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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Jocelyn J. Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JASON J. OWEN,

APPELLANT

APPELLATE CASE NO. 2020-000175

INITIAL BRIEF OF APPELLANT

SARAH E. SHIPE
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in admitting numerous instances of inadmissible character evidence that were incredibly prejudicial, and which invited an impermissible verdict based not on the evidence but based upon appellant's past convictions and alleged prior bad acts?

STATEMENT OF THE CASE

On January 17, 2019, appellant was indicted by a Beaufort County grand jury for stalking during the period between January and June 2018. R. *. Appellant was tried January 21-23, 2020, before the Honorable Jocelyn J. Newman and a jury. Jan. 21, Tr. 1. Jeffrey Stephens represented appellant. Mary Jones, assistant solicitor, and Julie Butner, assistant solicitor, represented the state. Jan. 21, Tr. 1.

On January 23, 2020, the jury found appellant not guilty of stalking but guilty of harassment, first degree. Jan. 23, Tr. 197, ll. 8-12. Judge Newman sentenced appellant to five years' imprisonment. Jan. 23, Tr. 209, ll. 11-14.

This appeal follows.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001). This Court is bound by the trial court's factual findings unless they are clearly erroneous. *Id.* at 6, 545 S.E.2d at 829. On review, we are limited to determining whether the trial judge abused his discretion. *Id.* This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. *Id.* The admission and exclusion of evidence is largely a matter of trial judge discretion and his rulings will not be overturned on appeal unless he manifestly abuses his discretion and the defendant suffered prejudice as a result. *State v. Thompson*, 305 S.C. 496, 502, 409 S.E.2d 420, 424 (Ct.App.1991).

ARGUMENT

The trial court erred in admitting numerous instances of inadmissible character evidence that were incredibly prejudicial, and which invited an impermissible verdict based not on the evidence but based upon appellant's past convictions and alleged prior bad acts.

Relevant Facts

Appellant met Myra Ancheta in May 2013 in Beaufort County. In July the two began a romantic relationship which ended for the first time in December, 2013. Jan. 22, Tr. 77, ll. 12-19. In early 2014, appellant and Ancheta rekindled their relationship and remained a couple until April 2016, when Ancheta moved to Biloxi, Mississippi. Jan. 22, Tr. 82, ll. 1-16. In May 2016, while Ancheta was living in Biloxi, she obtained a protective order against appellant which ordered that appellant have no contact with her. Jan. 22, Tr. 98. On June 13, 2016, appellant pled guilty to stalking in Biloxi, Mississippi. Subsequently, in January of 2017, appellant pled guilty to violating the court's May 2016 protective order. On April 28, 2017, appellant pled guilty to harassment, first degree in Beaufort County.

Appellant was arrested June 29, 2018, and his home was searched pursuant to a search warrant. Subsequently, appellant was indicted in Beaufort County for stalking Ancheta during the period of time between January and June 2018, including sending greeting cards to her home in Biloxi, leaving flowers at Ancheta's home in Biloxi and at her mother's home in Beaufort, South Carolina when Ancheta was visiting, surveilling Ancheta's online activities including social media accounts, and contacting Ancheta via electronic methods. R.*.

During pretrial motions, the state moved to introduce Rule 404(b), SCRE evidence of prior bad acts. Jan. 21, Tr. 58, ll. 8-24. The solicitor claimed during the time when Ancheta and appellant first separated, between December 2013 and January 2014, appellant left flowers and

cards at Ancheta's home on multiple occasions and on one occasion entered her home to damage a water pipe, causing flooding and other property damage. The solicitor also alleged that after the couple separated in April 2016, appellant left flowers and cards at Ancheta's Biloxi home, left flowers and other items at Ancheta's mother's home in Beaufort, and hacked various online accounts in order to monitor Ancheta's activity. Additionally, the solicitor moved to admit evidence of appellant's three prior convictions. Jan. 21, 59-60.

The solicitor alleged appellant sent greeting cards to Ancheta during the time of May to December 2017 and then again in August 2018. The solicitor argued that the cards, mailed outside of the indicted dates, demonstrated appellant's identity as the sender because law enforcement's search of appellant's home revealed rubber address stamps that matched the stamped address on the envelopes mailed to Ancheta. Jan. 21, Tr. 63, ll. 16-20. The solicitor claimed evidence that appellant left roses for Ancheta shared a close degree of similarity to prior instances that appellant admitted to in court for the 2016 and 2017 Biloxi convictions. The solicitor averred the alleged property damage and prior convictions substantiated Ancheta's fear of appellant harming her physically or further damaging her property. Jan. 21, Tr. 78, ll. 14-20.

Defense counsel responded that all the evidence was inadmissible pursuant to Rule 404(b), SCRE. As to the alleged prior bad acts, counsel argued there was no direct evidence linking appellant to those incidents and the state could not prove by the clear and convincing standard that appellant committed any of the acts it intended to introduce. Additionally, defense counsel argued that appellant sending Ancheta greeting cards and leaving flowers at her home, on dates outside of January to June 2018, were the exact offenses for which appellant was being charged in this trial and, while similarity is a portion of the argument for common scheme, if the crimes are "too similar" they become more prejudicial than probative. As to the earlier

convictions, counsel argued those were inadmissible because they were not relevant to proving what happened between January and June 2018. Jan. 21, Tr. 65-76.

The court denied the state's motion to admit evidence of property damage to Ancheta's home or evidence of appellant leaving flowers for Ancheta outside the dates stated on the indictment. Jan. 21, Tr. 81, ll. 11-17; 85, 22-24. The court found that all of appellant's prior convictions were inadmissible because they were for such similar crimes and would be more prejudicial than probative. Jan. 21, Tr. 83, ll. 1-23; 85, ll. 9-14. However, the court granted the state's motion to introduce evidence that appellant had previously sent Ancheta greeting cards on special occasions. Jan. 21, Tr. 85, ll. 22-24.

The following day, outside the presence of the jury, there was a discussion regarding state's exhibit 91, a recording of appellant's interview with police. The solicitor had previously provided defense counsel a redacted version of the interview, which omitted references to court, probation, and parole related to appellant's prior convictions. Jan. 22, Tr. 13, ll. 1-14. Defense counsel acknowledged that most of the objectionable portions of the recorded interview had been redacted but argued the recording contained other references to prior bad act evidence that should be redacted before the video was shown to the jury, including references to junk mail Ancheta received. Jan. 22, Tr. 13-15. Defense counsel argued the evidence was not relevant and was inadmissible under Rule 404(b), SCRE. Jan. 22, Tr. 16, l. 20-17, l. 5.

The court ruled it would allow statements referencing junk mail to remain in the recording over defense counsel's objection. The court then revised its ruling from the prior day, stating that it was concerned about the "potential prejudicial effect of mentioning [] [appellant's] prior convictions," and concluding that, while neither of the Biloxi, Mississippi convictions were admissible, Ancheta would be allowed to testify about the actions leading to the convictions but

not the convictions resulting from the actions. Jan. 22, Tr. 17, l. 20-18, l. 10. The court went on to clarify that it would allow Ancheta to testify regarding the alleged property damage to the extent that Ancheta feared for her safety because she believed that appellant had previously damaged her property. Jan. 22, Tr. 19, 5-10.

Over defense counsel's objection, Ancheta testified that she received nine greeting cards she believed were from appellant when they were separated and read aloud the romantic contents of a few of the cards. A card dated May 6, 2017, read: "to my wife, my friend, my soulmate." A card dated June 2, 2017, read: "Our anniversary reminds me it's not only about what we give each other on special days like today but what we share every day of the year." A Christmas card sent December 27, 2017, read in part: "you are the love of my life and not a day goes by that I don't realize how lucky I am to be married to you." Three of the nine cards were mailed in 2017, one was mailed in August of 2018, and the other five were mailed during the period between January and June 2018. The envelopes of the cards were stamped with a black block stamp with Ancheta's name and address as recipient and the return address. The envelopes of the cards were postmarked from various locations all over the country including: Jacksonville, Florida, Valentine, Texas, and Little Rock, Arkansas. Jan. 22, Tr. 85-88.

Ancheta claimed that when she and appellant were broken up there were numerous occasions where she found flowers outside her home that she believed were left by appellant. Jan. 22, Tr. 80-81; 83; 94. She alleged that, not long after appellant ended their relationship in December 2013, when she returned home from an early morning walk, she discovered water standing throughout the inside of her home. Ancheta said, "it was just terrifying to see all this water in [her] house." However, later that very month, Ancheta and appellant reconciled and remained together for two years. Jan. 22, Tr. 81, l. 8-82, l. 2.

Ancheta testified that in June 2018 she returned to Beaufort for a family wedding and while there she found a flower outside her mother's home and close by a sharp object. Jan. 22, Tr. 94, 10-15. Ancheta testified that when she left the wedding, held at a nearby hotel, she saw appellant's vehicle following her. Jan. 22, Tr. 96-97.

Ancheta testified that while she lived in Biloxi, she was granted a protective order against appellant and then, over defense counsel's objection, gave the following testimony:

Q: When did the contacts stop from [appellant]?

A: They've never stopped. It doesn't matter how many times - - it doesn't matter how many times a judge has told him and there has been several.

Jan. 22, Tr. 99, ll. 2-17.

At that point the defense moved for a mistrial arguing, based on Ancheta's testimony referencing other judicial orders, there was a danger of the jury making its decision based on an emotional response instead of the evidence. Defense counsel stated that, while he did not believe a curative instruction would be sufficient, if the court denied the motion for a mistrial, the defense requested input on the wording of any curative instruction given to the jury. Jan. 22, Tr. 101, ll. 1-17.

The state responded that defense counsel opened the door to information regarding prior restraining orders in his opening statement when defense counsel said that Ancheta had not taken any steps to cut off communication with appellant. Jan. 22, Tr. 101, 19-25.

The court denied defense counsel's motion for a mistrial. The court found Ancheta's testimony could be interpreted by the jury as merely a comment on the restraining order that had been admitted during Ancheta's testimony. Jan. 22, Tr. 105-107.

During Officer Todd Duncan's testimony, the state introduced state's exhibit 91, recording of appellant's police interview.¹ Defense counsel renewed his previous objection to the portion of the statement discussing junk mail. The state played state's exhibit 91 for the jury. While the recording was being played, defense counsel asked the court to approach, the court declined, and the recording continued. In the presence of the jury, defense counsel moved to strike and for a curative instruction arguing the version played for the jury was not the version that had been previously discussed. At that point an off the record bench conference was held. Jan. 23, Tr. 112.

The court dismissed the jury to the jury room so that defense counsel could put his objection on the record. Defense counsel stated that between the thirteen- and fourteen-minute mark the recording included references to electronic monitoring, going to court, and lawyers. Defense counsel insisted that none of that content was present in the redacted version previously sent to the defense. Counsel told the court he received an email with an attached version from the state at 1:30 that morning, but he had not reviewed the recording due to the late hour. Jan. 23, Tr. 113. The defense requested that if the jury asked to review the recording again that those portions be excluded and a specific instruction on prior bad acts be given at the close of trial. Jan. 23, 115-116.

The solicitor responded that the original recording was fifty-five minutes long and admitted she had agreed to redact the recording and had provided a redacted version to the defense that was thirty-six minutes long. The solicitor admitted court and probation were referenced in the recording played for the jury. The solicitor argued that during opening statements defense counsel had opened the door for prior bad act evidence to come in and,

¹ State's exhibit 91 is on file with this Court.

because the court had already allowed Ancheta's testimony regarding appellant's prior convictions, the solicitor unredacted the recording back to the original to include references to court, electronic monitoring, etc. Jan. 23, Tr. 114.

The court requested the state redact any references to court, probation, and lawyers from the recording and stated it would charge the jury regarding prior bad acts. Jan. 23, Tr. 116-117. However, the record does not reflect that the jury reviewed another version of the recording other than the full unredacted version played during Officer Duncan's testimony.

After the jury returned a verdict of guilty for harassment, first degree, defense counsel made a motion for a new trial based on the admission of prior bad act evidence. Counsel argued that there was too much similarity between what was alleged in the indictment and the prior bad act evidence that was admitted. Defense counsel asserted the prior bad act evidence posed a great danger of unfair prejudice to appellant. Much of the evidence, specifically the greeting cards that were before the jury, was the same type of evidence as what was alleged in the indictment, and thus there was great risk of the jury convicting based on the prior bad act evidence that should not have been considered. Additionally, defense counsel argued state's exhibit 91, recording of appellant's statement to police, referenced prior court, prior judges, and probation, and those references likely affected the jury in its deliberation. Jan. 23, Tr. 199-200.

The court denied defense counsel's motion for a new trial. Jan. 23, Tr. 200.

Discussion

Evidence is relevant if it "ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE; *State v. Schmidt*, 288 S.C. 301, 342 S.E.2d 401 (1986); *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991). All relevant evidence is admissible, unless constitutionally, statutorily, or otherwise provided. Rule 402, SCRE. However, relevant

evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE.

South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator. Rule 404(b), SCRE; *State v. King*, 334 S.C. 504, 514 S.E.2d 578 (1999); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

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.” *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (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. *Id.* 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 ...”).

Although *State v. Lyle* does not distinguish between sexual offenses and non-sexual offenses, the common trend in South Carolina is to apply the *Lyle* exceptions differently to sexual offenses. Compare *Lyle*, 125 S.C. 406, 118 S.E. 803 (a forgery case), to *State v. Nelson*, 331 S.C. 1, 501 S.E.2d 716 (1998) (a child molestation case, distinguishing the application of the *Lyle* exceptions for motive and intent from cases that were not sexual in nature). *State v.*

Fonseca, 383 S.C. 640, 647–48, 681 S.E.2d 1, 4 (Ct. App. 2009), *aff'd*, 393 S.C. 229, 711 S.E.2d 906 (2011).

The trial court erred in allowing the state to distract the jury with numerous instances of inadmissible evidence that were incredibly prejudicial and which invited the jury to make its decision based not on the evidence but on appellant's past convictions and appellant's alleged prior bad conduct. Any past conduct of appellant was not relevant to his alleged actions during the time between January and June 2018, and, if it were relevant, the state had the power to indict appellant for that conduct. Instead of focusing on the state's evidence of what actually occurred during those months, the jury was allowed to consider not only appellant's prior convictions that were dangerously similar to the charges for which appellant was on trial for but also alleged instances of prior bad acts that the state did not prove by clear and convincing evidence.

Even if the Court finds the evidence was relevant, it was substantially more prejudicial than probative. Appellant was charged with stalking and convicted of harassment, first degree, which are exactly the same charges as two of his prior convictions. All of the alleged prior instances, other than the alleged property damage, were the same conduct, leaving flowers and sending cards, which the state was alleging appellant committed between January and June of 2018. The state, unable to prove the elements of stalking, which include a pattern of conduct, between January and June of 2018, padded its case with appellant's prior convictions and alleged conduct that occurred outside that time period and asked the jury to decide that, because appellant pled guilty at some other time to similar conduct, he must be guilty in this case. The court acknowledged, that "because they are for such similar crimes [the] [prior] [convictions] have the potential of being more prejudicial than probative." Jan. 21, 83, ll. 19-23.

Likewise, much of appellant's alleged prior bad conduct was the same conduct for which appellant was on trial. Part of the state's allegations in this case was that appellant was sending unwanted greeting cards to Ancheta and that he was leaving flowers for her during the months of January to June 2018. However, at trial Ancheta was permitted to testify regarding instances as far back as 2013 when she believed appellant entered her home and busted a pipe causing water damage. Ancheta also testified about instances outside the indicted dates where she found flowers. Four of the nine greeting cards admitted in evidence were received by Ancheta on dates outside of the indicted dates. It was likely extremely confusing for the jury to separate what appellant was actually charged with in this case from alleged prior instances of the same exact conduct.

The evidence at issue was propensity evidence and was not introduced to establish either a common scheme or plan, or the identity of the appellant as the state argued. The state wanted this evidence in front of the jury to make it appear appellant was obsessed with Ancheta and to signal to the jury that, because appellant had already been convicted of the same crime in Biloxi, Mississippi, he was guilty of this crime. At trial, appellant asserted his constitutional right to not testify or otherwise put up a case and did not introduce his character into evidence, and it was therefore impermissible for the state to introduce evidence of appellant's prior convictions or evidence of appellant's alleged bad acts. "In a criminal case, the State cannot attack the character of the defendant unless the defendant herself first places her character in issue." *Mitchell v. State*, 298 S.C. 186, 188-89, 379 S.E.2d 123, 125 (1989). "Further, evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate that the accused is a bad person." *Id.*

CONCLUSION

By reason of the foregoing argument, appellant requests this Court reverse his convictions and remand his case for a new trial.

s/ Sarah E. Shipe
Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of February, 2021.

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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 in the above-referenced case has been served upon William M. Blich, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 16th day of February, 2021; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Jason J. Owen, at 246 North Circle, Bluffton, SC, 29910, this 16th day of February, 2021.

s/ Sarah E. Shipe
Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT