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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
The Honorable Jocelyn J. Newman, Circuit Court Judge

Appellate Case No. 2020-000175

THE STATE, Respondent,

v.

JASON J. OWEN, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

I. The trial court properly admitted numerous instances of character evidence because they were relevant, probative and fell into exceptions to Rule 404(b), SCRE.

STATEMENT OF THE CASE

Appellant was indicted by a Beaufort County Grand Jury for stalking during the period between January and June 2018. Appellant proceeded to a jury trial on January 21-23, 2020, in the Beaufort County Court of General Sessions before the Honorable Jocelyn J. Newman. The State was represented by Assistant Solicitors Mary Jones and Julie Butner. Jeffrey Stephens, Esquire, represented the Appellant. The jury found Appellant not guilty of stalking, but guilty of harassment, first degree. Appellant was sentenced to five years' imprisonment. This appeal follows.

STATEMENT OF FACTS

In May of 2013 Myra Ancheta (Victim) met Jason Owen (Appellant) at Appellant's dive shop in Beaufort County. (R. 177). They began a relationship in July of 2013 that ended in December of 2013. (R. 177). During the period they were broken up, Victim received roses at her house on a daily basis. (R. 180). Specifically, on December 22, 2013 Victim received a single rose at three separate times throughout the day. (R. 180-181). In January of 2014, Appellant and Victim got back together, but the relationship ultimately ended again in April of 2016, at which point Victim moved to Biloxi, Mississippi to escape from Appellant. (R. 182).

Four days after moving to Mississippi, Victim opened her front door to find multiple roses, a poster that stated "Congratulations on your new home. Call me. Your husband," and notes saying "I love you" in multiple languages. (R. 183). Victim had not given Appellant her new address in Mississippi. (R. 229). After leaving her house, she noticed Appellant's truck at a nearby Family Dollar store. (R. 184). Following the incident, Victim notified police and obtained a protective order against Appellant ordering no contact. (R. 184).

Prior to this case, Appellant was charged and pled guilty to stalking in Biloxi, Mississippi as well as violation of the protective order. (R. 59). Appellant also pled guilty to harassment, first degree in Beaufort County. (R. 59). Following these incidents, Appellant was again arrested June 29, 2018 and his home was searched pursuant to a search warrant. Subsequently Appellant was indicted in Beaufort County for stalking Victim during the period of time between January 2018 and June 2018.

STANDARD OF REVIEW

"In criminal cases, the Appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "A trial judge has considerable latitude in ruling on admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion." State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "A ruling on the admissibility of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." Id. "If there is any evidence to support the admission of bad act evidence, the trial judge's ruling cannot be disturbed on appeal." State v. Martucci, 380 S.C. 232, 253, 669 S.E.2d 598, 609 (Ct. App. 2008). "'To warrant reversal based on the admission or exclusion of evidence, the Appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or lack thereof.'" State v. Singleton, 395 S.C. 6, 13, 716 S.E.2d 332, 336 (Ct. App. 2011) (quoting Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)).

ARGUMENT

The trial court properly admitted numerous instances of character evidence because they were relevant, probative and fell into exceptions to Rule 404(b), SCRE.

Appellant contends the trial judge erred in admitting numerous instances of character evidence because they were prior bad acts, not relevant and more prejudicial than probative. Specifically, Appellant argues that these instances should not have been allowed by the trial judge:

1. Prior convictions: (1) harassment in Beaufort County, (2) stalking in Mississippi and (3) violation of a protection order in Mississippi;
2. Flowers left at Victim's South Carolina home between December 2013 and January 2014;
3. Flowers left at Victim's Mississippi home in April 2016;
4. Four letters sent to Victim's home outside of the indicted dates;
5. A busted pipe incident within the victim's home.

This argument lacks merit because these instances were admissible because they fell within exceptions to Rule 404(b), SCRE, or the door was opened by defense counsel.

Prior Bad Acts

The State admitted evidence of roses and cards being left for the Victim by Appellant as well as a protective order obtained by Victim against Appellant. These instances were properly admitted under Rule 404(b), SCRE or because Appellant opened the door and they were relevant and not unduly prejudicial. "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, absence of mistake or accident, or intent." Rule 404(b), SCRE. "To be admissible, a bad act must logically relate to the crime with which the defendant has been charged." State v. Fletcher, 379 S.C. 17, 23, 664

S.E.2d 480, 483 (2008) "If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." Id. Even if prior act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rule 403, SCRE. This case involves the action of leaving roses and cards at the Victim's homes. The acts of leaving roses and cards are not inherently bad acts and a reasonable person might not see them as such. However, if they are deemed by this Court to be prior bad acts, they are admissible because they fall within the exceptions to Rule 404(b) and are not unduly prejudicial.

Clear and Convincing

"If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." Fletcher, 379 S.C. at 23, 664 S.E.2d at 483. Appellant argues that the jury was allowed to consider alleged instances of prior bad acts that the State did not prove by clear and convincing evidence. When considering the admissibility of Appellant's prior bad acts the judge was presented with evidence of cards that Appellant did send during the date range as well as cards sent outside of the date range and she was able to see the similarities between them. (R. 77). The judge was also told that Appellant admitted to law enforcement in 2013 that he had sent roses, he admitted that he sent them in Biloxi in 2016, and he admitted to harassment in 2017. (R, 82). There was also a journal entry introduced that was found during the execution of the search warrant on the house. (R. 82). The journal entry admitted that he picked up roses and drove to Biloxi and left the roses and note at her house. (R. 325). This was all clear and convincing evidence that Appellant committed the acts.

Motive

The leaving of roses by Appellant on multiple occasions at both of her houses showed Appellant's motive to harass Victim. In State v. Cheeseboro, the court held that both the barbershop and cab driver murders involved burglaries showing defendant's express need for money, which meant evidence of the cab driver murder in the barbershop trial was admissible to establish motive. State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001). In State v. Varvil, defendant and victim dated for a period of time that ultimately ended. State v. Varvil, 338 S.C. 335, 337 526 S.E.2d 248, 250 (Ct. App 2000). The defendant began calling her work place repeatedly at night leaving long voicemails as well as driving by her work and home. Id. This court ruled that the visits to victim's home were relevant to show defendant's intent of harassing her which was a necessary element of unlawful use of telephone. Id. at 338 S.C. at 341, 526 S.E.2d at 341. In this case, Appellant was charged with stalking. The judge charged the jury that "the state must prove beyond a reasonable doubt....the Defendant engaged in a pattern of words whether verbal, written, or electronic or a pattern of conduct that serves no legitimate purpose and is intended to cause and does cause a targeted person and would cause a reasonable person in the targeted person's position to fear death, assault, bodily injury or damage to the property of a person or member of their family." (R. 475). Similar to Varvil, the leaving of roses at both of Victim's homes was introduced to show defendant's intent to harass Victim and was necessary to prove the pattern element of the crime.

Identity

The cards sent to Victim were introduced not for purposes of the cards themselves, but to show that Appellant was the one who sent the cards. Further the leaving of the roses was a signature of the Appellant. Other crimes or bad acts evidence may be admissible to prove the identity of the

perpetrator. Rule 404(b), SCRE. "Of course, Rule 404(b), Federal Rules of Evidence, prohibits the admission of evidence of past criminality for the purpose of establishing a criminal propensity. Such evidence is admissible, however, for other purposes including proof of identity." State v. Johnson, 623 F.2d 339, 341 (4th Cir. 1980). In State v. Beck, in a trial for murder of an escort, the court allowed testimony that Appellant had assaulted and robbed another escort service employee two days prior to the murder because the evidence was probative of identity. State v. Beck 342 S.C. 129, 536 S.E.2d 679 (2000). In State v. Forney, evidence that defendant was the gunman in an earlier robbery was admissible for identity purposes to show that he, not his co-defendant, shot a police officer. State v. Forney, 321 S.C. 353, 468 S.E.2d 679 (1996).

In this case there were nine letters introduced at trial that were sent to Victim. Victim testified to the appearances of each of the cards. Five of the cards introduced were sent during the indicted time of January 2018-June 2019. (State's Exhibit 20-24). Victim testified that State's Exhibit 20-24 all had a big block address stamp that had her address on it and the return addresses on each were a smaller stamp as "M. Ancheta" (R. 188-191). Similarly, Victim testified that State's Exhibits 18, 19 and 25 were consistent with the big address block stamp as well as the return address of "M. Ancheta" (R. 186-191). Pursuant to a search warrant of Appellant's property, a printer stamp was found with large block lettering with Victim's address on it consistent with the address stamped onto the letters, as well as the smaller version of the stamp. (R.309, 318)

Victim also testified that on State's Exhibits 17, 19, 20, 24, there was a specific U.S. Constitution Stamp and on State's Exhibits 21-23, there was a specific American flag stamp. (R. 186-191). Investigator Snider testified that American flag stamps and U.S. Constitution stamps consistent with the stamps found on the letters sent to Victim were found at Appellant's house. In State's Exhibit 17, 19, 22, 23, and 24 the letter is addressed to "my wife." (R. 186-191). Victim

testified that they had a "commitment ceremony" on June 6, 2014 because they could not get married due to both of their marital situations. (R. 224-225). State's Exhibit 18, although not addressed to his wife was dated four days before the anniversary of the commitment ceremony date and discusses their anniversary. (R. 187). The four cards that were introduced outside of the indicted period were introduced for the purposes of showing that Appellant was the one who wrote the cards. The evidence of leaving the roses on multiple occasions was introduced to show that this was a signature of Appellant and that it was he who was leaving the roses for Victim. These were admissible under the identity exception to Rule 404(b) SCRE.

Common Scheme or Plan

The leaving of the flowers and cards by Appellant showed a common scheme or plan. "When considering whether there is clear and convincing evidence of other bad acts, an appellate court is bound by the trial judge's factual findings unless they are clearly erroneous," State v. Clasby, 385 S.C. 148, 155, 682 S.E.2d 892, 895 (2009). In State v. Clasby, the court held that victim's testimony regarding four prior incidents of uncharged sexual misconduct were admissible as evidence of common scheme or plan because it showed continuous illicit conduct by defendant as the indicted offenses. Id. The court in State v. Kirton held evidence that defendant began touching and committing other sexual misconduct with Victim when she was six or seven years old was admissible to show common scheme or plan during trial for the indicted offense of CSC with a minor because it showed a pattern of escalating abuse of Victim by defendant and continuous illicit activity. State v. Kirton, 381 S.C. 7, 671 S.E.2d 107 (Ct. App 2008).

Victim testified that when she and Appellant were together he would often give her different gifts including roses and cards. (R. 178). She also testified that during the period she and Appellant were broken up (December 2013-January 2014) she received roses on a daily basis and

on one specific day she received a single rose at three different times during the day. (R. 180-181). Victim testified that she was concerned because this was a "consistent pattern" (R. 222). Victim testified about another incident of Appellant leaving flowers on her doorstep after they broke up in April of 2016. Victim testified she had moved to Mississippi to escape Appellant and four days after she moved, Victim opened the door to roses and a card on the front porch of her new home. (R. 182-183). Victim described throughout the times that she and Appellant were together, Appellant had a habit of leaving roses for her as well as sending cards. Victim also testified about nine cards she received basically once per month on holidays and significant dates they shared together. (R. 185-191). Similar to Clasby and Kirton, this conduct showed continuous harrassing conduct and a pattern of escalation falling into the exception of common scheme or plan.

Defense opened the door

The State did introduce a protective order obtained by the Victim against Appellant because defense counsel opened the door. State v. Robinson held that where Appellant opened the door to evidence, he cannot complain of prejudice from its admission. State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991). "When a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App. 1999).

Despite the trial judge ruling that Appellant's two convictions were not admissible, defense counsel opened the door during his opening statement. He stated that Victim took "no steps to cut off communication." (R. 137). The trial judge had made a previous ruling that the convictions were not admissible unless the door was opened. (R. 85). The statement that Victim did not attempt to cut off communication allowed the State to introduce the protective order she obtained in

Mississippi to "cut off communication", but again there was no specific mention of his convictions for stalking or violation of the protective order she obtained. The only information allowed in was his conduct to show a pattern of behavior that caused the Victim to fear for her life.

Relevance and Prejudice

Appellant argues that any of the past incidents were not relevant to the current incident and that even if they were relevant, they were more prejudicial than probative because they were too similar to the current charges for which Appellant was on trial. "Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Rule 401, SCRE. "Evidence which is not relevant is not admissible." Rule 402, SCRE. "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." Rule 403, SCRE.

Appellant was charged with stalking. South Carolina law defines stalking as:

> a pattern of words, whether verbal, written, or electronic, or a pattern of conduct that serves no legitimate purpose and is intended to cause and does cause a targeted person and would cause a reasonable person in the targeted person's position to fear:
>
> (1) Death of the person or a member of his family;
> (2) Assault upon the person or a member of his family;
> (3) Bodily injury to the person or member of his family;
> (4) Criminal sexual conduct on the person or a member of his family; kidnapping of the person or a member of his family; or
> (5) Damage to the property of the person or a member of his family.

S.C. Code Ann. §16-3-1700 (1976). The conduct by Appellant of leaving roses and cards introduced by the State were extremely relevant to show the pattern in Appellant's conduct, a

necessary element of the charged crime, as well as who committed the conduct, and was not unfairly prejudicial to Appellant. The prior conduct was necessary to help provide the jury with evidence of a continuous pattern instead of a few instances during a certain time period. The Court in State v. Lyle, specifically articulated that evidence of other crimes is acceptable to prove the specific crime charged when it tends to establish identity and motive. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Appellant's conduct introduced by the State was admissible because it fell into the exceptions to Rule 404(b) SCRE, therefore the trial judge did not err in admitting them. Appellant's conviction should be affirmed.

Prior convictions

Appellant seems to argue that three of Appellant's prior convictions were presented to the jury. Appellant had three prior convictions that were to be introduced: (1) harassment in Beaufort County (2) stalking in Mississippi and (3) violation of a protective order in Mississippi. Despite the fact that defense counsel had no objection to the harassment conviction coming in, the trial judge actually ruled that none of Appellant's prior convictions were admissible. (R. 85). She then used her discretion to revise her ruling regarding the two convictions in Mississippi. She stated

> Those two convictions are still not admissible, which of course could be reevaluated if the Defendant testifies. But his actions, his conduct I will allow without mentioning the convictions; the fact that he he's been convicted of the crime his actions to the extent that they caused the victim to fear for her life, safety, etcetera or to the extent that they show a pattern of behavior as of course is required to prove harassment. The actions themselves can be discussed but not the convictions for those actions.

(R. 118). Neither the harassment in Beaufort nor the stalking in Mississippi were specifically discussed. Victim testified strictly about Appellant's conduct, but said nothing about whether he was charged or convicted of anything. Victim did make a reference to judges, but it was extremely

vague and was not specific to any convictions. (R. 199).[1] State v. Thompson held that a vague reference to a defendant's prior criminal record was not sufficient to justify a mistrial, where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes. State v. Thompson, 352 S.C. 552, 575 S.E.2d 77 (Ct. App. 2003). Victim made a vague reference to other judges, but was not attempting to talk about any other crimes of which Appellant was convicted or charged. The State did introduce a protective order obtained by the Victim against Appellant because defense counsel opened the door.

Busted Pipe

The State wanted to admit evidence of property damage to Victim's home. Appellant had admitted to law enforcement that on the day there was a busted pipe in Victim's home, that Appellant had been inside her home to leave her hundreds of love notes all over her house while Victim was away. (R. 62). When the Victim returned to her house there was a busted pipe and water all over the floor resulting in property damage. (R. 62). The State wanted to admit this evidence for the purpose of proving that the Victim feared property damage, an element of the offense. (R. 62). The trial judge ruled that the property damage to the Victim's home was not admissible. (R. 81). The trial judge revised her ruling the next morning stating that it was admissible to the extent that Victim feared for her safety because she believed he broke a pipe in her house. (R. 119). During Victim's testimony she stated that she arrived at her house one day and found water throughout the house and she was terrified about it, not understanding how it happened. (R. 181). She made no reference or inference that she believed Appellant caused the

[1] Counsel for Appellant at trial moved for a mistrial because he believed the references to judges was a clear implication to the jury that there had been prior cases involving the defendant. The judge denied the mistrial. There is no appeal on whether there is an improper denial of mistrial. (R. 199).

water damage. There was also no testimony that she feared for more property damage caused by Appellant. The testimony of the busted pipe should not have been admitted, however, it was harmless as it caused no prejudice to the jury as they would have had to speculate that Appellant caused the damage.

Harmless error

The admission of any testimony regarding the busted pipe was entirely harmless because it was vague and did not result in prejudice. "To warrant the reversal based on the admission or exclusion of evidence, the Appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or lack thereof." State v. Singleton, 395 S.C. 6, 13, 716 S.E.2d 332, 336 (Ct. App 2011) Appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Byers, 392 S.C. 438, 448, 710 S.E.2d 55, 60 (2011). The jury was presented with extremely vague evidence that there was a busted pipe in Victim's house that resulted in water damage. The evidence was not at all connected to Appellant because he was not referred to at all. Further, in the testimony of the busted pipe Victim stated that it was "terrifying to see all this water in my house and not understanding how that happened." (R. 181). It could not possibly have been prejudicial to him when he wasn't named or even referenced at all. Therefore the admission of testimony of a busted pipe was harmless error. Appellant's conviction should be affirmed.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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."

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