

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Thomas A. Russo, Circuit Court Judge

ORIGINAL

THE STATE,

RESPONDENT,

V.

MARREESE JAMAUL FRIPP,

APPELLANT.

APPELLATE CASE NO. 2018-002265

INITIAL BRIEF OF APPELLANT

RECEIVED

JAN 15 2020

SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse his discretion by admitting evidence that Appellant allegedly used excessive corporal punishment on Minor 1, Minor 3, and Minor 4, when Appellant was being tried for similar allegations concerning Minor 2, since such evidence was not admissible pursuant to Rule 404(b), SCRE, as it merely showed Appellant had the propensity to commit the conduct for which he was being tried, and was unfairly prejudicial to Appellant pursuant to Rule 403, SCRE?

STATEMENT OF THE CASE

A Beaufort County Grand Jury indicted Appellant on July 21, 2016 for unlawful neglect of a child. R. *. A pretrial hearing was held on December 4, 2017 before the Honorable Carmen T. Mullen. Tr. 1. Assistant Solicitor Dustin Whetsel represented the state, and Jessica Saxon represented Appellant. Tr. 2. Appellant's case was ultimately called to trial on December 10, 2018 before the Honorable Thomas A. Russo, and a jury. Tr. 1. Assistant Solicitors Sara Rebekah Luttrell and Jacob McFadden represented the state. Tr. 1. Jessica Saxon and James Bell represented Appellant. Tr. 1.

On December 12, 2018, the jury found Appellant guilty as indicted. Tr. 546, ll. 1-14. He was sentenced to six years imprisonment. Tr. 554, l. 24 – 555, l. 3.

This appeal follows.

STANDARD OF REVIEW

“In criminal cases, the appellate court sits solely to review errors of law.” State v. Cope, 405 S.C. 317, 334, 748 S.E.2d 194, 203 (2013) (citing State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). “The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion.” Id. at 334-335, 748 S.E.2d at 203 (quoting State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009)) (internal quotation marks omitted). “An abuse of discretion occurs when the trial court's ruling is based on an error of law.” Id. at 335, 748 S.E.2d at 203 (quoting State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008)) (internal quotation marks omitted).

ARGUMENT

The trial judge abused his discretion by admitting evidence that Appellant allegedly used excessive corporal punishment on Minor 1, Minor 3, and Minor 4, when Appellant was being tried for similar allegations concerning Minor 2, since such evidence was not admissible pursuant to Rule 404(b), SCRE, as it merely showed Appellant had the propensity to commit the conduct for which he was being tried, and was unfairly prejudicial to Appellant pursuant to Rule 403, SCRE.

Relevant Facts

Appellant was tried for alleged conduct that occurred on or about December 18, 2015. The state alleged at trial that Appellant used excessive corporal punishment on his stepson, Minor 2, who was ten years old, causing injuries to his stomach and the back of his legs. Specifically, the state's theory was that Appellant struck Minor 2 with a belt and/or an extension cord.

The allegations surfaced on December 25, 2015 after Minor 2's godmother, Bessie Hugee, observed bruises on Minor 2's stomach. Hugee showed Minor 2's biological father, Mack Williams, the injuries when Williams came to pick up Minor 2 and his younger brother, Minor 3, from her home on Christmas Day. Minor 2 allegedly told Hugee, "Daddy hits me with . . . a belt." Tr. 317, l. 25 – 319, 13. Hugee understood "Daddy" to be Appellant. Tr. 317, l. 25 – 319, 13.

Williams immediately drove Minor 2 to the Beaufort County Sheriff's Office to report the allegations. Minor 2 allegedly told Deputy Amanda Dimitrov, who took the initial report, that the bruises on his stomach were caused by "Daddy." Tr. 187, ll. 8-14. Minor 2 identified "Daddy" as Appellant. Tr. 187, ll. 8-14.

Despite this initial disclosure, during a forensic medical exam on January 12, 2016, Minor 2 told Kristin Dalton, the nurse practitioner who examined him, that the marks on his stomach were from when “he spilled a bowl of Oodles of Noodles on himself.” Tr. 255, l. 22 – 256, l. 4. During her exam, Dalton also observed “a bunch of linear scars” on the back of Minor 2’s legs. Dalton claimed Minor 2 told her these marks were from when Appellant “whipped” him with a belt. Tr. 264, l. 1-19. Minor 2 allegedly said this happened before Christmas. Tr. 264, l. 20 – 265, l. 6. Based on this evidence, Appellant was arrested and later indicted for unlawful neglect of a child.

As a result of the abuse allegations, the Department of Social Services became involved and the other children in the home also underwent a forensic medical exam conducted by Kristin Dalton. The children included Minor 1, who was twelve years old, Minor 3, who was nine years old, and Minor 4, who was four years old. Dalton observed a “thick, curved scar” on the back of Minor 3’s right thigh. She claimed Minor 3 told her “he was beaten with a belt and extension cords by his father Marreese [Appellant].” Dalton also observed curved linear scars on the back of Minor 1’s thighs, butt, and right hip. Tr. 272, l. 13 – 273, l. 6. She did not question Minor 1 about the cause of these injuries because he has cerebral palsy and is nonverbal. Tr. 272, ll. 10-12. Dalton did not observe any similar injuries on Minor 4. Tr. 267, ll. 6-10.

Minor 1, Minor 3, and Minor 4 were also forensically interviewed at Hopeful Horizons, the local children’s advocacy center, by Sitha Patel. Minor 3 allegedly disclosed that Appellant beats him with a belt and an extension cord. Tr. 442, ll. 14-18. Minor 4 allegedly claimed that Appellant would “beat” her and her brothers with a belt on the butt. Tr. 428, ll. 3-21.

After the other children were forensically interviewed, Appellant was charged and indicted for two additional counts of unlawful neglect of a child concerning the other children. There was no specific date alleged in these indictments as the children never provided any dates.

The state moved pretrial to introduce the allegations of physical abuse committed by Appellant concerning the other children that were not alleged in the indictment for which he was being tried. Again, Appellant was being tried for his alleged use of excessive corporal punishment on or about December 18, 2015 causing injuries to Minor 2. For whatever reason, the state chose not to try the two subsequent indictments. The state argued the other allegations were admissible pursuant to Rule 404(b), SCRE because they were evidence of lack of mistake or accident, identity, and a common scheme or plan. Tr. 85, ll. 4-17.

Defense counsel objected arguing the evidence did not meet any of the exceptions found in Rule 404(b). Tr. 82, l. 14 – 83, l. 19. Rather, the allegations were merely the state’s attempt to show Appellant is a “bad person.” Tr. 82, ll. 7-13. Counsel argued the state’s attempt to introduce the alleged abuse of Minor 1, Minor 3, and Minor 4 was “just the State boot strapping on untried, unproven, allegations to strengthen or attempt to strengthen the allegation in this case which is a date certain issue type allegation.” Tr. 83, l. 20 – 84, l. 3. Moreover, pursuant to Rule 403, SCRE, counsel asserted any probative value of the evidence was outweighed by the unfair prejudice to Appellant and that the admission of the additional allegations would merely confuse the jury. Tr. 84, l. 14 – 85, l. 3.

The state ultimately proffered the testimony of Minor 1, Minor 2, Minor 3, and Minor 4. All four children denied making any previous statements to Kristin Dalton and/or Sitha Patel about Appellant “beating” them with a belt or extension cord. See Tr. 103, l. 2 – 107, l. 17; Tr. 129, l. 6 – 137, l. 17; Tr. 141, l. 18 – 142, l. 23.

The trial judge found the evidence was admissible pursuant to Rule 404(b) to show the existence of a common scheme or plan and the absence of mistake or accident. Tr. 151, ll. 20-25.

During the trial, the state called Minor 3 and Minor 4 and questioned them about their prior statements to Kristin Dalton and Sitha Patel, in which they alleged physical abuse. As they did during their *in camera* testimony, the children denied making any such statements. The state ultimately impeached Minor 3 and Minor 4 with the statements they made during their forensic interviews with Sitha Patel. The state also introduced photographs of Minor 1 and Minor 3's injuries taken by Kristin Dalton over defense counsel's objections. Dalton was also permitted to testify about the statements allegedly made by Minor 3 concerning the cause of his injuries.

Discussion

The trial judge abused his discretion by admitting evidence that Appellant allegedly used excessive corporal punishment on Minor 1, Minor 3, and Minor 4, when Appellant was being tried for similar allegations concerning Minor 2, since such evidence was not admissible pursuant to Rule 404(b), SCRE, as it merely showed Appellant had the propensity to commit the conduct for which he was being tried. Moreover, any probative value of the evidence was outweighed by the unfair prejudice to Appellant pursuant to Rule 403, SCRE.

“South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator.” State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) (citing Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)). “As a threshold matter, the trial court must determine whether the proffered evidence is relevant as required under Rule 401,

SCRE.” State v. Cope, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013) (citing Clasby, 385 S.C. at 154, 682 S.E.2d at 895). “If the trial court finds the evidence is relevant, it must then determine whether the bad act evidence fits within an exception in Rule 404(b).” Id. “If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing.” Cope, 405 S.C. at 337, 748 S.E.2d at 204 (citing State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008) (internal quotation marks omitted). “Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant.” Cope, 405 S.C. at 337-338, 748 S.E.2d at 204-205 (citing Clasby, 385 S.C. at 155, 682 S.E.2d at 896). “Further, evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad person.” State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) (citing Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989)).

In King, our Supreme Court held it was reversible error to admit evidence of prior thefts allegedly committed by King as evidence of motive or as part of the *res gestae*. King was accused of murdering his father-in-law, Billy Turbeville. Turbeville received two checks each month totaling \$2200. After paying his monthly bills totaling \$400, Turbeville kept the remaining cash inside his wallet in the front pocket of his pants. No wallet or cash was found on Mr. Turbeville when his body was discovered. King, 334 S.C. at 508, 514 S.E.2d at 580. The trial court allowed King’s ex-wife to testify that King regularly pawned household items, stole cash from her purse, forged checks on her bank account, stole cash from her bank account by using her ATM card, and stopped paying his share of the bills in the months that preceded the murder. Id. at 511, 514 S.E.2d at 582.

After considering both Rule 404(b), SCRE, and the *res gestae* theory, the Court held the remote thefts were not admissible under any theory, and that the evidence merely showed King's bad character and his propensity to commit crimes. Id. at 513, 514 S.E.2d at 583. The Court further held the admission of the evidence was not harmless because the prior thefts suggested King had a drug problem, which was highly prejudicial, and all the evidence against King was circumstantial. Id. at 514, 514 S.C. at 583.

In this case, evidence of the undated alleged physical abuse of Minor 1, Minor 3, and Minor 4 similarly show Appellant's propensity to commit the conduct for which he was being tried, specifically the use of excessive corporal punishment on Minor 2, and was not admissible under any of the exceptions of Rule 404(b). As defense counsel argued below, the state was merely "boot strapping on untried, unproven, allegations to . . . attempt to strengthen the allegation in this case which is a date certain issue type allegation." Tr. 83, l. 20 – 84, l. 3. The allegation of abuse that occurred on or about December 18, 2015 was a totally separate event from the general allegations of abuse alleged by Minor 1, Minor 3, and Minor 4 and should have been excluded by the trial judge.

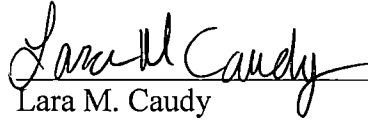
The admission of this unindicted conduct was unfairly prejudicial to Appellant because the allegations involved numerous children and more offensive conduct, such as striking Minor 1, who is disabled, for urinating or defecating on himself. See Rule 403, SCRE. Moreover, the evidence was improperly used by the state to prove Appellant committed the crime for which he was being tried.

Respectfully, this Court should hold the trial judge abused his discretion by admitting evidence of the alleged abuse of Minor 1, Minor 3, and Minor 4, reverse Appellant's conviction and sentence, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of January, 2020.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Thomas A. Russo, Circuit Court Judge

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THE STATE,

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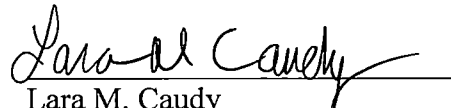
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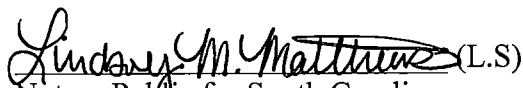
CERTIFICATE OF SERVICE

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. Blicht, 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 Marreese Jamaul Fripp, #295622, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 15th day of January, 2020.


Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 15th day of January, 2020.

 (L.S)
Notary Public for South Carolina
My Commission Expires: October 22, 2024.