STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Thomas W. Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TYSHAWN ANTWAUN BROWN,

APPELLANT

APPELLATE CASE NO. 2022-001171

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court reversibly erred by allowing the State to solicit testimony of Appellant's alleged gang affiliation pursuant to 404(b) where motive was irrelevant to the charged offenses, and where any probative value of such testimony was substantially outweighed by the danger of unfair prejudice of implied lawlessness and violence inherently associated with gang activity?

STATEMENT OF THE CASE

Appellant Tyshawn Antwaun Brown was indicted for murder and attempted murder by the Horry County Grand Jury on June 17, 2020. R. 10, ll. 2-22; R. 377-378; R. 381-382. His case proceeded to trial before the Honorable Thomas W. Cooper and a jury from August 8th through 10th, 2022. R. 1. Appellant was represented by Eric Fox and Nicholas O'Neill, while the State was represented by Joshua Holford and Adam Harrelson. R. 1. The jury convicted Appellant of the charged offenses, and the trial court imposed concurrent sentences of life without parole for murder, and thirty (30) years for attempted murder. R. 360, ln. 25—R. 361, ln. 6; R. 375, ll. 5-11; R. 379-380; R. 383-384.

STANDARD OF REVIEW

Appellate courts sit to review only errors of law in criminal cases and are limited to determining whether the trial court abused its discretion." State v. Robinson, 438 S.C. 421, 431, 882 S.E.2d 883, 888 (Ct. App. 2023); see also 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 there is no evidentiary support for its factual conclusions." Id.

STATEMENT OF THE FACTS

On April 24, 2018, at around 9:30 p.m. Charles Durant (Durant) and his girlfriend Winter Parker (Parker) were in Durant's green Chevrolet S-10 pick-up truck leaving Exxon the gas station in Loris, South Carolina. R. 280, ln. 1—R. 281, ln. 24. Joe Rich (Rich) was also at the Exxon gas station at the time, and entered in a gray KIA minivan with two other occupants. R. 164, ln. 3—R. 166, ln. 20; R. 193, ln. 3—R. 194, ln. 9; R. 195, ll. 2-5. Shortly after, the minivan left the Exxon and traveled in the same direction as Durant. At the intersection of Church and Spring Streets, the van drove beside the pick-up truck, and the sliding side-door opened revealing Heath Reaves (Reaves)—Parker's cousin—sitting in the back with an AR-15 pointed towards Durant. R. 168, ln. 19—R. 169, ln. 12; R. 170, ll. 17-24; R. 177, ll. 23-24; R. 195, ll. 6-11; R. 282, ll. 2-11. Immediately afterward, the van cut in front of the truck and stopped. The driver of the van came out with a handgun, and shot multiple times into the truck: once in the driver's-side A-pillar, at least once through the driver's side door window, and twice through the windshield on the driver's side. R. 135, ll. 16-24; R. 138, ln. 16—R. 139, ln. 17; R. 171, ll. 3-12; R. 205, ll. 3—R. 195, ll. 11-14; R. 284, ll. 15-25; R. 287, ll. 14-24; St. Ex. #37 (Photograph). Durant was fatally shot after being struck twice with .44 cal. bullets: once under his left armpit, and once further down on the left side of his torso. R. 224, ll. 3-8; R. 225, ln. 13—R. 226, ln. 1; R. 232, ln. 4—R. 233, ln. 17. Parker was also struck twice: once in her elbow, and once in her back. R. 286, ll. 2-18; R. 288, ll. 7-14; R. 240, ll. 9-19; R. 243, ll. 12-20. The driver went back to the van, which promptly left the scene. Meanwhile, the truck rolled forward into a nearby tree, and Parker was able to run to a nearby home where she received help to call 911 and her family. R. 86, ln 19—R. 87, ln. 1; R. 89, ll. 2-25; R. 171, ll. 18-22; R. 194, ll. 15-16; R. 289, ll. 2-23.

Police arrived at around 9:41 p.m., and found the truck at the tree with Durant still inside. R. 71, ll. 6-13; R. 73, ll. 20-3; St. Ex. #19 (Photograph). While no shell casings were found in the area, several bullet fragments were collected from inside the truck. R. 155, ll. 1-11. Officers also obtained video footage from the nearby Exxon, and sought information on both the gray minivan and Rich. R. 94, ll. 6-16. When interviewed at the jail, Rich identified a man he called "Young Boy" from a picture shown to him by police as being in the van that night; however, Rich later changing his story.[1] R. 96, ll. 10-23; R. 105, ll. 2-12. Rich now said that he was the front seat passenger in the gray minivan on April 24th, that Reaves was in the back, and "Smoke" was driving. R. 111, ln. 14—R. 112, ln. 10; R. 193, ln. 11—194, ln. 9. Rich claimed that they followed Durant, and drove beside it when Reaves opened the sliding side door of the minivan; Reaves then pointed his AR-15 at the truck, but said "it jammed." Rich further alleged that "Smoke" then cut off the truck at the intersection, got out with a "big chrome gun" from beneath his seat, and shot several times. R. 195, ll. 2-14; R. 197, ln. 12—R. 198, ln. 3.

The minivan license plate was tracked by police and registered to Brittany Burk (Burk), who was purportedly Appellant's girlfriend. R. 108, ln. 22–R. 109, 11; R. 126, ll. 8-10. It was later found parked at the residence of Lashaye Washington (Washington), Appellant's sister. R. 125, ln. 5—Tr 126, ln. 10.

Upon learning that he was wanted, Reaves turned himself into authorities in Philadelphia, Pennsylvania in May of 2018, and he was extradited to South Carolina in July of 2018. R. 172, ln. 19—R. 173, ln. 5; R. 180, ln. 11—R. 181, ln. 24. Reaves was charged with murder and

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[1] Rich was charged with obstruction related to his first statement to them, as "Pretty Boy Orlando"—the man Rich identified in the picture as being "Young Boy"—was found to be working at a local hotel during the time of the incident. However, that charge was apparently dismissed prior to Appellant's trial. R. 110, ln. 11—R. 11, ln. 12; R. 113, ll. 8-19; R. 120, ln. 1—R. 121, ln. 19.

attempted murder, and released on bond. He was later rearrested on unrelated drug trafficking and weapons charges, and engaged in negotiations regarding the present case. R. 182, ln. 2—R. 186, ln. 2. At that time, Reaves proffered that Appellant was "Smoke," and that on the night of April 24, 2018, it was Appellant who drove the van beside Durant's truck, and then in front of the truck, after which he exited the minivan and shot into the truck. R. 164, ln. 3—R. 165, ln. 17; R. 168, ln. 22—R. 169, ln. 1. In 2020, Appellant was taken into custody New York City, and extradited to South Carolina. R. 271, ll. 5-14.

The case proceeded to trial on August 8, 2022. R. 1. During pretrial motions, the State indicated its desire to introduce prior bad act evidence at trial. R. 38, ln. 9—R. 39, ln. 10. Specifically, the State sought admission of testimony stating not only that Appellant was in a gang, but also that he was a "high-ranking member," and told one of the other witnesses to shoot Durant purportedly because Durant wanted out of the gang. Thus, the State claimed such testimony would prove motive and intent. R. 39, ll. 1-10; R. 45, ln. 13—R. 48, ln. 16. Counsel for Appellant (Counsel) objected "to any mention of gang activity or gang affiliation" on several bases. R. 41, ll. 7-8. First, he argued that the State was not required to prove motive or intent. R. 40, ll. 11-12. He further argued that any probative value was outweighed by the prejudicial effect, especially due to the fact that evidence of gang affiliation is distracting to a jury because it "conjures up lawlessness, the image of lawlessness of violence in most people's minds," and is therefore misleading to jurors as well. R. 40, ln. 7—R. 41, ln. 8. Moreover, Counsel pointed out to the court that the gang affiliation evidence permitted by case law on which the State relied was relevant there because defendant was charged with accessory and conspiracy charges in addition to the underlying offenses. As such, evidence of gang affiliation here was far less probative here

because Appellant was not charged with conspiracy or accessory offenses. R. 47, ln. 8—R. 48, ln. 10.

The trial court determined that the testimony the State sought regarding gang affiliation was "narrowly tailored to a narrow set of evidence in a very confined space of time and directed toward motive, at least, reason, motive, whatever it happens to be for these things to have occurred." R. 50, ll. 20-23. Accordingly, the court ruled on the matter as follows:

> I will allow the very limited evidence as it has been outlined to me assuming it meets the other test of admissibility and does not belabor the record with continued repetition or could tend to tilt the balance of probative versus prejudice in an entirely different way. . . . I will allow the evidence as it has been presented over objection of defense counsel for the reasons that we have talked about and the restrictions that I have outlined as they have been explained to me.

R. 51, ll. 3-19.

During trial before the jury, the State solicited testimony regarding Appellant's alleged gang affiliation through Reaves. Specifically, Reaves testified that he, Appellant, and Durant were all members of the "Food Town Brant" gang,[2] and that Durant was trying to get out. Although he acknowledged there was no conversation about it, Reaves further asserted that Appellant knew of Durant's desire to leave the gang, and that he did not want it to happen. R. 170, ll. 2-12. On cross-examination regarding his proffer agreement with the State, Reaves acknowledged that he was the person who introduced Durant to the gang and "brought [Durant] to the table." R. 178, 10-15. Reaves further averred that he had influence and some authority, and that Appellant actually asked him what he wanted to do at the Exxon when they saw Durant leave; yet Reaves claimed to have told Appellant, "whatever you want to do" in an apparent shift

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[2] Rich was apparently not a member of the "Food Town Brant" gang, but "[j]ust hung around." R. 176, ll. 17-25.

of responsibility, and alleged that Appellant told Reaves to "shoot him" once the van was pulled beside Durant's truck. R. 178, ln. 16—R. 179, ln. 16.

The State again brought up Appellant's alleged gang affiliation in its closing argument. In particular, the State highlighted Reaves' testimony to provide motive:

> You know, for years in this case we tried to figure out a why. Why? I see him at the gas station, he's just going to get gas. There's no argument out there. What's the deal? What is the reason? What happened? You know, it's not until Heath Reaves comes and he says it's because he didn't want to be a part of the gang.

R. 314, ll. 1-6. The jury ultimately found Appellant guilty of both offenses as charged. The trial court sentenced Appellant to concurrent sentences of thirty (30) years for attempted murder, and life for murder.

This appeal follows.

ARGUMENT

The trial court reversibly erred by allowing the State to solicit testimony of Appellant's alleged gang affiliation pursuant to 404(b) where motive was irrelevant to the charged offenses, and where any probative value of such testimony was substantially outweighed by the danger of unfair prejudice of implied lawlessness and violence inherently associated with gang activity.

In the case at bar, the State sought, and was allowed to elicit bad conduct testimony regarding Appellant's alleged gang affiliation, the permitted purpose for which the court indicated was to show motive. First, the trial court failed to determine whether the prior bad act evidence itself met the clear and convincing standard of proof prior to admission. Second, such evidence was irrelevant to prove the charges for which Appellant was on trial. Moreover, even if relevant, the probative value of any purported gang affiliation was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury pursuant to Rule 403. Accordingly, the bad conduct evidence of alleged gang affiliation was wrongly admitted.

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, even 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.

Additionally, "in general, evidence of a person's character is not admissible to prove the person acted in conformity therewith on a particular occasion." State v. Johnson, 433 S.C. 550, 555, 860 S.E.2d 696, 699 (Ct. App. 2021) (citing Rule 404(a), SCRE (internal quotations omitted). Such propensity evidence is prohibited unless it meets additional requirements for

inclusion under a limited exception through Rule 404(b) of the South Carolina Rules of Evidence:

> 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. When a party seeks to introduce bad acts evidence pursuant to Rule 404(b), two threshold requirements must be satisfied by the proponent before the alleged conduct may be admitted: (1) whether the purported bad conduct even happened by clear and convincing evidence if it did not previously result in a conviction; and (2) whether there was a logical correlation between the alleged prior bad acts and a material issue in the current case. See, e.g., State v. Perry, 430 S.C. 24, 31, 842 S.E.2d 654, 658 (2020) ("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. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001); State v. Robinson, 438 S.C. 421, 435, 882 S.E.2d 883, 891 (Ct. App. 2023) (citing Johnson, 433 S.C. at 556, 860 S.E.2d at 699) ("If the prior bad act did not result in a conviction the state must prove the prior bad act by clear and convincing evidence."). Courts are cautioned to apply the logical relevancy test with "rigid scrutiny." Robinson, 438 S.C. at 435, 882 S.E.2d at 891 (citing Johnson, 433 S.C. at 556, 860 S.E.2d at 699).

Moreover, even if the proffered bad acts evidence satisfies the requirements of relevance and 404(b), it must still pass muster under Rule 403 of the South Carolina Rules of Evidence. Rule 403 provides for 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."). In other words, even if the evidence of other unconvicted bad conduct meets the clear and convincing standard, and even if it has a logical relevance to or connection between the bad conduct and a disputed fact or element of the crime charged, it is still nonetheless inadmissible if it fails the test of Rule 403.

As the State conceded, testimony of Appellant's purported gang affiliation was evidence of prior bad acts. R. 46, ll. 12-13; see also Johnson, 433 S.C. at 556, 860 S.E.2d at 699 ("Without question, the testimony about [the Defendant's] gang affiliation was prior bad act evidence."). However, the trial court failed to perform the required threshold analysis of whether such evidence met the clear and convincing standard. After listening to arguments by both the State

and Counsel, as well as considering the two primary South Carolina cases on the matter,[3] the trial court ruled[4] as follows:

> The Court, of course, in the well drafted Opinion has all of these appeals one of these days, and it'll be from another Court higher up when his time comes. He did, as Mr. Fox indicated, made it clear that *while a motive is not an element of all of the charges, it is an element of conspiracy and accessory* which require proof of planning, et cetera, and that appears to be at least one of the reasons that he gave for allowing this evidence to come in in support of those charges, *which as [Counsel] said does not exist in this case.* The Opinion is replete with concern, of course, and evidence of gang affiliation demands careful handling because its power to distract the fact finder from its rational task of deciding the facts, et cetera, and luring their attention to lure is there and the trial judge has to temper the risk if that evidence would outweigh or exert an influence on the jury's emotions, and that's always a concern.
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> . . . . .
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> *I'm very familiar with the venue here, it's my home circuit.* I tried cases in there for about 20 years before I retired and started doing other things and I echo Judge Hill's concern about over-trying cases. *I've now found that true here, you folks, at least in my experience have been a vast exercise of restraint and not to use the burden of proof beyond a reasonable doubt to simply lure the gate to anything that passes a smell test to be offered into evidence, as you've outlined it Mr. Holford, I don't think you have that in your plan in this particular case. This appears to be very narrowly tailored to a narrow set of evidence in a very confined space of time and directed toward motive, at least, reason, motive, whatever it happens to be, for these things to have occurred.* The Johnson case referred in part to the fact that it was, in that case, I think, offered somewhere *I read this as an explanation for a killing that would otherwise would appear to be completely senseless, and*

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[3] See State v. Johnson, 433 S.C. 550 860 S.E.2d 696 (Ct. App. 2021); and State v. Robinson, 438 S.C. 421, 435, 882 S.E.2d 883 (Ct. App. 2023).

[4] Although Counsel did not renew the same objections to this evidence contemporaneous with Reaves' testimony, Appellant respectfully asserts that the pain language used by the trial court shortly before opening statements in the case indicated that its ruling on the matter was indeed final. State v. Jones, 435 S.C. 138, 144, 866 S.E.2d 558, 561 (2021) ("If an evidentiary ruling is pretrial, a contemporaneous objection must be raised during trial when the evidence is admitted, whereas *a party need not renew an objection if the decision is final.*") (emphasis added).

> *apparently that was something that the Court took into account for some limited purpose. I will allow the very limited evidence as it has been outlined to me assuming it meets the other test of admissibility and does not belabor the record with continued repetition or could tend to tilt the balance of probative versus prejudice in an entirely different way.* It certainly it is prejudice. It is only unfair prejudice that attracts the attention of judges and appellate courts, but I recognize that unfair depends on the point of view, really. One person's unfair is another person's pristine proof, and so I will be monitoring this very clearly at the conclusion of trial, of course I will—and during the trial, if you request it, Mr. Fox, I will be glad to give a limiting instruction during the time this is offered if you wish for that to be done. I will allow the evidence as it has been presented over objection of defense counsel for the reasons that we have talked about and with the restrictions that I have outlined as they have been explained to me. Does everybody understand where we are on that point?

R. 49, ln. 10—R. 51, ln. 20 (emphasis added). Absent from the court's ruling is any analysis regarding whether the alleged bad act evidence of Appellant's purported gang affiliation happened or was reliable to the clear and convincing standard. Instead, the court apparently relied upon its familiarity and experience in the circuit where it observed the State had "been a vast exercise of restraint and not to use the burden of proof beyond a reasonable doubt to simply lure the gate to anything that passes a smell test to be offered into evidence, as you've outlined it Mr. [Assistant Solicitor], I don't think you have that in your plan in this particular case." R. 50, ll. 14-20. In other words, the trial court based its decision upon past experiences with cases in the circuit, not the specific facts or sources of those facts before it, or whether there was any veracity to the specific allegations of gang affiliation. Thus, the trial court erred as a matter of law, as it failed to perform the threshold analysis of whether the alleged prior bad conduct occurred by clear and convincing evidence

Next, even if evidence of Appellant's alleged affiliation with the "Food Town Brant" gang met the first threshold for admissibility under Rule 404(b), it was nonetheless irrelevant

under Rules 401 and 402, SCRE, and the trial court failed to "apply the logical relevancy test with rigid scrutiny." Robinson, 438 S.C. at 435, 882 S.E.2d at 891 (citing Johnson, 433 S.C. at 556, 860 S.E.2d at 699). First, the trial court's ruling was clear that the limited purpose for which it allowed testimony regarding gang affiliation into evidence was to show motive. R. 50, ll.15-23. Yet, as Counsel pointed out, motive was not an element of the charges for which Appellant was being tried. R. 40, ll. 11-12. As Counsel further asserted, contrary to the facts of the Johnson case to which the court referred in its ruling, Appellant was not charged with conspiracy or accessory before the fact to murder; rather, he was charged with personally committing the offenses of murder and attempted murder himself. R. 47, ln. 8—R. 48, ln. 10. Thus, his case is distinguishable from Johnson as to the need for the State to prove motive.

Second, the court failed to analyze how and whether such evidence was logically related to a disputed material fact or element of the charged offenses. Appellant's purported membership in the "Food Town Brant" gang would not have a "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. For instance, it would not make more or less probable that fact of whether he drove a gray KIA minivan on April 24, 2018, nor whether he cut-off Durant's truck with the minivan, nor whether he shot Durant twice with a .44 magnum revolver, nor whether Parker was struck twice as well, nor even whether witnesses saw Appellant shoot a handgun into Durant's truck. Here, the material fact in dispute in Appellant's trial was not if, where, when, or how Durant was murdered; "[t]his was a who done it," and the evidence of alleged gang affiliation did not make more or less probable the facts regarding identity. R. 323, ln. 3.

To the limited extent the unproven fact of gang affiliation had any relevance, it was merely to explain *why* something like this could happen.[5] The State said as much in its closing argument to the jury:

> You know, for years in this case we tried to figure out a why. Why? I see him at the gas station, he's just going to get gas. There's no argument out there. What's the deal? What is the reason? What happened? You know, it's not until Heath Reaves comes and he says it's because he didn't want to be a part of the gang.

R. 314, ll. 1-6. However, "why" something like this could happen was not relevant to the disputed material facts of the case or elements of the offenses. Accordingly, the testimony of Appellant's alleged gang affiliation was irrelevant.

Finally, even if relevant, any probative value of testimony regarding Appellants purported gang affiliation was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. See Rule 403, SCRE. As Counsel argued, any probative value was outweighed by the prejudicial effect, especially due to the fact that evidence of gang affiliation is distracting to a jury because it "conjures up lawlessness, the image of lawlessness of violence in most people's minds," and is therefore misleading to jurors as well. R. 40, ln. 7—R. 41, ln. 8. These concerns are not unfounded. Our own Appellate Courts have cautioned, "[e]vidence of gang affiliation demands careful handling because of its power to distract the fact finder from its rational task of deciding the facts from objective evidence, luring their attention to the lurid, raising the risk that they will decide the case on an improper or subjective (often unduly emotional) basis." Johnson, 433 S.C. at 559, 860 S.E.2d at 701.

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[5] Even in cases where 404(b) evidence regarding gang affiliation is authorized to explain motive and intent behind "otherwise senseless shootings," trial courts are still cautioned that "these terms are not magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names." Johnson, 433 S.C. at 557-58, 860 S.E.2d at 700-01.

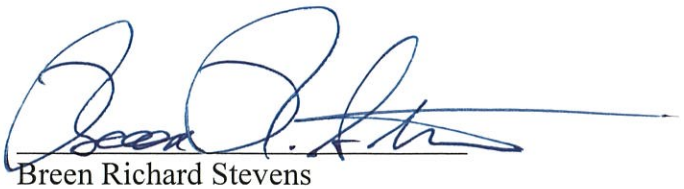
Here, the State's evidence regarding Appellant's purported gang affiliation suggested to the jury to make a decision on an improper basis, such as an emotional one, and the State's closing arguments to the jury confirmed those concerns. Williams, 430 S.C. at 151, 844 S.E.2d at 65 (quoting Wilson, 345 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."). Despite the fact that Reaves was also allegedly in the "Food Town Brant" gang, and despite the fact that Reaves left the gang and became a State's witness, and despite the fact that Reaves was not killed but only "beat-out" when he left the gang, the State nonetheless was permitted to introduce evidence averring not only that Appellant was in the gang, but also that he was of high rank in the gang, all purportedly to prove motive to kill Durant because Durant wanted to leave the gang. R. 186, ln. 20—R. 187, ln. 16; R. 190, ll. 6-9. In other words, evidence adduced at trial showed that murder was not how members were removed from the gang; thus, testimony of Appellant's alleged high-status in the "Food Town Brant" gang as motive to kill Durant due to his desire to depart was of extremely low probative value.

Moreover, once stripped of its potential potency for the purported evidentiary purpose, what is left is the highly prejudicial allegation by Reaves claiming Appellant was a high-ranking member of a gang—an allegation utilized by the prosecution in its closing argument to the jury in support of its own theory of the case. R. 169, ln. 18—R. 170, ln. 12; R. 314, ll. 1-6. In so doing, the State took full advantage of the impermissible bad acts evidence allowed by the trial court, and misled the jury by "luring their attention to the lurid, raising the risk that they will decide the case on an improper or subjective (often unduly emotional) basis." Johnson, 433 S.C. at 559, 860 S.E.2d at 701; see also 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."). Thus, any probative value of testimony regarding Appellants purported gang affiliation was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, and Appellant was prejudiced by its erroneous admission. See Rule 403, SCRE.

CONCLUSION

For the foregoing reasons, Appellant Tyshawn Antwaun Brown respectfully requests reversal of his convictions and sentences, and remand for a new trial.



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of April, 2023.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
Apr 24 2023
SC Court of Appeals

Appeal from Horry County

Honorable Thomas W. Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TYSHAWN ANTWAUN BROWN,

APPELLANT

APPELLATE CASE NO. 2022-001171

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tyshawn Antwaun Brown states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Thomas W. Cooper, which was held on August 8 - 10, 2022, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

Wherefore, he asks the Court to relieve him as counsel for Tyshawn Antwaun Brown.

Respectfully Submitted,

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of April, 2023.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
Apr 24 2023
SC Court of Appeals

Appeal from Horry County

Honorable Thomas W. Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TYSHAWN ANTWAUN BROWN,

APPELLANT

APPELLATE CASE NO. 2022-001171

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictments:
(2) Sentence sheets;
(3) State's exhibit #19 (photograph);
(4) State's exhibit #37 (photograph);
(5) Transcript (August 8th through 10th, 2022): Pp. 1-376.

I certify that this designation contains no matter which is irrelevant to this appeal.

Breen Richard Stevens
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

This 24th day of April, 2023.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Breen Richard Stevens
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

This 24th day of April, 2023.

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THE STATE,

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TYSHAWN ANTWAUN BROWN,

APPELLANT

APPELLATE CASE NO. 2022-001171

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Tyshawn Antwaun Brown, #350764, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 24th day of April, 2023.

Breen Richard Stevens
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

From:	Stock, Chris
To:	SC - BROWN MELODY; Angela Brown
Cc:	Stevens, Breen
Subject:	Brown, Tyshawn - Anders Brief of Appellant, Record on Appeal and Proposed Transportation Order - 2022-001171
Date:	Monday, April 24, 2023 4:21:00 PM
Attachments:	Brown, Tyshawn - Record on Appeal - 2022-001171.pdf Brown, Tyshawn - Proposed Transportation Order - 2022-001171.pdf Brown, Tyshawn - Anders Brief of Appellant - 2022-001171.pdf Brown, Tyshawn - Anders Brief of Appellant - 2022-001171 - AG Cover Letter.pdf

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Ms. Brown,

Please find attached for service the Anders Brief of Appellant, Designation of Matter, Record on Appeal and Proposed Transportation Order for Tyshawn Antwaun Brown's appeal which will be filed today with the Court of Appeals.

Thank you.

Chris

Chris Stock
Administrative Assistant
Commission on Indigent Defense
Appellate Division
(803) 734-1330