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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2019-000292

THE STATE,

Respondent,

v.

DEIPO DERRICK LEWIN,

Appellant.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STATEMENT OF FACTS3

STANDARD OF REVIEW5

ARGUMENT6

 The trial judge did not err in refusing to admit evidence of specific violent acts by Victim that occurred more than a year after Appellant shot Victim because Appellant did not know Victim prior to the shooting and therefore any violent acts by Victim were irrelevant to Appellant’s self-defense claim. Even if the trial judge erred, Appellant was not prejudiced by the trial judge’s ruling because Appellant was allowed to present evidence that Victim had a pending criminal charge that was being prosecuted by the Twelfth Circuit Solicitor’s Office and that Victim had a reputation for violence. Therefore, any error was harmless6

CONCLUSION.....12

TABLE OF AUTHORITIES

Cases:

State v. Amburgey, 206 S.C. 426, 34 S.E.2d 779 (1945) 7

State v. Brown, 321 S.C. 184, 467 S.E.2d 922 (1996) 7

State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000)..... 7

State v. Douglas, 369 S.C. 424, 632 S.E.2d 845 (2006)..... 5

State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000) 5

Rules:

Rule 404 SCRE..... 6

Rule 404(a) SCRE..... 9

Rule 404(a)(2) SCRE..... 6, 7, 8

Rule 405 SCRE..... 7

STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in refusing to admit evidence of specific violent acts by Victim that occurred more than a year after Appellant shot Victim when Appellant did not know Victim prior to the shooting and therefore any violent acts by Victim were irrelevant to Appellant's self-defense claim? And if the trial judge erred, was Appellant prejudiced by the trial judge's ruling when Appellant presented evidence that Victim had a pending charge with the Twelfth Circuit Solicitor's Office and that Victim had a reputation for violence, thereby making any error harmless?

STATEMENT OF THE CASE

In June 2018, a Florence County Grand Jury indicted Appellant for one count of attempted murder, one count of strong arm robbery, and one count of possession with intent to distribute marijuana. (2018-GS-21-1070). On October 14-15, 2019, a jury trial was held in the Florence County Court of General Sessions with the Honorable Michael G. Nettles presiding. Appellant was represented by Matthew Sherrod Swilley, Esq. The State was represented by Assistant Solicitors Ryan White and Todd Tucker. The State did not proceed against Appellant on the strong arm robbery count or the possession with intent to distribute marijuana count. At the conclusion of trial, the jury convicted Appellant of the lesser included offense of assault and battery of a high and aggravated nature. The trial judge sentenced Appellant to a term of ninety months' imprisonment. Appellant timely filed a notice of appeal and an initial brief.

STATEMENT OF FACTS

On December 25, 2017 Phillip Hannah (Victim) went to the 4 Way Stop gas station on Church Street in the City of Florence to buy marijuana from Charles Moore. (Tr. V1, p. 55-56). According to Victim, Moore reached into his pocket and took his money. (Tr. V1, p. 57-58, State's Exhibit #34). Victim responded by striking Moore with a baseball bat that he was carrying up his sleeve. (Tr. V1, p. 58, State's Exhibit #34). As Victim began to chase Moore with the bat, a gray Ford Focus crossed the street and entered the parking lot of the gas station. (Tr. V1, p. 58). The gray car crashed into a barrier surrounding the gas pumps, and Appellant exited the car and began firing a pistol at Victim. (Tr. V1, p. 58). Victim returned to his vehicle and attempted to flee. (Tr. V1, p. 59, State's Exhibit #34). As Victim placed his car into reverse, he was shot one time in the face. (Tr. V1, p. 60). Despite being shot in the face, Victim was able to drive himself to the hospital. (Tr. V1, p. 61). Victim lost six teeth and suffered a laceration to his tongue. (Tr. V1, p. 60, Tr. V2, p. 25). Victim remained in the hospital for three days. (Tr. V1, p. 60). While he was recovering in the hospital Victim identified Appellant in a photo lineup. (Tr. V1, p. 61-62, 147-48, Tr. V2, p. 139).

Darlene Wingate was getting cash from an ATM inside the gas station when the shooting occurred. (Tr. V1, p. 101). Wingate witnessed Appellant shooting at Victim as Victim ran from Appellant and returned to his vehicle. (Tr. V1, p. 104-05). Moore testified on behalf of the State at trial. Moore admitted he knew Appellant and that Appellant was staying with him for the holidays. (Tr. V1 p. 119). Moore also acknowledged he went to the gas station to sell marijuana to Victim, and that Victim hit him with a bat. (Tr. V1 p. 120). However, Moore denied ever seeing the shooter. (Tr. V1, p. 125). Appellant testified in his own defense. Appellant testified he was at Moore's house on the day of the shooting. (Tr. V2, p. 54). Moore left his house on foot to

go to the gas station, and he asked Appellant to give him a ride home. (Tr. V2, p. 55-56).

Appellant testified that when he arrived at the gas station he saw someone chasing Moore with a bat. (Tr. V2, p. 58). After crashing his car into the fuel pump barrier, Appellant claimed Victim came towards him with a bat. (Tr. V2, p. 58-61). According to Appellant, he initially fired his weapon at Victim's car to scare him away. (Tr. V2, p. 61-61). Appellant claimed he only fired at Victim because Victim kept walking in Appellant's direction. (Tr. V2, p. 62). Appellant claimed he never saw a bullet strike Victim, but testified that Victim eventually ran away. (Tr. V2, p. 63). Appellant did not know Victim and had never seen him prior to the shooting. (Tr. V2, p. 64).

Law enforcement collected ten .40 caliber shell casings from the exterior of the gas station. (Tr. V1, p. 92, 144). Additionally, law enforcement found a box of .40 caliber ammunition inside the gray car as well as credit cards and other documents bearing Appellant's name. (Tr. V1, p. 144-45). The State and Appellant stipulated Appellant fired a weapon at Victim and each of the shell casings found at the gas station came from Appellant's weapon. (Tr. V2, p. 86, 92). The trial judge read the aforementioned stipulation to the jury prior to closing arguments. (Tr. V2, p. 92). At the conclusion of trial, Appellant was convicted of the lesser included offense of assault and battery of a high and aggravated nature.

STANDARD OF REVIEW

“The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.” State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

ARGUMENT

The trial judge did not err in refusing to admit evidence of specific violent acts by Victim that occurred more than a year after Appellant shot Victim because Appellant did not know Victim prior to the shooting and therefore any violent acts by Victim were irrelevant to Appellant's self-defense claim. Even if the trial judge erred, Appellant was not prejudiced by the trial judge's ruling because Appellant was allowed to present evidence that Victim had a pending criminal charge that was being prosecuted by the Twelfth Circuit Solicitor's Office and that Victim had a reputation for violence. Therefore, any error was harmless.

Appellant argues the trial judge erred by refusing to allow Appellant to present evidence of specific violent acts by Victim. Specifically, Appellant complains he was not allowed to elicit the specific details of the pending domestic violence charge nor was he allowed to elicit that Victim attacked someone else with a baseball bat in a separate incident. Appellant's argument fails for two reasons. First, the trial judge properly ruled Appellant could introduce evidence of Victim's reputation for violence through the testimony of Alayna Neal, but the trial judge correctly declined to allow Appellant to inquire into specific instances of conduct by Victim because Appellant did not know Victim prior to the shooting and thus any other violent acts¹ committed by Victim were irrelevant to whether Appellant acted in self-defense. Second, Appellant was not prejudiced by the trial judge's ruling because Appellant was nonetheless allowed to ask Victim whether he had a pending criminal charge being prosecuted by the Twelfth Circuit Solicitor's Office and Appellant was allowed to introduce evidence of Victim's reputation for violence. Therefore, any error in the trial judge's ruling was harmless.

Rule 404 of the South Carolina Rules of Evidence addresses the admissibility of character evidence. Rule 404(a)(2) provides:

¹ The specific violent acts Appellant asserts should have been admitted did not occur until over one year after the shooting. (Tr. V1, p. 165-67).

(a) Character Evidence Generally. 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(a)(2) SCRE. Rule 405 of the South Carolina Rules of Evidence specifies the acceptable methods of proving character:

- (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 acts 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 in 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. Day, 341 S.C. 410, 419-420, 535 S.E.2d 431, 436 (2000); see also State v. Amburgey. 206 S.C. 426, 429, 34 S.E.2d 779, 780 (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 judge’s discretion and will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the accused.” State v. Brown, 321 S.C. 184, 187, 467 S.E.2d 922, 924 (1996).

Here, prior to trial, Appellant moved to admit evidence of Victim's pending domestic violence charge under Rule 404(a)(2) SCRE. (Tr. V1, p. 40). The trial judge initially denied Appellant's request in the following ruling²:

The Court: Well, I'll tell you, I'm not gonna give wide latitude with regard to introducing evidence about the victim's reputation for violence and turbulence. I'll allow you to do that. But I'm not gonna allow you to get into specific instances.

(Tr. V1, p. 45, lines 4-8). The trial judge allowed Appellant to proffer the testimony of Alayna Neal. (Tr. V1, 165-69). Neal testified Victim was her cousin and that she grew up with him. (Tr. V1, p. 165). According to Neal, on June 24, 2019 Appellant assaulted her, her mother, and her grandmother. (Tr. V1, p. 165-67). As a result of this incident, Victim was charged with domestic violence. (Tr. V1, p. 166-69). Neal also detailed a separate incident where Victim assaulted her grandmother and "put a bat up against her neck." (Tr. V1 p. 167-68). Neal did not specify when the second incident with the bat occurred or whether Appellant was charged with a criminal offense. (Tr. V1, p. 168). Following Neal's testimony, the trial judge made the following ruling:

The Court: All right. He has proffered this testimony and I'm not gonna allow it. I think it's testimony with regard to specific instance. However, you can call [Neal] and you can ask her these questions; Do you know [Victim]? How do you know [Victim]? And she can go through it in great detail how she knows him. Are you familiar with his reputation for turbulence and violence in the community? And she can say what it is. Cannot say about criminal domestic violence or talk about beating up the baby's mama, the grandma or her. But she can say that he is a violent person who is bad about beating people up. But you can't get into specific instances. Do you understand that?

² Despite the trial judge's ruling, Appellant nonetheless asked Victim in front of the jury on cross examination whether he had a pending domestic violence charge. (Tr. V1, p. 79). The trial judge denied the State's motion for a mistrial and gave the jury a curative instruction. (Tr. V1, p. 82-83). However, Appellant was allowed to ask Victim if he had a pending charge that was being prosecuted by the Twelfth Circuit Solicitor's Office. (Tr. V1, p. 83-84).

(Tr. V1, p. 169 lines 16-25 – p. 170 lines 1-3). Subsequently, Appellant called Neal as a witness in his case-in-chief. (Tr. V2, p. 50-51). Neal testified Victim had a reputation for violence and “He’s known to get mad and try to fight people.” (Tr. V2, p. 51 line 3).

On appeal, Appellant argues the trial judge erred by declining to allow him to elicit evidence of Victim’s pending domestic violence charge and the specific details surrounding that charge. Specifically, Appellant asserts “[Victim]’s actions produced reasonable apprehension of great bodily harm, as attested to by Appellant. Coupled with Appellant’s theory of the case, that Appellant acted in self-defense, [Victim]’s numerous clashes with members of the community should have been brought out before the jury.” (Initial Brief of Appellant 2). Appellant seems to argue that introducing evidence of Victim’s prior specific acts of violence were essential to establishing Appellant’s self-defense claim. Appellant’s argument fails because Appellant did not know Victim prior to the shooting and thus any violent acts committed by Victim could not have possibly had any effect on whether Appellant had a reasonable apprehension of death or great bodily harm. Appellant testified he lived in Georgia and was only visiting Florence for the holidays. (Tr. V2, p. 52-53). Appellant admitted he didn’t know many people in the community and “could count on one hand how many people I know in Florence.” (Tr. V2, p. 52 lines 21-22). Appellant also admitted he had never seen Victim before in his life prior to the shooting. (Tr. V2, p. 64). Appellant never alleged that Victim’s other violent acts were directed towards Appellant or otherwise involved Appellant in any way. Because Appellant had no knowledge of Victim’s violent tendencies or specific violent acts that had not yet occurred, the only possible reason Appellant could have to admit the evidence would be for the purpose of proving Victim’s propensity for violence, which is expressly prohibited by Rule 404(a) SCRE. Therefore, the trial judge properly excluded the evidence.

Furthermore, Victim's alleged prior acts of violence were not even prior violent acts but rather subsequent violent acts. Appellant shot Victim on December 25, 2017. At least one of the specific instances of violence that Appellant complains of occurred more than a year after the shooting on June 24, 2019³. (Tr. V1, p. 165-67). Therefore, even if Appellant had known Victim, Victim's future acts of violence could not have effected whether Appellant had a reasonable apprehension of great bodily harm on December 25, 2017. Because Appellant did not know Victim, and Victim's violent acts occurred after the shooting, the trial judge properly declined to let Appellant introduce evidence of specific violent acts by Victim.

Harmless Error

Even if the trial judge erred in excluding evidence of Victim's other acts of violence, Appellant was not prejudiced by the trial judge's ruling and the ruling had no effect on the outcome of the trial. While the trial judge prohibited Appellant from asking Victim about the specific crime he was charged with⁴, the trial judge still allowed Appellant to introduce evidence that Appellant had a pending charge that was being prosecuted by the Twelfth Circuit Solicitor's Office. (Tr. V1, p. 83-84). Furthermore, to the extent Appellant wished to introduce evidence of Victim's violent tendencies, he succeeded in doing so. Appellant introduced evidence through Neal that Victim had a reputation for violence and that "He's known to get mad and try to fight people." (Tr. V2, p. 51 line 3). Finally, Appellant's self-defense claim was not impeded by the trials judge's ruling. Appellant testified Victim approached him with a bat and Appellant only fired at Victim because Victim kept coming towards him. (Tr. V2, p. 58-62). Victim was free to

³ Neal did not specify when the incident with the baseball bat occurred other than to say it occurred before the incident when Victim was charged with domestic violence. (Tr. V1, p. 167-68).

⁴ Appellant nonetheless asked Victim in front of the jury whether he had a pending domestic violence charge. (Tr. V1, p. 79). The trial judge responded to Appellant's disregard for his ruling by giving the jury a curative instruction. (Tr. V1, p. 82-83).

argue he acted in self-defense to prevent Victim from hitting him with a bat. Whether Victim was charged with domestic violence over a year after shooting would have no effect on the jury's ultimate determination that Appellant did not act in self-defense. Therefore, any error by the trial judge in excluding other acts of violence by Victim was entirely harmless. Appellant's conviction and sentence should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the sentences and convictions of the lower court should be affirmed.

Respectfully submitted,

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April 28, 2021

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2019-001775

THE STATE,

Respondent,

v.

DEIPO DERRICK LEWIN,

Appellant.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by email to the address listed in AIS and with a copy of the same to be deposited in the United States mail, postage prepaid, addressed to

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I further certify that all parties required by Rule to be served have been served.
This twenty-eighth day of April, 2021.



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From: Sally Ellison
Sent: Wednesday, April 28, 2021 10:55 AM
To: 'tgilliam@sccid.sc.gov'; Stock, Chris
Cc: Scott Matthews; William Blicht; Sally Ellison; Victim Services
Subject: The State v. Deipo Derrick Lewin Appellate Case No. 2019-001775
Attachments: STATE-LEWIN Deipo Derrick Letter Serving IBOR and DOM Appellate Case No. 2019-001775 (02554543xD2C78).pdf; STATE-LEWIN Deipo Derrick Initial Brief of Respondent Appellate Case No. 2019-000292 (02554537xD2C78).pdf

Good Morning:

Attached for service this date is the Initial Brief of Respondent and Designation of Matter and cover letter in the above appeal. These documents will be filed today with the Court of Appeals through AIS One Drive. A copy of the Brief will also be provided to you as indicated on the Proof of Service. Please confirm receipt of this email.

Thank you.

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