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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

THE STATE,

RESPONDENT,

V.

MICHAEL SCOTT SIMMONS,

APPELLANT

APPELLATE CASE NO. 2016-001975

Appeal from Richland County

R. Knox McMahon, Circuit Court Judge

Opinion No. 27959

RETURN TO THE PETITION FOR REHEARING

On March 25, 2020, this Court issued its very logical, well-reasoned opinion reversing and remanding Appellant’s convictions. Specifically, this Court held the trial judge erred in allowing the state to introduce dangerously unfair prejudicial evidence previously excluded on the theory that defense counsel “opened the door” to the evidence while cross-examining the state’s key witness. State v. Simmons, Op. No. 27959 (S.C. Sup. Ct. filed Mar. 25, 2020). Subsequently, the state filed a petition for rehearing, (1) alleging this Court failed to utilize the correct standard of review and (2) rehashing the same arguments previously presented and considered by this Court. On April 8, 2020, this Court requested a return from Appellant.

Standard of review

Contrary to the state's first admonition, this Court did not "overlook[] its standard of review in determining that the trial court abused its discretion in finding defense counsel opened the door and admitted evidence from the external hard drive." This Court carefully and precisely followed the standard of review. Under the state's formulation of an abuse of discretion, no evidentiary ruling would ever be subject to reversal. Instead of an abuse of discretion standard, which requires determining whether the conclusions of the trial court either lack evidentiary support or are controlled by an error of law, the state requested this Court employ the "any evidence" standard. See State v. Herrera, 425 S.C. 558, 562, 823 S.E.2d 923, 924 (2019) (explaining "[a]n abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law"). This Court's opinion acknowledged and applied the correct standard of review.

Using the correct and "generous" standard of review, this Court properly concluded that "defense counsel's questioning was not sufficient to permit the state to introduce the previously-excluded evidence in rebuttal." This Court conducted an in-depth analysis of the state's direct examination of VanHouten and defense counsel's cross-examination of VanHouten. As this Court explained, "the state had already elicited testimony from VanHouten on direct that there was no child pornography found on Simmons' desktop." Thus, "defense counsel was certainly entitled to drill down on that fact during cross-examination," which is exactly what happened. This Court correctly held that "[t]he trial court's ruling that defense counsel's same questioning on cross opened the door to the excluded evidence essentially allowed the state to achieve what it was prohibited from doing directly – discussing and ultimately playing the eight videos for the

jury.” This Court properly applied the correct standard of review, an abuse of discretion, to the facts presented.

As this Court explained, prior to trial, the trial judge agreed with defense counsel that the eight videos found on the external hard drive were “more prejudicial than probative.” R. 66, ll. 15-22. Thus, the judge excluded those videos from evidence. R. 66, ll. 21-22. Further, on direct examination, the state showed VanHouten the search warrant return, which listed the external hard drive as an item seized from the residence. R. 271, ll. 22-24. VanHouten stated he examined those items, including the external hard drive. R. 271, l. 25 – R. 272, l. 4. Next, the state asked if VanHouten analyzed all of the computers listed. R. 272, ll. 6-7. VanHouten responded:

As far as the actual computer systems, I did a forensic preview. The – when the, when the, the items were brought or when I – when the investigator told me what he was looking for, he specifically pointed out this is one – of the first – this particular item is something we need to *focus* on. I would go ahead and do a complete forensic image on that because the case agent would know the best about the case itself. The rest of the stuff, the rest of the laptops or computers that were involved, I did -- I conducted a forensic preview.

R. 272, ll. 8-17 (emphasis added). VanHouten further explained he conducted a full forensic examination of the HP Pavilion desktop, which was the item listed on the search warrant return that the investigator asked him “to focus on.” R. 273, ll. 11-23. This full examination was conducted because the “submitting agent or investigator said [it] was pertinent to his case.” R. 275, ll. 15-20. The state asked VanHouten, “In examining the other computers that were seized from the home, you did not do an in-depth analysis like this?” R. 303, ll. 24-25. VanHouten explained he did not conduct full examinations on the other seized items, but conducted “previews” only. R. 304, ll. 1-19.

During cross-examination, VanHouten said he had a list of items to focus on that were seized from Appellant's room. R. 308, ll. 5-14. Defense counsel then had VanHouten list the "non-focused items," which included the external hard drive. R. 308, l. 15 – R. 314, l. 1. Defense counsel next questioned VanHouten about the items law enforcement did not seize from the residence, such as the iPad, phone, and computer. R. 314, l. 12 – R. 315, l. 20. Defense counsel made clear he wanted VanHouten to testify – just as he had on direct examination – that there were no full examinations conducted on the non-focus items, which included items not seized from the home and items that were seized from locations in the home other than Appellant's room. R. 319, ll. 1-6.

A review of the direct and cross examinations of VanHouten support this Court's holding that "the questions regarding the contents of the desktop were effectively identical." Further, the record supports this Court's conclusion that defense counsel "was well aware of the possibility of opening the door" and "carefully tailored his questions to track the state's direct examination. Most importantly, defense counsel "did not elicit any substantive testimony regarding the hard drive." Using language *first* used by VanHouten during the direct examination, defense counsel "grouped the items as 'focus' and 'non-focus.'" This grouping and questions regarding the groupings did not open the door to the properly excluded evidence. This Court's decision is supported by the facts and precedent. See State v. Major, 301 S.C. 181, 185, 391 S.E.2d 235, 238 (1990) (holding the door was open to question Major regarding his prior conviction for simple possession of cocaine where Major denied ever having used crack cocaine, but explaining the door was open only as to the specific traits initially focused on by Major); State v. Young, 378 S.C. 101, 106, 661 S.E.2d 387, 389 (2008) (holding "Young's testimony that he hated to see a woman cry did not open the door to the admission of his prior CDV and CSC convictions"); State v. Foster, 354

S.C. 614, 623, 582 S.E.2d 426, 430 (2003) (concluding a defendant did not open the door to a witness's prior consistent statement where the defendant asked "a single, non-substantive question about her prior consistent statement, and then questioned [her] veracity by asking about her prior inconsistent statements");

None of the questions asked of VanHouten by defense counsel opened the door to the contents of the external hard drive. Defense counsel's questioning of VanHouten was in service of the defense that Appellant was not guilty because Kyle was the person who had downloaded the child pornography at issue. The questions asked of VanHouten concerned the investigator's focus on Appellant and neglect of any other member of the Doiron family, particularly, Kyle, as a suspect. Defense counsel did not, and would not have, wanted to question VanHouten about the external hard drive as it had been found in Appellant's room. Rather, defense counsel's questions concerned VanHouten's failure to "focus" on any items found outside Appellant's room. The state did not, and could not, point to any question or series of questions asked by defense counsel that opened the door to the previously excluded evidence. In fact, the state and defense counsel discussed how to handle the external hard drive and arrived at a mutually agreeable solution – "ignore it." Several items of evidence mentioned the external hard drive, including the search warrant return, but those references were innocuous without a description of the content of the hard drive. Defense counsel complied with this agreement by mirroring the questions asked on direct examination about the hard drive – simply about its existence. The focus of the examination was on the state's failure to conduct full examinations on any of the digital media devices found outside Appellant's room. Nothing could be gained from making it appear that the state had not conducted a full examination on another device found in Appellant's room. This Court correctly concluded the judge erred in

finding defense counsel opened the door to the unfairly prejudicial character evidence contained on the external hard drive.

Otherwise inadmissible

After alleging this Court failed to apply the correct standard of review, the state argued, in the alternative, that even if defense counsel did not open the door, the verboten evidence was admissible pursuant to Rule 404(b), SCRE. The state presented this exact argument in its brief, which this Court, including the dissent, found unavailing.

The rules of evidence and case law prohibit the introduction of character evidence except in limited circumstances. The South Carolina Rules of Evidence and case law preclude the introduction of evidence of a defendant's other crimes, wrongs, or acts to prove the defendant's guilt for the crime charged except to establish, among other things, identity. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). In fact "[e]vidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged." State v. Johnson, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987).

As explained by this Court in State v. Wesley Smith, 391 S.C. 353, 361, 705 S.E.2d 491, 495 (2011), in order to introduce evidence of some other act by the defendant under one of the exceptions, the prosecutor must lay a proper foundation. Due to the danger this type of evidence poses, "[e]vidence of other crimes must be put to a rather severe test before admission." State v. Cutro, 332 S.C. 100, 103, 504 S.E.2d 324, 325 (1998). At the outset, the prosecutor must prove by clear and convincing evidence that the defendant committed the other act, if the defendant was not convicted of the act. Id. (citing State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008)). Next, the prosecutor must articulate the logical connection between the other act and one of the five exceptions listed in Rule 404(b), SCRE. Id. (citing State v. Pagan, 369 S.C. 201,

211, 631 S.E.2d 262, 267 (2006)). This requires a showing of how the evidence of the other act will assist the fact-finder in understanding a material issue in the case related to one of the Rule 404(b), SCRE, exceptions. Id. If the trial judge determines the prosecutor has satisfied both requirements, then the judge must determine whether the probative value outweighs the prejudicial effect pursuant to Rule 403, SCRE. Id. (citing State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009)).

Importantly, the state failed to present any argument in its petition for rehearing that the prosecution proved by clear and convincing evidence that Appellant downloaded the videos onto the external hard drive, which would have been a necessary foundational requirement in order for the evidence to be admitted pursuant to Rule 404(b), SCRE. “Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal.” Fletcher, 379 S.C. at 24, 664 S.E.2d at 483. The state’s failure even to present an argument on this crucial aspect exposes its inability to satisfy the elemental prerequisite of clear and convincing evidence to admissibility.

As stated in Appellant’s brief, the evidence presented by the state to establish that Appellant was the person who placed the videos on the external hard drives was a far cry from the cases where the Court of Appeals has found clear and convincing evidence of the prior bad act and more akin to the cases in which this Court has declared the state’s evidence lacking. Cf. State v. Scott, 405 S.C. 489, 748 S.E.2d 236 (Ct. App. 2013) (finding clear and convincing evidence of a prior bad act where the parties related their positions during a hearing and written motions and a brief, the proffered testimony was very specific and appeared credible); State v. Martucci, 380 S.C. 232, 257,

669 S.E.2d 598, 611 (Ct. App. 2008) (finding clear and convincing evidence where the witness testified about his direct observations of prior incidents and other witnesses testified about bruises and burns in this homicide by child abuse case); State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004) (finding clear and convincing evidence where the alleged victim testified that the defendant previously assaulted her, the defendant was arrested and incarcerated, and another witness testified to having seen bruises on the alleged victim's arm following the assault) with Fletcher, 379 S.C. at 25, 664 S.E.2d at 483-484 (holding it was error to admit the testimony of a witness who testified about observing two incidents of alleged child abuse where the prosecution presented no evidence that the defendant was the person who engaged in the abuse despite evidence in the record that the defendant was at least present at the time of the alleged abuse); State v. Pierce, 326 S.C. 176, 178, 485 S.E.2d 913, 914 (1997) (finding error where witnesses testified about the victim having a split lip and swollen eye but there was no evidence the defendant inflicted the injuries); State v. Cutro, 332 S.C. 100, 106, 504 S.E.2d 324, 327 (1998) (holding it was error to admit the death of another child and the injuries of a third child due to a lack of evidence that the defendant had caused the death or injuries despite the children having died and acquired the injuries while in her and her husband's care).

Further, the state could not show how the videos on the external hard drive proved identity as the state had not shown Appellant downloaded the material onto the external hard drive. See State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006). To support its contention that the videos on the external drive were probative of the identity of the person who downloaded the images that were the subject of the charged offenses, the state relied upon the disputed claim that the external hard drive was found connected to Appellant's computer. As this Court noted, whether the external hard

drive was connected to Appellant's computer was a fact in dispute at trial and not one proven by the state by clear and convincing evidence.

Finally, even if the state satisfied the foundational requirements of Rule 404(b), SCRE, which Appellant disputes, the trial judge's initial ruling that the videos were inadmissible because the danger of unfair prejudice substantially outweighed any probative value was correct and remained correct even after the cross-examination of VanHouten. Even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; see also State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011). The first step requires a determination of the probative value of the evidence. The second step requires an evaluation of the danger of unfair prejudice resulting from the introduction of the evidence. The third step requires balancing of the probative value and unfair prejudice. "When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case." State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008). Unfair prejudice means an undue tendency to suggestion a decision on an improper basis, commonly, but not necessarily, an emotional one. Orozco, 392 S.C. at 218, 708 S.E.2d at 230 (citing State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001)); see also State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)(providing that "[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one").

The probative value of the videos on the external hard drive was very low. The videos were found on an external hard drive in Appellant's room and were not the subject of the charged offenses. The videos were not like the videos comprising the charged offenses, were not found on the same device, and were not closely connected in time. The prejudicial effect of the videos was

dangerously high. The videos showed what was obviously child pornography, unlike the videos of the charged offenses for which the ages of the actors in the videos was less clear. The videos on the external hard drive were longer than the videos recovered through the file sharing program, exposing the jurors to more graphic episodes of child pornography. The danger was unfairly high that the jury would decide the case on emotion as no one could argue the emotional toll of watching child pornography would have on a jury. Balancing the low probative value of the videos against the extremely high danger of unfair prejudice results in a conclusion that the videos were not admissible under Rule 403, SCRE. The trial judge correctly ruled as such during the pre-trial motions hearing. However, the judge erred in allowing the jurors to see the videos when he determined defense counsel had opened the door through his cross-examination of VanHouten.

Lack of proportionality

This Court correctly held that even if the trial court's decision were supported by the evidence presented, then the trial court abused its discretion by permitting the state to play all eight videos on the external hard drive because such a response "far exceeded the proper scope, and therefore would *also* be error." (emphasis added). In its petition for rehearing, the state presented no challenge to this holding. See Rule 221(a), SCACR (providing a petition for rehearing must "state with particularity the points supposed to have been overlooked or misapprehended by the court"). Thus, even if this Court were to grant the state's petition for rehearing for the reasons stated therein, the holding that the admissibility of all eight videos exceeded the proper scope of permissible evidence to rebut any alleged contention presented through defense counsel's cross examination of VanHouten would remain and require reversal. Cf. Rule 242(d)(2), SCACR (limiting questions presented in petitions for writ of certiorari to those raised in the petition for rehearing at the Court of Appeals); In re Morrison, 321 S.C. 370 n.2, 468 S.E.2d 651 n.2 (1996)

(noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal).

Conclusion

Appellant respectfully requests this Court deny the state's petition for rehearing.

Respectfully Submitted,

s/Susan B. Hackett

SUSAN B. HACKETT

Appellate Defender

This 17th day of April, 2020.