

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Oct 29 2021

SC Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of General Sessions
The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2020-001554

THE STATE,RESPONDENT,

v.

CALVIN CARROLL COCHRAN,APPELLANT.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court properly allowed the admission of Appellant's prior convictions for failure to register as a sex offender where the prior convictions were admitted pursuant to Rule 404(b), SCRE to demonstrate Appellant's intent and the absence of accident or mistake in failing to do so.

STATEMENT OF THE CASE

On June 15, 2020, Appellant was indicted by the Oconee County grand jury for failing to register, third offense, under S.C. Code Ann. § 23-3-470. On November 16, 2020, a jury trial was held before the Honorable R. Lawton McIntosh. Joseph Holland, Esquire, represented Appellant; Assistant Solicitor William Stolarski, Esquire, represented the State. The jury found Appellant guilty as charged and the trial judge sentenced Appellant to three years' of active service and two years of probation.

Appellant filed a timely Notice of Appeal and subsequently submitted a Brief in support of his appeal on August 4, 2021. This Brief of Respondent follows.

STATEMENT OF FACTS

Justin Pelfrey, a deputy with the Oconee County Sheriff's Office, testified that on December 27, 2019, he encountered Appellant and informed him he needed to register as a sex offender with Sergeant Winchester, a fellow deputy of his, by the end of that year. Pelfrey went so far as to schedule a specific time for Appellant to meet with Winchester, between 9:00 a.m. and 12:00 p.m. on December 31, 2019. Pelfrey had Appellant sign a written notice acknowledging he had been informed of the information and, before leaving, offered to give him a ride to any place of his choosing. Instead of choosing the sheriff's office and registering, Appellant elected to be dropped off outside a hospital in Oconee County. Appellant was given copies of the documentation and left outside the hospital. (Tr.p.36, line 3–Tr.p.40, line 10; State's Exhibit 1)

Kelly Winchester, the sheriff's deputy with whom Appellant was supposed to meet, testified she managed Oconee County's sex offender registry and had met Appellant on several occasions. Appellant was originally registered on May 29, 2018, and had last registered with the county on October 11, 2018. When Appellant had initially registered as a sex offender on May 29, 2018, Winchester had presented Appellant with a packet of information explaining Appellant's requirement of registering and later re-registering with the State along with the legal repercussions of failing to comply with the process. After Winchester explained the information to Appellant, he initialed and signed the forms to confirm his receipt of them and the information therein. When Appellant re-registered on October 11, 2018, Winchester again explained the forms to Appellant and had him sign and date the documents. After that date, Appellant failed to ever register again. Winchester confirmed Appellant failed to register with her in December of 2019 and that Appellant had expressed resistance to the registration process, stating he did not

believe he should have to register. (Tr.p.41, line 24–Tr.p.50, line 1, Tr.p.51, line 12–Tr.p.52, line 5; State’s Exhibit 2)

After the State rested its case, Dr. Richard Frierson, an expert in forensic psychiatry testified for the defense. Dr. Frierson evaluated Appellant on three separate occasions, on the last of which he diagnosed Appellant with dementia. When Dr. Frierson initially met Appellant in 2018, Dr. Frierson found Appellant suffered from “mild neurocognitive disorder” which did not affect Appellant’s day-to-day living. However, when Dr. Frierson evaluated Appellant on December 2, 2019, he determined Appellant’s cognitive issues had progressed to dementia. At that point, Appellant “had to leave himself notes to try to remember things.” (Tr.p.56, line 13–Tr.p.64, line 23)

Dr. Frierson stressed that he believed Appellant was criminally responsible for failing to register as a sex offender because he still knew it was wrong not to register and, in his last interview with Frierson, knew it was a requirement; however, Frierson went to say he believed Appellant lacked “sufficient capacity” to conform his conduct because he likely forgot about the conversation reminding him to register. (Tr.p.64, line 24–Tr.p.66, line 13)

On cross-examination, Dr. Frierson testified that Appellant knows, in general, he has to register as a sex offender but “doesn’t like it and doesn’t feel that he should have to register” (Tr.p.66, line 23–Tr.p.67, line 24)

Following Dr. Frierson’s testimony and outside the presence of the jury, the State informed the court of its intention to call Beverly Whitfield to the stand to testify about Appellant’s prior convictions for failing to register as a sex offender. Relying on Rule 404(b), SCRE, and State v. Smith, 377 S.C. 27, 522 S.E.2d 598 (1999), the State argued Appellant’s convictions were admissible as evidence of Appellant’s intent to not register as an offender as

well as evidence it was not a mistake or accident that he failed to do so. The State believed these two convictions were particularly relevant because they occurred on September 10, 2018,¹ and December 19, 2019, the latter of which occurred only a few days prior to Pelfrey's conversation with Appellant. Trial counsel opposed the admission of the convictions, arguing they were improper pursuant to Rule 403, SCRE. Trial counsel also he was not putting forth an argument on the absence of mistake or accident, but only that he was arguing Appellant lacked the intent to commit the crime based on his dementia. The trial judge noted Appellant's objection, but found the evidence admissible for the reasons argued by the State.(Tr.p.69, line 23–Tr.p.74, line 4)

On reply, Whitfield, the Clerk of Court for Oconee County testified only about Appellant's December 19, 2019 conviction for failing to register as a sex offender and confirmed Appellant pled guilty to the offense on that date. Additionally, the State recalled Winchester as a witness and had her confirm her participation in a December 18, 2018 trial in which Appellant was found guilty of failing to register. (Tr.p.74, line 18–Tr.p.80, line 14)

¹ While initially referenced as a September 10, 2018 conviction, the evidence at trial indicated Appellant was officially indicted for the offense on October 9, 2018, and was convicted on December 18, 2018. (Tr.p.80, lines 5–14). The Oconee County Public Index confirms this. See Records for Calvin Carroll Cochran, Oconee County Tenth Judicial Circuit Public Index, <https://publicindex.sccourts.org/Oconee/publicindex> (containing no information suggesting any type of motion for reconsideration was filed prior to the initiation of the appeal of the circuit court judge's ruling).

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."); also State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence.").

ARGUMENT

The trial court properly allowed the admission of Appellant's prior convictions for failure to register as a sex offender where the prior convictions were admitted pursuant to Rule 404(b), SCRE to demonstrate Appellant's intent and the absence of accident or mistake in failing to do so.

Appellant argues the trial judge erred in admitting the evidence of his prior convictions because evidence of Appellant's dementia was not being used to show accident or mistake and the potential prejudice of such convictions "grossly outweighed their probative value." The State disagrees with these allegations of error. Appellant's intent, and whether he mistakenly forgot to register, was Appellant's only defense to his charged crime. Thus, evidence that he intentionally failed to register was extremely probative to the State's case and outweighed any potential prejudice from introducing his prior convictions.

"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." State v. Cope, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013); see also State v. Weaverling, 337 S.C. 460, 467, 523 S.E.2d 787, 791 (Ct. App. 1999) *citing State v. Lyle*, 125 S.C. 406, 118 S.E.2d 803 (1923) ("Generally, South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt of the crime charged."); Rule 404(b), SCRE (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).

However, evidence of other crimes or misconduct is admissible to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related that proof of one tends to establish the other; or (5) identity. See Rule 404(b), SCRE;

State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923); also State v. Wilson, 274 S.C. 635, 266 S.E.2d 426 (1980); State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984); State v. Atkins, 309 S.C. 542, 424 S.E.2d 554 (1992); State v. Weaverling, at 468–69, 523 S.E.2d at 791; State v. Clasby, 385 S.C.148, 682 S.E.2d 892 (2009).

“Further, even though the evidence falls within a Lyle exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. The determination of the prejudicial effect of prior bad act evidence must be based on the entire record and the result will generally turn on the facts of each case. The erroneous admission of prior bad act evidence, however, may be deemed harmless.” See State v. Fletcher, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008); State v. Clasby, 385 S.C. 148, 156, 682 S.E.2d 892, 896 (2009). This Court is bound by the trial judge's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000). Accordingly, the trial judge's ruling will not be disturbed on appeal if there is any evidence to support the admission of bad act evidence. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). Applying this standard, the State submits that the trial judge did not abuse his discretion.

In the case sub judice, the challenged evidence was introduced in order to prove Appellant’s intent and also the absence of mistake or accident in his committing the charged offense. In State v. Smith, the named defendant was convicted of murder and assault and battery with intent to kill in connection with a fatal shooting of his daughter. The Supreme Court held that the defendant’s prior criminal domestic violence conviction was admissible in trial to show an ongoing abusive relationship to rebut the defendant’s claim that the shooting was an accident. State v. Smith, 337 S.C. 27, 33, 522 S.E.2d 598, 601 (1999). Similar to Smith, the evidence of Appellant’s conviction made it less probable Appellant’s failure to register was accidental or

unintentional, as Appellant claimed, and more probable that Appellant did not register because he simply did not want to. See id. at 33, 522 S.E.2d at 601 (in trial for murder and ABIK, the Supreme Court alternatively found that “[t]he solicitor properly offered appellant’s July 1996 criminal domestic violence conviction to establish appellant’s intent to kill and the absence of mistake or accident. The prior conviction was logically relevant to appellant’s intent and absence of mistake or accident at the time of the shooting” roughly three months later); State v. Simmons, 310 S.C. 439, 442-43, 427 S.E.2d 175, 177-78 (1993) (evidence of prior attacks on elderly women admissible to show defendant’s intent to enter an elderly murder victim’s home without her consent in trial for murder and burglary; also, finding that the probative value of this evidence was not substantially outweighed by prejudicial effect), *sentence rev’d on other grds.*, Simmons v. South Carolina, 512 U.S. 154 (1994); State v. Sweat, 362 S.C. 117, 124–25, 606 S.E.2d 508, 512 (Ct. App. 2004) (finding in a defendant’s trial for burglary in the first degree, assault and battery with intent to kill (ABIK), and three counts of assault of a high and aggravated nature (ABHAN), trial judge did not err by allowing defendant’s girlfriend – who was also a victim in case on trial - to testify to a prior act of criminal domestic violence in prosecution occurring forty-five days before crimes for which he was being tried. The Court found that “both motive and intent can be inferred from the prior bad act”); State v. Ford, 334 S.C. 444, 452, 513 S.E.2d 385, 389 (Ct. App. 1999) (evidence appellant and co-defendant had previously robbed or attempted to rob victim of common law robbery “was a necessary element in understanding their motive and intent when they accosted” victim on date of crime); also United States v. Contreras, 816 F.3d 502 (8th Cir. 2016) (evidence defendant had previously spanked his daughter hard enough to leave a mark, and had apologized to daughter’s mother, was admissible in his trial for the second degree murder of his daughter; such evidence was relevant

to prove absence of mistake and lack of accident, and was similar in kind and close in time to the crime charged, and probative value of the evidence outweighed potential prejudice”); State v. Boe, 847 N.W.2d 315, 321 (S.D. 2014) (trial court did not abuse its discretion by admitting evidence of defendant's 2002 conviction for aggravated assault as other act evidence in his trial for 2012 aggravated assault, where both the past and current incidents involved a female victim in a relationship with defendant who was not complying with defendant's wishes, and defendant used a firearm in both incidents; this other act evidence was relevant to negate defendant’s claim that the shotgun fired accidentally, that he did not intend to harm victim with the shotgun, and that he had no motive to harm her); State v. Grubb, 675 N.E.2d 1353 (Ohio App 1996).

Notably, Appellant’s intent was the central issue in the instant case because trial counsel based the entirety of his defense on his argument that Appellant did not register because he forgot to do so, and such forgetfulness meant Appellant lacked the requisite intent to commit the crime. Appellant’s sole witness at trial was Dr. Frierson, who testified he believed Appellant’s cognitive issues may have been the reason Appellant failed to register with Winchester. Appellant’s intent—or lack thereof—was the sole issue at trial. Appellant’s prior convictions, including the one which occurred mere days before Appellant’s conversation with Pelfrey, supported the State’s contention that Appellant failed to register simply because he did not wish to do so. Thus, evidence of Appellant’s other convictions possessed immense probative value. See Smith, 337 S.C. at 33, 522 S.E.2d at 601.

Moreover, the probative value of the convictions, particularly the December 19, 2019 one, was not substantially outweighed by their prejudicial effect under Rule 403, SCRE. The convictions were extremely probative for disproving Appellant’s claim that his failure to register was the result of some accidental oversight and was because Appellant simply believed he

should not be required to register. While the prior convictions for failing to register may have had some prejudicial effect, the State asseverates that the danger of unfair prejudice was minimal compared to its relevance to the State's case. See Sweat, 362 S.C. at 129, 606 S.E.2d at 515 (“Testimony of the October incident was highly probative. It tended to show motive and intent, and it completed the State's theory of the case”); also State v. Green, 412 S.C. 65, 79, 770 S.E.2d 424, 432 (Ct. App. 2015), *reh'g denied* (Apr. 21, 2015) (“If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal”), *cert. denied* (Sept. 3, 2015).

Accordingly, the trial judge did not err in admitting Appellant's prior convictions into evidence.

CONCLUSION

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

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**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

Respondent proposes the same Designation of Matter to be Included in the Record on Appeal as Appellant.


To facilitate the preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers. The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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THE STATE,RESPONDENT,

v.


CALVIN CARROLL COCHRAN,APPELLANT.

PROOF OF SERVICE

I, Leigh Ann Stone, 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 for the following individual:

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I further certify that all parties required by Rule to be served have been served this 29th day of October, 2021.



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Oct 29 2021

SC Court of Appeals

Good Morning Ms. Gilliam,

Attached please find a copy of the Initial Brief of Respondent and Designation of Matter in The State v. Calvin Carroll Cochran (2020-001554). This brief will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System.

If you will, please reply to confirm receipt of this email.

Thanks !

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