

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHUNDREZ JERVINO DRINKARD,

APPELLANT

APPELLATE CASE NO 2019-001192

ANDERS BRIEF OF APPELLANT

RECEIVED
FEB 14 2020
SC Court of Appeals

WANDA H. CARTER
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STATEMENT OF ISSUE ON APPEAL

The trial judge erred in allowing prior bad act testimony in violation of Rule 403, SCRE, into evidence at trial because this confused the jury and prejudiced the defense.

STATEMENT OF THE CASE

Appellant Shundrez Drinkard was found guilty per jury trial on the charges of trafficking in cocaine¹, trafficking in crack cocaine², possession of a weapon during the commission of a violent crime, and possessing or receiving stolen goods at the Greenville County General Sessions Court before Judge R. Lawton McIntosh, who sentenced appellant to an aggregate prison term of seven years. Appellant was represented at trial by Attorneys Morgan E. Cleary and Stuart B. Sarratt, and Assistant Solicitor Howard L. Steinberg appeared on behalf of the state.

Appellant appealed. This brief follows.

¹ 28 grams or more, but less than 100 grams.

² 28 grams or more, but less than 100 grams.

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.

In order to admit evidence of bad acts not resulting in conviction, the trial court must, “[a]s a threshold matter, ... determine whether the proffered evidence is relevant.” Clasby, 385 S.C. at 154, 682 S.E.2d at 895; see State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). “If the trial judge finds the evidence to be relevant, the judge must then determine whether the bad act evidence [is admissible under the terms] of Rule 404(b)” to show, *inter alia*, the existence of a common scheme or plan. Clasby, 385 S.C. at 154, 682 S.E.2d at 895. If the testimony is relevant and proffered for a permissible purpose, the trial court must next conduct a balancing test, pursuant to Rule 403; where the testimony's probative value is substantially outweighed by the danger of unfair prejudice, the trial court may exclude it. See State v. Gillian, 373 S.C. 601, 611, 646 S.E.2d 872, 877 (2007); see also Rule 403, SCRE (“[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ...”).

ARGUMENT

The trial judge erred in allowing prior bad act testimony in violation of Rule 403, SCRE, into evidence at trial that because this confused the jury and prejudiced the defense.

In this case, police officers arrived at a particular residence in Greenville, South Carolina, per an investigation into a prior shooting incident, and upon their arrival there observed appellant placing a black bag into a car parked nearby. A search of the black bag revealed the presence of a gun, cocaine, crack cocaine. Ammunition was found during a search inside the residence.

At trial, Officer Jacob Walters testified that he went to the residence in question on October 19, 2019, to investigate a shooting that occurred there on October 12, 2019. Officer Walters testified that after he pulled into the driveway, he saw appellant standing beside a vehicle (Dodge Charger) and crouching down at the rear driver's door. Apparently, there was a black bag that appellant had carried to the car and placed in the backseat area. A search of that bag revealed the presence of a gun, cocaine, and crack cocaine. The loose rounds of ammunition and magazines that were recovered were found inside the house. App. 116, 1.3-12; App 104, 1.23-p.115, 1.24. Appellant was not charged in connection with the ammunition found at the scene. App. 116, 1.13-22. The Court addressed the issue of the ammunition and the ammunition evidence outside of the presence of the jury as follows:

Solicitor: Before the jury is present, I want to take the items that are not introduced that were found inside the house, to avoid confusion, I'm going to put them in this bag. Tr. 125, 1.3-6

The Court: And for the record, that black bag had several rounds that were found inside the house, but were not part of the charge for the defendant...[b]ut they were placed in the bag somehow during the arrest process...so they are to be put in the brown paper bag. App. 125, lines 11-15.

At closing, the solicitor made the following remark:

The fact that you have this weapon—all this evidence is yours. Sometimes the judge might say I'll send back the firearm without the ammunition or vice versa. That'll be up to the judge's decision. But all the evidence is yours to look at. App. 170, l. 24–p. 171, l.3.

Under Rule 403, SCRC, evidence, although relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” See State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (2008), where the Court upheld the trial judge’s decision to apply Rule 403, SCRE, and exclude evidence that the state’s key witness was a drug dealer and that drugs were found next to the murdered victim, and that a prior drug sale occurred before the shooting because this would “cloud the issues” and “risk...confusion or misdirection” on the issues. See State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (2001), where the Court upheld the trial judge’s decision to apply Rule 403, SCRE, and exclude a psychiatrist’s testimony about the defendant’s anti-social personality because the same would have confused the jury as this was irrelevant to the assault charge against the defendant. See also 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 connection 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. 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, or to suggest that the accused has the propensity to commit the crime charged. State v. Peaks, 302 S.C. 378, 396 S.E.2d 362 (1990); State v. Smith, 309 S.C. 409, 419 S.E.2d 816 (1992).

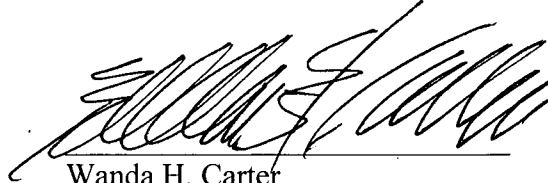
In the case at bar, appellant was not indicted on any ammunition charges³, and as a result, any mention of appellant's perceived connection to this ammunition served only to confuse the jury and prejudice appellant's defense as it constituted prior bad act evidence that ultimately lent credence to his guilt on the weapon charge (and other charges also) for on which he was on trial.

Here, the erroneous admission of the ammunition testimony in the case at bar constituted prejudicial prior bad evidence that 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). Clearly, it was error to introduce testimony regarding the finding of ammunition at the scene near where appellant was found and to connect the same to the drugs and gun found in the black bag (that contained no ammunition) that appellant was seen on the video carrying to the vehicle at the scene, because no ammunition charges were filed against appellant in the case. The trial judge erred in allowing the prejudicial prior bad act testimony and evidence in question into evidence in violation of Rule 403, SCRE, as this confused the jury and prejudiced the defense.

³ S.C. Code Ann 16-23-470 (illegal possession of tear gas gun or ammunition).
S.C. Code Ann 16-23-520 (possession of Teflon coated ammunition).
S.C. Code Ann 23-31-5 10 (possession of firearm or ammunition).

CONCLUSION

Based on the foregoing argument, counsel for appellant would request that this Court reverse appellant's convictions and sentences and remand his case to the circuit court for a new proceeding.



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of February, 2020.

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THE STATE,

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APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Shundrez Jervino Drinkard states that:

1. She is Deputy Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge R. Lawton McIntosh, which was held on July 8 & 9, 2019, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, She asks the Court to relieve her as counsel for Shundrez Jervino Drinkard.

Respectfully Submitted,



Wanda H. Carter

Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 14th day of February, 2020.

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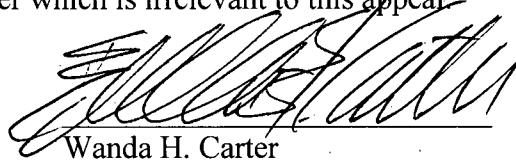
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s):
- (2) Entire Trial Transcript (July 8-9, 2019)

I certify that this designation contains no matter which is irrelevant to this appeal

February 14, 2020



Wanda H. Carter
Deputy Chief Appellate Defender

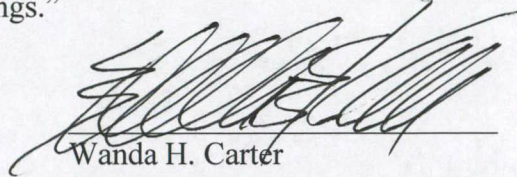
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ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, 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 Filings."

February 14, 2020.



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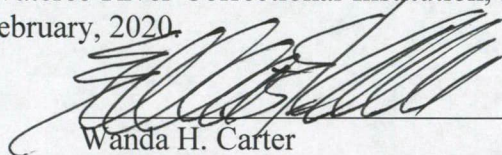
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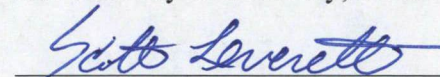
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders 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 Anders Brief of Appellant and Designation of Matter have been served on Shundrez Jervino Drinkard, 380712, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 14th day of February, 2020.



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 14th day of February, 2020.

 (L.S)

Notary Public for South Carolina

My Commission Expires: September 27, 2028.