. 233, l. 3. Counsel articulated additional arguments against the admission of Appellant's statement, including its prejudicial nature outweighing the probative value as well as confusion of the issues. Id.

The trial judge found that the door was opened during the opening statement. Tr. 233, ll. 4 – 19. The trial judge ruled that parts of Appellant's statement, including some admissions and prior convictions were admissible in limited circumstances:

> I do find that based upon the opening, the door was opened and some of the evidence I think is allowable, however, again opening statements are not evidence and the jury will be instructed on that. I'm going to limit the testimony of law enforcement as to what he admitted to and his prior convictions only to show that there is evidence to prove otherwise because I believe [you said in] your opening statement that I would never do something to a female or something to that effect. My concern about the prior convictions are they're for domestic violence and also involving a weapon and obviously I think that's too similar in nature to the alleged crime and the introduction of such evidence would be more prejudicial than probative so if you would please instruct the witness accordingly I would appreciate that.

Tr. 233, ll. 4 – 19.

During the testimony of Lorianne Bravo, an investigator with the Orangeburg Sheriff's Office, the state elicited testimony which described Appellant's statements. Tr. 326, l. 12 – Tr. 340, l. 25. The conclusion of defense counsel's cross-examination of Bravo coincided with the end of the third day of trial. Tr. 386, l. 6 – Tr. 387, l. 22. The next morning, defense counsel sought clarification on the matter of Appellant's prior record while asserting that it was not the topic of proper redirect examination. Tr. 388, ll. 7 – 14. In response, the trial court noted that

the assistant solicitor could question Bravo in the areas which defense counsel elicited testimony on cross-examination:

> She can go into what you went into on your cross examination and clarify any of those issues but nothing further. So if you touched on it on your cross examination **which you kind of started away from it for the most part,** I don't have my notes right in front of me but it's fair game.

Tr. 388, ll. 15 – 22. (emphasis added). The trial judge indicated that the assistant solicitor could "go within the boundaries" of the prior day's ruling. Id. The assistant solicitor indicated she was going to steer clear of Appellant's presence in jail. Tr. 389 l. 3 – Tr. 390, l. 5. The trial court instructed the witness, Bravo, to stay within the parameters of the ruling. Tr. 390, ll. 6 – 8.

At the end of Bravo's testimony on redirect, the last question asked by the assistant solicitor, beyond the scope of cross-examination and in contradiction to the prior agreement and ruling, was designed to elicit testimony about Appellant's prior convictions:

> And while he did admit that and saying that he never hurt women, you were able to prove that that was not a truthful statement by showing that he has prior convictions of crimes against women, correct?

Tr. 399, ll. 2 – 6. Counsel objected to this comment. Tr. 399, l. 22 – Tr. 400, l. 3. He noted that the question was beyond the scope of what was agreed upon in chambers and discussed prior to the redirect; he moved that the comment be struck from the record. Id. The trial judge remarked that the question and answer were "consistent with what was allowable yesterday" so the objection was overruled. Tr. 400, ll. 13 – 14.

Appellant's statement was never entered into evidence. After the state rested, the assistant solicitor sought to stipulate that "the defendant did give a statement in this case." Tr. 403, ll. 4 – 12. Counsel for Appellant agreed, and four stipulations were eventually published to the jury; the fourth read: "the statement by the defendant was made voluntarily of his own free will." Tr. 404, ll. 1 – 24.

After the defense rested, counsel renewed his objection to the mention of Appellant's prior convictions and moved for a curative instruction. Tr. 444, ll. 2 – 5. The trial judge denied the motion. Tr. 444, ll. 19 – 20. The assistant solicitor referenced Appellant's statement as well as the prior convictions during closing argument. Tr. 461, ll. 12 – 17.

Discussion

As noted by the trial judge, when the prior offenses are similar to the offense for which the defendant is on trial, the danger of unfair prejudice to the defendant weighs against its admission. State v. Colf, 337 S.C. 622, 525 S.E.2d 246, 249 (2000). In State v. Page, this Court held that the trial court erred in finding that "Page's counsel's zealous representation of his client required the admission of ... inadmissible evidence." 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008). In the matter at bar, defense counsel's zealous representation cannot have opened the door, especially where Appellant did not testify, the question regarding his prior convictions revolved around law enforcement showing Appellant his prior convictions rather than a statement by Appellant, and where the question exceeded the scope of cross-examination of the witness.

The prior convictions were inadmissible. In State v. Broadnax, 414 S.C. 468, 476, 779 S.E.2d 789, 793 (2015), the South Carolina Supreme Court held that for impeachment purposes, crimes of "dishonesty or false statement" are crimes in the nature of *crimen falsi* "that bear upon a witness's propensity to testify truthfully." Adams v. State, 284 Ga.App. 534, 644 S.E.2d 426, 431–32 (2007) (footnote omitted) (surveying federal and state treatment of the issue, and adopting the more narrow federal definition); see also United States v. Smith, 551 F.2d 348, 362–63 (D.C.Cir.1976) ("[I]n its broadest sense, the term '*crimen falsi*' has encompassed only those crimes characterized by an element of deceit or deliberate interference with a court's

ascertainment of truth." (emphasis added)). Crimes of domestic violence, therefore, are not per se probative of truthfulness.

The state contended that counsel opened the door during his opening statement. Trial counsel's opening statement did mention Appellant's statement to law enforcement but did not reference any prior convictions:

> One thing that I would be interested to know if they're [going to] talk to you about is Mr. Jenkins' own statement. Back in 2017 when he was told that he was going to be charged with these two crimes was about two years and nine months after the initial alleged attack. He gave a statement to police and in that statement he adamantly denied ever having assaulted anyone, but he wasn't able to provide much more information than that and that's probably because they wouldn't give him any information about the person who is accusing him.

Tr. 85, ll. 2 – 11. Counsel referenced some of the questions Appellant asked law enforcement in order to receive additional information. Tr. 85, ll. 12 – 23. However, counsel never mentioned any prior convictions. Nonetheless, the state averred that the door was opened "to get into the statement in its entirety including the prior convictions" and prior bad acts and more. Tr. 231, l. 11 – Tr. 232, l. 10. The trial court ruled that the door was opened. Tr. 233, ll. 4 – 19.

In State v. Page, supra, trial counsel attempted to show how the state had very little evidence to link Page to the murder and attempted armed robbery by cross-examining a detective. 378 S.C. at 480-1, 663 S.E.2d 357, 359. The state moved to admit a co-defendant's statement on the basis that Page opened the door. This Court held the trial court erred in admitting the inadmissible evidence but found the error harmless. Id. at 484, 663 S.E.2d at 360.

Appellant's statement was not published to the jury. Bravo's account of Appellant's statement was the only version offered at trial. Had the state sought to enter Appellant's statement as an exhibit, trial counsel could have moved to redact the inadmissible portions regarding prior convictions. The line of questioning which resulted in the admission of

Appellant's prior convictions did not follow Appellant admitting to or even mentioning the prior convictions. Rather, Bravo showed Appellant his prior convictions and testified accordingly at his trial. Tr. 399, ll. 2 – 6. Following a potentially leading question, Bravo indicated in the affirmative that she found Appellant to be untrustworthy based upon his denial of hurting women. Id. This testimony exceeded any alleged door opening and should not have been allowed.

Additionally, counsel for Appellant did not approach the topic of Appellant's prior convictions during his cross-examination of Bravo. He asked Bravo to discuss Montgomery's statements to Still and to the nurse at the hospital. Tr. 367, ll. 9 – 23; Tr. 368, ll. 19 – 22. He briefly asked her whether Appellant denied raping anyone four or five times; she answered that he did. Tr. 381, ll. 4 – 10. This narrow line of questioning did not delve into whether Appellant hurt other women. The question to Bravo by the assistant solicitor on redirect, therefore, exceeded the scope of cross-examination and should not have been allowed.

This Court held in State v. Young that testimony from a defendant that he hated to see a woman cry did not open the door for the admission of prior convictions. 378 S.C. 101, 661 S.E.2d 387 (Ct. App. 2008). This Court remarked that Young's testimony, read in its proper context, was not offered as "evidence of a specific character trait towards women in general." Id. at 106, 661 S.E.2d at 389. This Court held that "the isolated statement used to justify admission of the prior ... convictions was simply part of Young's narrative recounting his version of the events that occurred on the night in question." Id. In the matter *sub judice*, Appellant's statement was mentioned during opening statements for an identical reason: to further a narrative and provide context; neither counsel's remarks nor Appellant's statement were evidence in this case.

In addition to the admission of testimony regarding his prior convictions before the jury, Appellant's statement was used against him in sentencing as well. The trial judge referenced his statement to law enforcement during the sentencing phase:

> Mr. Jenkins, certainly your attorney has indicated that you have been respectful throughout this trial and I certainly don't have anything to say that you have not been respectful throughout this trial, however, your prior record, **your statement to law enforcement**, your prior record involving domestic violence against females you show a complete and utter disregard for any females including your own mother who is standing here to talk on your behalf. Look at the pain that you have caused her as well as everybody else in this courtroom.

Tr. 517, ll. 5 – 14. (emphasis added). Within seconds, the trial judge handed down the maximum sentence for both charges.

The evidence which emanated from Bravo was improperly elicited during the last question of the state's case-in-chief. The question exceeded the scope of cross-examination and revolved around action taken by Bravo, the presentation of his prior convictions to Appellant, which dealt with otherwise inadmissible evidence. The trial court erred in denying Appellant's request for the testimony to be struck as well as the motion for a curative instruction.

"Generally, a curative instruction is deemed to have cured any alleged error." State v. Walker, 366 S.C. 643, 658, 623 S.E.2d 122, 129 (Ct.App.2005). "A curative instruction to disregard incompetent evidence and not to consider it during deliberation is deemed to have cured any alleged error in its admission." Id. 658, 623 S.E.2d at 130.

"Because a trial court's curative instruction is considered to cure any error regarding improper testimony, a party must contemporaneously object to a curative instruction as insufficient or move for a mistrial to preserve an issue for review." State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 850 (Ct. App. 1999); see also State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996) (no issue is preserved for appellate review if the objecting party accepts

the judge's ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial). If the trial judge sustains a timely objection to evidence and gives the jury a curative instruction that it be disregarded, the error is deemed to have been cured by the instruction. George, 323 S.C. at 510, 476 S.E.2d at 911–12.

State v. Smith, 290 S.C. 393, 350 S.E.2d 923 (1986), addressed the issue of what constitutes a sufficient curative instruction. The South Caroline Supreme Court reversed the trial court for its failure to give an adequate instruction after the solicitor improperly asked the psychiatrist if he was aware the defendant had refused to give a statement to the police. The judge asked the members of the jury if anyone remembered the solicitor's question. When one juror responded affirmatively, the judge simply instructed that juror to "forget it" and not to speak with anybody else regarding the question. Id., 290 S.C. at 394, 350 S.E.2d at 924.

Reasoning that the judge's casual remark to "forget" the question did not serve as a curative instruction, the Court inculcated:

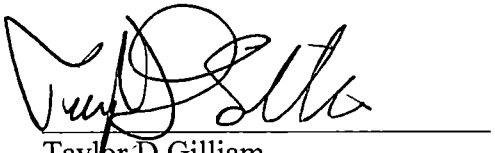
> Great care should be exercised in the "delicate, difficult and important matter" of instructing the jury to disregard incompetent evidence. The jury should be specifically instructed to disregard the evidence, and not to consider it for any purpose during deliberations. A mere general remark excluding the evidence does not cure the error.

Id. 290 S.C. at 395, 350 S.E.2d at 924 (internal citations omitted).

Counsel for Appellant did not open the door for the full, unredacted statement given by Appellant to be discussed at length by one of the state's witnesses during redirect examination. Counsel stipulated that the statement was made voluntarily but did not open the door to the entire statement simply by referencing it during opening statements. The trial court erred in ruling that the door was opened, allowing Bravo to testify about showing Appellant his prior convictions, and denying Appellant's request for a curative instruction.

CONCLUSION

Based upon the foregoing, Appellant respectfully requests that this Court reverse his convictions and remand for a new trial.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of December, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Honorable Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TYQUIN TERRELL JENKINS,

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 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 Tyquin Terrell Jenkins, #328294, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 2nd day of December, 2019.

Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of December, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022