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Dec 14 2020

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County

Honorable Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DEIPO DERRICK LEWIN,

APPELLANT

APPELLATE CASE NO 2019-001775

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to allow Appellant to present evidence regarding the character of the victim, including multiple analogous prior bad acts and a pending domestic violence charge, where the victim, who was known to be violent, previously assaulted someone with a baseball bat, and where the victim was similarly armed with a baseball bat in the situation giving rise to Appellant's arrest?

STATEMENT OF THE CASE

On June 7, 2018, a Florence County grand jury indicted Appellant for attempted murder based on alleged acts that occurred on “December 25, 2107 [sic].” R. __ (Indictment). Appellant proceeded to a two-day trial before the Honorable Michael G. Nettles and a jury on October 14, 2019. Tr. 1. Matthew Swilley represented Appellant; J. Ryan White and Todd Tocker appeared on behalf of the state. The jury found Appellant not guilty of attempted murder but convicted him of assault and battery of a high and aggravated nature. Tr. 145, ll. 10 – 19 (October 15, 2019).¹ Judge Nettles sentenced Appellant to ninety months’ incarceration. Tr. 155, ll. 2 – 6 (October 15, 2019).

This appeal follows.

¹ The two days of trial were transcribed by different court reporters, and as such, the transcripts are paginated separately.

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.

ARGUMENT

The trial court erred in refusing to allow Appellant to present evidence regarding the character of the victim, including multiple analogous prior bad acts and a pending domestic violence charge, where the victim, who was known to be violent, previously assaulted someone with a baseball bat, and where the victim was similarly armed with a baseball bat in the situation giving rise to Appellant’s arrest.

Relevant facts

At the outset of trial, Appellant conceded that he was the individual who shot Phillip Hannah; identify was not in dispute in this matter. Tr. 39, l. 21 – 40, l. 11 (October 14, 2020). Appellant would end up testifying on his own behalf in order to establish a self-defense claim. Tr. 52, l. 13 – 80, l. 22 (October 15, 2020).

Prior to trial, counsel for Appellant advised the trial court that he intended to ask Hannah about a prior incident to show his inclination toward violence. Tr. 40, l. 16 – 49, l. 8 (October 14). Appellant moved to admit evidence under Rule 404(a)(2), SCRE. Id. The trial judge agreed that Appellant could establish that the victim has a reputation for violence but opined that under Rule 405, SCRE, Appellant could not introduce specific acts of violence. Id.

The trial judge indicated he would allow Appellant “wide latitude with regarding evidence about the victim’s reputation for violence and turbulence” but ruled that Appellant was prohibited from discussing specific instances. Tr. 45, ll. 4 – 8 (October 14).

Following the judge’s ruling, Appellant inquired about proffering testimony from witnesses regarding Hannah’s violent tendencies. Tr. 45, ll. 9 – 10 (October 14). Because Hannah was set to testify early on at trial, the trial judge suggested that the proffered testimony could be heard later. Tr. 45, ll. 11 – 23 (October 14). Counsel for Appellant then questioned

whether the fact that Hannah had a pending CDV charge being prosecuted by the solicitor's office in Florence County was subject to cross-examination. Tr. 47, l. 1 – 49, l. 8 (October 14).

The trial judge ruled that Appellant could ask if any charges were pending and if Hannah had been offered any deals in exchange for his cooperation. Id. However, Appellant was prevented from “getting into the specific instances.” Id. In response, Appellant again suggested it would be proper for the jury to hear about specific instances. Id. The trial judge declined to modify his ruling. Id.

Hannah was the state's second witness at trial. Tr. 55 (October 14). He testified that on Christmas Day in 2017, he “wanted a little weed” so he called Charles Moore. Tr. 56, ll. 5 – 20 (October 14). Moore and Hannah had previously engaged in drug transactions. Id. The two agreed to meet at a gas station in Florence. Tr. 56, l. 21 – 59, l. 21 (October 14). Hannah claimed that after Moore arrived at the gas station, Moore attempted to go through Hannah's pockets. Id. Hannah contended that Moore stole money from him and that as a result, Hannah armed himself and began attacking Moore:

I had a bat in my sleeve because I was wary of what was going on because he sounded sketchy on the phone so when he started running through my pocket, I pulled it out and I started hitting him with the bat. I hit him like once or twice. He threw his hood on, put his hands in his pocket and started trying to run away. At that moment I started chasing him with the bat.

Tr. 58, ll. 4 – 11 (October 14).

Hannah testified that as he was chasing Moore with a baseball bat, a gray Ford Focus turned into the gas station and drove towards him. Tr. 58, l. 12 – 59, l. 21 (October 14). According to Hannah, the Focus crashed; he then got into his van and began driving away. Id. Hannah claimed the driver of the Focus, later identified as Appellant, got out of the car and

began shooting at his van. Id. Hannah sustained a gunshot wound to the face. Tr. 60, ll. 3 – 8 (October 14).

During cross-examination, counsel for Appellant asked Hannah whether he had a pending domestic violence charge. Tr. 79, l. 20 – 83, l. 23 (October 14). The state objected, and the judge sent the jury outside the courtroom. Id. The parties discussed the judge’s prior ruling and whether Appellant could ask about the pending offense as long as he stayed away from the specific allegations. Id. The state moved for a mistrial but then withdrew the motion. Id.

The trial judge reiterated his ruling that “[w]e are not going to have any discussion about anything about criminal domestic violence.” Id. After the jury returned to the courtroom, the trial judge offered a curative instruction directing them to disregard the question about a particular offense. Id.

An employee at the gas station, Darlene Wingate, referred to Hannah as the instigator. Tr. 106, l. 25 – 107, l. 8 (October 14). She elaborated on that characterization and agreed with the assertion that Hannah “began the violent situation.” Id. Wingate’s testimony called into question Hannah’s recollection of the situation. She told the jury about how Hannah, armed with the bat, approached the crashed Focus. Tr. 108, l. 12 – 109, l. 17 (October 14). According to Wingate, “the last thing that happened before [she] heard gunshots was the bat was raised.” Id.

Soon after Wingate left the witness stand, the jury heard from Moore. Moore outright denied going through Hannah’s pockets. Tr. 123, ll. 1 – 4; Tr. 127, ll. 18 – 25 (October 14). Moore agreed that the reason he was at the gas station was to sell marijuana. Tr. 119, l. 21 – 121, l. 2 (October 14). After the marijuana sale, Moore contended that he was attacked as part of a verbal disagreement. Id. Moore ran away from his attacker and had his back turned when the Focus crashed and shots were fired. Id. Although he recalled hearing gunshots, Moore had

sustained a head injury from the bat and did not recall many details. Tr. 123, ll. 12 – 24 (October 14). Moore never saw Appellant fire any shots. Tr. 125, ll. 2 – 18 (October 14).

After the jury was sent home on the first day of trial, the trial judge heard proffered testimony regarding Hannah's predisposition toward violence. Alen Neal, Hannah's cousin, testified unequivocally that Hannah had a reputation for "violence with people." Tr. 165, ll. 8 – 22 (October 14). Neal pressed charges against Hannah following an incident on June 24, 2019. Tr. 165, l. 23 – 166, l. 1 (October 14).

Neal testified in great detail regarding Hannah's prior acts of violence, including how Hannah was fighting with the mother of his child when Neal was asked to intervene. Tr. 166, l. 2 – 169, l. 12 (October 14). Neal arrived to assist, and Hannah attacked her:

Phillip [Hannah] still put his hands on me. He grabbed me by my hair, dragged me throughout the kitchen, pulled out a couple of my braids, slammed my head into a sink and a chair. My mother tried to get him off of me. He proceeded to hit my mother. My grandmother jumped in it to try to get him off both of us. He proceeded to hit my grandmother. I called the police. The police got involved. Before they came, he ran so they had to go find him.

Tr. 167, ll. 8 – 16 (October 14). In one previous instance, Hannah attacked Neal's grandmother and put a baseball bat up against her neck. Id. Neal reiterated that Hannah's reputation for violence was known in the community:

Phillip [Hannah] is known to get mad and if you [are] smaller than him or he thinks he can beat you, he will try and fight you and if he cannot, then I have known for him to try and hit people with stuff. He is known for not getting his way and thinking he can lay his hands on people.

Tr. 169, ll. 5 – 12 (October 14). The trial court ruled that the instances of specific conduct were not to be mentioned.

After the state rested, Neal testified in front of the jury on the second day of trial. Tr. 50, 1. 18 – 51, 1. 6 (October 15, 2020). Her testimony was limited to questions regarding Hannah’s reputation for violence. Id.

Discussion

The South Carolina Rules of Evidence allow evidence to be offered in order to show the character trait of a victim:

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

...

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

Rule 404, SCRE. Rule 405 also speaks to both the testimony that can be elicited as well as the manner in which it is heard:

(a) Reputation or Opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Rule 405, SCRE.

In the murder prosecution of one pleading self-defense against an attack by the deceased, evidence of other specific instances of violence on the part of the deceased are not admissible unless they were directed against the defendant or, if directed against others, were so closely connected at point of time or occasion with the homicide as reasonably to indicate the

state of mind of the deceased at the time of the homicide, or to produce reasonable apprehension of great bodily harm. State v. Brown, 321 S.C. 184, 467 S.E.2d 922 (1996); State v. Amburgey, 206 S.C. 426, 34 S.E.2d 779 (1945). Whether a specific instance of conduct by the deceased is closely connected in point of time or occasion to the homicide so as to be admissible is in the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the accused. Id. (citing State v. Peak, 134 S.C. 329, 133 S.E. 31 (1926)).

Although the majority of the above cases preceded the Rules of Evidence, their holdings remain. Hannah's actions produced reasonable apprehension of great bodily harm, as attested to by Appellant. Tr. 65, ll. 6 – 8 (October 15). Coupled with Appellant's theory of the case, that Appellant acted in self-defense, Hannah's numerous clashes with members of the community should have been brought out before the jury. Therefore, it was proper for the jury to hear about other specific instances of violence by Hannah.

Further, the weapon used by Hannah against Moore and Appellant—a baseball bat—was also previously utilized by Hannah, against Neal's grandmother. The testimony elicited from Neal, coupled with the pending charge, represented numerous, credible instances of violence. This was a case wherein the jury should have learned about Hannah's prior incidents involving similar acts of violence.

CONCLUSION

Based on the foregoing, Appellant respectfully requests that this Court reverse his conviction and remand for a new trial.

s/Taylor D. Gilliam
Taylor D. Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of December, 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;
- (2) Trial transcript dated October 14, 2019 pages 1 – 4;
- (3) October 14 transcript pp. 30 – 171;
- (4) Trial transcript dated October 15, 2020 pages 1 – 3;
- (5) October 15 transcript pp. 11 – 44;
- (6) October 15 transcript pp. 50 – 82; and
- (7) October 15 transcript pp. 91 – 155.

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

December 14, 2020.

s/Taylor D. Gilliam

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CERTIFICATE OF SERVICE

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 Initial Brief of Appellant and Designation of Matter has been served upon opposing counsel this 14th day of December, 2020 by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS); and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Deipo Derrick Lewin, #381721, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512.

s/Taylor D. Gilliam
Taylor D. Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT