STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

NICK RUSSELL EVANGELISTA,

APPELLANT

APPELLATE CASE NO. 2018-000448

FINAL BRIEF OF APPELLANT

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1.

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2.

Whether the court erred by excluding evidence the decedent operated a financial scam to "return" merchandise she never purchased for refund money, and that she had appellant take over or participate in the scam once she was discovered, since this evidence was relevant to appellant's battered person's self-defense case, since it was probative of the level of manipulation and control the decedent exercised over appellant?

STATEMENT OF THE CASE

Appellant was indicted by the Beaufort County Grand Jury for the offense of the murder of his live-in girlfriend, Rebecca Melton. R. 597 – 598. Appellant's case was called to trial on December 11, 2014, before the Honorable Deadra L. Jefferson, and a jury. Trasi Campbell and James Bell represented appellant. Hunter Swanson and Marry Coppage Jones were the assistant solicitors. R. 1.

On December 14, 2014, the jury found appellant guilty of murder. R. 508, ll. 5-8. Judge Jefferson sentenced appellant to forty-five years' imprisonment. R. 509, ll. 7-12.

This appeal follows.

STANDARD OF REVIEW

Expert testimony

The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted). The circuit court's decision to admit expert testimony will not be reversed on appeal absent "a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006) (citations omitted). An abuse of discretion occurs when the circuit court's conclusions "either lack evidentiary support or are controlled by an error of law." State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (quoting Douglas, 369 S.C. at 429–30, 632 S.E.2d at 848) (internal quotation marks omitted). "A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." State v. Grubbs, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing Means v. Gates, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct.App.2001)). To show prejudice, the appellant must prove "that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citing Means, 348 S.C. at 166, 558 S.E.2d at 924).

Admission of evidence

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). " An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are

controlled by an error of law." Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

ARGUMENT

1.

The judge erred by ruling the testimony of Dr. Lois Veronen was not "appropriate" testimony for the pre-trial immunity hearing as to the battered person's syndrome and appellant's state of mind, since Dr. Veronen's expert testimony was relevant at the immunity hearing in the same manner as it was in appellant's self-defense case later before the jury.

Relevant Facts

Prior to trial, defense counsel Campbell reminded the judge that they had a pending motion to have Dr. Lois Veronen testify at the immunity hearing. "The reason Dr. Veronen should be able to testify at the immunity hearing is because she can speak to the specific elements in the statute, which the defendant has the burden to prove." R. 3, ll. 3-19.

The judge asked how Dr. Veronen could ethically testify about something "she was not a witness to [the homicide]." "They can't say what they think about somebody's state of mind. . . " R. 3, l. 20 – 4, l. 5.

Defense counsel Campbell answered that Dr. Veronen was an expert in the field of the battered person syndrome and that would be the subject matter of her testimony. R. 4, l. 6 – 6, l. 23. Campbell explained that Dr. Veronen's testimony went to the element that appellant reasonably believed he had to use deadly force to meet her attack. Campbell said that appellant's state of mind and how he perceived the "rapid succession of events on that night, it's extremely relevant evidence." R. 7, ll. 17-23.

Defense counsel cited Dr. Veronen's report which was attached to her motion and memorandum in support of motion to bar prosecution under S.C. Code §16-11-410 through 450. R. 510 – 572.

In this report, Dr. Veronen concluded that:

> [N]ick has been a victim of violent acts, assaults, and degrading acts in his relationship with Becca Melton. These acts coupled with his compassion for her depression and his love for her, produced cognitive, affective, and behavioral changes in Nick that have come to be known as the "Battered Spouse Syndrome". His cognitive problem-solving ability had been impaired, and he was reliving experiences of previous abusive episodes when she attacked him. He acted reflexively in a way to preserve his life. This was not a conscious free-thinking adult man capable of volitional acts, but a man biologically and psychologically responding to past threats and attacks.

R. 516 – 525.

The trial judge was dismissive of Dr. Veronen's report, and she added: "[I]'ve never had a psychological expert testify specifically about what somebody thought who wasn't there. And I don't think it's admissible." The judge stated that not only did she think the expert testimony was admissible but she thought it would be unethical for Dr. Veronen to testify about appellant's state of mind. R. 5, l. 24 – 7, l. 21.

The solicitor moved that Dr. Veronen not be allowed to testify at the immunity hearing. However, she stressed that it was appellant's burden to prove he acted in self-defense and that he had no duty to retreat by a preponderance of the evidence at the immunity hearing. "And I think immunity is a bar to prosecution. It's not a defense." The judge responded, "It is, [That is] correct." R. 8, ll. 13-20.

The solicitor added: "And so we are dealing with separate issues here. Self-defense is what the purview of battered spouse falls under. It's only relevant to state of mind in a self-defense case. The defendant has already made statements regarding what happened. And putting up the testimony of Dr. Veronen to expound on his ever-evolving story of what happened the night of the murder does not seem appropriate *at this stage*. There's certainly a lot of evidence to the contrary that the defendant was in fear." The solicitor added that she intended to

prove the decedent did not pose a threat to appellant, "and I think that it just presents a factual issue, *not a matter of law at this point that the court can rule on.*" R. 8, l. 22 – 9, l. 9. (emphasis added). The judge would agree that the expert testimony on the battered person syndrome was admissible for the jury to consider self-defense, but improper for the court to consider as to immunity from prosecution.

Defense counsel Campbell responded that the defense was only relying on Subsection C of the Castle Doctrine statue [S.C. Code §16-11-440 (C)] and not the presumption of reasonable fear regarding an intruder [S.C. Code §16-11-440 (A)]. Under Subsection C, whether or not appellant was reasonably in fear "is a fact that Your Honor would have to find at the immunity hearing. And Dr. Veronen is critical to the proof of why his fear was reasonable." R. 9, ll. 10-21.

The judge then challenged defense counsel Campbell to cite her a case that says "a therapist can tell me about somebody's state of mind." The judge repeated that she did not think Dr. Veronen's testimony was proper and said that it would be "speculative at best." R. 9, l. 22 – 10, l. 12.

Defense counsel Campbell argued that appellant was suffering from post-traumatic stress disorder and trauma from repeated attacks on him by the decedent, and that this evidence was relevant. R. 10, l. 23 – 11, l. 6. The judge disagreed, stating she did not think any of this "rises to the level of stand your ground." The judge said, "It might amount to a self-defense argument. I don't know that it's going to meet the preponderance of the evidence of stand your ground." R. 11, l. 25 – 12, l. 5.

During the immunity hearing, appellant testified that he was a physician's assistant with an orthopedic practice. He met the decedent, Rebecca Melton, online after his divorce. R. 43, l. 5 – 46, l. 3.

After about six months of dating, the decedent moved in with appellant. Appellant said the decedent had a young son from a previous marriage but she was not allowed to visit the child. Appellant testified this made the decedent suicidal. R. 45, l. 22 – 48, l. 15.

The verbal abuse of appellant started after the decedent drank and mixed medication with alcohol. Appellant explained, for example, that on St. Patrick's Day in 2013 that the decedent attacked him. "She pulled my hair, scratched my face." R. 49, l. 2 – 50, l. 17.

On a Memorial Day weekend, the decedent again became violent and threatened appellant's children and his father. The decedent said she could have them killed by "her father" who had ties with organized crime. Appellant said he believed the decedent could have him and his family killed. "She was very persuasive, very angry. I didn't know where that anger came from a lot of times. So on that night, she again physically abused me, pulled my hair, scratched me. I did call the police." R. 50, l. 23 – 52, l. 24.

Appellant explained that the threats continued, and that he would have to check in to hotels on occasion when the decedent became violent. He also stayed with his ex-wife on one occasion. On another occasion, the decedent stabbed appellant in his forearms with the car keys, and appellant, a physician's assistant, was able to treat his own wound with a "compressive wrap." R. 57, l. 8 – 59, l. 2.

The decedent was arrested twice for criminal domestic violence on appellant, and appellant paid for her lawyer after these arrests. R. 59, l. 4 – 60, l. 4. The decedent was also

ordered to wear an "alcohol leg monitor," which appellant said she did for thirty days. R. 60, ll. 5-24.

Appellant explained that the decedent continued to attack him physically, that she was taken to jail for the attacks, and that she continued to abuse her medication. R. 62, l. 5 – 66, l. 11.

Appellant also testified that he knew the decedent was involved in defrauding businesses, and that the decedent solicited her daughter to be part of that scheme. The decedent also told appellant "you're going to do all the false returns because she wasn't allowed to do it anymore," and appellant did that that at her insistence. R. 68, ll. 13-25. The judge, as seen in issue two infra, would not allow the jury to hear this testimony.

Further, when the decedent was angry with appellant she would hide his clothes and sometimes bury his clothes so he would have to dig them up and wear them. R. 69, l. 4 – 70, l. 19.

As will be seen infra, Dr. Veronen testified before the jury that this was another manner of the decedent manipulating, controlling, and humiliating appellant. Appellant's lawyer, Dudley Ruffalo, would also testify in the presence of the jury that appellant seemed very downcast. "His clothes were disheveled, somewhat dirty, unironed. He appeared at ends as the expression goes." R. 420, l. 19 – 421, l. 5.

Appellant testified on the night that he killed the decedent she attacked him again with her car keys, which she used "like a weapon, pulling my hair, scratching my throat." Appellant said he was afraid the decedent would stab him again, and he only remembered "grabbing some

bubble wrap to try to make her stay quiet."[1] R. 70, l. 23 – 73, l. 17. Dr. Veronen, when allowed to testify as to the battered person defense in the presence of the jury as to appellant's state of mind at the time he killed the decedent spoke of appellant's "disassociative times . . ." R. 389, ll. 4-13.

On cross-examination, appellant said numerous 911 calls were made. Appellant told the 911 dispatcher in one call that "my girlfriend is threatening me continuously . . . I'm with her in the same place." R. 74, ll. 3-23.

Appellant confirmed that the only weapon he was stabbed with was the decedent's car keys. Being a physician's assistant, he treated himself for his injuries. R. 76, ll. 2-22. Appellant also said he did attempt to hide the truth that the decedent was "horribly abusive" to him from others. R. 78, ll. 17-20. Appellant confirmed that he was 5'8," 165 pounds. The decedent was 5'4", 120 pounds. R. 77, ll. 8-15.

After he killed the decedent, appellant admitted he wrote in his journal that she did not deserve to die and that she was a good and beautiful person. Appellant also wrote, "There are two sides to every story, the truth is somewhere in between. I say that not to defend my action, because it's indefensible." R. 82, ll. 7-23.

Appellant confirmed that the decedent was naked at the time of their final struggle, and that he told the investigators he wanted her to stop breathing when he killed her. R. 86, l. 13 – 87, l. 23. Appellant repeated that the decedent attacked him with her car keys before he killed her. R. 88, ll. 12-23.

Investigator Jon Adams testified he was called by Palmetto Dunes security and they found a "deceased white female that was nude in a spare bedroom in the house she shared with

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[1] The decedent was still naked at the time she was killed. Appellant said they had sex earlier before the decedent became physically violent once again. R. 86 – 88.

appellant." R. 89, l. 21 – 90, l. 5. Adams said his investigation led him to understand that this was a "tumultuous" relationship that Adams claimed was "mutually combative, that they were drawn to each other for some strange reason, because they would move from place to place [together]." R. 91, l. 23 – 92, l. 3.

Adams testified when he was dispatched to the location, "I was not sure if Mr. Evangelista wasn't also a victim of homicide." R. 99, ll. 2-7. Adams said he was familiar with 911 calls that appellant made where appellant told the 911 operator that "My girlfriend hit me. It's over. I've had enough. You are going to jail. . . You should have thought about that when you fucking beat me up." He knew the decedent had hit appellant with her fists and that she threw a bottle and that "his face was bleeding." R. 102, l. 5 – 103, l. 17.

Adams also said he learned that the decedent sent text messages to one of her girlfriends where she wrote: "I made him [appellant] dig his clothes up again. He will know better next time than to mess with me again." R. 103, l. 18 – 104, l. 5. Adams confirmed that the decedent was attempting to demean appellant and joking with one of her girlfriends about how she treated appellant. R. 103, l. 24 – 104, l. 4. Adams finally confirmed that the condominium was "a wreck." Adams searched it when the decedent's body was found, and a knife was found "on a center table by the bedrooms." R. 112, ll. 2-24.

The solicitor then argued that appellant brought on the difficulty in the relationship and that "just because this was a toxic relationship, does not mean the victim was the primary aggressor." The solicitor also argued that appellant continued to come back to the home despite his complaints of abuse. She noted that appellant was larger and more physically fit than the decedent, and that the decedent was naked and allegedly without a weapon when appellant killed

her. The solicitor argued this all presented a jury issue and that the defense had not met their burden on statutory immunity. R. 115, l. 10 – 116, l. 20.

Defense counsel Campbell then argued that under Subsection C of the immunity statute, appellant was in a place he had a right to be and acting lawfully. Campbell repeated that immunity was sought under Subsection C of the statute, and she referenced the battered person syndrome diagnosis. Campbell said that the decedent continuously abused appellant, "She pulled him in, the grifter that she was, her machinations and her schemes and what she did to him, she had done to him so many times before." "It did end that night when he protected himself, as he had a right to do under South Carolina law, from another attack." R. 117, l. 25 – 120, l. 15.

The solicitor noted that the defense referred to the "battered spouse syndrome as a diagnosis." "[T]here's been absolutely no testimony regarding battered spouse syndrome." She claimed appellant had a duty to retreat and she argued appellant was not entitled to a presumption of fear under the statute. The defense, again, was only seeking immunity under Subsection C, the stand your ground provision, and not claiming the advantage of the Subsection A presumption. R. 120, l. 18 – 121, l. 10.

The judge ruled that appellant had failed to meet his burden to prove he was entitled to immunity by a preponderance of the evidence. The judge noted that appellant could present his self-defense case to the jury but that she was denying immunity. She said she reserved the right to issue a written order. However, a written order was never issued. R. 121, l. 12 – 124, l. 24.

Discussion

As seen, the defense's immunity argument was grounded in S.C. Code § 16-11-440(C). Appellant was not relying on the "presumption of reasonable fear of imminent peril of death or great bodily injury" contained in S.C. Code §16-11-440(A).

Rather, S.C. Code § 16-11-440(C) states, "A person who is not engaged in unlawful activity and who is attacked in another place where he has the right to be, including, but not limited to, his place of business, has no duty to retreat and has a right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60."

The principal case involving this subsection of the immunity statute, which the defense relied on, was State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016). See, Motion and Memorandum in Support of Motion to Bar Prosecution under S.C. Code § 16-11-410 – 450 at pp. 4-5; R. 513 – 514.

In State v. Jones, our Supreme Court rejected the state's argument that -- appellant being in the same home she shared with her decedent boyfriend, and the parking lot of that apartment complex -- was not in "another place where she had a right to be." The Court determined that the trial judge correctly found "another place" in the statute intended to encompass dwellings, residences, occupied vehicles, along with "any other place where a person has a right to be and is acting lawfully." State v. Jones, 416 S.C. at 289, 786 S.E.2d at 135.

In State v. Jones, Jones was attacked by her boyfriend and she stabbed him on her way out of the apartment. The boyfriend was following Jones around, apparently ensuring she did not take any of his possessions when she left. Jones had grabbed a knife for protection and

because she believed her boyfriend was getting ready to hit her again she "grabbed the knife out of [her] shirt and stabbed him' one time in the chest. Jones then ran out of the apartment." State v. Jones, 416 S.C. at 288, 786 S.E.2d at 135.

In State v. Jones, applying Subsection C, the Supreme Court found the trial judge correctly ruled that Jones was entitled to immunity under S.C. Code § 16-11-440(C), because she: (1) was not engaged in unlawful activity at the time of the attack; (2) was attacked in a place where she had a right to be; (3) she did not have a duty to retreat but, rather, had the right to stand her ground and meet force with deadly force; and (4) acted in self-defense. State v. Jones, 416 S.C. at 289 – 290, 786 S.E.2d at 135.

Here, defense counsel correctly did not rely on the presumption contained in S.C. Code § 16-11-440(A), because appellant and the decedent in this case had an equal right to be in the residence. See, State v. Curry, 406 S.C. 364, 369, 752 S.E.2d 263, 265 (2013).

The solicitor in this case properly argued the defense had the burden by the "preponderance of the evidence" to prove appellant was entitled to immunity under the statute. See, State v. Duncan, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011). However, the solicitor successfully urged that Dr. Veronen's testimony was not proper during the immunity hearing because this involved a ruling by the trial judge as a "matter of law," and not a jury verdict as to self-defense.

This was fundamentally unfair for several reasons. As the Supreme Court recognized in State v. Jones, "Whether a victim of domestic violence may invoke immunity from prosecution under the provisions of Stand Your Ground laws has been the subject of much debate among legal scholars. See, e.g., Brandi L. Jackson, No Ground On Which to Stand: Revise Stand Your Ground Laws so Survivors of Domestic Violence are No Longer Incarcerated for Defending

Their Lives, 30 Berkeley J. Gender L. & Just. 154, 168-70 (2015) (noting that '[s]ome SYG jurisdictions have limited the application of the defense to only those situations where an intruder attacked the defendant, depriving domestic violence survivors of the SYG privilege when their attacker is an intimate partner or a cohabitant' but recognizing several jurisdictions have abolished 'the distinction between an intruder and co-occupant when evaluating whether the defendant could invoke the SYG defense." See, State v. Jones, 416 S.C. at 299, 786 S.E.2d at 140-141.

"Appellate courts have responded by authorizing a person, who is charged with a violent crime against a cohabitant that occurs in their residence, to invoke the doctrine of self-defense and seek immunity from prosecution." State v. Jones, 416 S.C. at 299, 786 S.E.2d at 141, *citing* State v. White, 20 Neb.App. 116, 819 N.W.2d 473 (2012); State v. Effler, 207 N.C.App. 91, 698 S.E.2d 547 (2010); State v. Thomas, 77 Ohio St.3d 323, 673 N.E.2d 1339, 1343 (1997); State v. Harden, 223 W.Va. 796, 679 S.E.2d 628, 640 (2009).

As Dr. Veronen would later note before the jury, the "battered person's syndrome" is part of an evolution of the "battered women's syndrome" and the "battered spouse's syndrome" that had its roots in research of traumatized Vietnam veterans returning home.

Our Supreme Court recognized and applied the principles of the battered women's syndrome in Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992), in which the petitioner, Bertha Robinson, killed her husband while he was sleeping. The Supreme Court found pursuant to the battered women's syndrome that Robinson could still be not guilty by reason of self-defense since a battered woman can act at a time when the batterer is not physically abusing her, allowing her meet the first element of self-defense, which requires that she not be at fault in bringing on the difficulty.

The Supreme Court noted that the second element of self-defense, which requires the defendant to actually be in imminent danger, or believe that he or she was in imminent danger, to also be met when the victim believes she is in imminent danger "even though her batterer is not physically abusing her when she acts." See, Robinson v. State, 308 S.C. 74, 79, 417 S.E.2d 88, 91 (1992).

As to the third element of self-defense, which requires a defendant to show a reasonable, prudent person in the same or similar circumstances would have acted as the defendant did, the Court found that element can also be satisfied by the belief that only the death of the batterer can provide relief. Here, as in Robinson, appellant had no duty to retreat, since he was on his own premises.[2]

Since at an immunity hearing, appellant had to also prove the elements of self-defense, save the duty to retreat, by a preponderance of the evidence, it should hopefully be apparent how unfair the solicitor's position and the judge's ruling in not allowing Dr. Veronen's testimony was at the immunity hearing.

Appellant sought to prove he was entitled to immunity because he met the elements of self-defense and because he suffered from the "battered person's syndrome." To have the battered person's syndrome understood and applied at the immunity hearing, it mandated expert testimony. That expert in this case was Dr. Veronen. See, State v. Curry, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013)(necessity of proving the elements of self-defense also).

The trial judge in this case denied appellant a full and fair hearing on his right to immunity under S.C. Code § 16-11-440(C), on his right to stand his ground, where he suffered from the battered person's syndrome, when the judge reasoned that Dr. Veronen's testimony

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[2] The Court did not grant relief in Robinson because it was a post-conviction relief case, and it could not fairly be held that defense counsel was ineffective for not anticipating the defense.

would be improper at the immunity hearing because it would be unethical. The judge reasoned Dr. Veronen's testimony was proper for a jury to consider as to self-defense, but improper for the court to consider as to immunity.

This record contains Dr. Veronen's proposed testimony because in the presence of the jury, the same evidence appellant maintains was improperly excluded at the immunity hearing, Dr. Veronen testified as an expert in the battered person syndrome. She was also cross-examined at length. R. 373, l. 25 – 374, l. 20.

Dr. Veronen told the jurors that the purpose of her evaluation was to identify "his current functioning, to identify the background of the relationship between Rebecca Melton and Nick Evangelista. And also to determine, at the time the incident took place, the death of Rebecca Melton, what was Nick's state of mind." She was to determine whether appellant's history and psychological profile was consistent with "spousal or battered person syndrome." R. 375, ll. 1-14.

Dr. Veronen explained that the battered person syndrome involved "higher levels of fear." "It's a numbness or psychological disconnection from the immediate threat and reality of a situation." R. 375, l. 1 – 376, l. 1.

Again, Dr. Veronen testified how the research had developed from the study of Vietnam veterans and post-traumatic stress disorder. She explained the "triggers" that were later researched with "victims of sexual assault." R. 377, l. 4 – 378, l. 2.

Dr. Veronen opined, "we determined that Nick was traumatized by the increasing threats and Becca's degrading behavior. Basically, to the outside world, Nick was a hard-working, competent, compassionate professional, treating patients in the orthopedic clinic or assisting surgeries at the hospital. At home, at night with Becca, he became an appeaser, a highly

conforming partner to her depressive and at times irrational demands." R. 380, ll. 9-23. Dr. Veronen testified that appellant was suffering from post-traumatic stress disorder and a major depressive disorder. R. 381, l. 14 – 383, l. 4.

Dr. Veronen explained that the battered person syndrome was more difficult for men to handle "because of feelings [of] pride, that they should be able to manage this situation." There was also a stigma for a man being a victim of violence at the hands of his partner. "And there's certainly humiliating aspects, embarrassment, all those factors that are associated with men not reporting." R. 383, ll. 5-20.

On the night appellant killed his line-in girlfriend, Dr. Veronen opined that appellant was suffering from the battered person syndrome and he was suffering from post-traumatic stress disorder. This was "[t]he psychological disorder of, at times reliving experiences, heightened levels of fear and anxiety, and dissociative times in which one has a loss of complete awareness because of the heightened emotional arousal." Dr. Veronen said appellant *was not "a free-thinking adult man" and "he was not engaging in volitional behavior."* R. 389, ll. 4-21. (emphasis added).

Appellant should be granted a new trial where he can properly have the court consider the expert testimony of Dr. Veronen on the battered person's syndrome on the issue of immunity from prosecution pursuant to S.C. Code § 16-11-440(C).

2.

The court erred by excluding evidence the decedent operated a financial scam to "return" merchandise she never purchased for refund money, and that she had appellant take over or participate in 1the scam once she was discovered, since this evidence was relevant to appellant's battered person's self-defense case, since it was probative of the level of manipulation and control the decedent exercised over appellant.

Relevant Facts

Appellant largely repeated his immunity hearing testimony on him being a physician's assistant, meeting the decedent on line, them moving in together in June, 2013, her threats, and the beginning of her physical violence against him. R. 280, l. 6 – 291, l. 23. Appellant went back over the violence of the Labor Day weekend where the decedent punched him, scratched him, and pulled his hair. R. 297, l. 6 – 299, l. 2.

Appellant hired an attorney for the decedent for each of her three CDV charges. Even though appellant was a victim of CDV, and he had never been convicted of that crime himself he was told he did "not qualify" for any victim's services. R. 300, l. 9.

Appellant explained how the decedent would hide his clothing, bury his clothing, and "there would be no clothing [to go] back to work [in] the next day." Appellant was forced to dig up his clothes so he had something to wear. R. 300, l. 10 – 301, l. 9. The decedent also destroyed appellant's personal property including his "racing bike," and "guitars." The decedent continued to abuse a combination of prescription drugs and alcohol, and she was violent. Appellant bailed the decedent out of jail, and even know he knew it was wrong, he enabled the decedent by writing her a prescription for drugs. R. 301, l. 10 – 305, l. 16.

Defense counsel then asked appellant: "Were there things that you did with Rebecca in businesses around the Lowcountry that you knew were wrong but did it anyway?" Appellant said there were such things, but the solicitor objected before appellant could explain. The judge observed she thought the defense wanted to get into prior bad acts that were not the subject of a conviction. R. 304, l. 18 – 306, l. 17.

The defense then proffered appellant's testimony. Appellant explained the decedent's financial scam. The decedent would go to "T.J. Maxx, Marshalls, or Home Goods" and take price tags off the items and bring the tags home. The decedent would find other clothing from Goodwill or online, and then exchange them for money with the store she stole the tag from. R. 307, ll. 7-21.

Appellant was aware of the decedent's scam. However, the decedent ultimately was banned from returning items to the stores when they apparently figured out she was a scam artist. The decedent then sought out appellant to "do the returns in her place." Appellant then participated in this theft for the decedent, as did the decedent's daughter. R. 307, l. 7 – 308, l. 12.

Defense counsel Campbell argued, "So the defendant takes the position that in order to have a full-throated illustration of the relationship of Rebecca Melton to Nick Evangelista in terms of her level of manipulation over him, this is relevant to the level of manipulation that she could bring him to." R. 308, ll. 17-23. Defense counsel said the level of manipulation the decedent had over appellant was illustrated by her having him commit a crime for her. R. 308, l. 17 – 309, l. 1.

The judge ruled that appellant's word without corroboration was not sufficient to be clear and convincing evidence of what she reasoned was a prior bad act. Defense counsel then cited

the receipts, which were in evidence, as evidence. The judge stated, "That doesn't prove she stole it. And tags are very, very advanced now. You can't just take a tag off something and put it on something else. Those tags are encoded. They know exactly when you purchase things. That's how you can return stuff without a receipt. So I'm a little hard-pressed as to how any of that would meet the clear and convincing standard." R. 309, ll. 8-18.

The solicitor argued the evidence was not relevant and it was an attack on the decedent's character. As to lack of evidence, defense counsel stated:

> Well, I will just add that her calendar and her handwritten notes, which are in evidence, support her activities of slating [stating] the times and the dates for which she would do returns and the times that she would have Nick do returns. So there is evidence in the record that she was making all of these returns, that she solicited Nick to make returns as well. And I believe his testimony as to how the returns were transacted is sufficient to overcome any argument by the State, particularly in terms of our defense and in terms of our battered person syndrome expert [Dr. Lois Veronen] who will testify to the manipulation of Mr. Evangelista.

R. 310, ll. 6-16.

The judge said she thought the only purpose of this evidence was to impugn the character of the decedent and have the jury believe she was a bad person. The judge added that she did not think the defense argument about manipulation, threats, and connivance was persuasive. The judge stated she did not know if the decedent was a "compulsive shopper," and the judge reasoned that high-volume businesses such as T.J. Maxx, Marshalls, and Wal-Mart made their money when "you return stuff and you buy more stuff." The judge ruled this scam evidence was not admissible. R. 311, l. 7 – 313, l. 7.

On cross-examination, appellant said he did not remember if he told investigators that that he feared for his life when he killed the decedent. R. 367, l. 23 – 368, l. 1. He admitted he

told the investigators he blacked out and that he had snapped at the time he killed the decedent. R. 368, ll. 3-5.

As seen above, Dr. Lois Veronen then testified as an expert in the battered person syndrome. R. 373, l. 25 – 374, l. 20. Dr. Veronen explained that the battered person syndrome involved "higher levels of fear." "It's a numbness or psychological disconnection from the immediate threat and reality of a situation." R. 375, l. 1 – 376, l. 1.

Dr. Veronen said that appellant was suffering from the battered person syndrome and that he was suffering from post-traumatic stress disorder and "the psychological disorder of, at times reliving experiences, heightened levels of fear and anxiety, and dissociative times in which one has a loss of complete awareness because of the heightened emotional arousal." Dr. Veronen said appellant was not a free-thinking adult male and he was not engaging in volitional behavior at the time he killed the decedent while suffering from the battered person syndrome. R. 389, ll. 4-21.

The judge instructed the jury on how a "battered person" may act in self-defense. The judge instructed that a battered person can act in self-defense "even though the batterer is not being physically abusive when the defendant acts. This is because of the "heightened sense of imminent danger arising from the perpetual terror of physical and mental abuse. Often the terror does not decrease even when the batterer is absent or asleep." The battered person can reasonably come to believe that "[o]nly the death of the batterer can provide relief." R. 500, l. 25 – 501, l. 3.

Discussion

The battered person syndrome is a very complex psychological phenomenon that is difficult to understand in the best of circumstances. As Dr. Veronen explained, when it involves

a man, it is even more complex for people to understand because of a man's pride and his inability to discuss the syndrome. It would, respectfully, be difficult for a jury to understand how a man could be manipulated and forced to live in a manner he did not wish to, and to do things he did not wish to do by this woman. That is particularly so where the solicitor emphasized that appellant was physically fit, he was bigger than the decedent, and the solicitor claimed appellant's injuries were minor. R. 475, l. 20 – 480, l. 2.

The excluded evidence the decedent continued her returned merchandise scam once she was banned by having appellant take over the scam was relevant to the battered person syndrome.

While the jury heard from Dr. Veronen that appellant suffered from the battered person syndrome, that he had post-traumatic stress disorder, and a major depressive disorder, and that he was not a free-thinking adult male at the time he killed the decedent, this was going to be most difficult for a jury to understand. The solicitor wanted the jury to think Dr. Veronen was nothing but a hired gun and that is why she cross-examined her about her fee. R. 390, l. 4 – 391, l. 9.

The jury needed to hear evidence of how the decedent manipulated appellant to appreciate the battered person syndrome as it related to appellant's self-defense case. Evidence that she drank too much and was apparently addicted to the prescription drugs she used, and that she hit appellant was evidence she was a violent addict.

Evidence that she buried appellant's clothes, and took pleasure in appellant digging them up was evidence she enjoyed humiliating appellant. However, the excluded evidence that the decedent had appellant take over her returned merchandise scam was evidence of how she could manipulate and control appellant to the point of having him commit crimes that surely would have cost him his career if he had been arrested.

The most difficult part of the battered person syndrome, like the battered woman's syndrome, is attempting to educate a jury how the battered person can be manipulated to stay with the batterer when common sense dictates they should leave. See, Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992).

The definition of relevant evidence is broad. "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 or less probable than it would be without the evidence." Rule 401, SCRE. Appellant demonstrated the reason this relevant evidence was admissible as to the battered person syndrome in support of his self-defense case and the court erred by reasoning it was an merely an attack on the decedent's character under Rule 404(b), SCRE, or otherwise.

"Other bad acts" evidence is usually analyzed as it pertains to a defendant, and whether it meets a State v. Lyle, 125 S.C. 406, 118, S.E. 803 (1923), exception. Here, the evidence of the returned merchandise scam was offered because it showed the decedent's ability to manipulate and control appellant, which was relevant to his battered person self-defense case. The evidence here was not offered to demonstrate the decedent's bad character. Cf. State v. Stokes, 345 S.C. 368, 548 S.E.2d 202 (2001).

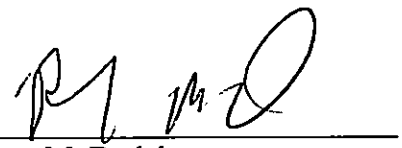
When evidence of a battered person syndrome is offered the syndrome by its nature is going to include the batterer's bad conduct and abuse over time. See, Robinson v. State, 308 S.C. 74, 417 S.E.2d 88 (1992). Such hypersensitivity as displayed, respectfully, by the trial judge here regarding the decedent's character in light of appellant's right to offer this defense, and to have the jury analyze evidence of that defense in accordance with the judge's jury charge was misguided.

Finally, the judge's vague ruling that the evidence was more prejudicial than probative was also erroneous. When applied correctly, Rule 403, SCRE, provides "although relevant, evidence may be excluded if its probative value is *substantially outweighed by the danger of unfair prejudice*." Thus, the probative value must be *substantially outweighed* not only by the danger of prejudice, but of *unfair prejudice*. Unfair prejudice means an undue tendency to suggest a decision or verdict on an improper basis. See, State v. Gilchrist, 320 S.C. 621, 496 S.E.2d 424 (1998).

The admission of this evidence of the return scam and how the decedent manipulated appellant into taking over it or participating in it was relevant. It would have allowed the jury to have important context in understanding Dr. Veronen's expert testimony, and it would have given context to what in isolation looked like Dr. Veronen's unsubstantiated opinion that appellant was an extremely manipulated man who was not a "free-thinking" man at the time he killed the decedent in self-defense. The judge's erroneous exclusion of this financial scam manipulation evidence was prejudicial to appellant's battered person syndrome self-defense case, and he should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed, and this case remanded to the Beaufort County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of October, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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."

October 15, 2019.

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