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STATE OF SOUTH CAROLINA S.C. SUPREME COURT

IN THE SUPREME COURT

ORIGINAL

Certiorari to Sumter County

Honorable Brian M. Gibbons, Circuit Court Judge

MICKEY MARKELL JOHNSON,

APPELLANT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001292

BRIEF OF APPELLANT
PURSUANT TO WHITE V. STATE

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in allowing extensive expert and lay testimony on gangs because under State v. Lyle, it suggested prior bad acts, criminal propensity, was unduly prejudicial, and it bolstered the testimony of the co-defendants who testified for the State?

STATEMENT OF THE CASE

Petitioner adopts the statement set forth in the petition for writ of certiorari granting this belated appeal.

ARGUMENT

The trial court erred in allowing extensive expert and lay testimony on gangs because under *State v. Lyle*¹ it suggested prior bad acts, criminal propensity, was unduly prejudicial, and it bolstered the testimony of the co-defendants who testified for the State.

During pre-trial motions defense counsel noted that this is a case that the State is going to allege that it's a gang-related retaliation shooting. (App. p. 6, lines 10-18). A shootout took place early in the day at an apartment complex on March 22, 2011 between two gangs, 135 Piru and Folk Gang Nation. No one was hurt. Later in the day petitioner, who the State alleges is the leader of 135 Piru gang, ordered one or more of his members to go over to a residence of an apartment complex and shoot an individual of the rival gang. (App. p. 7, line 10- p. 8, line 13).

Mentioning the word gang is unduly prejudicial. To say that petitioner is a gang member will put in the jury's mind that he is a bad person and that he must have ordered the hit. (App. p. line 14- p. 9, line 21). Evidence of gangs and gang activity will also serve to bolster the testimony of co-defendants who will testify for the State. (App. p. 10, lines 19-22).

Of course the solicitor said he had two gang investigators who would testify at trial. He stated the following:

And what they found and you'll see from the testimony from co-defendants is -- who gave statements is that there was a gang in Sumter County called 135 Piru. It is a Blood gang that was being led -- the Sumter set was being led by Mickey Johnson, the defendant. They will also testify about what happened on -- I mean the State intends to bring out everything about how it is structured, who calls the shots, everything -- well, a lot to do with how this particular gang works in Sumter and throughout the state because I mean it's -- it's a large gang that runs through New Jersey on down, Your Honor, and we intend to bring out all of that because the jury

¹ *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923)

has to know -- to under fully understand the case, they have to know exactly how this organization works. They have to know that Bless, AKA the defendant Mickey Johnson, had the ability to call the shots and order those under him to go commit certain crimes, one crime being the murder that took place on March 22nd.

All that's going to be established I think through the relevant testimony of the co-defendants and also the investigators who went through this case. The part about the importance of protecting territory, brotherhood, camaraderie, with the sporting of the flags and everything is important to go to motive as well. And all this goes back to why did the murder take place the night of March 22nd, 2011, and there's no way that the jury can understand it unless they know exactly what was going on that day, and what was going on that day is you had a gang operating in Sumter led by Mickey Johnson and then as part of a plan because of a shooting that happened, they developed a plan to get retaliation. The evidence is relevant. It tends to show facts in the case to the jury. It goes to motive. It goes to the jury understanding the full -- getting a full understanding of what happened.

(App. p. 12, line 7- p. 14, line 4).

Defense counsel's response:

MR KENT: Judge, respectfully, Mr. Goings -- his argument is exactly the problem and that's exactly what Lyle tries to prohibit. They have yet to offer a specific act that they're even trying to introduce so we can't even go with nexus or proximity or time or anything of that nature. What the State is trying to say is we want to talk about gang structure. We want to talk about everybody in a gang. We want to talk about all these people in the gang. We're not going to offer a specific act. We want to talk about gangs are bad, ladies and gentlemen of the jury, and this guy is the leader of the gang so convict him. That's not Lyle evidence.

(App. p. 14, line 16- p. 15, line 2)

Ultimately the trial court ruled that it was going to allow the mention of gangs and that its probative value substantially outweighed its prejudicial effect. (App. p. 19, lines 10-13). The trial court failed to conduct an on the record balancing test to show why the probative value of gang testimony substantially outweighed its prejudicial effect. See, State v. Spears, 403 S.C. 247, 742 S.E.2d 878 (2013).

The mere mention of gangs brings a person to think of crimes, drug dealing, and violence. Of course it did not take the assistant solicitor very long to mention gang activity in his opening argument. (App. p. 67, line 3- p. 70, line 12).

Next, the assistant solicitor called Detective Lyons as his very first witness. He was an expert witness on gangs. No gang members had testified yet for the State. Defense counsel had warned earlier in his pre-trial motion that this would bolster the testimony of the co-defendant gang members who would testify for the State. In State v. Barrett, 299 S.C. 485, 386 S.E.2d 242 (1989), the State presented the testimony of a DSS social worker prior to the victim ever testifying. Over objection, the social worker testified as to the details of what the victim had told her concerning an alleged criminal sexual conduct charge. Defense counsel argued that it constituted impermissible bolstering.

The Court on appeal ruled as follows:

Here, Thomas (the social worker) testified extensively to details of the sexual abuse reported by Victim. This error was exacerbated by the fact that, at the time Thomas testified, Victim's credibility was not subject to impeachment inasmuch as she had not taken the stand.

Although there was physical evidence suggesting the presence of sexual abuse, the State relied solely upon Victim's testimony to establish the details of the crime and the identity of the perpetrator. Other courts have held that improper bolstering constitutes reversible error under similar facts: *See e.g., People v. Sanders*, 59 Ill.App.3d 650, 16 Ill. Dec. 814, 375 N.E.2d 921 (1978); *People v. Therrien*, 97 Mich.App 633, 296 N.W.2d 8 (1979); *Smith v. State*, 100 Nev. 471, 686 P.2d 247 (1984).

The State contends that any error here was harmless in that Thomas' testimony was merely cumulative to Victim's. To the contrary, it is precisely this cumulative effect which enhances the devastating impact of improper corroboration. Accordingly, admission of the evidence mandates reversal of the conviction.

In this case Detective Lyons testified for thirty-six (36) pages (App. p. 80- p. 116) about his gang findings and expertise. This included gangs in general to gangs in Sumter County and

gangs within the South Carolina Department of Corrections. He testified about the gang known as 135 Piru in Sumter. He testified as to the structure of the gang and that he learned that petitioner was head on the gang. The gang members had to pay dues and they had to put in work for the gang and go to meetings. If they did not they would be punished by being fined or beaten. Members were initiated by being jumped or beaten. They had their own colors of burgundy, red, and green.

Detective Lyons next went into the shooting that occurred on March 22, 2011. A gang member, Rasheed Brandon, was arrested for the murder.²

On cross-examination, Detective Lyons admitted he did not have any independent knowledge of this case. His information came from the co-defendants. (App. p. 117, line 18- p. 118, line 18).

The very last witness to testify for the state was another expert in gang investigations, Special Agent Mark Benube from the State Law Enforcement Division (SLED). He was essentially a bookend for Detective Lyons' testimony. The assistant solicitor apparently felt he needed to prejudice the trial and petitioner with more expert gang investigation testimony. Agent Benube worked on the investigation with Detective Lyons. His testimony really did not add anything to the factual basis of the case. (App. p. 529, line 8- p. 547, line 17).

Only four witnesses with any experience as gang members testified in this trial. They all went into depth on gang operations. Dontae Crayton was a member of 135 Piru for a while. Before that he was a member of 9Tre Ganster Blood. (App. p. 208, line 4- p. 207, line 10). He had a first degree burglary charge but got a plea deal to second degree burglary, non-violent with an agreed eight year sentence for his cooperation in testifying. (App. p. 211, line 10- p. 212, line

² He was not tried along with petitioner.

22). He testified about details of the gang and that petitioner was the leader. (App. p. 213, line 21- p. 220, line 25).

William Morgan testified that at one time he was a member of The Bloods. Petitioner at that time was the head of that organization. (App. p. 237, lines 1-16). He was charged with pointing and presenting a firearm, criminal conspiracy, and accessory before the fact to murder. He plead only to pointing and presenting a firearm. He heard about the murder but he did not know anything about it because he was not a member of 135 Piru. (App. p. 275, line 5- p. 277, line 11).

John Stamps testified next. He gave almost 60 pages of testimony on direct examination with a great deal of it about his membership in 135 Piru. (App. p. 303- p. 362). He said petitioner was the leader of Piru. He also implicated petitioner in order to have the victim killed. (App. p. 347, line 20- p. 348, line 18). Stamps was charged with murder and conspiracy. He pled to voluntary manslaughter (0 to 15 years) and to conspiracy (0 to 5 years). (App. p. 359, line 23- p. 360, line 18).

Bryant Bradley was the last gang member to testify. He, too, gave almost 60 pages of testimony on direct examination, the majority of it about 135 Piru. (App. p. 423- p. 480). He also implicated petitioner in setting up the plan to have somebody hit. (App. p. 468, line 4- p. 471, line 17). He was facing 30 to life on the accessory charge and was pleading down to a 0 to 15 year charge. (App. p. 478, lines 17-25).

In State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991), the Court adopted that portion of the Federal Rules of Evidence 403 that states “although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” And “unfair prejudice” means “an undue tendency to suggest decision on an improper basis,

commonly, though not necessarily, an emotional one.” FED. R. EVID. 403 advisory committee’s note.

In United States v. Irvin, 87 F.3d 860, 864 (1996) the Court wrote:

We have consistently held that, under appropriate circumstances, gang evidence has probative value warranting its admission over claims of prejudice. *See Butler*, 71 F.3d at 251(collecting cases); *United States v. Thomas*, 86 F.3d 647, 652-53 (7th Cir. 1996) (collecting cases). However, we have also long recognized the substantial risk of unfair prejudice attached to gang affiliation evidence, noting such evidence “is likely to be damaging to a defendant in the eyes of the jury” and that gangs suffer from “poor public relations.” *United States v. Lewis*, 910 F.2d 1367, 1372 (7th Cir. 1990); *Butler*, 71 F.3d at 251. We therefore require careful consideration by district courts in determining the admissibility of gang membership and gang activity evidence. *Butler*, 71 F.3d at 251; *Rodriguez*, 925 F.2d at 1053.

At the evidentiary hearing defense counsel summed it all up this way:

Q. Well, what was really the state's case?

A.To be very candid, the state's case, to mimic the words of Mickey, the state's case was basically to scare the jury and to say that gangs in Sumter County were so scary and because Mickey Johnson was the leader of a gang, that he must have been responsible for making such a hit because why would somebody else have done something of that nature.

(App. p. 712, lines 16-23).

Q. Did you attempt to, prior to trial, limit or exclude any references to gang affiliations or activity in the case?

A. Yes, I did. That was my biggest fear, and Mickey and I talked about that the entire time that I was very fearful that at the mention of gang -- and always thought there a chance it could come in. But if the state was allowed to try a gang case inside of a murder case, that if you could fear the jury just enough and say, hey, this is happening in our community, I thought that would be trouble. So, we spent quite some time, a lot of pretrial motions trying to keep any mention of gang, expert testimony about gang, anything about gang out whatsoever.

(App. p. 713, line 14- p. 714, line 1)

Concerning witnesses who testified against petitioner at trial such as Bryant Bradley and William Morgan:

Q. Were they the state's main -- two of the state's main witnesses?

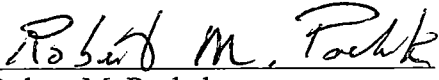
A. I heard Mickey say that and, and, and I'm going to answer it this way. They were they should have been the state's main witnesses against with Mickey, but what ended up happening is the main witnesses against Mickey were the witnesses testifying about gangs and gang activity. But as far as the specific facts that it should have been against Mickey, those were the main ones.

(App. p. 716, lines 15-23)

The gang testimony was extensive, excessive, and prejudicial. It should not have been allowed into evidence.

CONCLUSION

Petitioner's conviction should be reversed.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of January, 2018.

STATE OF SOUTH CAROLINA

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Appellant pursuant to White v. State in the above referenced case has been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Appellant pursuant to White v. State has been served on Mickey Markell Johnson, #298814, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 5th day of January, 2018.



Robert M. Pachak
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of January, 2018.



Notary Public for South Carolina
My Commission Expires: July 5, 2027.