STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Marlboro County

Honorable Paul M. Burch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAMAINE ANTRON MCCOY,

APPELLANT

APPELLATE CASE NO 2020-000180

ANDERS BRIEF OF APPELLANT

WANDA H. CARTER
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The lower court erred in allowing a police officer to testify about appellant's alleged connection to a crime for which he had not been charged and was not on trial for in the case.

STATEMENT OF THE CASE

Appellant Damaine A. McCoy was found guilty of assault and battery in the first degree and resisting arrest with a deadly weapon during the January 2020 term of the Marlboro County General Sessions Court before Judge Paul M. Burch, who sentenced him to an aggregate prison term of seventeen and one-half years. Michael Stephens represented appellant at trial and Assistant Solicitor Elizabeth Munnerlyn appeared on behalf of the state.

Appellant appealed his convictions and sentences. This brief follows.

STANDARD OF REVIEW

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 lower court erred in allowing a police officer to testify about appellant's alleged connection to a crime for which he had not been charged and was not on trial for in the case.

The police were called to a scene (residence) per information that appellant had taken a baby away from a home and was in possession of said baby, hot water, and some type of cane or stick that had metal taped to the end. Officer Buddy Cole arrived on the scene after having been dispatched there and found appellant at another residence where he was holding the baby and swinging something. Ultimately, someone was able to rescue the baby, but shortly thereafter a struggle ensued between appellant and Officer Cole. During that struggle, Officer Cole's arm was hit with the stick and he was also hit behind his ear before blacking out. R. 36, l.10-p. 45, l.13. A taser was used on appellant by another officer who arrived at the scene minutes later; and ultimately appellant was taken into custody. R. 45, l.14-p.48, l.20. During Officer Cole's trial testimony, he stated the following:

> Dispatch radioed…and told that [appellant] had left the house with a metal walking cane and a hot pot of boiling water…[and] that the suspect, which was [appellant] had went in a house and took the child by force and left the residence with the child and wouldn't give it back…we knew we had a kidnapping on our hands then. R. 40, l.7-20.

Appellant was not on trial for kidnapping. Rather, appellant was on trial for resisting arrest and assault and battery charges only. There was no kidnapping charge filed against appellant in the instant case.

An alleged prior bad act that has not resulted in an arrest, indictment, or conviction is inadmissible at trial. State v. Diddlemeyer, 296 SC 235, 371 S.E.2d 793 (1988). Also, 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 kidnapping. Therefore, any mention of a possible kidnapping charge 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.

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 22nd day of December, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
Dec 22 2020
SC Court of Appeals

Appeal from Marlboro County

Honorable Paul M. Burch, Circuit Court Judge

THE STATE,

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DAMAINE ANTRON MCCOY,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Damaine Antron Mccoy 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 Paul M. Burch, which was held on January 27-28, 2020, 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 Damaine Antron Mccoy.

Respectfully Submitted,

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

This 22nd 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(s):
(2) Entire Transcript

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

December 22, 2020

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

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Division of Appellate Defense
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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."

December 22, 2020.

s/Wanda H. Carter
Deputy Chief Appellate Defender

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