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Aug 03 2020

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JERMAINE MARQUEL BELL,

APPELLANT

APPELLATE CASE NO. 2017-001500

Appeal from Chester County

Paul M. Burch, Circuit Court Judge

Opinion No. 5742

RETURN TO THE PETITION FOR REHEARING

This Court's Opinion is correct, and the state has failed to point to any reason to grant rehearing. This Court properly reversed based on existing precedent, and the state's petition for rehearing on issue preservation, the merits, and harmless error should be denied.

**Error preservation**

In its petition for rehearing the state argues that whether the statements constituted evidence of prior bad acts precluded by Rule 404(b), SCRE, was unpreserved because appellant did not make any argument, apart from citing Rule 404(b), SCRE. This Court's opinion correctly

addressed the merits of appellant's argument on the Rule 404(b) issue.<sup>1</sup> *State v. Bell*, Op. No. 5742 (S.C. Ct. App. Filed July 8, 2020) (Shearhouse Adv. Sh. No. 27 at 36).

At trial, defense counsel's objections, which included the evidentiary rule basis for objection, were sufficiently specific. *See State v. Taylor*, 333 S.C. 159, 508 S.E.2d 870 (1998). During Mitchell Mayfield's (decedent's husband) testimony defense counsel contemporaneously objected to the statement and stated Rule, 404(b), SCRE as the basis of the objection. R. 16, l. 21-17, l. 3. Later, during Jessica Lindsay's (decedent's daughter) testimony, defense counsel again objected stating, "same as before," and raised an additional basis Rule 403, SCRE. R. 78, ll. 10-16. *See State v. Wannamaker*, 346 S.C. 495, 552 S.E.2d 284 (2001) (to preserve an issue regarding the admissibility of evidence, a contemporaneous objection must be made). In both instances, the trial judge immediately ruled on the objection clearly stated by defense counsel. The record below reflects that the trial judge understood what testimony defense counsel was objecting to and the basis for the objection and ruled without requiring argument from defense counsel.

### **Merits**

After alleging this Court addressed an unpreserved issue, the state argued, in the alternative, that even if appellant had preserved the objections, the statements were not evidence of a prior bad act under Rule 404(b), SCRE, but rather only the decedent's suspicion that appellant had stolen the items from her. The Court rejected this argument finding the decedent's suspicion that appellant was stealing was evidence that (1) the decedent believed her property was stolen or lost; and (2) something led the decedent to believe appellant was responsible. Therefore, this Court correctly found the state elicited the decedent's belief that appellant was stealing to demonstrate that appellant had previously stolen from her. Additionally, this Court found that the state's

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<sup>1</sup> Appellant does not concede that his other evidentiary arguments were unpreserved.

distinction between evidence of prior bad acts and evidence of the belief of prior bad acts would swallow Rule 404(b)'s preclusion of prior bad acts evidence.

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 our Supreme Court in *State v. 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)).

The state failed to present any argument in its petition for rehearing that the prosecution proved by clear and convincing evidence that appellant stole personal items from the decedent, 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 critical aspect exposes its inability to satisfy the elemental prerequisite of clear and convincing evidence to admissibility.

**Not harmless beyond a reasonable doubt**

The state claims the Court overlooked certain points in concluding that the challenged statements were not harmless beyond a reasonable doubt. Specifically, the state asserts the Court only considered the state’s DNA evidence and overlooked all the state’s circumstantial evidence that tended to prove appellant’s guilt. However, in its opinion the Court closely considered the facts of the case and all of the evidence in detail and concluded the state’s circumstantial evidence was “not overwhelming,” and therefore, the challenged statements were not harmless beyond a reasonable doubt.

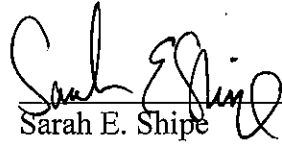
The state presented no direct evidence and minimal circumstantial evidence of appellant’s guilt. Instead, the state used the challenged statements to link appellant to a bag of the decedent’s underwear, which was found only after the police had left the scene and reported by Mayfield. The state used the challenged statements to speculate about a motive for the crime, insinuating to the jury during closing that perhaps decedent confronted appellant about the thefts or rejected him sexually

causing appellant to murder her. There was no evidence at trial, other than the challenged statements, tying appellant to this bag of decedent's belongings. The inference drawn from the challenged statements, that appellant was a sexual pervert, was not harmless beyond a reasonable doubt.

**Conclusion**

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

Respectfully Submitted,

  
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Sarah E. Shipe  
Appellate Defender

This 3rd day of August, 2020.

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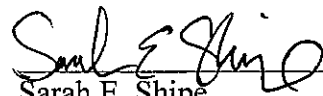
APPELLANT

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CERTIFICATE OF SERVICE

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Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Return to the Petition for Rehearing in the above-referenced case has been served upon William Edgar Salter, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 3rd day of August, 2020.



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Sarah E. Shipe  
Appellate Defender

ATTORNEY FOR APPELLANT