STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAMON RATIEK RILEY,

APPELLANT

APPELLATE CASE NO. 2019-001810

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred, in Appellant's trial for attempted murder and possession of a weapon during the commission of a violent crime, where it admitted video footage and photographs of Appellant posing with a gun in a moving car in violation of § 16-23-20, since the prior bad act evidence should have been excluded pursuant to Rules 404 and 403, SCRE?

STATEMENT OF THE CASE

During the December term of 2013, a Dorchester County Grand Jury indicted Appellant for two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime. R. 326 – 327; R. 328 – 329; R. 330 – 331; R. 332 – 333. Appellant was tried before the Honorable Maite Murphy and a jury, from August 19 – 21, 2019. Appellant was represented by Chad Shelton and Michael Barrett. The State was represented by Mike Spears and George Smythe. R. 1; R. 17; R. 194.

Appellant was convicted as indicted and he was sentenced to serve consecutive terms of imprisonment of thirty years for the first count of attempted murder and thirty years for the second count of attempted murder. He was sentenced to a concurrent five-year term for the weapons charge. R. 315, l. 18 – 316, l. 4; R. 324, ll. 6-16; R. 334 – 337.

This appeal 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. "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 ...").

"A trial court has particularly wide discretion in ruling on Rule 403 objections." *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct. App. 2012); see also *State v. Dial*, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances." (citation omitted)).

ARGUMENT

The court erred, in Appellant's trial for attempted murder and possession of a weapon during the commission of a violent crime, where it admitted video footage and photographs of Appellant posing with a gun in a moving car in violation of § 16-23-20, since the prior bad act evidence should have been excluded pursuant to Rules 404 and 403, SCRE.

The Snapchat[1] video footage and photographs therefrom (Snapchat evidence) showed Appellant in a car, looking at the camera, and posing with a common type of gun. Appellant appeared to be driving at the time. This was unfairly prejudicial evidence of a prior bad act since it showed Appellant committing a crime (unlawful carrying of a handgun), where Appellant was on trial for allegedly shooting two people while leaning out of a car window.

Relevant facts

On June 5, 2016, Kimberlee Felder (Complainant) was driving a friend's car around three-o'-clock in the morning. Complainant's then-husband, Carsheme Dinkins (Dinkins) was in the passenger seat. While the two were sitting at a red light, another car came up behind them and its occupants fired shots at Complainant and Dinkins as it drove past. R. 57, l. 15 – 64, l. 11. Complainant was shot in the face and Dinkins was shot in the arm. Dinkins took the wheel and drove to the hospital. R. 64, l. 17 – 112, l. 4; R. 92, ll. 9-12.

Police officers recovered cartridge casings and fired projectiles from the scene and from the car driven by Complainant that led them to believe four different guns were fired at the car. R. 238, l. 19 – 239, l. 11.

[1] "Snapchat is a social media application that allows users to send or post still images or videos." *Commonwealth v. Watkins,* 98 Mass. App. Ct. 419 (Mass. App. Ct. 2020).

Complainant claimed that she had seen the face of one of the shooters illuminated by muzzle flash and recognized the man as her cousin, Damon Riley (Appellant). R. 63, l. 1 – 66, l. 14. Appellant was arrested a few days later after a traffic stop was done to effectuate his arrest. Five people were in the car. Appellant was in the back passenger seat and a Glock 19 handgun was found under the front passenger seat by his feet, in an area that was only reachable from the back seat. Appellant's state identification card was found near the gun. R. 118, l. 17 – 125, l. 17. Appellant was cooperative with arresting officers and denied being the shooter. R. 131, ll. 15-25; R. 164, ll. 7-10.

An expert in firearms analysis testified at trial that the nine millimeter cartridge casings recovered from the scene of the shooting were fired from the Glock 19 handgun found at Appellant's feet during the traffic stop. R. 231, ll. 10-15; R. 239, l. 3 – 243, l. 20.

Appellant's cellular telephone was taken upon his arrest and its data was extracted by authorities. R. 165, ll. 12-18; R. 188, l. 2 – 190, l. 8. Police officers retrieved Snapchat video footage from the telephone. Several still images were created from the video footage. R. 195, l. 18 – 198, l. 3. The video footage and images showed Appellant posing with a handgun while driving. State's Exhibit #30; State's Exhibits #39 – 43. The State would later offer the testimony of an expert in firearms identification who said the gun displayed in the Snapchat evidence was a Glock 19. The expert also said the Glock 19 was a "fairly common," "popular handgun." R. 213, ll. 3-7; R. 218, ll. 19-24.

The State sought to admit the Snapchat evidence. State's Exhibit #30 is the Snapchat video footage and is on file with this Court. State's Exhibits #39 – 43 are photographs created from the Snapchat video footage and they are also on file with this Court. The Snapchat evidence

was labeled "Glizzy Gang 19." State's Exhibit #30; R. 156, ll. 5-6. Later testimony would establish that "Glizzy" was a nickname for a Glock firearm. R. 197, l. 14-16.

Defense counsel objected to the admission of the Snapchat evidence on the basis of "a 404(b) and 403 objection, specifically, as to character." R. 153, ll. 4-15. Defense counsel argued the evidence showed Appellant "in a car with a firearm and waving it around. That could be unlawful carrying. The firearm is not in a secure location." R. 153, ll. 21-24. "It is showing a bad act. And for that reason, I think that it would be character evidence that would be coming into play . . . the 403 is that it's just going to prejudice the jury, highly prejudicial, showing a gun, waving it around . . ." R. 154, ll. 1-7.

The solicitor said the State wanted to use the Snapchat evidence "to show off that he is holding a Glock 19." R. 154, ll. 18-19. Surprisingly, the solicitor further claimed, "In regards to the unlawful carrying of a gun, there's no evidence that the vehicle is moving in any way, shape or form. There's no evidence that he doesn't have a concealed weapons permit, that he is unlawfully carrying . . ." R. 155, ll. 4-8. In fact, however, the video footage showed Appellant in a car with trees flashing by in the background, which reflected the car was moving. *See* State's Exhibit #30.

The trial court found the evidence was evidence of a prior bad act but found it fit within a Rule 404(b) exception and was admissible. The court did not explicitly state what exception it found to apply, but, from the context, it appeared the court found the evidence went to identity. The court ruled as follows.

> I must balance the consideration of the probative value as to whether that outweighs the prejudicial effect. When it's offered to prove something other than character, as it is in this case, it's being offered to prove possession of the gun by the [d]efendant. Considering the fact that the actual gun was found in proximity of the [d]efendant with four other people, I think the probative value

> outweighs the prejudicial effect, and the gun will come in – the video will come in. And, of course, I did ask you to redact the portion that had any kind of gang relation name or whatever that was on that Snapchat.

R. 155, l. 16 – 156, l. 4.

Thereafter, the Snapchat evidence was admitted in conformity with the court's ruling. R. 196, l. 2 – 198, l. 9. The solicitor referred to the Snapchat evidence three times in his closing argument. R. 275, l. 17 – 378, l. 3. Appellant was convicted and sentenced to an active term of sixty years' imprisonment. R. 315, l. 18 – 316, l. 4; R. 324, ll. 6-16.

Discussion

The Snapchat evidence showed Appellant committing the crime of unlawful carrying of a handgun. S.C. Code Ann. § 16-23-20 makes it a criminal offense to display a handgun in a moving car. That statute provides, in relevant part,

> **It is unlawful for anyone to carry about the person any handgun**, whether concealed or not, **except** as follows, unless otherwise specifically prohibited by law: . . . (9) **a person in a vehicle if the handgun is**: (a) **secured in a closed glove compartment, closed console, closed trunk, or in a closed container** secured by an integral fastener and transported in the luggage compartment of the vehicle; . . . If the person has been issued a concealed weapon permit pursuant to Article 4, Chapter 31, Title 23, then the person also may secure his weapon under a seat in a vehicle, or in any open or closed storage compartment within the vehicle's passenger compartment; or (b) concealed on or about his person, and he has a valid concealed weapons permit pursuant to the provisions of Article 4, Chapter 31, Title 23 . . .

The solicitor's argument that the video footage did not show Appellant committing the crime of unlawful carrying of a handgun because "there's no evidence that the vehicle is moving" was untrue. The video shows the car was moving while Appellant was posing with a gun. State's Exhibit #30. The handgun was not secured or concealed. Therefore, regardless of

whether Appellant had a concealed weapons permit, his actions were in violation of § 16-23-20. It also appears Appellant was in the driver's seat. State's Exhibit #30.

Rule 404(b), SCRE provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." *See also State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, a prior bad act must first be established by clear and convincing evidence. *State v. Tutton*, 354 S.C. 319, 325, 580 S.E.2d 186, 189 (Ct. App. 2003).

"[E]vidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad person." *State v. King*, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999). "The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime." *State v. Perry*, 430 S.C. 24, 29, 842 S.E.2d 654, 657 (2020) (quoting *Michelson v. United States*, 335 U.S. 469, 475 (1948)).

Here, the Snapchat evidence was evidence of a prior bad act under Rule 404(b), SCRE since it showed Appellant committing the crime of unlawful carrying of a pistol because he had a gun out unsecured in a car. It also appears Appellant was acting in a reckless manner by posturing with a deadly weapon while driving and not looking at the road. The evidence did not fall within a 404(b) exception. "Evidence of other bad acts is generally inadmissible to prove a defendant's guilt for the crime charged; however, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. Rule 404(b), SCRE." *State v. King*, 424 S.C. 188, 199, 818 S.E.2d 204, 210 (2018).

Here, the court found the Snapchat evidence went to identity. However, this evidence did not go to identity because the State's expert admitted that a Glock 19 was a common, popular handgun. The fact that Appellant was one of thousands, or millions, of people who possessed a Glock 19 did not establish his identity as the perpetrator. Moreover, the State had other evidence to show identity—Appellant was found with the actual Glock 19 used in the shooting by his feet during a traffic stop. Also, Complainant identified Appellant as the shooter. *See State v. Lyle*, 125 S.C. at 406, 118 S.E. at 809 (to justify evidence of an extraneous crime to prove identity, such evidence must be "necessary.") Here, the Snapchat evidence was not necessary.

The court's finding that the Snapchat evidence was admissible under an exception to 404(b) was error. However, even if the court correctly found the evidence admissible as a 404(b) exception, an application of the remainder of the 404(b) analysis—Rule 403—shows that the admission of the evidence was error.

Once bad act evidence is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE. *State v. Spears*, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013). Rule 403, SCRE provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

"Unfair prejudice means an undue tendency to suggest decision on an improper basis." *State v. Dickerson*, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000). When "the previous alleged bad act is strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced." *State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984); *State v. Brooks*, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000). Here, the prior bad act evidence was

similar to the act for which Appellant was being tried—committing a gun crime while in a moving car. Moreover, it appears the video footage showed Appellant disregarding the safety of others on the road when he played with the gun while looking at the camera instead of the road. The video footage also portrayed Appellant as someone who glorified gun violence. Appellant was unfairly prejudiced because the jurors may have believed that regardless of guilt, Appellant should be removed from the public at large based on the bad act evidence.

The error was not harmless. "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." *State v. King*, 424 S.C. at 201, 818 S.E.2d at 211 (quoting *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006)). "Whether the improper introduction of evidence is harmless requires us to look at the other evidence admitted at trial in order to determine whether the defendant's guilt is conclusively established by competent evidence such that no other rational conclusion could be reached by the jury." *State v. Tutton*, 354 S.C. at 334, 580 S.E.2d at 194.

Apart from Complainant's identification of Appellant, the evidence was circumstantial. Appellant did not confess. No gunshot residue evidence showed he fired a gun. Dinkins, the only other eyewitness to the crime, did not testify. The solicitor thrice referred to the bad act evidence during his closing argument. *See State v. Lawson*, 424 S.C. 51, 63, 817 S.E.2d 509, 515 (Ct. App. 2018) (error admitting prior bad act evidence was not harmless where state's case was circumstantial); *State v. Timmons*, 327 S.C. 48, 54, 488 S.E.2d 323, 326 (1997) (reversal required given volume of prior bad act evidence and solicitor's repeated references to it in argument). Under these circumstances, the error was not harmless beyond a reasonable doubt. *King*, 424 S.C. at 201, 818 S.E.2d at 211; *Tutton*, 354 S.C. at 334, 580 S.E.2d at 194.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of March, 2021.

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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."

March 18, 2021.

s/ *Joanna K. Delany*
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