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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
General Sessions Court
DeAndrea G. Benjamin, Circuit Court Judge

Case No. 2017-GS-40-07158
Case No. 2017-GS-40-07162
Case No. 2017-GS-40-07165
Case No. 2017-GS-40-07166
Appellate Case No. 2019-001981

The State,

Respondent,

v.

Charles Barham,

Appellant.

FINAL REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in admitting testimony that Charles Kusko said appellant stole his tools?

2. Did the trial court err in admitting testimony concerning appellant's alleged participation in a prior burglary?

3. Was the cumulative effect of the trial court's errors, in combination, so prejudicial as to deny appellant a fair trial?

SUPPLEMENTAL STATEMENT OF THE CASE

The opening brief of appellant, Charles Brandon Barham, contains a statement of the case, to which appellant adheres. This supplemental statement of the case is made to clarify the statement of the case in the brief of respondent, to the extent the state's characterization of the new trial motion filed by appellant in the lower court is incomplete. The state's brief indicates the new trial motion was based on alleged error in admitting certain evidence pursuant to the "opening the door" doctrine. The challenged evidence was testimony by co-defendant Floyd Owen concerning a remote burglary, unrelated to the charges for which appellant was on trial, in which Owen implicated appellant. The new trial motion went further than merely alleging error in admitting this testimony. The motion also argued the admission of the evidence denied appellant due process and a fair trial, because it placed him in the position of giving up his right to remain silent in order to address the evidence of the unrelated burglary and was burden-shifting. R. pp. 1128, 1130. The admisstion of this evidence is challenged in this appeal (Issue 2).

ARGUMENT IN REPLY

I. THE TRIAL COURT ERRED IN ADMITTING TESTIMONY THAT CHARLES SAID APPELLANT STOLE HIS TOOLS.

Appellant challenged the court's admission of testimony of Charles Kusko's daughter, Laurin Barnes, concerning an alleged conversation she had with her father in which he asserted that appellant stole his tools. R. p. 618, line 11. Appellant contends this statement was hearsay and was not within the state-of-mind exception to the hearsay rule under which the trial court admitted it. *See* Rules 801(c), 802, 803(3), SCRE; *State v. Tennant*, 394 S.C. 5, 15-16, 714 S.E.2d 297, 302-03 (2011)*, State v. Garcia*, 334 S.C. 71, 76, 512 S.E.2d 507, 509 (1999); *State v. Daise*, 421 S.C. 442, 460, 807 S.E.2d 710, 719 (Ct.App. 2017); *State v. Hughes*, 419 S.C. 149, 155-56, 796 S.E.2d 174, 177-78 (Ct.App. 2017); *Vail v. State*, 402 S.C. 77, 87, 738 S.E.2d 503, 508-09 (Ct.App. 2013). He further contends the statement was inadmissible under Rules 403 and 404(b), SCRE, and case law addressing the admissibility of evidence under those rules. *See State v. Perry*, 430 S.C. 24, 29-33, 842 S.E.2d 654, 657-58 (2020); *State v. Williams*, 430 S.C. 136, 151-52, 844 S.E.2d 57, 65-66 (2020); *State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008); *State v. Bell*, 430 S.C. 449, 466, 845 S.E.2d 514, 523 (Ct.App. 2020); *State v. Thompson*, 420 S.C. 386, 397, 803 S.E.2d 44, 50 (Ct.App. 2017), *cert. dismissed as improvidently granted*, 426 S.C. 325, 826 S.E.2d 871 (2019). Finally, he contends the admission of this evidence was not harmless. Appellant adheres to the argument of this issue in his opening brief.

The state makes a number of unfounded procedural arguments with respect to this issue. It contends the defense waived the earlier objection, after the court had admitted the testimony, by later questioning the witness about it. On the contrary, after an objection has been overruled and the challenged evidence has been admitted, the prior objection is not

waived simply because the defense further questions the witness about the testimony the court previously admitted. The state also contends the defense failed to exhaust its remedies with respect to the admission of this evidence by seeking a curative instruction. On the contrary, curative instructions are used to cure the harm that results when the jury hears evidence or argument that the court has disallowed. A request for a curative instruction is not required when the court has overruled an evidentiary objection and admitted the evidence.

The state contends the defense did not specifically argue the evidence was not clear and convincing and this aspect of the argument is not preserved for appellate review. One of the stated bases of the defense's objection was Rule 404(b), and part of the Rule 404(b) analysis is a determination of whether the evidence is clear and convincing, if it is not the subject of a criminal conviction. *See Fletcher*, 379 S.C. at 23, 664 S.E.2d at 483; *Bell*, 430 S.C. at 466, 845 S.E.2d at 523. When a party makes an objection, particular words are not required, as long as the basis for the objection is clear. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). Invocation of Rule 404(b) as a ground for excluding this evidence was sufficient to preserve all aspects of a Rule 404(b) analysis, including whether the evidence of this statement was clear and convincing evidence.

In its argument of this issue, the state notes that appellant's claim of error pertains only to Charles's statement that appellant stole his tools, and that the remainder of Charles's statement to his daughter – that appellant was going to bring back Charles's tools and that Charles was not going to pay appellant until appellant brought back the tools – has not been challenged by appellant on appeal. *See* R. p. 618, line 12; p. 619, lines 1-2. The distinction the state makes is important, because it is ***the remainder of the statement*** that

serves as the basis of the state's arguments in favor of admission, not the challenged part of the statement – "Brandon stole my tools." The state relies on ***the remainder of the statement*** – which showed the existence of an ongoing dispute between appellant and Charles over money – to assert the evidence was admissible under Rule 404(b) as evidence of malice, motive, and intent. It relies on ***the remainder of the statement*** to argue it was admissible as part of the *res gestae*. It relies on ***the remander of the statement*** to argue it was not offered for the truth of the matter but to establish the ongoing dispute over money. It relies on ***the remainder of the statement*** to argue it was admissible under Rule 804(b)(3), SCRE, as a statement against pecuniary interest. It relies on ***the remainder of the statement*** to argue it was admissible as evidence of prior difficulties between the parties, as an additional sustaining ground. All of these arguments address the admissibility of ***the remainder of the statement*** – which pertained to the dispute between Charles and appellant over money. As the state points out, appellant challenged on appeal only the admission of the statement "Brandon stole my tools." The state's arguments based on the unchallenged ***remainder of the statement*** do not establish the admissibility of the part of the statement appellant is challenging on appeal – "Brandon stole my tools."

In arguing the statement was admissible under Rule 803(3), the state acknowledges the case law on which appellant relies that draws a distinction between admission of a statement of an emotion such as anger or fear and admission of a statement as to the reason for that anger or fear. *See State v. Garcia*, 334 S.C. 71, 76, 512 S.E.2d 507, 509 (1999). However, the state offers no argument or explanation to show how the challenged portion of the statement – "Brandon stole my tools" – is not precluded under *Garcia* and the additional case law cited in appellant's opening brief. Acknowledging that appellant's

"point is well taken," the state simply argues, as it does with respect to other aspects of this issue, that ***the remainder of the statement*** was properly admitted to prove the ongoing dispute between the two men and Charles's state of mind, including his anger but also including his admission that he owed appellant money and his statement of his intent to get his tools back and to not pay appellant until the tools were returned. *See* Brief of Respondent, footnote 24 and related text. The state's argument, premised on ***the remainder of the statement***, does not negate the clear inadmissibility of the challenged portion of the statement – "Brandon stole my tools" – under the *Garcia* line of cases.

The state contends the statement was admissible as a statement against pecuniary interest under Rule 804(b)(3). Again, this argument pertains to ***the remainder of the statement***, not the challenged portion of the statement, "Brandon stole my tools."

The state also argues the statement "Brandon stole my tools" was evidence of an alleged grudge appellant held against Charles. On the contrary, if this statement was evidence of a grudge, it was evidence of a grudge ***Charles*** held against ***appellant***. As argued in the opening brief, such evidence did not establish a motive for appellant to kill Charles but instead showed a motive for Charles to kill appellant. Similarly, to the extent the statement showed Charles bore a grudge against appellant, it was inadmissible to establish a grudge or motive for appellant to kill Charles.

As with its other arguments, the state's contention that the challenged statement was more probative than prejudicial pertains to ***the remainder of the statement***, not the portion challenged here – "Brandon stole my tools." A statement implicating appellant in a different criminal offense than the charges for which he was on trial was highly prejudicial and invited a verdict of guilty on an improper basis. Charles's belief that

appellant stole his tools was not probative of any element of the offenses for which appellant was on trial and therefore had little or no probative value whatsoever. The prejudicial effect clearly outweighed the probative value of this evidence, and its admission cannot be deemed harmless. The Court should reverse and grant a new trial.

II. THE TRIAL COURT ERRED IN ADMITTING TESTIMONY CONCERNING APPELLANT'S ALLEGED PARTICIPATION IN A PRIOR BURGLARY.

Appellant also challenges the admission of testimony of Floyd Owen, upon recall to the stand by the state, concerning the details of a 2007 burglary he claimed he and appellant did together. Although Owen had implicated appellant and appellant was charged in connection with that offense, only Owen was convicted. The state dismissed the charges against appellant related to the 2007 incident.

Appellant challenges the admission of Owen's recall testimony about the 2007 burglary, arguing the defense did not open the door to this evidence, that it exceeded what was allowed as an invited response if the door was opened, that it was inadmissible under Rules 404(b) and 403, and that the admission of the evidence deprived appellant of his right to remain silent, was improper burden-shifting, and denied him due process and a fair trial. *See* U.S. Const. amends. V, XIV; S.C. Const. art. I, §§ 3, 12. Appellant adheres to the argument of this issue in his opening brief.

In its brief, the state does not contend this evidence was admissible under Rule 404(b) or Rule 403. Instead, it relies only on the contention that the defense opened the door to admission of this evidence through questions it asked of the investigating officer. On this aspect of the issue, the state acknowledges, even quotes, the applicable principle of law. "'Where one party ***introduces evidence*** as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though

[the] latter evidence would be incompetent or irrelevant had it been offered initially.'" *See State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) (emphasis added) (citations omitted); *see also State v. Heyward*, 426 S.C. 630, 636, 828 S.E.2d 592, 595 (2019). In this case, the defense attempted but was unsuccessful in eliciting the evidence it questioned the officer about. The defense questions did not elicit testimony from the officer to the effect that Owen implicated appellant in the 2007 burglary. The questions by counsel did not open the door to a response, because the questions did not result in the introduction of the evidence they shought to elicit.

It is well recognized that statements by counsel are not evidence. *See Landry v. Landry*, 430 S.C. 153, 163, 843 S.E.2d 491, 496 (2020); *Ex parte Morris*, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006). It is also well recognized that argument of counsel is not evidence. *See In re Gonzalez*, 409 S.C. 621, 636 n. 3, 763 S.E.2d 210, 218 n.3 (2014); *Morris*, 367 S.C. at 64, 624 S.E.2d at 653. Likewise, counsel's questions are not evidence; only the answers elicited by counsel's questions are evidence. *See State v. Washington*, 431 S.C. 394, 408, 848 S.E.2d 779, 786 (2020).

In *State v. Washington*, our Supreme Court recognized the distinction between questions asked by counsel and the answers the questions elicit in its determination whether there was evidence in the record to support a particular jury charge. There, the defense attempted repeatedly, without success, to elicit testimony that an individual other than the defendant was the person who shot the victim. *See Washington*, 431 S.C. at 408, 848 S.E.2d at 786. That individual, Kinloch, repeatedly denied the assertions to that effect contained in counsel's questions. *Id.* The state sought and the trial court granted a jury instruction on accomplice liability, based on the defense's questions that suggested

someone other than defendant was the shooter. The Supreme Court found the accomplice liability charge was not properly given, because the record contained no evidence that someone else may have been the shooter. *Id.*, 431 S.C. at 407-10, 848 S.E.2d at 786-87.

Importantly, the Court rejected the contention that the ***questions*** directed to Kinloch in his cross-examination by defense counsel provided an evidentiary foundation for the accomplice liability charge. The Court stated:

> While Petitioner very aggressively cross-examined Kinloch, the fact remains that counsel's questions and accusations were not evidence. Kinloch's refusal to admit to the statements and conduct attributed to him does not constitute evidence upon which the jury could rely to determine Kinloch was armed or that he was the shooter.

Id., 431 S.C. at 408, 848 S.E.2d at 786. Similarly, in this case, defense counsel asked the investigating officer if Owen previously named appellant in connection with a charge he faced, but that question did not elicit an answer confirming that he had. The questions by counsel were not evidence, and those questions did not elicit the evidence they sought. Because no actual evidence was introduced to the effect that Owen previously implicated appellant in a crime with which Owen was charged, the door was not opened to allow otherwise inadmissible testimony to be admitted in response.

State v. Stroman, relied upon by the state and the trial court, is not applicable here. In *Stroman*, one of the state's witnesses was a person who had pleaded guilty to the crimes for which the defendant was on trial. On cross-examination, the defense asked questions of this witness if he had previously broken into houses for money, and he admitted that he had. *See Stroman*, 281 S.C. at 512-13, 316 S.E.2d at 398-99. The trial court then allowed the state to further question the witness about the defendant's having also been involved in two of those prior crimes, under the door-opening doctrine, and the Supreme Court

affirmed. Specifically, the Court stated the applicable rule: "'Where one party ***introduces evidence*** as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially.'" *See id.*, 281 S.C. at 513, 316 S.E.2d at 399 (emphasis added) (citations omitted). As stated in *Stroman* and the cases cited in appellant's opening brief, whether the door has been opened so as to invite a response depends upon whether ***evidence*** has been ***introduced***. *Stroman* is distinguishable from the case presented here, because the question in *Stroman* elicited evidence and thereby opened the door to further questions by the state with respect to the evidence introduced by the defense. In this case, questions were asked, but the information sought to be elicited was not forthcoming. There was no evidence introduced by the defense, and the door was therefore not opened for any response.

In its brief, the state does not address another important facet of this issue. Appellant contends that, if defense counsel's questions to the investigating officer opened the door, the testimony the state introduced far exceeded the response invited by the questions. An important component of the door-opening doctrine is that the response must be proportional. *See State v. Simmons*, 430 S.C. 1, 14-15, 841 S.E.2d 845, 852 (2020); *Heyward*, 426 S.C. at 637, 828 S.E.2d at 595. The rebuttal evidence is appropriate only so long as it does not unfairly prejudice the defendant. *See Simmons*, 430 S.C. at 14, 841 S.E.2d at 852. In this case, the testimony elicited from Owen upon his recall by the state far exceeded a proportional response and was unfairly prejudicial to the defendant. It was exactly the "'thinly-veiled attempt to show propensity by way of the open-door doctrine'" that the Supreme Court will not sanction. *See Simmons*, 430 S.C. at 15, 841 S.E.2d at 85,

quoting Heyward, 426 S.C. at 637, 828 S.E.2d at 595; *see also Williams*, 430 S.C. at 151, 844 S.E.2d at 65.

The rebuttal evidence presented by the state was a detailed account by Owen of the 2007 burglary, in which he portrayed appellant in the leading role. R. pp. 814-15. But providing the details of the alleged offense was not responsive to the information the defense sought to elicit in its cross-examination of the investigating officer – that Owen had previously implicated appellant in another offense for which Owen was charged. R. p. 724. A proportional response would have been the response the defense offered to stipulate, as framed by the trial judge. The judge asked if what the state was trying to put in was that "[appellant] did get charged, and it got dismissed. And the other guy [Owen] got convicted of it." The state agreed this was what it wanted to put in, and the defense offered to stipulate to that. R. p. 742, lines 5-15, lines 20-22.

The testimony offered by the state far exceeded a truly proportional response. The only portion of Owen's rebuttal testimony that was within the "invited response" allowed under the door-opening doctrine was his precise rebuttal of the matter suggested by the defense's questions – his denial that he lied about appellant in the burglary. This denial came at the end of his lengthy "rebuttal" testimony. R. p. 821. That testimony, which detailed the specifics of the prior burglary and appellant's alleged involvement in it, was grossly disproportionate to the question that purported to open the door to a response.

Moreover, it was extremely prejudicial in that it invited the jury to convict appellant of the crimes for which he was on trial because of his alleged involvement in the 2007 burglary. In fact, the State's closing argument to the jury emphasized the 2007 burglary and made it the basis of an argument for conviction for the instant charges based on

appellant's alleged involvement with Owen in the 2007 crime. R. p. 928, lines 13-23. This argument demonstrates the State was seeking to use the improper rebuttal evidence to obtain a conviction based on a purported propensity to act consistently with the state's allegations. Under these circumstances, the admission of the improper rebuttal testimony was highly prejudicial, and it likely influenced the jury to convict appellant of the unrelated charges for which he was on trial.

In addition to the highly prejudicial nature of any propensity evidence, the admission of this evidence was further prejudicial because it compelled appellant to give up his constitutional right to remain silent, resulting in improper burden-shifting, and denied him a fair trial. *See* U.S. Const. amends. V, XIV; S.C. Const. art. I, §§ 3, 12. Had the testimony not been admitted, appellant would have invoked his right to remain silent and not taken the stand, due to the inadequacy of the state's evidence to link appellant to these crimes, apart from testimony of witnesses with demonstrated bias and a personal stake in implicating appellant. Admission of Owen's testimony about the unrelated burglary forced appellant to give up his right to remain silent and take the stand to refute the rebuttal testimony, increasing the prejudicial effect of the erroneously admitted rebuttal testimony.

The state contends the admission of this testimony was harmless. Propensity evidence is always prejudicial, and the harmful effect of this propensity evidence is clear. There was no physical evidence linking appellant to these crimes. There was a significant amount of evidence linking Andrew Kusko to the crimes, *e.g.*, Andrew's history of prior difficulties with Charles, Andrew's belief that Charles was stealing from their sister, Andrew's altercation with Charles just a day and a half before the shooting that resulted in

Andrew being placed under a no-trespass order, Charles's fear of Andrew expressed to other witnesses, the presence of a vehicle resembling Andrew's in the vicinity of Charles's house at the approximate time of the shooting. The witnesses whose testimony purported to link appellant to the crime or implicated him directly all had personal stakes in the outcome, either through their motivation to help the outcome of their own criminal investigations and charges (*e.g.*, Owen, Jessica James, Jenny Baker) or to deflect blame onto appellant so as to not be blamed themselves (*e.g.*, Andrew Kusko). Based on the weakness of the evidence presented at trial and the state's argument to the jury premised on Owen's rebuttal testimony, the error in the admission of the disproportionate, highly prejudicial rebuttal testimony cannot be deemed harmless.

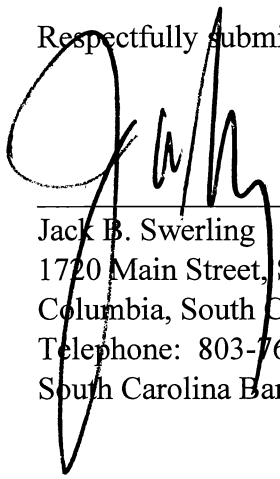
III. THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRORS WAS, IN COMBINATION, SO PREJUDICIAL AS TO DENY APPELLANT A FAIR TRIAL.

Appellant rests on the argument of this issue set out in his opening brief.

CONCLUSION

For all the reasons set out above, the Court should reverse appellant's convictions and remand for a new trial.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

Counsel certifies that the final brief and final reply brief of appellant comply with Rule 211(b) of the South Carolina Appellate Court Rules. Counsel also certifies that the final briefs comply with the Order of the Supreme Court of South Carolina, *Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings* (April 15, 2014).

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