STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

Honorable Perry H. Gravely, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT DARRELL SHORES,

APPELLANT

APPELLATE CASE NO 2019-001708

ANDERS BRIEF OF APPELLANT

WANDA H. CARTER
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ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Constitutional Provisions

STATEMENT OF ISSUE ON APPEAL

The trial judge erred in allowing the jury to hear prior bad acts evidence during a police officer's testimony about the facts that led to appellant's arrest in this case because the officer's account included the recollection of additional information about a prior arrest warrant sworn out against appellant from another state on a charge for which he was never convicted ultimately.

STATEMENT OF THE CASE

Appellant Robert Darnell Shores was convicted of driving under suspension, providing false information to the police, resisting arrest, and an open container violation per jury trial held at the October, 2019 term of the Pickens County General Sessions Court before Judge Perry H. Gravely. Appellant was represented at trial by John G. Rechenbeil, and Assistant Solicitor Shannan S. Odom appeared on behalf of the state. Judge Gravely sentenced appellant to imprisonment for an aggregate period of one year, suspended upon the service of 90 days and probation for 18 months.

Appellant appealed. This brief follows.

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 the jury to hear prior bad acts evidence during a police officer's testimony about the facts that led to appellant's arrest in this case because the officer's account included the recollection of additional information about a prior arrest warrant sworn out against appellant from another state on a charge for which he was never convicted ultimately.

At trial, Officer Jeremiah Vissage testified that he was patrolling shortly before midnight on November 23, 2017, on Calhoun Memorial Highway when he noticed a vehicle with the head lights "stuck on" and that he pulled up beside the vehicle to motion and voice that information to the driver of the vehicle. Thereafter, the driver of the vehicle pulled into a Bojangles parking lot. Officer Vissage testified that the driver and passenger were trying to switch seats so he initiated a traffic stop, got out of his vehicle, and walked to the driver and passenger and asked for their identifications. Officer Vissage stated that they were under arrest and they initially refused to follow his instructions, but ultimately they did exit the vehicle. At first, appellant gave a false name, but later gave his true name. Officer Vissage added that he smelled alcohol coming from the vehicle and found beer under the driver's seat. R. 35, l.23-p. 50, l.2. A stipulation was read into the record that appellant's license was suspended on November 22, 2017. R. 86, lines 1-8.

Appellant testified that he and his nephew did not get out of the vehicle because Officer Vissage was completely out of control to the extent that he drove up fast to them and was demanding that they get out of their vehicle, and that "[the officer] was acting crazy, which made him in effect hesitate because he did not want the incident to escalate. R. 97, l.5-p.105, l.19.

When the state rested its case, defense counsel requested a curative charge instructing the jury not to consider the officer's mention of appellant's prior arrest warrant from 2018 that emanated out of the state of Florida, especially since it was dismissed ultimately. R. 88, l.13-

p.89, l.20. The trial judge responded that he would "include something in there." R. 89, l.2-5;R.9, l.17-23. The prior arrest warrant referenced by Officer Vissage follows:

> Q: Now, once he got out of the car, were y'all able to determine his real name?
>
> A: Yeah, we were able to determine his real name. After speaking with him for a few minutes, he, finally told us his real name. And we used that to determine he, also, had a warrant for his arrest. And that may have been the reason he…R. 49, l.17-23.

Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis. State v. Stearns, 403 S.C. 247, 742 S.E.2d 878 (Ct. App. 2013). Moreover, evidence of prior bad acts is inadmissible to suggest that the accused has the propensity to commit the crime charged. State v. Peake, 302 SC 378, 396 S.E. 2d 362 (1990). State v. Smith 309 SC 409, 419 S.E. 2d 816 (1992). Prior bad acts evidence is not admissible to show that the accused is a bad person. Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989). Also, even if prior crimes are considered under any exception; nonetheless, the prior crimes still cannot be used to show that the accused is a bad person. State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008). 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. Peake, 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 on trial for any prior arrest warrant issued against him. Therefore, any mention of prior arrest warrant served only to confuse the jury and prejudice appellant's defense as this prior bad act evidence lended credence to the idea that appellant had a

criminal disposition and was probably guilty on the charges for which he was on trial. Here, the testimony by Officer Vissage about a prior criminal case against appellant for which there was an arrest warrant sworn out against him bore no relevance to appellant's arrest on the instant charges for which he was on trial, particularly since there was no conviction on that prior arrest warrant.

The error here constituted prejudicial prior bad acts evidence that violated appellant's right to a fair trial under 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). The trial judge erred in allowing the prejudicial prior bad acts testimony in question into evidence at trial.

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.

s/Wanda H. Carter
Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of October, 2020.

STATE OF SOUTH CAROLINA

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THE STATE,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Robert Darrell Shores 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 Perry H. Gravely, which was held on October 1-2, 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 Robert Darrell Shores.

Respectfully Submitted,

s/Wanda H. Carter
Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 23rd day of October, 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) Trial transcript dated October 1-2, 2019

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

October 23, 2020

s/Wanda H. Carter
Wanda H. Carter
Deputy Chief Appellate Defender

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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."

October 23, 2020.

s/Wanda H. Carter
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