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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County

Honorable Daniel D. Hall, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CLINTON WARREN BEEBE,

APPELLANT

APPELLATE CASE NO. 2022-000627

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court reversibly erred by permitting the State's key witness—Appellant's Wife—to testify regarding Appellant's alleged prior violence and abuse toward her as the basis for Wife lying to police where the alleged conduct was irrelevant to the charged offense, where it failed to meet the legal standards or exceptions required under Rule 404(b), where Appellant did not first enter character trait evidence of his peacefulness or domestic tranquility, and where any probative value was substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury?

STATEMENT OF THE CASE

Appellant Clinton Warren Beebe was indicted by the Kershaw County grand jury for murder on February 13, 2019. Tr. * (Indictment). From April 25th through 29th, 2022, his case was tried before the Honorable Daniel Hall and a jury. Tr. 1. William S. Tetterton represented Appellant, while the State was represented by Curtis Anthony Pauling, IV, April Sampson, Christina Allard, and Dale Scott. Tr. 1. Appellant was found guilty, and the trial court imposed a sentence of life without parole. Tr. 973, lines 9-16; Tr. 979, line 18—Tr. 980, line 2; Tr. * (Sentence Sheet).

STANDARD OF REVIEW

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Whitner, 399 S.C. at 557, 732 S.E.2d at 866.

STATEMENT OF THE FACTS

Appellant Clinton Warrant Beebe was with his best friend, Adam Davis (Davis), at Clark's bar in Bethune watching the South Carolina Gamecocks play the University of South Florida in the Birmingham Bowl on December 29, 2016. Tr. 744, ln. 15—Tr. 745, ln. 14; Tr. 770, ll. 3-25; Tr. 772, ln. 23—Tr. 773, ln. 8; Tr. 774, ln. 14—Tr. 775, ln. 5. Afterward, the two rode in the same car and eventually went to Appellant's home. Tr. 776, ll. 5-9; Tr. 778, ll. 22-24. Shortly after arrival, Appellant's wife, Peggy Danielle Beebe (Wife), arrived home from work. At Davis' request, Wife drove both Appellant and Davis in her Acura SUV to the Exxon where Davis purchased more beer. Tr. 780, ll. 1-3; Tr. 784, ln. 11—Tr. 785, ln. 3; Tr. 786, ll. 1-20. After returning home, the three left again in Wife's vehicle to consummate Davis' purchase of one gram of cocaine from Darryle Coe. Tr. 788, ln. 22—Tr. 789, ln. 9; Tr. 791, ll. 1-9; Tr. 792, ln. 2—Tr. 793, ln. 20; Tr. 794, ln. 24—Tr. 795, ln. 3.

When the three arrived home, Appellant and Davis walked inside the mobile home while Wife remained outside to smoke her cigarette. Tr. 796, ll. 1-5. Davis asked Appellant to get and show him the pistol Appellant recently bought from a co-worker.[1] Tr. 777, ll. 16; Tr. 796, ll. 10-11; Tr. 833, ll. 5-11. While Davis waited on a settee in the living room, Appellant went to the bathroom, and then to the bedroom where he retrieved a box containing the handgun. Meanwhile, Wife had come inside, spoke briefly with Davis, and sat on the couch watching television. Appellant came out of the bedroom, sat in the recliner across from Davis, and pulled the pistol from its container while Davis was trying to untie the baggie of cocaine again. Tr. 798,

[1] The last and only time Appellant had shot the firearm was when he purchased it from his co-worker approximately two weeks prior to the present incident. The pistol was loaded, and then shot (poorly) by Appellant. The seller then took it, shot it accurately, and placed the gun back in its case. Tr. 765, ln. 11—Tr. 768, ln. 23; Tr. 803, ll. 4-14.

ln. 9—Tr. 799, ln. 15; Tr. 800, ln. 24—Tr. 803, ln. 17. According to Appellant,[2] he removed the loaded magazine, and racked the slide; contrary to Appellant's expectation, no bullet was ejected and he believed it was in a safe condition. Appellant started to set the firearm down on the ottoman between he and Davis; when he did, he pulled the trigger as well believing it was necessary to make sure the gun was safe to handle. Tr. 803, ln. 21—Tr. 805, ln. 24. "Whenever [Appellant] racked it back and pulled the trigger, the gun went off." Tr. 806, ll. 1-2. The bullet struck Davis in the head above the left eyebrow. Tr. 403, ll. 8-24.

Both Appellant and Wife were shocked by both the noise and incident itself. Appellant checked Davis' head twice, and put a bag over it. Tr. 466, ln. 9—Tr. 467, ln. 23; Tr. 806, ll. 2-14. According to Appellant, Wife was concerned that she and the children would be left without support if they notified police and Appellant went to jail.[3] Tr. 809, ll. 18. Both Appellant and Wife put Davis' body in Wife's vehicle, drove around for a while, stopped at a friend's home to get a shovel from his porch, and buried Davis on rural property with which Appellant was familiar. Tr. 809, ln. 19—Tr. 812, ln. 5. Shortly after, they drove back to the gravesite, obtained Davis' iPhone, and threw the cell phone into the Little Lynches River. Tr. 814, ll. 7-13.

Appellant and Wife both continued to clean-up and cover-up the incident over time, including: removing and burning the chair in which Davis sat when he was shot; repairing and

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[2] According to Wife's testimony at trial, she "wasn't paying much attention to what [Appellant] was doing." She recalled Appellant came out of the bedroom, removed the gun from its case, pointed it at Davis, and pulled the trigger. Tr. 465, ll. 15-20. She was "completely shocked" because there was no motive or plan for Appellant to shoot his best friend, and no malice between Appellant and Davis, other than a hateful, evil, or mean look on Appellant's face when it happened. Tr. 550, ll. 1-13; Tr. 551, ll. 8-15; Tr. 568, ll. 1-6. As wife conceded on cross-examination, "You're right. There was no malice. There was no fight. There was no arguments. He done it for no reason." Tr. 562, ln. 25—Tr. 563, ln. 2.

[3] Wife's recollection differed essentially in that she essentially went along with helping Appellant out of fear of him, and that Appellant told her she would lose her daughter because she was just as guilty as him. Tr. 558, ln. 7—Tr. 561, ln. 24.

painting the wall where the bullet hit after passing through Davis' head; puttying the wood where the bullet struck; destroying the gun; replacing and painting the seat in Wife's Acura SUV where Davis' body was located when moved; taking Wife's vehicle to a scrap yard; moving Davis' body to another location to avoid detection by a search party, and burning the tarp used to move it; cleaning Davis' body; and not telling people what actually occurred. Tr. 814, ll. 14-17; Tr. 815, ll. 20-22; Tr. 819, ln. 24—Tr. 821, ln. 5; Tr. 837, ln. 18—Tr. 839, ln. 4Tr. 840, ln. 22—Tr. 5Tr. 847, ll. 4-25; Tr. 850, ln. 18—Tr. 851, ln. 17.

Approximately two months later, Appellant's attorney (Counsel) was approached by several law enforcement officers inquiring about the body. After meeting alone with Counsel, Appellant ultimately notified law enforcement where to find his best friend's remains by sending an anonymous letter containing handwritten coordinates of the body's location. Tr. 490, ll. 2-12; Tr. 815, ln. 22—Tr. 816, ln. 21. Upon receiving the letter, police looked unsuccessfully for about two hours. Tr. 321, ln. 2—Tr. 325, ln. 5. They called Counsel for more help; approximately ten minutes later, Counsel called back with more specific information. Tr. 325, ll. 6-21. Davis' remains were finally found on March 8, 2017. Tr. 326, ll. 17-24.

South Carolina State Law Enforcement Division (SLED) Agent Terrence Matthews (SLED Agent) arrived the following day. Davis' remains were unearthed, and ultimately moved for a forensic examination. Tr. 346, ln. 11—Tr. 352, ln. 22. Pathologist Janice Ross confirmed Davis was killed by a single gunshot to the head with an entrance wound just above the left eyebrow, traveling front to back, left to right, and slightly upward. Tr. 401, ln. 5–Tr. 403, ln. 24.

On March 30, 2022, Wife met with all four prosecutors as well as investigators in the case at the office of her attorney, Jack Swerling. At that meeting, Wife changed her story from what she previously told law enforcement, and now implicated Appellant. Tr. 391, ln. 24—Tr.

392, ln. 25. During the 96-minute interview, Wife indicated she was physically abused by Appellant years ago before they were married. Tr. 437, ln. 10—Tr. 438, ln. 2. At trail, Wife acknowledged when she met with prosecutors that she was "afraid on the eve of trial" that she would lose her daughter. Tr. 560, ln. 25—Tr. 561, ln. 4.

At Appellant's pretrial motions hearing, Counsel sought suppression of statements from Wife regarding alleged past abuse by Appellant toward her. The State acknowledged there were statements regarding "chronic abuse that we would be talking about," but the trial court deferred the matter to be resolved during trial. Tr. 68, ln. 9—Tr. 70, ln. 1. Immediately prior to Wife being called as a witness by the State, the motion regarding her anticipated testimony was raised again. Tr. 430, ll. 11-14. Counsel first objected to testimony of prior bad conduct by Appellant toward Wife pursuant to 404(b), especially since the alleged physical conduct was purported to be years in the past and unrelated to the present matter. Tr. 430, ln. 9—Tr. 431, ln. 4. The State responded by claiming Wife's new statements allege years of abuse with specific instances purportedly including Appellant breaking her nose, and at one point putting a gun in her mouth. The State argued such testimony was relevant to explain Wife's motive for lying to police for several years until her final statement at the office of her attorney on March 30, 2022. Further, the State argued Rule 404(b) "never once says it has to be used for the defendant's motive. It says it's not admissible to show conduct in conformity therewith, and we're not doing that." Tr. 430, ll. 1-4. The State further argued as follows:

> If you read the rule, Your Honor, it says evidence of other prior crimes, wrongdoings, or acts is not admissible to prove the character of a person in order to show action and 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. It never once says the defendant's motive, intent, or any of that.

> And in this case, Your Honor, she is actually a codefendant and, therefore, a co-conspirator. So her motive, her intent is relevant and admissible. And so we wouldn't be using it to show his conformity or his actions at all. We're using it to show why she's in fear of him, why she acts accordingly, why she continues to cover up what happened, and why she did not tell law enforcement until recently.

Tr. 432, ll. 12-25. Counsel responded that "evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad person." He also began asserting that the bad act must be logically related until he was stopped by the trial court. Tr. 433, ll. 16-18. Counsel further argued that permitting testimony of prior bad acts by Appellant would predispose the minds of jurors to find Appellant guilty and strip him of the presumption of innocence. Moreover, he maintained the defense had not put Appellant's character in evidence, and that the State cannot now be allowed to do so. Tr. 433, ln. 23—Tr. 434, ln. 6. Counsel likewise argued such testimony by Wife was not relevant under Rules 401 and 402, SCRE, and even if relevant the probative value would be "greatly outweighed by the prejudicial value." Tr. 435, ll. 9-21.

The State went on to acknowledge that Wife is "not talking about [Appellant] being violent to anyone else." Tr. 436, ll. 2-3. The State finally revealed the extent of what it sought to elicit as follows:

> She is talking about to her he has been abusive their entire relationship to the point that he's broken her nose, he's dragged her in a car, he has put a gun into her mouth and what she would testify to is that the day this happened when the shooting occurred, he had the same look in his eye as he did when he put the gun in her mouth and that he told her I will do to you what I've done before and I'll take you from your children.
>
> It goes directly to why she continued to cover this up and why she did not tell police he was no longer around her.

Tr. 436, ll. 3-14. Counsel referred to the March 30, 2022, statement of Wife, wherein she indicated an alleged abuse (being dragged by a car) happened before Wife and Appellant were married in 2010, and that when asked again about things that happened Wife indicated it was years ago. Tr. 437, ll. 14-20.

The trial court determined that "the State is allowed to in a general way ask [Wife] why she testified one way in 2017 and why she testified another way in March of 2022." Tr. 438, ll. 4-6. The Court ultimately ruled as follows:

> I don't have a problem with [the State] asking in a general sense why did you change, why did you say one thing in 2017, why did you say something else in 2022 in a general—in a general way about her fear, but to go into specific—you know, it's sort of a fine line. To go into specific instances of conduct about the defendant would be improper, and I'm not going to allow that in.

Tr. 438, ll. 18-24. The Court then affirmed the State's understanding that Wife could say "in general she was abused by the defendant throughout their relationship," but that she could not "get into specific instances." Tr. 439, ll. 2-13.

During Wife's testimony, she was repeatedly asked by the State why she assisted in covering-up the incident, and why she lied. Tr. 470, ln. 22—Tr. 471, ln. 4.Tr. 472, ln. 14; Tr. 477, ln. 10—Tr. 479, ln. 6. After giving various other answers, Wife acknowledged Appellant never threatened her life. Tr. 479, ln. 16. At one point, Wife responded that "[t]here was no denying the cheating and the affairs because of the multiple children, but I tried to hide the abuse with makeup or with clothing and stuff like that." Tr. 481, ll. 17-25. Finally, after more inquiry as to why she lied, the State elicited the following testimony from Wife:

> Because there's not a day—not a day, a week, a month, or a year that he was just nice and good to me. Since I was 15 years old, he's always been abusive, mentally, emotionally, physically. If I wasn't physically being hit, then I was being told I was a stupid

shit bitch or I was trash. I mean the list goes on and on. I was constantly being told—called names.

Tr. 491, ll. 4-6. Then again on re-direct examination, after Wife acknowledged she told Appellant she loved him when he was held in pretrial incarceration, the State asked the following series of questions:

Q: [D]id you say that to him after he abused you?
A: I would tell him that every, you know, day. It was a normal thing, yes.
Q: Even after he hit you?
A: Yes.
Q: Even after he called you fat?
A: Yes.

Tr. 566, ll. 15-25.

The State further posited alleged bad acts by Appellant toward Wife in its cross-examination of Appellant's witness, Steve Mooneyham. There, the State made the following line of questioning:

Q: So, Mr. Mooneyham, you stated that you never saw any physical signs of abuse?
A: That's correct.
Q: Did you ever see Dani's broken nose that she had?
A: I did not.
Q: How about the black eye that she had?
A: I did not.
Q: Were you there when he put her head through the wall?
A: I was not.
Q: Okay. How about when he put the gun to her face? Were you there for that?

Tr. 658, ln. 22—Tr. 659, ln. 7. A bench conference was held, and Counsel's objection at the end of the line of questioning was sustained. Tr. 659, ll. 8-14.

During its closing argument, the State highlighted Wife as a victim following the instructions of Appellant. Specifically, the prosecution delved into "the psyche of somebody

who is 15 years old and is seduced by a 23-year-old man," as well as into notions of grooming and subordination,[4] culminating in the following statement:

> I mean, in some ways, [Appellant] sounds like the ultimate megalomaniac. It almost seemed like he was hell bent on testing the outer limits of his power and his control over [Wife]. I mean, [Wife], not only am I going to verbally abuse you, not only am I going to beat the hell out of you, I'm going to go with two separate women, have two separate kids with them. I'm going to bring these kids over and you're just going to have to deal with it, aren't you?

Tr. 890, ll. 4-12. The State also stressed that credibility was "an issue in pretty much any trial. It's certainly one here." Tr. 890, ll. 23-24. The notion was broached again when it said, "Were y'all able to remember [Wife]'s testimony? Can you see it in your mind's eye? Can you compare it to [Appellant]'s testimony? Credibility. That's going to be a component that y'all are going to use in judging this case." Tr. 897, ll. 6-9. In furthering the point, the State maintained that "[Wife] was somebody who was forced to go along with [Appellant]'s coverup. She had no say. I think you all were paying close attention when she was testifying. Credibility is just a big component in any criminal case." Tr. 915, ll. 12-17.

During its deliberations, the jury sent out several notes. First, the jury sought to hear from Wife's direct examination testimony, and later likewise sought to hear from Appellant's testimony. Tr. 967, ln. 22—Tr. 970, ln. 24; Tr. * (Court's Exhibits 3, 4, and 5—Jury Notes). Appellant was found guilty of murder and sentenced to life without parole. Tr. 973, lines 9-16; Tr. 979, line 18—Tr. 980, line 2; Tr. * (Sentence Sheet).

This appeal follows.

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[4] Tr. 888, ln. 20—Tr. 890, ln. 21. No psychologist, psychiatrist, or other expert witness provided testimony regarding grooming or psychological aspects to Wife's relationship with Appellant.

ARGUMENT

The trial court reversibly erred by permitting the State's key witness—Appellant's Wife—to testify regarding Appellant's alleged prior violence and abuse toward her as the basis for Wife lying to police where the alleged conduct was irrelevant to the charged offense, where it failed to meet the legal standards or exceptions required under Rule 404(b), where Appellant did not first enter character trait evidence of his peacefulness or domestic tranquility, and where any probative value was substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury.

In the case at bar, the State sought, and was permitted to elicit bad character testimony regarding Appellant from its own witness—Wife—that Appellant abused her physically, emotionally, and mentally for years, all under the guise of explaining why Wife previously lied to law enforcement. Such evidence was irrelevant under Rule 401 to the charge for which Appellant was on trial, garnered no application of any exception under Rule 404(b), and allowed the State to place bad character traits of violence and domestic abuse before the jury even though Appellant had not opened the door by first raising contrary traits of peacefulness or domestic tranquility in violation of Rule 404(a)(1)—a fact of which the Court was made acutely aware. Tr. 434, ll. 9-14. Moreover, even if relevant, any probative value of evidence regarding prior domestic violence by Appellant toward Wife in the past was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury pursuant to Rule 403.

Evidence is relevant if it "ha[s] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. All relevant evidence is admissible, unless constitutionally, statutorily, or otherwise provided. Rule 402, SCRE. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Rule 403, SCRE.

Limitations to relevant evidence include those found in Rule 404. Specifically, Rule 404(b) of the South Carolina Rules of Evidence 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.

Rule 404(b), SCRE. Additionally, Rule 403 of the South Carolina Rules of Evidence allows for even relevant evidence to be excluded "if 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 also State v. Kelley, 319 S.C. 173, 177, 460 S.E.2d 370 (1995) ("It is well settled that evidence should be excluded when its probative value is outweighed by its prejudicial effect."). "The Rule 403 concern most often invoked is 'the danger of unfair prejudice.' In the context of Rule 403, "[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." State v. Williams, 430 S.C. 136, 151, 844 S.E.2d 57, 65 (2020) (quoting State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001)); see also State v. Huckabee, 419 S.C. 414, 423, 798 S.E.2d 584, 589 (Ct. App. 2017) ("Unfair prejudice means an undue tendency to suggest a decision on an improper basis.").

Also, "[i]n a criminal case, the State cannot attack the character of the defendant unless the defendant himself first places his character in issue." State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) (citing Rule 404(a), SCRE; and State v. Mitchell, 298 S.C. 186, 379 S.E.2d 123 (1999)). "Further, evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate that the accused is a bad person." Id. (quoting Mitchell, 298 S.C. at 189, 379 S.E.2d at 125); see also State v. Lawson, 424 S.C. 51, 57, 817 S.E.2d 509, 512 (Ct.

App. 2018)). A limited exception is "when the accused offers evidence of his good character regarding specific character traits relevant to the crime charged, [and] the solicitor has the right to cross-examine him as to particular bad acts or conduct." Williams, 430 S.C. at 149, 844 S.E.2d at 64 (quoting State v. Young, 378 S.C. 101, 106, 661 S.E.2d 387, 389 (2008)); see also, Rule 404(a)(1). However, "[w]hether the subject is contrary character trait evidence under Rule 404(a)(1) or impeachment of a witness under Rule 607, Rule 403 requires the evidence offered to be proportional to the evidence that gave rise to its admissibility. We have guarded against 'thinly-veiled attempt[s] to show propensity' initiated under the guise of an attempt at impeachment." Williams, 430 S.C. at 151, 844 S.E.2d at 65 (2020) (citing Young, 378 S.C. at 106, 661 S.E.2d at 390; and State v. Heyward, 426 S.C. 630, 637, 828 S.E.2d 592, 595 (2019)).

Relevance

First, Appellant's alleged prior abuse of Wife was not relevant to proving whether Appellant murdered Davis. As the State conceded, the alleged conduct had nothing to do with abuse or violence toward anyone other than Wife. Tr. 436, ll. 2-3. Yet, whether Appellant was a good husband or an abusive one had no bearing on whether he shot and killed Davis with malice aforethought. Under the elements of this offense, the State had to prove Appellant killed Davis with malice aforethought. See S.C. Code Ann. §16-3-10 (West, Westlaw current through 2022). Wife testified freely as to what she recalled as an eyewitness to the shooting, none of which had anything to do with whether Appellant committed domestic violence toward her in the past. This reality is especially glaring in light of Wife's testimony under cross-examination: "You're right. There was no malice. There was no fight. There was no arguments. He done it for no reason." Tr. 562, ln. 25—Tr. 563, ln. 2. The reason the State indicated it sought admission of bad character evidence of Appellant's alleged trait of being an abusive husband was to explain why

Wife lied to law enforcement about the matter in the past. In other words, the State sought to introduce the bad character trait of Appellant's purported domestic abuse in order to bolster the credibility of its own witness. Such evidence is irrelevant, and the trial court erred in permitting its introduction. See Rule 401, SCRE.

Prior bad acts

Yet the State nonetheless sought admission of Appellant's alleged prior bad acts of domestic violence through Rule 404(b), ostensibly under the theory that the Rule allows evidence of Appellant's prior bad acts to show the motive of Wife as his co-conspirator:

> [T]he rule, Your Honor, it says evidence of other prior crimes, wrongdoings, or acts is not admissible to prove the character of a person in order to show action and 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. It never once says the defendant's motive, intent, or any of that.
>
> And in this case, Your Honor, she is actually a codefendant and, therefore, a co-conspirator. So her motive, her intent is relevant and admissible. And so we wouldn't be using it to show his conformity or his actions at all. We're using it to show why she's in fear of him, why she acts accordingly, why she continues to cover up what happened, and why she did not tell law enforcement until recently.

Tr. 432, ll. 12-25. Such an interpretation misapplies Rule 404(b). The Rule allows for otherwise inadmissible propensity evidence of a person's prior bad acts to show that person's motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. "In the words of Rule 404(b), it 'prove[s] the character of [the] person' and 'shows[s] action in conformity' with that character." State v. Perry, 430 S.C. 24, 30, 842 S.E.2d 654, 657 (2020). Here, the State did not seek evidence of Appellant's purported bad acts to prove his motive, identity, the existence of his common scheme or plan, the absence of his mistake or accident, or

his intent; rather, the State incongruously transposed Appellant's alleged prior bad acts of domestic violence to prove Wife's alleged motive. In other words, the State was permitted to bad character introduce evidence under an incorrect application of Rule 404(b). This too was error.

For the sake of argument, even if Rule 404(b) was potentially viable, the court nonetheless failed to perform any analysis as to whether the incidents happened by clear and convincing evidence, or whether there was a logical correlation between the alleged bad acts and the crime charged—both of which are required before evidence of alleged prior bad acts can be admitted under Rule 404(b). See, e.g., Perry, 430 S.C. at 31, 842 S.E.2d at 658 ("Historically, to justify a finding that evidence of other crimes, wrongs, or acts is offered for a legitimate purpose, and thus should not be excluded pursuant to Rule 404(b), South Carolina courts have required a logical relevancy or connection between the other crime and some disputed fact or element of the crime charged."); see also, State v. Robinson, Op. No. 5960, 2023 WL 151401, at *6 (S.C. Ct. App., filed Jan. 11, 2023) (citing State v. Johnson, 433 S.C. 550, 556, 860 S.E.2d 696, 699 (Ct. App. 2021)) ("If the prior bad act did not result in a conviction the state must prove the prior bad act by clear and convincing evidence."). Specifically, the trial court ruled as follows:

> It seems to me that the State is allowed to in a general way ask her why she testified one way in 2017 and why she testified another way in March of 2022.
>
> It becomes problematic I mean in general sense if she says that she was scared of him and we've had instances of abuse and intimidation in the past. . . . [T]hat seems relevant and to why she would change, but then beginning and going into specific instances of conduct such as putting a bullet in—I mean a gun into her mouth or to her head, *then you enter into a world of trial within a trial about whether that, in fact, took place and whether it did or didn't take place*, and that becomes problematic and not allowed under the rules.

> . . . I don't have a problem with [the State] asking in a general sense why did you change, why did you say one thing in 2017, why did you say something else in 2022 in a general—in a general way about her fear, but to go into specific—you know, it's sort of a fine line. To go into specific instances of conduct about the defendant would be improper, and I'm not going to allow that in.

Tr. 438, ll. 18-24 (emphasis added). The court then affirmed the State's understanding that Wife could say "in general *she was abused by the defendant throughout their relationship*," but that she could not "get into specific instances." Tr. 439, ll. 2-13 (emphasis added). Based on the trial court's own rationale, it was aware of the requirements needed for admission of 404(b) evidence the State sought under its theory, yet failed to fulfill them.

In other words, the State was permitted by the trial court to introduce bad character evidence of Appellant's purported domestic violence against Wife based upon an incorrect application of Rule 404(b). The evidence was neither shown to be true and accurate under the clear and convincing standard, nor was it logically related to either Appellant's killing of Davis or the elements of murder. As such, even if Rule 404(b) was potentially viable under the present facts, it was wrongly applied.

Bad character evidence

Thus, the trial court's erroneous ruling permitted the State to introduce character trait evidence against Appellant as a bad husband who committed acts of physical, mental, and emotional domestic violence against Wife throughout their entire marriage.[5] Such evidence is likewise prohibited pursuant to Rule 404(a) and (a)(1) because Appellant did not first place his

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[5] Counsel pointed out as much during the *in camera* hearing, and the court acknowledged Counsel's concerns. Tr. 433, ln. 23—Tr. 434, ln. 11. Accordingly, the matter was preserved for appellate review. See, e.g., State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595-96 (2010) ("Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review. Instead, a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue.") (internal citations omitted).

character trait for peacefulness or domestic tranquility at issue. King, 334 S.C. at 512, 514 S.E.2d at 582 ("In a criminal case, the State cannot attack the character of the defendant unless the defendant himself first places his character in issue.") (citing Rule 404(a), SCRE; and State v. Mitchell, 298 S.C. 186, 379 S.E.2d 123 (1999)). As our Supreme Court explained in State v. Williams, "[p]lainly, before the State may rebut evidence of a character trait of the accused, the accused must first offer evidence of that character trait into the trial. The rule does not allow rebuttal character evidence from the State when a witness other than the accused gratuitously testifies about a character trait of the accused." Id. 430 S.C. at 148, 844 S.E.2d at 64 (emphasis in original).

In Williams, the defendant was charged with the murder of Larry Moore, and wounding of his long-time girlfriend of 15-years, Reva McFadden. Id. 430 S.C. at 141, 844 S.E.2d at 60. During trial, McFadden testified for the State regarding the facts of the incident. In its cross-examination of McFadden, the defense introduced the character trait of the defendant being non-confrontational. Id. 430 S.C. at 144-45, 844 S.E.2d at 61-62. The State immediately sought to introduce two prior incidents of domestic violence between the defendant and McFadden to counter the assertion of his non-confrontational character trait. Id. 430 S.C. at 145, 844 S.E.2d at 62. The Supreme Court ultimately held that "[t]he trial court properly allowed the State to ask McFadden if she had been involved in two prior confrontations with Williams, as this would impeach her previous testimony that Williams had never been in any confrontations with anyone. However, the trial court erred in allowing the State to elicit the details of the incidents...." Id. 430 S.C. at 152–53, 844 S.E.2d at 66. Specifically, "no further impeachment was warranted after the State initially challenged McFadden regarding her untruthful testimony on cross-examination was not true." Id. 430 S.C. at 152, 844 S.E.2d at 66. Additionally, the probative

value of any details was tenuous at best, and their introduction "had 'an undue tendency to suggest a decision on an improper basis.'" Id. 430 S.C. at 152, 844 S.E.2d at 66. Accordingly, the case was reversed and remanded. Id. 430 S.C. at 153, 844 S.E.2d at 66.

Here the facts are even more in favor of reversal. Unlike Williams, Appellant was not the first to introduce character traits of non-confrontation or peacefulness. Rather, the Counsel only elicited testimony as to whether a witness saw signs of abuse on Wife or whether Appellant was a violent person *after* the State first introduced the character traits of violence and abuse through Wife's testimony. Tr. 657, ln. 16—Tr. 658, ln. 3. Accordingly, Appellant did not open the door to testimony regarding bad character evidence of domestic violence or abuse, and the trial court erred by allowing the State to introduce such evidence.

Rule 403

Moreover, even if evidence about why Wife lied to police was relevant to the offense of murder, any probative value of testimony regarding prior violence or abuse by Appellant toward Wife in the past was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. See Rule 403, SCRE. As discussed above, "Rule 403 requires the evidence offered to be proportional to the evidence that gave rise to its admissibility. We have guarded against 'thinly-veiled attempt[s] to show propensity' initiated under the guise of an attempt at impeachment." Williams, 430 S.C. at 151, 844 S.E.2d at 65 (2020) (citing Young, 378 S.C. at 106, 661 S.E.2d at 390; and State v. Heyward, 426 S.C. 630, 637, 828 S.E.2d 592, 595 (2019)).

Here, there was no protection against the thinly-veiled attempt to show propensity for violence under the guise of an attempt at impeachment. Id. Even if the reason the State wanted to introduce bad character evidence was purportedly to explain that Wife was afraid of

Appellant, the evidence offered was not proportional—at least in part because Appellant did not enter the counter-trait into evidence prior to Wife's testimony. Wife could have simply said that she was following Appellant's instructions and she was afraid of Appellant—something she did do numerous occasions in her testimony without mentioning violence or abuse—and the rationale for explaining why Wife initially lied would have been satisfied. Tr. 461, ll. 11-14; Tr. 468, ll. 5-12; 470, ln. 20—Tr. 471, ln. 3; Tr. 472, ll. 4-18; Tr. 473, ll. 8-14; Tr. 476, ln. 20—Tr. 477, ln. 1; Tr. 478, ll. 7-10; Tr. 470, ll. 4-16; Tr. 490, ln. 22—Tr. 491, ln. 5. However, without Appellant even opening the door, the Court permitted Wife to tell the jury the was afraid because she had been abused by Appellant throughout their relationship. Tr. 439, ll. 2-13. This alone was error; yet, during direct examination and under repeated inquiry as to why she lied, the State elicited the following testimony from Wife:

> Because there's not a day—not a day, a week, a month, or a year that he was just nice and good to me. Since I was 15 years old, he's always been abusive, mentally, emotionally, physically. If I wasn't physically being hit, then I was being told I was a stupid shit bitch or I was trash. I mean the list goes on and on. I was constantly being told—called names.

Tr. 491, ll. 4-6. Then again on re-direct examination, after Wife acknowledged she told Appellant she loved him when he was held in pretrial incarceration, the State asked the following series of questions:

> Q: [D]id you say that to him after he abused you?
> A: I would tell him that every, you know, day. It was a normal thing, yes.
> Q: Even after he hit you?
> A: Yes.
> Q: Even after he called you fat?
> A: Yes.

Tr. 566, ll. 15-25. Such testimony includes details beyond even a simple statement that she was afraid of Appellant, or that Appellant abused her. Thus, Wife was erroneously permitted to say

that she was afraid of Appellant *because of prior abuse*, including its types, manifestations, and duration in her actual testimony on direct and re-direct examination.

The State again delved into alleged violent bad acts by Appellant toward Wife in its cross-examination of Appellant's witness, Steve Mooneyham, after Counsel attempted to mitigate the damage done by Wife's testimony regarding domestic violence on direct. There, the State engaged in the following line of questioning:

> Q: So, Mr. Mooneyham, you stated that you never saw any physical signs of abuse?
> A: That's correct.
> Q: Did you ever see Dani's broken nose that she had?
> A: I did not.
> Q: How about the black eye that she had?
> A: I did not.
> Q: Were you there when he put her head through the wall?
> A: I was not.
> Q: Okay. How about when he put the gun to her face? Were you there for that?

Tr. 658, ln. 22—Tr. 659, ln. 7. Although the trial court sustained Counsel's objection, the subject matter itself should never have been broached in the first instance through Wife's testimony. See, e.g., King, 334 S.C. at 512, 514 S.E.2d at 582; Williams, 430 S.C. at 149, 844 S.E.2d at 64; Rule 404(a)(1), SCRE. Had the trial court properly suppressed testimony regarding alleged prior domestic violence or abuse by Appellant toward Wife, then the jury would not have been exposed to even more details on cross-examination that the State intentionally elicited. Instead, the court wrongly allowed the State to paint Appellant with the broad brush of bad character evidence, thereby confusing the issues of the elements required for it to prove the offense of murder with Appellant's conduct toward Wife throughout their relationship, and to mislead the jury in considering this conduct when evaluating the case. See Rule 403, SCRE. Indeed, the State resorted to doing exactly that in its close to the jury by positing Appellant's

alleged and unproven abusive conduct toward Wife as the basis for Wife being more credible than Appellant in a case where credibility was crucial. Tr. 890, ll. 4-12; Tr. 890, ll. 23-24; Tr. 897, ll. 6-9; Tr. 915, ll. 12-17. As Counsel argued, such evidence suggests the jury to make a decision on an improper basis, such as an emotional one, and the State's closing arguments to the jury confirmed those concerns. Williams, 430 S.C. at 151, 844 S.E.2d at 65 (quoting Wilson, 345 S.C. at 7, 545 S.E.2d at 830); see also Huckabee, 419 S.C. at 423, 798 S.E.2d at 589 ("Unfair prejudice means an undue tendency to suggest a decision on an improper basis.").

Therefore, the trial court erred in allowing Wife's testimony regarding alleged prior acts of violence and abuse toward her by Appellant, as it allowed the State to impermissibly smuggle-in the bad character traits of violence and abuse in Appellant's murder trial under the guise of Wife's excuse for lying to law enforcement. Such evidence was irrelevant to the offense for which Appellant was on trial, and Appellant did not open the door to such testimony by first introducing the character traits of peacefulness or domestic tranquility. Moreover, the testimony did not go to prove Appellant's motive, identity, absence of mistake or fact, common scheme or plan, or intent to murder Davis. Further, even if relevant, any probative value was substantially outweighed not only by the danger of unfair prejudice, but also confusion of the issues, and misleading the jury. Accordingly, the trial court erred.

Prejudice

Appellant was prejudiced by the trial court's erroneous ruling. First, as indicated above, in its closing argument the State highlighted Wife as a victim following the instructions of Appellant. Specifically, the prosecution delved into "the psyche of somebody who is 15 years old and is seduced by a 23-year-old man," as well as into notions of grooming and subordination, culminating in the following statement:

> I mean, in some ways, [Appellant] sounds like the ultimate megalomaniac. It almost seemed like he was hell bent on testing the outer limits of his power and his control over [Wife]. I mean, [Wife], not only am I going to verbally abuse you, not only am I going to beat the hell out of you, I'm going to go with two separate women, have two separate kids with them. I'm going to bring these kids over and you're just going to have to deal with it, aren't you?

Tr. 890, ll. 4-12. The State also stressed that credibility was "an issue in pretty much any trial. It's certainly one here." Tr. 890, ll. 23-24. The notion was broached again when it said, "Were y'all able to remember [Wife]'s testimony? Can you see it in your mind's eye? Can you compare it to [Appellant]'s testimony? Credibility. That's going to be a component that y'all are going to use in judging this case." Tr. 897, ll. 6-9. In furthering the point, the State maintained that "[Wife] was somebody who was forced to go along with [Appellant]'s coverup. She had no say. I think you all were paying close attention when she was testifying. Credibility is just a big component in any criminal case." Tr. 915, ll. 12-17. In so doing, the State took full advantage of the impermissible bad character evidence allowed by the trial court, and misled the jury to consider it as the basis for Wife being more credible than Appellant in a case where credibility was crucial. See, e.g., State v. Johnson, 293 S.C. 321, 326, 360 S.E.2d 317, 320 (1987) (finding the trial court's error prejudicial where the "testimony established no material fact or element of the crime for which appellant was on trial; instead, it served to prejudice the jury by focusing its attention on appellant's propensity to commit criminal acts.").

Second, the jury sent out several notes during its deliberations that indicated interest in comparing the testimony of Wife's direct testimony with that of Appellant's. Initially, the jury sought to hear from Wife's direct examination testimony. Afterward, they likewise sought to hear from Appellant's testimony. Tr. 967, ln. 22—Tr. 970, ln. 24; Tr. * (Court's Exhibits 3, 4, and 5—Jury Notes). Thus, after the State thoroughly tainted the matter of Appellant's credibility

with improper bad character evidence, the jury specifically focused upon the testimony of the only two people who witnessed the incident: Appellant and Wife. In so doing, the jury inherently made a credibility determination between the two on the critical matter at issue in the trial: malice aforethought. Accordingly, Appellant was prejudiced by the erroneous ruling. See, e.g., Kotteakos v. United States, 328 U.S. 750, 765, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557 (1946).[6]

[6] "[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." Id.

CONCLUSION

For the foregoing reasons, Clinton Warren Beebe respectfully requests reversal of his conviction and sentence, and remand for new trial.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of February, 2023.