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Nov 18 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CALVIN CARROLL COCHRAN,

APPELLANT

APPELLATE CASE NO 2020-001554

INITIAL REPLY BRIEF OF APPELLANT

TAYLOR D GILLIAM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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ARGUMENT IN REPLY

In its brief, the state conveniently overlooks Mr. Cochran's uncontradicted dementia diagnosis. Within the "argument" section, the Brief of Respondent references the word 'dementia' only once, at the outset when describing the arguments raised on appeal. BOR p. 7. The state contends that because Mr. Cochran was previously convicted of failure to register, he therefore intentionally failed to register yet again. The prior convictions constituted textbook propensity evidence and should never have been admitted.

Between Dr. Frierson's first two meetings with Mr. Cochran, in 2018 and then on December 2, 2019, Mr. Cochran's diagnosis worsened from mild neurocognitive disorder (pre-dementia) to major neurocognitive disorder (dementia). Tr. 61, l. 17 – 62, l. 21. His dementia was therefore established prior to his second failure to register conviction dated December 19, 2019. R. __ (State's Exhibit 4).

The state weaponized Mr. Cochran's prior convictions in its closing, wherein it suggested that Mr. Cochran intentionally failed to register **because he had done it before**:

> And he's failed to register twice already in a running stream going back to 2018. This is not a person who keeps forgetting, this is a person who just doesn't want to register.

Tr. 86, ll. 19 – 23.

These prior convictions were improperly admitted under Rules 404(b) and Rule 403, SCRE. They were highly prejudicial because they involved the same conduct for which Mr. Cochran was on trial. See State v. Bryant, 369 S.C. 511, 517–18, 633 S.E.2d 152, 156 (2006) (holding that when a prior offense is similar to the charged offense the "danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission."); State v. Scriven, 339 S.C. 333, 343, 529 S.E.2d 71, 76 (Ct. App. 2000) (holding

that when prior convictions are "similar or identical to charged offenses ... the likelihood of a high degree of prejudice to the accused is inescapable.").

Last year, through a trio of cases, the South Carolina Supreme Court overruled State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009). Through State v. Perry, 430 S.C. 24, 842 S.E.2d 654 (2020), the Court revived the logical connection test in common scheme or plan cases. Moreover, the Court referred extensively to the seminal prior bad act case State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), particularly for the notion that "rigid scrutiny" is necessary to control "the dangerous tendency and misleading probative force of this class of evidence." Lyle at 417, 118 S.E. At 807. An equally dangerous tendency manifested in Mr. Cochran's case. The jury undoubtedly concluded that because he failed to register twice before, he therefore intentionally failed to register yet again. The trial judge failed to enforce the rigid scrutiny requirement and thereby erred in admitting the two prior convictions.

In Perry, our Supreme Court held "Rule 404(b) prevents the State from introducing evidence of a defendant's other crimes for the purpose of proving his propensity to commit the crime for which he is currently on trial." 430 S.C. at 30, 842 S.E.2d at 657. As noted above, when the prior bad acts are identical to the crime charged for the subject trial, the prejudice is immeasurably enhanced. In Mr. Cochran's case, the jury should have determined whether Mr. Cochran possessed the ability to conform his conduct such that he could have even committed this crime in the first place. The prior convictions did not aid in this analysis; rather, they showed the jury that because Mr. Cochran was found guilty before, he should be found guilty again.

The state claims this evidence was offered to support its contention "that Appellant failed to register simply because he did not wish to do so." BOR p. 10. This statement lacks merit for

two reasons. Firstly, evidence that Mr. Cochran did not wish to register was elicited from other witnesses; those allegations were already before the jury. R. 51, l. 23 – R. 52, l. 5; R. 67, ll. 20 – 24. Secondly, the prior convictions did not make more or less true the claims that Mr. Cochran failed to register intentionally *this time*. There was no legitimate purpose to the admission of these convictions other than to suggest that Mr. Cochran was guilty again. This was an impermissible reason to admit evidence:

> When evidence of other crimes is admitted based solely on the similarity of a previous crime, the evidence serves only the prohibited purpose by Rule 404(b), and allows the jury to convict the defendant on the improper inference of propensity that because he did it before, he must have done it again.

Perry, 430 S.C. at 41, 842 S.E.2d at 663. Furthermore, under State v. Nix, "[e]vidence of other crimes must be put to a rather severe test before admission." 288 S.C. 492, 343 S.E.2d 627 (1986). There is no evidence of the trial judge making a determination under such a severe test.

The state's reliance on State v. Smith, 337 S.C. 27, 522 S.E.2d 598 (1999) and others is misplaced. BOR pp. 8 – 10. Each opinion referenced involves some sort of *violent* crime, an overt act. The Rule 404(b) exception more clearly applies in those instances. Mr. Cochran was indicted for a nonviolent offense that required him to take additional steps or else be charged and potentially convicted. However, he was incapable of complying due to his neurocognitive disorder, as credibly testified to by an expert witness. Mr. Cochran was entitled to have the jury in his case rest its verdict upon properly admitted evidence, not propensity evidence.

In State v. Spears, this Court remanded a case back to the trial court following a failure to conduct a Rule 403 balancing test on the record. 403 S.C. 247, 742 S.E.2d 878 (Ct. App. 2013). In the event this Court concludes the evidence was properly admitted under Rule 404(b), SCRE, Appellant would respectfully request a remand as was done in Spears, wherein the trial court can conduct an on-the-record balancing test.

CONCLUSION

Based on the foregoing, Appellant respectfully requests that this Court reverse his conviction and remand for a new trial.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of November, 2021.

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Initial Reply Brief of Appellant have been served on Calvin Carroll Cochran, #378588, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 18th day of November, 2021.

Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT