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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Orangeburg County

Honorable Edgar W. Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHNATHAN GREEN,

APPELLANT

APPELLATE CASE NO 2020-001414

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

ARGUMENTS IN REPLY

1.

The Court of Appeals erred in finding that the trial judge did not err in allowing the witness to testify that on a prior occasion Petitioner assaulted her when the testimony was not relevant, did not meet an exception pursuant to Rule 404(b), the State failed to prove the alleged prior assault by clear and convincing evidence and the probative value of the alleged prior assault was substantially outweighed by the danger of unfair prejudice pursuant to Rules 403 and 404(b), SCRE.....3

2.

The Court of Appeals erred in finding that the trial judge did not err in allowing the witness to testify that on a prior occasion Petitioner threatened to blow the witness’s face off when the testimony did not meet an exception pursuant to Rule 404(b), the State failed to prove the alleged prior threat by clear and convincing evidence and the probative value of the alleged prior threat is substantially outweighed by the danger of unfair prejudice pursuant to Rules 403 and 404(b), SCRE.....7

CONCLUSION.....12

TABLE OF AUTHORITIES

Cases

Blakely v. State, 360 S.C. 636, 602 S.E.2d 758 (2004)..... 5, 8, 9

Johnson v. State, 433 S.C. 550, 860 S.E.2d 696 (Ct. App. 2021)..... 3, 4

State v. Brooks, 79 S.C. 144, 60 S.E. 518 (1908)..... 5

State v. Kirton, 381 S.C. 7, 671 S.E. 107 (Ct. App. 2008) 9, 10

State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)..... 3, 4

State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (2020)..... 3, 7

State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980)..... 4, 5, 8

State v. Smith, 300 S.C. 216, 387 S.E.2d 245 (1989)..... 4

State v. Thomas, 248 S.C. 573, 151 S.E.2d 855 (1966) 4

State v. Tutton, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003)..... 6

State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001)..... 6

Rules

Rule 403, SCRE3, 4, 7, 10

Rule 404(b), SCRE *passim*

Other Authorities

40 C.J.S., Homicide, Section 228 5

ARGUMENTS IN REPLY

- 1. The Court of Appeals erred in finding that the trial judge did not err in allowing the witness to testify that on a prior occasion Petitioner assaulted her when the testimony was not relevant, did not meet an exception pursuant to Rule 404(b), the State failed to prove the alleged prior assault by clear and convincing evidence and the probative value of the alleged prior assault was substantially outweighed by the danger of unfair prejudice pursuant to Rules 403 and 404(b), SCRE.**

The State failed to show some connection of cause and effect between the alleged prior assault in January of 2015, and the charged attempted murder of Hogges and her boyfriend when Petitioner saw them together almost a year later. The alleged January incident took place when Hogges, the mother of Petitioner's child, picked up their daughter from Petitioner's mother's house. The prior incident had nothing to do with Hogges' boyfriend. The attempted murder incident was, according to the State, a result of Petitioner seeing Hogges and her boyfriend together and had nothing to do with the child. The trial judge erred in allowing Hogges to testify about the alleged January incident that took place almost a year before the shooting. The testimony was irrelevant and did not meet an exception pursuant to Rule 404(b).

In Johnson v. State, 433 S.C. 550, 860 S.E.2d 696, 699 (Ct. App. 2021), the South Carolina Court of Appeals, discussing Rule 404(b) evidence after this Court's decision in State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (2020), wrote:

Such evidence—commonly referred to in our state as “prior bad act” or Lyle evidence—is not admissible unless its proponent can demonstrate it has a legitimate purpose, i.e. the evidence does something more than prove a person has a propensity to commit crimes. Rule 404(b), SCRE, recognizes only five legitimate purposes for prior bad act evidence: to prove “motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.”

Our supreme court addressed the proper approach to Rule 404(b) admissibility in State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (2020). In a criminal case, the State must convince the trial court that the prior bad act evidence is logically relevant to a material fact at issue in the case: “If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it

incidentally proves the defendant guilty of another crime.” Lyle, 125 S.C. at 417, 118 S.E. at 807. If, after applying the logical relevancy test with “rigid scrutiny,” the trial court concludes the prior bad act evidence serves some purpose other than to show the defendant's proclivity for criminal conduct (and that purpose is one of the five listed in Rule 404(b)), then the evidence is admissible unless 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; see Perry, 430 S.C. at 44, 842 S.E.2d at 665. If the prior bad act did not result in a criminal conviction, the State also bears the burden of proving the prior bad act by clear and convincing evidence. State v. Smith, 300 S.C. 216, 218, 387 S.E.2d 245, 247 (1989).

In Johnson the Court of Appeals found that evidence of gang affiliation was logically relevant to show motive and intent. The fatal shooting in the Johnson case was the result of mistaken gang rivalry. In contrast, in the present case the alleged January incident was not logically relevant to the attempted murder and served no other purpose than to show propensity.

Respondent argues that the alleged incident in January meets the identity exception to Rule 404(b) citing State v. Thomas, 248 S.C. 573, 151 S.E.2d 855 (1966). (BOR p. 14). Respondent’s reliance on Thomas is misplaced because in Thomas the prior bad act was the theft of the victim’s watch. Four years later Thomas went to the victim’s house and told her he planned to kill her for putting him on the “chaingang” for stealing her watch. The prior stealing of the watch and the charged crime in Thomas were connected and the prior stealing meets the identity exception to Rule 404(b). The alleged prior January incident and the charged crime in the present case are not connected and the January incident does not meet the identity exception.

Respondent argues that the alleged incident in January meets the motive exception to Rule 404(b). (BOR p. 15). While evidence of prior difficulties between the parties may be admissible to show motive, there still must be some connection of cause and effect between the evidence and the charged crime. See State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980).

(“Evidence of previous difficulties or ill feelings between the accused and the victim and of facts showing the cause of such difficulties or ill will is admissible on the question of motives where there is some connection of cause and effect between the evidence and the crime. 40 C.J.S., Homicide, Section 228.”). In Plyler this Court found that a verbal altercation three days prior to the fatal shooting showed motive on the part of the accused and was not so remote in time as to negate its probative value. The alleged January incident in the present case had nothing to do with the attempted murder and was so remote in time as to negate any possible probative value. In State v. Brooks, 79 S.C. 144, 60 S.E. 518 (1908), cited by Respondent (BOR p. 17), the prior difficulty and the charged crime both involved the custody of Brooks’ daughter. Again, in the present case the alleged January incident had nothing to do with the attempted murder and should have been excluded.

Respondent argues that the prior incident meets the intent exception of Rule 404(b). (BOR pp. 18-20). As discussed below with regard to the alleged prior threat, while evidence of prior threats may be admissible to show malice and intent, the State must still establish a connection between the prior alleged incident from a year ago and the crime charged. Respondent’s reliance on Blakely v. State, 360 S.C. 636, 602 S.E.2d 758 (2004), is misplaced because the State in Blakely was able to show a connection between a prior threat and the charged crime. In the present case the prior alleged January incident did not involve a threat and there was no connection between the prior incident and the charged crime. The testimony about the alleged January incident should have been excluded.

Additionally, the State failed to prove the prior January incident by clear and convincing evidence. The only person to testify about the alleged January incident was Hogges. Hogges admitted during the pre-trial hearing that she did not call the police but testified that she went to

the sheriff's department and filed a report. (R. p. 15, lines 15-22). The officer who took the report noted that he did not observe any physical injury. (R. p. 26, lines 1-5). The sheriff's department did not press charges against Petitioner for the alleged January incident. (R. p. 26, lines 8-18). Hogges testified that Petitioner's mother was a witness to the January incident and called the police. (R. p. 112, lines 16-17). Petitioner's mother, however, while called as a witness by the State at trial, was not questioned about the alleged January incident and was not called as a witness at the pre-trial hearing. The testimony should have been excluded because the State failed to prove the alleged January incident by clear and convincing evidence.

While an appellate court should not re-evaluate the trial judge's findings as to witness credibility, (See State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Tutton, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003)), in the present case the trial judge failed to make a specific finding of credibility and failed to specifically find that the State presented clear and convincing¹ evidence of the alleged January incident. Instead, the trial judge in the present case stated:

Now, here with the Thanksgiving incident, it's more descriptive. And I think – but, of course, again, I think it's up to the jury whether or not they believe her in that situation. And right now, all of these motions are just essentially – I can change my mind. These are essentially Motions in Limine. But I'm inclined to let it in. It's close. It kind of goes along with the January event that shows the animus between them. And there are a couple of cases where there's domestic violence you can use that testimony later on, a prior domestic violence even in an assault and battery with intent to kill. And so I've got some cites here if you are interested, but I - - ”

This Court does not have to re-evaluate the trial judge's finding as to witness credibility to find that the State failed to present clear and convincing evidence of the January allegation. The testimony and evidence about the January allegation should have been excluded.

¹ The trial judge correctly stated the clear and convincing standard. (R. p. 29, lines 18-20).

Finally, testimony about the alleged January 2015, incident should have been excluded because the probative value of the alleged prior assault was substantially outweighed by the danger of unfair prejudice pursuant to Rules 403, 404(b), SCRE. The probative value was low because, as discussed above, there is not a connection between the alleged January incident and the charged attempted murder. Additionally, the alleged January incident was so remote in time as to negate any possible probative value. The admission of the propensity evidence was unfairly prejudicial. The admission of the evidence requires reversal.

- 2. The Court of Appeals erred in finding that the trial judge did not err in allowing the witness to testify that on a prior occasion Petitioner threatened to blow the witness's face off when the testimony did not meet an exception pursuant to Rule 404(b), the State failed to prove the alleged prior threat by clear and convincing evidence and the probative value of the alleged prior threat is substantially outweighed by the danger of unfair prejudice pursuant to Rules 403 and 404(b), SCRE.**

The State failed to show some connection of cause and effect between the alleged prior threat when Hogges refused Petitioner's offer to help fix her car and the charged attempted murder of Hogges and her boyfriend when Petitioner saw them together. As discussed above, in order for prior bad act evidence to be admissible the State must show that the evidence is logically relevant to a material fact at issue in the case. See Perry. The alleged prior threat in the present case is not logically relevant to a material fact at issue in the case. Testimony about the alleged prior threat did not meet an exception pursuant to Rule 404(b).

Respondent argues that the alleged prior threat meets the identity exception to Rule 404(b). As discussed above with regard to the alleged January incident, there is no connection between the alleged prior threat and the attempted murder. The alleged threat to Hogges alone

when she refused Petitioner's help is not connected with the attempted murder of Hogges and her boyfriend after Petitioner saw them together. The prior threat does not prove identity.

Respondent argues that the prior threat meets the motive exception of Rule 404(b). (BOR pp. 15-20). As discussed above while evidence of prior difficulties between the parties may be admissible to show motive, there still must be some connection of cause and effect between the evidence and the charged crime. See State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980). Again, there is no connection between the alleged prior threat to Hogges alone and the charged attempted murder of Hogges and her boyfriend.

Respondent argues that the prior threat meets the intent exception of Rule 404(b). (BOR pp. 18-20). Evidence of prior threats may be admissible to show malice and intent. See Blakely v. State, 360 S.C. 636, 602 S.E.2d 758 (2004) The State, however, must establish a connection between the threats and the crime charged. In Blakely the girlfriend testified about the prior threat as follows:

Q: What was your relationship with [respondent]?

A: I was his girlfriend.

Q: How long did y'all date?

A: About six months.

Q: Were you dating that day on January 1st, 1998? Were y'all still dating then?

A: No. We had quit. I had been calling the relationship all along off, and he like kept threatening me. And, you know, threatened to do something to my family like killing us and blowing up the house. And so I kind of like hung in there because I was afraid of him.

Blakely, 360 S.C. at 638–39, 602 S.E.2d at 759. Blakely threatened the girlfriend when she tried to call off the relationship. Blakely was then charged with murder and assault and battery with

intent to kill after he saw his girlfriend kissing another man and confronted the two, fatally shooting the man. There was a connection between the threat and the charged crime.

In contrast, in the present case there was no connection between the alleged threat when Hogges refused Petitioner's offer of help and the charged attempted murder of Hogges and her boyfriend. Hogges did not testify that the alleged threat was made when she tried to call of the relationship with Petitioner, as in Blakely. Hogges testified at the pre-trial hearing that, "The week of Thanksgiving, he came to my house to try and fix my car. And I told him I didn't want him to do anything for me, that, you know, I didn't want him to do anything for me. And he was just like don't – me I'll blow your face off. And I told him to get out the yard and don't come back no more." (R. p. 14, lines 9-14). At trial Hogges testified that that Petitioner and his brother came to her house to fix her car and she told him she did not want him to do anything for her. (R. p.112, line 25 – p. 113, lines 1-24). Hogges testified, "And he looked at me and said, don't play with me I'll blow your face off. And then I said that's the problem right there. I said get out of my yard and don't come back and leave me alone." (R. p. 113, line 25 – p. 114, lines 1-3). The alleged prior threat had nothing to do with the boyfriend and should have been excluded.

Additionally, the State failed to prove the prior threat by clear and convincing evidence. The only person to testify about the alleged threat was Hogges. Hogges testified that Petitioner's brother was a witness to the alleged threat but he was not called as a witness by the State. Hogges did not report the alleged threat to the police. The testimony should have been excluded because the State failed to prove the alleged threat by clear and convincing evidence.

Like the January allegation, proof of the prior threat is distinguished from the proof of the prior bad act in State v. Kirton, 381 S.C. 7, 27, 671 S.E.2d 107, 117 (Ct. App. 2008), where the Court of Appeals wrote, "Testimony in the record supports the finding made by the trial judge

that there was clear and convincing evidence of the prior bad acts, and that finding was not erroneous.” The trial judge in the present case did not make a specific finding that there was clear and convincing evidence of the alleged prior threat. Instead, the trial judge in the present case stated:

Now, here with the Thanksgiving incident, it's more descriptive. And I think – but, of course, again, I think it's up to the jury whether or not they believe her in that situation. And right now, all of these motions are just essentially – I can change my mind. These are essentially Motions in Limine. But I'm inclined to let it in. It's close. It kind of goes along with the January event that shows the animus between them. And there are a couple of cases where there's domestic violence you can use that testimony later on, a prior domestic violence even in an assault and battery with intent to kill. And so I've got some cites here if you are interested, but I - - ”

(R. p. 31, line 24 – p. 32, lines 1-4). In order for the jury to have an opportunity to determine credibility with regard to Hogges's testimony about the alleged prior bad acts, the judge had to first determine that the State presented clear and convincing evidence of the alleged prior bad acts. The judge failed to make that determination before admitting the testimony. The trial judge erred. The State failed to prove the alleged prior threat by clear and convincing evidence. The testimony about the alleged prior threat should have been excluded.

Finally, as also discussed above in regard to the alleged January assault, the probative value of the alleged prior threat was substantially outweighed by the danger of unfair prejudice pursuant to Rules 403, 404(b), SCRE. The highly inflammatory alleged threat to “blow her face off” tends to suggest a decision on an improper emotional basis. The State failed to meet its burden to show that the probative value of the prior alleged threat was not substantially outweighed by the danger of unfair prejudice from the inherent tendency of the evidence to show propensity. The testimony should have been excluded as more prejudicial than probative.

Both prior bad act allegations involved only Hogges, the mother of Petitioner's child. The shooting for which the jury found Petitioner guilty was directed at the mother and the boyfriend when Petitioner saw them together. The boyfriend was not involved in the prior allegations. The January allegation was not relevant to the December shooting at both the mother and her boyfriend. The State failed to establish a connection between either of the allegations of prior bad acts and the December shooting which would be probative of identification, motive, or intent. Neither prior bad act allegation was proved by clear and convincing evidence. The January allegation is far too remote in time to be probative of the December shooting. Finally, in this trial for two counts of attempted murder the probative value of the prior bad act allegations is substantially outweighed by the danger of unfair prejudice.

CONCLUSION

Based on the above arguments, this Court should reverse the convictions and remand the case for a new trial.

s/ Kathrine H. Hudgins
Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of September, 2021.