STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions
Honorable William P. Keesley, Circuit Court Judge

Appellate Case No. 2018-002091

THE STATE, ...RESPONDENT,

v.

MARK LORENZO BLAKE, JR., ...APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge did not err in allowing the State to reference Appellant's improper possession of a firearm because Appellant failed to object to such at trial. Further, any alleged error is harmless given the overwhelming evidence of Appellant's guilt.

STATEMENT OF THE CASE

On August 5, 2013, the Charleston County Grand Jury indicted Appellant for attempted murder. On November 13–15, 2018, Appellant proceeded to a jury trial before the Honorable William P. Keesley. Appellant appeared pro se with Jason King, Esquire, serving as standby counsel; assistant solicitor Stephanie Linder, Esquire, represented the State. The jury found Appellant guilty as indicted and the trial judge sentenced Appellant to life imprisonment without the possibility of parole.[1]

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal. This Brief of Respondent follows.

[1] Prior to trial, Appellant was served with notice of the State's intent to seek life without parole pursuant to S.C. Code Ann. § 17-25-45.

STATEMENT OF FACTS

Prior to trial, Appellant made numerous motions to the trial judge, including an expansive motion to exclude any and all evidence of his guilt or bad acts, including "[a]ny/every material regarding unlawful carrying of a firearm, nor stolen firearm, nor anything in connection regarding stolen firearm, such as burglary . . . ." The trial judge asked the State whether it intended to reference Appellant's legal inability to carry a weapon. The State informed the judge it did not intend to reference the charge of unlawful carrying of a firearm, but wished to discuss the fact that Appellant was not permitted to carry the weapon because it was "very important as a motive" for Appellant to flee from police. It explained the gun Appellant used had been stolen from a house in Berkeley County, but that did not intend to make any allegations that Appellant was the one who burgled it from its original owner. The State did believe the weapon's stolen status, the prohibition against Appellant owning a firearm, and Appellant's lack of a concealed weapons permit were important motivations for Appellant's charged crime. The State emphasized it would not address any of Appellant's prior convictions unless Appellant somehow "opened the door" to them during trial. It further explained it understood Appellant was alleging his actions occurred in self-defense, so utilizing this evidence would prove Appellant's could not be classified as such because he was not without fault in bring about the difficulty of the situation. (R.p.36, line 20–R.p.48, line 23).

The trial judge, noting Appellant's motion pertained to evidence regarding "him having a stolen firearm," issued his in limine ruling stating the State was not permitted to reference Appellant's firearm as stolen property, but it could reference Appellant's lack of a permit for the weapon and the prohibition against his possession of such. The trial judge explained to

Appellant that his ruling was based only on the information presented during the pretrial and that he may change his mind during the trial proper. (R.p.49, line 11–R.p.51, line 6).

Officer Cory Goldstein (Victim), a police officer for Charleston, South Carolina, was on patrol on March 30, 2013 when he observed a red Hyundai Elantra with heavily-tinted windows. Suspicious, he decided to follow the car to gather information. Victim also noticed the red sedan possessed North Carolina tags and decided to check the history of the vehicle using the mobile computer in his patrol car and discovered it belonged to a rental company. Knowing that rental vehicles typically do not possess after-market modifications, such as tinted windows, Victim continued to follow the vehicle. Shortly thereafter, the red sedan pulled into the parking lot of the Citadel Mall while Victim parked in the Bed, Bath, and Beyond parking lot across the street. The red sedan "hugged" the mall and began speeding through the mall parking lot, ignoring several stop signs an heading towards a different exit to the parking lot. Knowing that it was approximately 10:30 p.m. and that the mall was closed, Victim's suspicion of the vehicle's driver increased and he continued to follow. Now directly behind the sedan, Victim observed the vehicle turn into the Best Buy and Wells Fargo parking lot using an improper turn signal. At this point, after observing numerous traffic infractions, Victim activated his blue lights and attempted a traffic stop of the red sedan. Appellant did not stop, but "slow roll[ed]" until Victim activated his siren, at which point the red sedan ceased moving. As Victim exited his patrol car to continue the traffic stop, Appellant "squealed" his tires and sped off towards another exit to the Best Buy, turning off his headlights as he fled. Victim reentered his vehicle and pursued, keeping his blue lights and siren activated. (R.p.75, line 9–R.p.85, line 10).

Victim noticed the red sedan was rapidly picking up speed and barreling towards the Savannah Highway. Victim began relaying information over his police radio unit to dispatch

and other officers, including a physical description of the vehicle, its license plate information, and the sedan's direction of travel. After ignoring a red light, the vehicle headed southbound on the Savannah Highway. Still with his headlights deactivated, Appellant sped down the median lane. Fearing the risk to the other drivers on the highway, Victim deactivated his lights and siren but continued pursuit. Appellant turned onto the highway 526 eastbound ramp, but wrecked his vehicle while on the ramp. As Victim approached the wreck, he saw Appellant running from the vehicle. Victim parked his vehicle behind the sedan and began chasing Appellant on foot. (R.p.85, line 11–R.p.89, line 25).

While pursuing Appellant, Victim repeatedly yelled to him to stop and that he was a police officer. Appellant did look over his shoulder at Victim, but continued running from him. Victim began to gain ground on Appellant, nearing him near a sidewalk by the Comfort Suites hotel. Appellant went from running to a slow jog, continuously looking over his shoulder at Victim. Appellant reached his hand into his waistband area, still facing away from Victim, slowing to a walk and eventually a stop. Victim commanded Appellant not to move, but Appellant quickly turned around, took a "shooter-like stance," removed a gun from his waistband, yelled "You don't move, motherfucker," and began firing at Victim. One of Appellant's shot hit him in his bullet-proof vest and subsequent bullets hit his left arm, left hand, and right leg.. Victim withdrew his own weapon and began firing at Appellant. Victim continued shooting at Appellant until the latter eventually stopped shooting. (R.p.90, line 1–R.p.96, line 17).

During Victim's cross-examination, the State sought clarification on the pretrial ruling regarding reference to Appellant's improper possession of a weapon. The trial judge explained "[his] ruling would prevent [the State] from asking any question about [Appellant] possession a

weapon that was stolen." However, the State could question witnesses regarding Appellant's possession of a weapon and whether he had the right to possess a weapon without going into any specific questions as to why Appellant was prohibited from possession one. The State noted it would limit its questioning to the required parameters, and Appellant failed to lodge an objection to such. (R.p.146, line 25–R.p.147, line 21).

Officer Sean Flaherty, also with the Charleston Police Department, was on duty the night of March 30 when he heard Officer Goldstein over his police radio reporting a red sedan fleeing from a traffic stop. Knowing he was in the vicinity, Officer Flaherty kept looked for the two vehicle while traveling down the Savannah Highway. Before long, he spotted the sedan, speeding his direction without headlights on and swerving in-between vehicles. He saw the vehicle turn onto the on-ramp for Highway 526 East, at which point the vehicle stopped. Officer Flaherty then initiated his blue lights and approached the vehicle. When he was able to reach the vehicle, he found both the red sedan and Victim's patrol car stopped on the ramp, with Victim exiting his vehicle, jump the guardrail, and start running. Officer Flaherty checked the vehicle for any additional persons, but found the driver's door ajar and significant damage to the front of the vehicle and the front left tire. Finding no one, Flaherty ran in the direction he last saw Victim when he heard gunshots. By the time he arrived at the scene, Victim and Appellant were both wounded and on the ground. Similarly, Sergeant Robert Feeters and FBI Agent Ernest Terrell heard Victim report the red sedan refusing to comply with a traffic stop and reported to the scene to assist. They heard the gunshots and found the two men wounded at the scene. (R.p.314, line 7–R.p.328, line 24; R.p.333, line 12–R.p.353, line 19).

Witness Sean Riner was staying at the Comfort Inn hotel in Charleston on the night of the shooting. He was sitting outside, smoking, and saw a police car, flashing blue lights, pull over a

car in the distance. Moments later, he heard people running down a nearby sidewalk, spaced about ten feet apart, with someone hollering "Stop." The person in the back was easily identifiable as a police officer based on his gear. When they neared Riner, approximately twenty feet to his left, he saw the person in the front stop and turn. At that point, he saw shooting start between both parties. (R.p.281, line 16–R.p.290, line 12).

Trauma surgeon Stephanie Montgomery treated both Appellant and Victim the night of the shooting. She testified all of Appellant's gunshot wounds entered through the front of his body, two of which traveled through is body and exited through the rear portions of his limbs. (R.p.180, line 14–R.p.194, line 14).

SLED Agent Ryan Kelly, an investigator of the crime, testified he discovered Appellant was not permitted to have a gun. Appellant objected based on his "pretrial" arguments, which the trial judge overruled. (R.p.205, line 20–R.p.212, line 10).

Later, on cross-examination, Agent Kelly reiterated that Appellant "shot [Victim] with a gun [Appellant] shouldn't have had." Appellant asked Agent Kelly whether he possessed "any documentation showing that [he] signed any type of document saying [he] would never, ever" possess a weapon. Upon urging from the State, the jury was dismissed and the trial judge cautioned Appellant against a line of questioning which would allow the State to explore his criminal history. When the jury was called back into the courtroom, Appellant did not continue with his line of questioning. (R.p.249, line 9–R.p.254, line 14).

Appellant elected to testify in his own defense. He claimed he went out to meet a "female acquaintance" employed at the Wells Fargo. He claimed he was waiting for the woman at the King Street Grille, located at the Citadel Mall, when she called and stated she was "getting money out of the teller" at the Wells Fargo and requested Appellant meet her over there and

watch over her while she did so. On his way over, he noticed a car following closely behind. After the vehicle followed him into the Best Buy parking lot and stopped close behind him, he sped out of the parking lot at approximately 45-50 miles per hour and increased his speed to 65 miles per hour as he traveled towards the Savannah Highway. He believed he lost the car following him, but when entering the highway exit ramp his car cut off, locking his wheel and causing him to crash on the on-ramp. When he looked into his rearview mirror, he saw a car approaching him, full speed. He left his phone in the car, grabbed his firearm, jumped over the railing to the ramp, and ran. As he fled, he heard a person behind him yelling stop, but was unable to identify him. He claimed he heard gunshots and felt them hit him from behind before turning around and returning fire. (R.p.428, line 14–R.p.439, line 6).

On cross-examination, Appellant admitted the vehicle he was driving was not his, but rented by a friend for his use. Appellant agreed he was not legally permitted to operate the vehicle, but denied his driver's license had been suspended at that time until the State provided him with documentation of such. Appellant also admitted he had a prior conviction for driving under the influence. He did not know the full name of the woman he was to meet the night of the shooting, only that her first name was "Shundra." Appellant testified he did not realize the car behind him was a police car and never noticed the blue lights or sirens on the vehicle. He claimed he did not recognize the person running behind him as a police officer, despite the officer's uniform and his close proximity during the run. Appellant conceded he saw Officer Flaherty's blue lights during his run, and that he heard a person yelling "stop" at him. (R.p.439, line 10–R.p.482, line 23).

STANDARD OF REVIEW

"In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. Id. "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id.

ARGUMENT

The trial judge did not err in allowing the State to reference Appellant's improper possession of a firearm because Appellant failed to object to such at trial. Further, any alleged error is harmless given the overwhelming evidence of Appellant's guilt.

Appellant argues the plea judge erred in allowing the State to reference Appellant's improper possession of a firearm because such references were "irrelevant and highly prejudicial." The State disagrees with this allegation of error. Notably, issues regarding the information were not properly preserved for Appellate review due to Appellant's failure to object to such. As to the merits of Appellant's claim, his improper possession of a firearm was evidence of his motive for flight and for his attempt to murder the Victim. Finally, even if the trial judge did err in admitting the State to reference the possession of the firearm, it did not impact Appellant's conviction due to the overwhelming evidence of his guilt.

Issue Preservation

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912–13 (Ct. App. 2004); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005).

Regarding the requirement that a timely objection be raised, a defendant must make a **contemporaneous** objection to a perceived error during trial in order to preserve the issue for further review. State v. Blalock, 357 S.C. 74, 79, 591 S.E.2d 632, 635 (Ct. App. 2003); see State

v. Hoffman, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."). Thus, when a perceived error arises, the defendant must object at the first opportunity to do so or the issue is waived. State v. Sullivan, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993); see State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) ("A defendant must object at his first opportunity to preserve an issue for appellate review."); see also State v. King, 349 S.C. 142, 157, n.1, 561 S.E.2d 640, 647 (Ct. App. 2002) ("[N]o objection was made contemporaneously with this testimony so as to preserve the issue for review. King's belated objection to subsequent testimony came too late.").

In the instant case, Appellant failed to preserve this issue for appellate review. Notably, he objected to any reference to him possessing a stolen firearm. The State and trial judge agreed to exclude such references. However, the State made it clear it sought to discuss Appellant's inability to possess any weapon, which it believe to be an essential element of Appellant's flight from police and actions the night of the shooting. Appellant repeatedly failed to object to this ruling throughout the trial and as such the issue was not preserved for review. See, e.g., Blalock, 357 S.C. at 79, 591 S.E.2d at 635.

Relevant Evidence

As a general rule, all relevant evidence is admissible. State v. Aleksey, 343 S.C. 20, 34, 538 S.E.2d 248, 255 (2000); Rule 402, SCRE. Evidence that assists the jury in arriving at the truth of an issue is relevant and admissible unless otherwise incompetent. State v. Sweat, 362 S.C. 117, 126, 606 S.E.2d 508, 513 (Ct. App. 2004). Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. In the Matter of Care and Treament of Corley, 353 S.C. 202, 205, 577 S.E.2d 451, 453 (2003); State v. King, 349 S.C. 142, 153, 561 S.E.2d 640, 645 (Ct. App. 2002); Rule 401, SCRE

("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). It is not required that the inference sought should necessarily follow from the fact proved. See Sweat, 362 S.C. at 127, 606 S.E.2d at 513. Indeed, evidence is relevant if "logically relevant" to establish a material fact or element of the crime; it need not be "necessary" to the State's case in order to be admitted. Id. (citing State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990)).

Generally, evidence of prior bad acts is not admissible to prove the crime for which the defendant is charged. State v. Henry, 313 S.C. 106, 108, 432 S.E.2d 489, 490 (Ct. App. 1993). However, prior bad acts may be admissible when they establish: (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan; or (5) identity of the person charged. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923). Evidence of prior bad acts is admissible if it tends to show a common scheme or plan and is sufficiently similar to the charged offense and its probative value clearly outweighs its prejudicial effect. State v. Blanton, 316 S.C. 31, 32–33, 446 S.E.2d 438, 439 (Ct. App. 1994).

In determining whether to admit evidence of prior bad acts, the trial judge must first determine if the evidence is relevant. State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). If a piece of

evidence could assist the jury in arriving at the truth of an issue, it is relevant and should be admitted during trial. State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986).

To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "Further, even though the evidence . . . falls within a Lyle exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." State v. Braxton, 343 S.C. 629, 634, 541 S.E.2d 833, 836 (2001) (citing Rule 403, SCRE).

"Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)); see also State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000); United States v. Rodriguez–Estrada, 877 F.2d 153, 156 (1st Cir. 1989) ("[A]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided.").

The trial judge properly admitted evidence regarding Appellant's inability to possess a firearm because such evidence went to the heart of Appellant's motive for fleeing from police and shooting Victim that night. Victim testified he observed a vehicle acting suspiciously and initiated a traffic stop to investigate. However, without warning, Appellant initiated a high-speed pursuit, crashing his vehicle and fleeing on foot. Such behavior is an extreme response to a traffic stop and is only truly explained by Appellant's improper possession of a firearm. Without such evidence, the State's case would lack any evidence of why Appellant chose flight and to initiate a shootout with Victim and assists the jury in assessing the criminality of Appellant's actions that night. See 404(b), SCRE; Sweat, 362 S.C. at 126, 606 S.E.2d at 513.

Overwhelming Evidence of Guilt

"Error in a criminal prosecution is harmless when it could not reasonably have affected the result of the trial." State v. Sherard, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

Finally, any alleged error in the admission of evidence regarding Appellant's improper possession of a firearm is harmless given the overwhelming evidence presented by the State. Notably, neither party disputed Appellant shot Victim. The question at trial was whether Appellant possessed a legal defense for doing so. Appellant's incredible testimony claimed he was minding his own business when a car, which he was unable to identify as a police vehicle, began following him and continued pursuit through him wrecking his vehicle, jumping off a highway ramp, and running from the scene from an individual he was unable to identify as a police officer. Further, he claimed the person following fired first, and he responded in an effort to defend himself. All of Appellant's assertions were flatly contradicted by the State's case. Victim testified he initiated a traffic from which Appellant fled. Several officers at trial testified to hearing Victim's description of the events through the police radio, all of which confirmed his testimony.

Further, non-police witnesses contradicted Appellant's testimony. Dr. Montgomery, testified Appellant was not shot in the back like he claimed, but all shots for both men entered through the fronts of their bodies. Witness Sean Riner testified he could, even at his distance, identify Victim as a police officer. He also observed flashing blue lights and Appellant turn and face Victim before the shooting began.

In the instant case, all the credible evidence provided indicated Appellant fled from police, was at fault for the entire situation, and attempted to kill Victim. Even with the inclusion of the evidence regarding Appellant's improper possession of a firearm, the only logical conclusion that could have been reached by the jury was Appellant attempted to kill Victim. Accordingly, reversal of Appellant's conviction would be improper. See Bailey, 298 S.C. at 5, 377 S.E.2d at 584.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCAR, 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 Findings."

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