THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Leslie Parvin, Appellant.

Appellate Case No. 2012-205888

Appeal From Richland County
Clifton Newman, Circuit Court Judge

Opinion No. 5254
Heard February 5, 2014 – Filed July 30, 2014

AFFIRMED

Dwight Franklin Drake and Michael J. Anzelmo, both of Nelson Mullins Riley & Scarborough, LLP, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Brendan Jackson McDonald, and Solicitor Daniel Edward Johnson, all of Columbia, for Respondent.

LOCKEMY, J.: In this criminal appeal, Leslie Todd Parvin argues the trial court committed reversible error in allowing inadmissible hearsay statements from two witnesses. We affirm.

FACTS

Parvin was indicted on two counts of murder related to the deaths of Edgar Lopez and Pablo Guzman-Gutierrez. The State tried the case under the theory that Parvin solicited Lopez for sex and then killed Lopez and Gutierrez in retaliation when Lopez refused him later in the night. Parvin argued self-defense.

Motion *In Limine*

Immediately prior to trial, Parvin made a motion *in limine* to exclude any testimony referring to other crimes, wrongs, or bad acts. He contended that any statements alleging he was at Lopez's home for homosexual sex were inadmissible; specifically he objected to statements from three different witnesses—testimony from Adan Soto and Marlin Avila regarding statements made by Lopez at a gas station and testimony from Jose Monroy regarding statements Monroy overheard at Lopez's home. For purposes of appeal, we focus only on the contested testimony from Soto and Avila, which will be referred to as the Lopez statements. Parvin does not appeal any issue related to Monroy's testimony.

Parvin argued (1) the Lopez statements were inadmissible pursuant to Rule 404(b), SCRE, because the State could not prove by clear and convincing evidence that Parvin committed any bad acts, (2) the State was improperly introducing the Lopez statements to prove he was of bad character, and (3) the Lopez statements were more prejudicial than probative. Parvin also contended the Lopez statements would be inadmissible as hearsay.

The State argued the Lopez statements were admissible under the theory of res gestae or the present sense impression exception to the hearsay rule.[1] As to the issue of res gestae, the State asserted there was an ongoing chain of events, and the Lopez statements were an integral part of the crime. The State also contended the Lopez statements were admissible under Rule 803(3), SCRE, "then existing mental, emotional, or physical condition." Finally, the State emphasized that the Lopez statements also indicated Parvin's alleged motive and were not intended to

[1] The State cited *State v. Simpson*, 325 S.C. 37, 479 S.E.2d 57 (1996), and *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996), to support its arguments.

show bad character. However, the State also asserted it was not attempting to enter the Lopez statements pursuant to Rule 404(b), SCRE.[2]

The trial court ruled the Lopez statements (1) were admissible under the *res gestae* theory, (2) constituted an exception to the hearsay rule, and (3) were probative to the issue of Parvin's motive. During the trial, the trial court clarified its holding and stated that in admitting the testimonies under the res gestae theory, the testimonies "did not involve other crimes, but may have suggested some bad acts." It further stated the probative value of the evidence outweighed the prejudicial effect.

Parvin's Version of the Events

Parvin testified that on July 30, 2010, the day of the incident, he was driving his van and collecting scrap metal for recycling and profit. He carried a forty-five caliber pistol in his van as a result of his prior military service. On the way home from an unsuccessful search, Parvin picked up beer and passed Lopez's home, where Lopez and Gutierrez were drinking beer in the yard. Parvin stated he assumed the men were in the construction industry due to their attire and could possibly have leads regarding scrap metal. Parvin stopped in the yard and began speaking and drinking with Lopez and Gutierrez. Parvin claimed he did not want to immediately ask for connections or leads on scrap metal and first wanted to establish some sort of relationship with the men.

Parvin agreed to drive Lopez to the gas station for more beer and gave Lopez money for the beer. While at the gas station, Parvin claimed Lopez observed him move his gun from between the front seats and place it in the waistband of his shorts. Parvin remained in the van while Lopez entered the store and purchased the beer. Parvin and Lopez then returned to Lopez's home. Throughout the evening, several people came and left the home until only Parvin, Lopez, and Gutierrez remained. Parvin stated that when he tried to leave, Lopez would not let him and requested more money. Parvin refused and then asked for the change from the beer Lopez had purchased earlier in the night. Lopez became upset and threatened Parvin and Parvin's family. When Parvin attempted to leave again,

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[2] Rule 404(b), SCRE provides, "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, the absence of mistake or accident, or intent."

Gutierrez blocked his exit. Gutierrez made physical contact with Parvin and tried to obtain control of Parvin's gun. Parvin kept control of his gun and saw Lopez reach for something in the shed located in the yard. Parvin stated he became fearful for his life at that time and shot both Lopez and Gutierrez in self-defense.

The State's Case

In support of its version of events, the State offered testimony from Jose Monroy, who claimed he was drinking with Parvin, Lopez, and Gutierrez prior to the incident. Monroy stated he overheard Lopez tell Gutierrez that Parvin would be sleeping inside with him that evening. The beer was depleted at some point during the evening, and Lopez asked Parvin to drive him to a gas station to purchase more. The State presented testimony from Soto and Avila, who spoke with Lopez at the gas station.[3] Soto and Lopez were both from Guatemala, and Soto knew Lopez through Soto's sister-in-law. Soto stated Lopez approached him and began talking with him. Lopez mentioned he was at the gas station with an American to purchase a case of beer and further explained that Parvin had offered two hundred dollars to buy the beer and have sex. Lopez then showed Soto the two hundred dollars but told Soto he was going to tell Parvin to go home. Avila corroborated Soto's testimony. After returning to Lopez's home, the State opined that Parvin became angry because Lopez refused to have sex with him. The State presented Roberto Gonzalez-Merrin as an eyewitness to the shooting. Merrin explained that Parvin pulled a gun from his back and shot Lopez before turning the gun on Gutiererez, who was attempting to flee the scene, and shooting him in the back. Merrin testified that when the shooting occurred, Parvin was outside of the fence that surrounded Lopez's front yard while Lopez and Gutierrez were both inside the fence. Following the shooting, Parvin fled the scene in his minivan. Parvin then returned to his home, destroyed the guns used in the shooting, checked his family in to a motel for the evening, changed his appearance, and drove his minivan to Louisiana. While in Louisiana, Parvin sold his minivan for scrap and continued to Texas. Parvin returned to Columbia on August 15, 2010, and despite knowing that the authorities were looking for him, he never attempted to contact police.

Verdict

[3] Parvin objected to the testimony immediately prior to Soto's and Avila's answers, but the trial court overruled the objection.

The jury convicted Parvin of two counts of murder, and the trial court sentenced Parvin to thirty-five years' imprisonment. Parvin moved for a new trial based upon three grounds, and the trial court denied his motion. Thereafter, Parvin filed this appeal, in which he focuses only on the first ground contained within his motion for a new trial.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001) (citing *State v. Cutter*, 261 S.C. 140, 147, 199 S.E.2d 61, 65 (1973)). "We are bound by the trial court's factual findings unless they are clearly erroneous." *Id.* at 6, 545 S.E.2d at 829 (citing *State v. Quattlebaum*, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000)). "This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases." *Id.* "On review, we are limited to determining whether the trial judge abused his discretion." *Id.* "This [c]ourt does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." *Id.*

LAW/ANALYSIS

Parvin argues the trial court committed reversible error by allowing Soto and Avila to testify about the Lopez statements.[4] Specifically, he argues the Lopez statements were hearsay and did not qualify as a present sense impression under Rule 803(1), SCRE. He also argues the Lopez statements were unduly prejudicial because they related to the central issues in the case and allowed the State "to shape its entire presentation to the jury." We agree.

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may disturb a ruling admitting or excluding evidence only upon a showing of 'a manifest abuse of discretion accompanied by probable prejudice.'" *State v. Dennis*, 402 S.C. 627, 635, 742 S.E.2d 21, 25 (Ct. App. 2013) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006).

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[4] At trial, Parvin also objected to any reference by Monroy regarding homosexual sex. However, he does not raise that argument on appeal. Thus, we only address the Lopez statements.

"Hearsay is an out of court statement, offered in court to prove the truth of the matter asserted." *State v. Townsend*, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct. App. 1996). "Hearsay is inadmissible as evidence unless an exception applies." *Id.* Rule 803(1), SCRE, provides for the "present sense impression" exception, which allows for the admission of "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Our courts have not delineated a time frame that would constitute "immediately thereafter"; however, this court has held that a statement given nearly ten hours after the perceived incident cannot be admitted under Rule 803(1), SCRE. *State v. Burroughs*, 328 S.C. 489, 499, 492 S.E.2d 408, 413 (Ct. App. 1997).

Parvin contests the admission of the following testimony from Soto:

> Q: And did you have a chance to speak to [Lopez] on that day?
> A: Yeah, I spoke to him the day that I saw him at the gas station at that time.
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> . . . .
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> Q: And while you were talking to [Lopez], did he mention what he was doing at the gas station?
> A: Yeah, he told me he was going to buy a case of beer, that he was with an American.
> Q: Okay. Did he say anything else about the American and the beer?
> A: Yes, he said the American had given him $200 to buy beer because he wanted to have sex with him.

Parvin also contests the admission of the following testimony from Avila:

> Q: What did [Lopez] tell you about what he was doing with that American?
> A: He said that the American had given him money to buy beer and he said the American had given him $200 to have sex.

The witnesses gave no indication as to the amount of time between when Parvin allegedly solicited sex and when Lopez spoke with them. The State simply explained it was an "ongoing chain of events." We find the trial court erred in ruling the Lopez statements were admissible because the timing of the declarant's statement is a critical component of the present sense impression exception.

Despite finding error in the trial court's ruling, we must also find that it prejudiced Parvin before we can reverse. *See State v. Garner*, 389 S.C. 61, 67-68, 697 S.E.2d 615, 618 (Ct. App. 2010) ("[I]mproper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice. Such error is deemed harmless when it could not have reasonably affected the result of the trial, and an appellate court will not set aside a conviction for such insubstantial errors." (alteration by court) (internal quotation marks and citation omitted)).

Further in the trial, the State presented Detective William Gonzalez as a witness. Detective Gonzalez recorded statements from both Avila and Soto regarding the night of the incident. Detective Gonzalez testified that Avila stated Lopez said Parvin gave him two hundred dollars to have sex. There was no objection at the time of this testimony. Because the improperly admitted Lopez statements were cumulative to Detective Gonzalez's testimony, their admission did not prejudice Parvin. *See State v. Townsend*, 321 S.C. 55, 59, 467 S.E.2d 138, 141 (Ct. App. 1996) ("Where the hearsay is merely cumulative to other evidence, its admission is harmless.").

CONCLUSION

For the forgoing reasons, we find the trial court's error in allowing hearsay testimony was harmless because it was cumulative to other evidence received without objection. Thus, the trial court is

AFFIRMED.

WILLIAMS and KONDUROS, JJ., concur.