STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

BRIAN EVERETT PRINGLE,

APPELLANT

APPELLATE CASE NO 2017-001571

Appeal from Richland County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 2019-UP-391

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, counsel for appellant would petition for rehearing on this Court's holding that the prior bad act evidence admitted at trial was properly admitted as proof of identity because to the contrary, the state's identity evidence was presented in the form of matching DNA statistics and testimony from four (4) witnesses regarding identity, which in turn meant that the improperly admitted prior bad acts evidence (testimony from a probation officer and a police officer) constituted trial error, and when coupled with the prejudicial impact of the error, the result was appellant's receipt of an unfair trial. The following paragraphs support appellant's position on this issue.

1.) Appellant was on trial for allegedly committing the following three strong arm robberies during December 17-18, 2015: 1.) one at Pop's Gas Station on Percival Road in Columbia, SC on December 17, 2015; 2.) another at S-Mart on Greystone Boulevard in Columbia, SC on December 18, 2015; and 3.) another at Pops Gas Station on Farrow Road in Columbia, SC on December 18, 2015. At trial, the state presented the testimony of the three cashiers who were present at the three gas stations where the robberies occurred and also the testimony of the three different police officers assigned to investigate the cases. R 79, l. 19 – R. 82, l. 20. Note, that appellant did not testify at trial, but his girlfriend, Mary Seaburn, presented alibi testimony declaring that appellant was with her during December 17-18, 2015. R. 277, l. 14 – R. 281, l. 20.

2.) The state presented identification testimony from four people in the case (Craft, Sumter, Isenhoward, and Carwell). Also, DNA matches were made based on swabs taken from appellant's cap/hat and other crime scene items and extractions taken from appellant, and confirmed by John Barron, who testified at trial regarding his findings, which included the presence of appellant's DNA on the hat, and DNA mixtures on the swabs taken from the register counter top and door handle at the Greystone Blvd Station and from the door handle and cash register at the Percival Road Station. R. 240, l. 2 – R. 249, l. 7.

3.) Therefore, there was no need for a witness from SCDPPP (Agent Pamela Larson) to testify at trial about her contact with appellant and how she confirmed who appellant was when police presented her with a picture of the suspect, who was appellant, because the probative value of corroborating the identification evidence, which had been presented prior to her testimony, was outweighed by the prejudicial value of portraying appellant as a criminal who obviously committed prior criminal acts that ultimately landed him under the supervision of

SCDPPP Officer Pamela Lawson. The defense objected to Lawson's testimony pretrial and at trial on the ground that this testimony by Lawson was highly prejudicial and violated Rule 403, SCRE, based on the fact that she was appellant's probation officer. R. 37, lines 14-24; R. 43, l. 8 – R. 45, l. 8; R. 45, l. 15 – R. 49, l. 11; R. 177, l. 8 – R. 185, l. 10. See In-Camera hearing of Ms. Lawson at R. 174, l. 2 – R. 177, l. 16. The trial judge allowed Lawson to testify at trial on the ground that this covered the identity issue. R. 215, l. 21 – R. 219, l. 6. At trial, Lawson testified that she was employed by SCDPPP in 2015, and had face to face contact with appellant then, and that when police asked her to identify appellant in a series of photographs she was able to identify appellant from the pictures. R. 215, l. 21 – R. 217, l. 22.

4.) On appeal, appellant argued that the lower court erred in allowing the jury to hear prior bad acts evidence at trial, which included testimony from a probation and parole officer and testimony from a police officer who found a crack pipe while searching the vehicle appellant allegedly drove on the dates the alleged robberies were committed, because the testimony was more prejudicial than probative in the case.

5.) Regarding the prior bad acts issue, this court held as follows:

> We find the trial court did not abuse its discretion in allowing the probation officer's identification testimony because it was offered as to the material fact, Pringle's identity, and was not needlessly cumulative. See *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) ("In criminal cases, the appellate court sits to review errors of law only."); *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion."); *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) ("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."); *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) ("All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be avoided." (quoting *United States v. Rodriguez-Estrada*, 877 F.2d 153, 156 (1st Cir. 1989)) (emphasis in original)); id. ("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." (quoting *United States v. Bonds*, 12 F.3d 540, 567 (6th Cir. 1993))); *State v. Lyle*, 125 S.C. 406, 436, 118 S.E. 803, 814

(1923) (holding "a trial court has no discretionary power to exclude competent evidence that is not merely cumulative, offered as to a material point of fact, the proof of which is essential to the establishment of a party's cause of action"); id. at 439-40, 118 S.E. at 815 ("Every fact [...] which closes up an exit of possible distrust of the testimony, i.e., which prevents or refutes a possible discrediting hypothesis, is a corroborative fact." (quoting John Henry Wigmore, *Principles of Judicial Proof* 732 (1913))).

6.) Kimberly Strother testified that she was working overnight as a cashier at the Pops Gas Station on Percival Road in Columbia, South Carolina, during the early morning hours of December 18, 2015, when a customer walked in asking for change for a dollar bill in order to use the air pump. Strother stated that she saw a small blue truck (Suzuki style) beside the air pump and proceeded to open the register drawer to make change. When she opened the till, the customer reached into the drawer, took the money out and then ran out of the store. Strother stated that the customer had a beard and wore a camouflage hat at that time. Strother was not able to identify the customer from a photographic layout. R. 142, l.14 – R. 151, l. 4. Police Officer Kevin Scott Isenhoward testified that he was assigned to investigate the Percival Road robbery, and that when he learned of the details of that robbery, he developed appellant as a suspect based on his experience, and that when he saw the store video, then it was confirmed that appellant was a suspect. R. 186, l. 21 – R. 189, l. 25.[1] Kimbrell Sumter testified that she was working 3rd shift as a cashier at the S-Mart Gas Station on Greystone Boulevard in Columbia, South Carolina, when a customer walked in and picked out a honeybun to purchase and then placed a one dollar bill on the counter. Sumter stated that when she opened the register, [the customer] jumped across the counter and got all of the money out of the register "and then fled to

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[1] Prior to trial, the defense objected under Rule 403, SCRE, to any testimony from Officer Isenhoward regarding the basis upon which he developed appellant as a suspect, i.e., the fact that he knew appellant from appellant's till tapping priors when he (appellant) committed similar robberies in 2013 and the clothing that appellant wore as part of the modus operandi in the prior robberies. The trial court excluded such testimony as inadmissible evidence. R. 31, l. 11 – R. 51, l.7; R. 53, l.1 – R. 74, l. 7; R. 161, l. 12- R. 173, l. 5.

a Geo Tracker" vehicle. Sumter could not identify the perpetrator at the first photograph layout she was shown, but later identified appellant's picture as the perpetrator shown to her (only 50% sure) at the second police photographic lay-out shown to her. R. 115, l 23 – R. 127, l. 2. City of Columbia Police Officer Allison Fitzgerald stated that she was assigned to investigate the S-Mart robbery and that based on Isenhoward's advice after his viewing of the still pictures from that store robbery video, she developed appellant as a suspect in the case. Officer Fitzgerald stated that her research uncovered appellant's ownership of a blue Suzuki Sidekick (that looks like a Geo Tracker) and that she was able to get cashier Sumter on duty at the time to identify appellant as the perpetrator after she (cashier) was shown a second photograph layout. R. 193, l.7 – R. 201, l. 13. Torah Craft stated that she was working as a cashier at Pop's Gas Station on Farrow Road in Richland County on the night of December 17, 2015, when a customer entered before midnight and attempted to purchase a Little Debbie Honey Bun with a one-dollar bill. Craft stated that when she opened the register, the defendant reached his hand in the register, grabbed the money out, and then fled. Subsequently, Croft identified appellant as the perpetrator after she viewed photographic lay-out shown to her by police. R. 86, l. 13 – R. 99, l. 11. Police Officer Cris Truluck investigated this robbery and stated at trial that after speaking with Officer Isenhoward about the robbery (and the S-Mart robbery), appellant was developed as a suspect in the Pop's Gas Station Farrow Road robbery as well. R. 220, l. 13 – R. 234, l. 5. Police Officer John Carwell testified that he viewed the still pictures from the City of Columbia video and recognized the perpetrator as appellant. R. 208, l. 13 – p. 209, l. 25.

7.) Generally, prior crimes or bad acts cannot be presented to show that the defendant had the propensity to commit the crime charged, i.e., that he is a bad person. State v. Peake, 302 S.C. 378, 396 S.E.2d 362 (1990). State v. Smith, 309 S.C. 409, 419 S.E.2d 816 (1992); State v.

Martucci, 380 S.C. 232, 669 S.E.2d 598 (2008). Also, even if prior crimes are considered under the Lyle[2] exceptions; nonetheless, the value of the priors must outweigh the prejudicial value. State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008). Prior crime evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. State v. Spears, 403 S.C. 247, 742 S.E.2d 878 (2013). Unfair prejudice results when there is an undue tendency to make a decision on improper basis, and also prejudice comes into play when jury's verdict influenced by the challenged evidence. State v. Martucci, supra. To be admissible, the bad act must logically relate to the crime with which the defendant has been charged, and even if admissible as relevant under Rule 401, SCRE[3], and under the Lyle exceptions stated under Rule 404(b), SCRE (to show identity in this case); nonetheless, said evidence must be excluded if its probative value is outweighed by its prejudicial value under Rule 403, SCRE.[4] See State v. King, 416 S.C. 92, 784 S.E.2d 252 (2016). Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis. State v. Stearns, 403 S.C. 247, 742 S.E.2d 878 (Ct. App. 2013). Moreover, evidence of prior bad acts is inadmissible to suggest that the accused has the propensity to commit the crime charged. State v. Peake, 302 SC 378, 396 S.E. 2d 362 (1990). State v. Smith 309 SC 409, 419 S.E. 2d 816 (1992). Prior bad acts evidence is not admissible to show that the accused in a bad person. Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989). Also, even if prior crimes are

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2 Prior crimes can only be used in order to show motive, intent, identity, absence of mistake or accident or common scheme or plan. State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923).

3 Relevant evidence under Rule 401, SCRE is evidence having any tendency to make the existence of any fact that it of consequence to the determination of the action more probable or less probable than it would be without the evidence.

4 Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion, if the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless combative evidence.

considered under the Lyle exceptions; nonetheless, the prior crimes cannot be used to show that the accused is a bad person. State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008). In the case at bar, the revelation to the jury that a probation officer, who was familiar with appellant and identified him via a photograph shown to her by police, although used to show identity, was nonetheless prejudicial and the prejudicial value outweighed the probative value because the inference was that appellant was in the system at SCDPPP with this agent and therefore probably had a criminal record, which meant he committed other crimes, and thus held a criminal predisposition, and hence was probably guilty of the crimes for which he was being tried. The probation officer's testimony was overkill because identification evidence has already been submitted by four witnesses (coupled with DNA matches) and therefore, this needless presentation of cumulative evidence violated Rule 403, SCRE. Compare **by analogy the overkill in** State v. James, 355 S.C. 25, 583 S.E.2d 745 (2003). In State v. James, 355 S.C. 25, 583 S.E.2d 745 (2003), the Court cited to Old Chief v. United States, 519 U.S. 172 (1997),[5] in holding that the probative value of presenting prior burglary convictions beyond the two required per the statute "decrease[d]" because of there was already sufficient evidence presented to prove that element. he James Court went on to hold that "although there may be rare occasions where the admission of more than two prior burglary convictions is more probative than prejudicial and therefore proper, the potential for undue prejudice—for the impermissible interpretation of such evidence as propensity or character evidence—warrants great caution." In James, the Court reversed and held that the trial judge erred in admitting evidence of seven of James' prior burglary convictions

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5 In Old Chief, supra, to the Court held that it was more prejudicial than probative for the prosecution to rely on the defendant's prior indictment for assault causing serious bodily injury to establish the offense of possession of a firearm by anyone with a prior felony conviction because the assault indictment prejudiced the defendant on the charge of assault with a deadly weapon which he was also on trial at that same time.

because the "probative value of all seven of [his] prior burglary convictions was outweighed by the very great potential for prejudice to the defendant regardless of the trial judge's limiting instructions." The James Court ruled that the probative value of the submission of seven prior burglaries committed to the jury was more prejudicial than probative. Rule 403, SCRE, states that "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."

8.) Regarding the error in admitting a crack pipe found at the scene into appellant's case, this Court held as follows.[3]

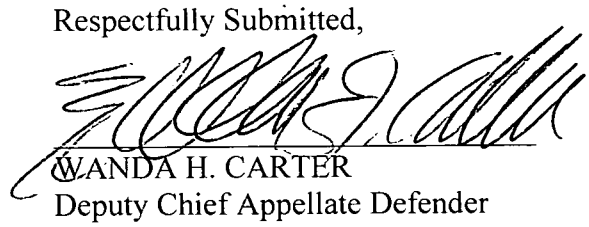
> To the extent the admission of the testimony of the law enforcement officer who found the crack pipe was erroneous, we find any error was harmless because, when considering this case as a whole, the evidence presented against Pringle at trial was overwhelming. See State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83, (Ct. App. 2003) (("Whether an error is harmless depends on the circumstances of the particular case."); State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151, (1985) ("No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case."); Thompson, 352 S.C. at 562, 575 S.E.2d at 83 ("error is harmless when it could not reasonably have affected the results of the trial."); id. ("Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed.").

9.) This case was not a drug case. The same Rule 403, SCRE, analysis regarding the prejudicial value outweighing the probative value would apply to the crack pipe evidence. See State v. Peake, 302 S.C. 378, 396 S.E.2d 362 (1990), where the Court reversed because the state presented testimony that the defendant, who was on trial for murder, offered to sell marijuana to the deceased days prior to her killing as the murder case had no drug connections and therefore such testimony was irrelevant and prejudicial. The Peake Court reiterated the rule that evidence of prior bad acts that are independent of and unconnected to

the crime for which the accused is on trial is inadmissible at trial. The prejudicial value of the admission of the probation agent's testimony and the crack pipe outweighed any probative value of the same and the error in admitting the same violated appellant's right to a fair trial via the Fourteenth Amendment and article 1, §3 of the South Carolina State Constitution, especially since it was highly likely that the prior bad acts evidence contributed to the jury's guilty verdicts and could not be deemed harmless error. See State v. Charping, 313 S.C. 147, 437 S.E.2d 88 (1991), citing to Chapman v. California, 386 U.S. 18 (1967).

WHEREFORE, based on the foregoing points, counsel for appellant would request a rehearing on this Court's opinion on the issues raised above.

Respectfully Submitted,



WANDA H. CARTER
Deputy Chief Appellate Defender

This 2nd day of January, 2020.

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THE STATE,

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V.

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Scott Matthews, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Brian Everett Pringle, #335802, at Goodman Correctional Institution, 4556 Broad River Road, Columbia, SC 29210, this 2nd day of January, 2020.

Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 2nd day of January, 2020.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.