

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Beaufort County

Honorable Edgar W. Dickson, Circuit Court Judge

Opinion No. 2023-UP-091 (S.C. Ct. App. Filed March 15, 2023)

Lower Court Case No. 2017-GS-07-00810

THE STATE,

RESPONDENT,

V.

DALE EUGENE KING,

PETITIONER

APPELLATE CASE NO. 2019-002078

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that pursuant to the South Carolina Court of Appeals' Opinion issued in this case on March 15, 2023, a petition for rehearing was filed on May 22, 2023, which was denied on June 22, 2023.

QUESTIONS PRESENTED

I.

The Court of Appeals erred in upholding the trial judge's ruling that the opening remark that "a trial is a search for the truth" did not require a mistrial because it was clear that this comment shifted the burden of proof in violation of petitioner's right to due process of law.

II.

The Court of Appeals erred in upholding the trial judge's denial of petitioner's mistrial motion after testimony surfaced that exceeded the parameters of prior difficulties between the parties evidence because this ultimately morphed into prior bad act evidence that was inadmissible at trial.

STATEMENT OF THE CASE

Petitioner was indicted by the Beaufort County grand jury for murder. Petitioner's jury trial was held before the Honorable Edgar W. Dickson and a jury from December 9–11, 2019. Petitioner was represented by Trasi Campbell. The state was represented by Kimberly Smith and Hunter Swanson.

The jury found petitioner guilty as charged and petitioner was sentenced to thirty-five-years imprisonment. Petitioner appealed, and on March 15, 2023, his conviction and sentence were affirmed by the South Carolina Court of Appeals. R. 1-3 A petition for rehearing was filed on May 22, 2023, which was denied on June 22, 2023. R. 4-21

This petition for writ of certiorari follows.

QUESTION I

The Court of Appeals erred in upholding the trial judge's ruling that the opening remark that "a trial is a search for the truth" did not require a mistrial because it was clear that the comment shifted the burden of proof in violation of petitioner's right to process of law.

On May 16, 2017, Matt Bowsher with the Beaufort Fire Department responded to the Atlantic Inn for a person who was possibly in cardiac arrest. R. 41, l. 25 – 42, l. 14. Bowsher arrived on the scene around 8:10 a.m. and found a woman who was "unresponsive, laying on the sofa, stiff and cold to the touch [and] also had signs of blood and a cut to the lip and also blood coming from the nose." R. 42, l. 15 – 43, l. 14. The woman was later identified as Veronica King, petitioner's wife of over thirty years.

Bowsher recalled that petitioner was present on the scene and that petitioner told him that King had a history of seizures and the two of them had been drinking with friends the night before. R. 46, l. 14 – 47, l. 1. Bowsher did not find any seizure medication. R. 47, ll. 18 – 19. A paramedic arrived shortly after Bowsher and found that the woman had "no cardiac activity whatsoever" and that her body was cold and stiff. R. 50, l. 20 – 53, l. 3.

Prior to law enforcement's arrival, Atul Patel, an employee of the hotel, recalled that petitioner came to his office and told him that King was not responding so Atul called 911. R. 56, ll. 9 – 18. Chet Patel owned the Atlantic Inn at the time of King's death, and he testified that both petitioner and King worked for him for almost seven years and lived in one of the rooms at the hotel during that time. R. 59, ll. 1 – 24.

Jerome Bates, who was married to King's sister, recalled speaking with petitioner on several occasions after King's death. R. 64, l. 7 – 66, l. 22. Bates maintained that on the morning of King's death, petitioner told Bates that he did not know what happened. Bates also testified

that petitioner was “highly intoxicated.” R. 66, l. 23 – 67, l. 4. Bates further stated that later, while he and petitioner were still at the hotel, petitioner stood in the doorway of his hotel room and said, “I have to face this the rest of my life.” R. 68, ll. 1 – 8.

Bates further claimed that petitioner told him that King must have fallen and hit her head while taking a shower. R. 68, ll. 9 – 15. Bates then recalled that he and petitioner were sitting in the hotel room when he asked petitioner what happened and petitioner responded: “I went to sleep around 10:30, 11 and I did not wake up until about 8:00 the next morning. When I got up, I noticed [King] wasn’t in the bed and I found her on the couch and was stiff.” R. 69, ll. 19 – 25. Bates then claimed that petitioner was “questioning himself” out loud and asked: “What was I thinking? What did I just do?” R. 70, ll. 2 – 18.

Ultimately, petitioner left the hotel and went to stay with Bates at his house later that day. While at Bates’ house, Bates claimed that petitioner said: “[King] wanted to take a shower and I just told her to get her ass in bed and we’d wash up in the morning when we get up. I don’t know why she just made her head so hard. She just wouldn’t listen to me.” R. 71, l. 17 – 72, l. 7.

Petitioner was arrested the following day after law enforcement received the preliminary autopsy results which showed King was strangled. R. 96, l. 13 – 100, l. 24. After petitioner was arrested, Bates recalled having two separate conversations with petitioner while he was in jail. First, Bates claimed that petitioner said he put King in the shower and as he was taking her out of the shower, she “slipped and she felt like dead weight” so he put King on the bed. R. 73, ll. 3 – 16. Bates claimed that in a second conversation with petitioner, petitioner said he grabbed King by the neck while getting her out of the shower and that she accidentally fell and hit her mouth. R. 73, ll. 17 – 24.

The morning that King was found dead, petitioner was transported to the Beaufort City Police Department to be interviewed. R. 92, l. 3 – 93, l. 25. Investigator Dowling, who interviewed petitioner, recalled his initial conversation with petitioner:

[Petitioner] advised that he resided in that unit with his wife, that the previous night they had been consuming alcohol with friends and he explained that at roughly 10:00 to 11:00 that his friends had departed and . . . it was just him and his wife, that they had secured the hotel room. . . . He stated that they both went to bed together. He didn't report any disturbance or any arguments that occurred.

He advised me that when he woke up in the morning at roughly 8 a.m., that he found his wife on the couch. He went over to investigate, and he described that he had rolled her over and noticed that she wasn't breathing.

R. 94, l. 12 – 95, l. 6. Dowling further recalled that in petitioner's first interview, petitioner said that he believed King might have taken a shower that night and that petitioner did not like King taking showers after she had been drinking for fear that she would slip and fall. R. 95, ll. 12 – 25.

Dowling interviewed petitioner again the next day prior to arresting him. R. 96, l. 13 – 100, l. 24. In the second interview, Dowling claimed that petitioner admitted to being angry at King for wanting to take a shower because she had been drinking. R. 100, l. 25 – 101, l. 23. Petitioner then supposedly told Dowling that if he was responsible for King's death that "it was not intentional and that he didn't mean to hurt [her]." R. 103, ll. 4 – 14. Petitioner further admitted that he and King were fighting on the night of her death and that he slapped her in the face at one point. R. 103, l. 15 – 104, l. 11.

The autopsy of King determined that she died from strangulation. R. 116, ll. 21 – 23. King had three areas of bruising on the left side of her neck, two areas of bleeding in her left eye, and hemorrhages in six of her ten neck muscles. R. 117, l. 17 – 121, l. 21.

Search for the Truth Remarks

The following opening remarks were given to the jury by the trial judge:

This trial, like all trials, may be different from what you might expect. Many people do not have the chance to attend actual court sessions and take part in a trial as you are now doing and they think from watching television or movies or reading books, that trials are always full of high drama, intense action and riveting circumstances.

While all of these things may be true at times, this trial is not for entertainment. It is a fundamental part of our democracy. *A search for the truth in an effort to make sure that justice is done between the parties before this Court. Searching for the truth and making sure justice is done is often slow, deliberate and repetitive.* It's the opposite of what you may have seen on television or in movies or read in books. This courtroom is a place of honor, dedicated to the protection and preservation of citizen's rights through what many have called the greatest justice system ever created.

R. 27, ll. 6 – 24 (emphasis added). The trial judge also instructed the jury that the attorneys were “officers of this Court, sworn to uphold the integrity and fairness of our judicial system *and to help you in the search for the truth.*” R. 28, ll. 1 – 4 (emphasis added). While the trial judge told the jurors that his opening remarks were not a charge on the law, he did tell the jury that his comments were an explanation of the procedure that would be followed during the trial. R. 28, ll. 10 – 19.

The judge also instructed the jury that it was their “purpose” to find and determine the facts and that it was their “solemn responsibility to determine the guilt *or innocence* of the Defendant.” R. 29, l. 1 – 32, l. 23 (emphasis added). Finally, the judge instructed: “In determining what the true facts are in this case, you must decide whether or not the testimony of a witness is believable.” R. 34, ll. 3 – 5. The judge did not define reasonable doubt in his opening instructions.

Defense counsel objected to these remarks arguing that instructing a jury that the purpose of petitioner's trial was to seek the truth unconstitutionally shifted the burden of proof to the defendant. R. 76, ll. 1 – 14. Counsel further argued that because this instruction appeared in the judge's opening remarks, the jury would now spend the entire trial believing that their role was to seek the truth. Counsel requested a mistrial because the harm to petitioner could not be cured. R. 76, l. 15 – 77, l. 7.

The judge stated that he believed the instruction was “just a cautionary thing to tell them that *I want them to get to the bottom of this.*” R. 77, ll. 16 – 23 (emphasis added). The judge further remarked that this was the charge he was given when he first became a judge and that he believed his closing charge on the law “should take care of that.” R. 77, l. 24 – 78, l. 6. The judge denied counsel's motion for a mistrial.

On appeal, the Court of Appeals held as follows on this issue:

We hold the trial court did not abuse its discretion by refusing to grant a mistrial after it instructed the jury that a trial is a “search for the truth.” *See State v. Harris*, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009) (“The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law.”). The trial court's “search for the truth” remarks came at the beginning of trial; the trial court did not give the jury any charges on the law or reasonable doubt at the time the remarks were made; the trial court, the State, and King devoted time in each of their opening remarks to explain the State's burden of proof and reasonable doubt; and the trial court properly instructed the jury on the law during its instructions immediately before deliberations. *See State v. Beaty*, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018) (holding the trial court's search for the truth comment during its opening remarks not to be reversible error where it was a “mere statement to the jury and not a charge on the law. . . . [and] the remarks were not linked to either the reasonable doubt or circumstantial evidence charges”); *State v. Patterson*, 425 S.C. 500, 512, 823 S.E.2d 217, 224 (Ct. App. 2019) (holding the trial court's search for the truth remark was not reversible error because the “comments came at the beginning of trial rather than the charge on the State's burden of proof at the end”); *id.* at 512, 823 S.E.2d at

224 ("Furthermore, . . . we note the trial court gave an accurate definition of reasonable doubt later during its opening statement and again in the jury charge."). Additionally, King's guilt was conclusively proven by King's own statements and the autopsy report presented by the State. *See State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result.").

Inasmuch as the "search for the truth" remarks were given at the beginning of the trial and not during the jury charge, then there is no erasure of the error due to sequence because the prejudice remained, arguably moreso as at the outset the jury heard this at the beginning when the jury's first impressions were formed.

More than two decades ago, in *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1998), our Supreme Court strongly urged trial judges to avoid using any "seek" language in their charges to the jury. The Court noted that such "in search of the truth" language was unnecessary and ran the risk of unconstitutionally shifting the burden of proof to the defendant. *Id.* at 151-56, 508 S.E.2d at 865-68.

In *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000), our Supreme Court repeated its warning that trial courts should avoid using any "seek the truth" language. However, the Court in *Aleksey* noted that in that case the "seek" language was used in the instruction on witness credibility. *Id.* at 27, 538 S.E.2d at 251-52. The "seek" language did not appear in either the reasonable doubt or circumstantial evidence portion of the instruction. *Id.* Thus, the *Aleksey* Court found that there was not a reasonable likelihood that the jury applied the challenged instruction in a manner inconsistent with the state's burden of proof beyond a reasonable doubt. *Id.* at 28-29, 538 S.E.2d at 252-53.

In State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012), our Supreme Court considered a jury instruction that “whatever verdict you reach will represent truth and justice for all parties that are involved in this case.” Although the issue was not preserved, the Court instructed trial judges “[to] remove any suggestion from his general sessions charges that a criminal jury’s duty is to return a verdict that is ‘just’ or ‘fair’ to all parties. Such a charge could effectively alter the jury’s perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State’s burden to prove the defendant’s guilt beyond a reasonable doubt.” Id. at 256, 737 S.E.2d at 475.

Despite our Supreme Court’s repeated admonitions regarding the dangers of “seek the truth” language in the court’s jury charge, trial judges have continued to employ new derivatives of this burden shifting language. Recently, in State v. Beaty, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018), our Supreme Court reviewed the trial court’s preliminary remarks to the jury, which included use of the terms “search[ing] for the truth,” “true facts,” and “just verdict.” The Court ruled:

[W]e agree with petitioner that a trial court should refrain from informing the jury, *whether through comments or through its charge*, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases may be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury’s perception of justice. We caution trial judges to avoid these terms and any other that may divert the jury from its obligation in a criminal case to determine, based solely on the evidence presented, whether the State has proven the defendant’s guilt beyond a reasonable doubt.

Id. (emphasis added). However, the Beaty Court found no prejudice sufficient to warrant reversal from the comments in light of its review of the entirety of the opening comments and the trial record. Id.

It is not the jury's function to search for the truth in criminal trials, or as the trial judge in this case stated: "to get to the bottom of this." R. 77, ll. 16 – 23. A jury's function is to determine whether the state has proven the defendant's guilt *beyond a reasonable doubt*. See Francis v. Franklin, 471 U.S. 307, 313 (1985) ("The Due Process Clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (citing In re Winship, 397 U.S. 358, 364 (1970))).

Here, while the judge's improper comments about searching for the truth appeared in his opening remarks rather than his definition of reasonable doubt, these opening remarks set the tone for the remainder of the trial. The "searching for the truth" language in the opening remarks was more prejudicial to petitioner than putting this same language in the charge on the law at the end of the trial. This is because the jurors spent the duration of the trial believing their job was something that it was not. In other words, the jurors spent the entire trial under the false and incorrect impression that their role was to determine "the truth." This is especially problematic in light of the judge's juxtaposition of a fictional television drama with petitioner's trial, which the judge incorrectly described as a search for the truth. "An instruction is defective if a reasonable juror could interpret it to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." State v. Manning, 305 S.C. 413, 416, 409 S.E.2d 372, 374 (1991).

When viewed in this light, the judge unconstitutionally shifted the burden of proof to petitioner not only by telling the jurors that their job was to search and find the truth, but also that it was their solemn duty to determine whether petitioner was guilty *or innocent*. This is unequivocally not the role of a criminal jury. Their job is solely to determine whether the state

has proven its case beyond a reasonable doubt. That is quite different from determining whether a criminal defendant is innocent. “[A]n essential of the due process guaranteed by the Fourteenth Amendment [is] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.” Jackson v. Virginia, 443 U.S. 307, 316 (1979).

The trial judge erred in informing the jury at the outset of petitioner’s trial that their role was to search for the truth and to determine whether petitioner was guilty or innocent. This was an incorrect statement of the law and of the actual role a criminal jury has. Furthermore, this improperly invited the jury to choose between the state’s version of events and petitioner’s. This error resulted in an unconstitutional shifting of the burden of proof to petitioner by implicitly requiring him to prove his innocence. Petitioner’s conviction should be reversed. See State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018); State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998); State v. Manning, 305 S.C. 413, 409 S.E.2d 372 (1991). The Court of Appeals erred in its ruling on this issue.

QUESTION II

The Court of Appeals erred in upholding the trial judge’s denial of petitioner’s mistrial motion after testimony surfaced that exceeded the parameters of prior difficulties between the parties evidence because this ultimately morphed into prior bad act evidence that was inadmissible at trial.

The state made a pretrial motion to introduce “the prior history of difficulties” between petitioner and King. R. 3, ll. 7 – 15. In support of its motion, the state proffered testimony by

King's sister, Bessie Bates. Bates testified, in part, that petitioner and King's relationship consisted primarily of "arguing, fighting, [and] fussing" and that she advised King to "move away from the situation." R. 6, l. 17 – 7, l. 5. The solicitor also informed the judge that it would seek to introduce testimony from one of petitioner and King's daughters regarding a domestic violence for which petitioner was arrested two months prior to King's death. R. 9, l. 24 – 10, l. The state argued that the testimony was admissible pursuant to State v. Smith, 337 S.C. 27 (1999) to establish petitioner's intent and a lack of mistake or accident as allowed under Rule 404 (b), SCRE. R. 14, l. 18 – 15, l. 14. The judge ruled that the sister's testimony about the generalized prior difficulties and the daughter's testimony about the domestic violence arrest from two months prior were admissible. R. 23, ll. 6 – 13.

When Bates was called before the jury the solicitor asked her if she ever gave King advice about her relationship with petitioner. R. 132, ll. 7 – 9. Bates answered that she had and continued: "witnessing the times when I had to go to the hospital and to check after her for being beaten and stuff like that." R. 132, ll. 10 – 13. Defense counsel objected and the judge informed the jury to disregard Bates' last answer. R. 132, ll. 14 – 19.

Outside the presence of the jury, defense counsel requested a mistrial because of Bates' improper testimony. R. 143, ll. 10 – 13. Counsel argued that Bates' testimony about going to the hospital to check on King after she was beaten by petitioner fell outside the permissible testimony about prior difficulties and that the judge's instruction to the jury to disregard the answer was insufficient to cure the harm. R. 143, ll. 13 – 25. The judge denied counsel's motion for a mistrial. R. 144, ll. 2 – 14.

On appeal, the Court of Appeals held as follows regarding this issue:

We hold the trial court did not abuse its discretion by refusing to grant a mistrial after Decedent's sister testified King had

committed a previous incident of domestic abuse. *See Harris*, 382 S.C. at 117, 674 S.E.2d at 537 ("The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law."). Following the sister's statement and King's objection, the trial court immediately instructed the jury to disregard the statement. *See State v. Smith*, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986) ("The jury should be specifically instructed to disregard [incompetent] evidence, and not to consider it for any purpose during deliberations."); *State v. Young*, 420 S.C. 608, 623, 803 S.E.2d 888, 896 (Ct. App. 2017) ("We start by presuming the cure worked, for we also presume juries follow their instructions."); *id.* at 624, 803 S.E.2d at 896 ("Limiting instructions are deemed to cure error unless 'it is probable that, notwithstanding the instruction, the accused was prejudiced.'" (quoting *Smith*, 290 S.C. at 395, 350 S.E.2d at 924)). Additionally, King's own statements and the autopsy report presented by the State conclusively proved King's guilt. *See Bailey*, 298 S.C. at 5, 377 S.E.2d at 584 ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result.").

"The power of the trial court to declare a mistrial should be used with the greatest caution under urgent circumstances and for very plain and obvious reasons stated on the record by the trial court." *State v. Harris*, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009). "A mistrial should only be granted when absolutely necessary, and a defendant must show both error and prejudice in order to be entitled to a mistrial." *State v. Wilson*, 389 S.C. 579, 585–86, 698 S.E.2d 862, 865 (Ct. App. 2010). "Insubstantial errors that do not impact the result of a case do not warrant a mistrial when guilt is conclusively proven by competent evidence." *State v. White*, 371 S.C. 439, 447–48, 639 S.E.2d 160, 164 (Ct. App. 2006).

Here, the solicitor agreed that pursuant to *State v. Williams*, 321 S.C. 327, 468 S.E.2d 626 (1996), the details of prior difficulties between Petitioner and King were not admissible. R. 21, ll. 12 – 19. However, Bates testified anyway to the details of the prior difficulties by saying that King was hospitalized from petitioner physically assaulting her on previous occasions. This

testimony was extremely prejudicial because petitioner and King were married for over thirty years and there was no time frame given as to the prior assaults and hospitalizations testified to by Bates. However, the implication of Bates' testimony was that petitioner physically assaulted King resulting in King being hospitalized on more than one occasion. This testimony was highly inflammatory and invited the jury to render a verdict on an improper basis. This Court of Appeals erred in its ruling with respect to this erroneous testimony.

Also, the trial judge erred in allowing testimony that petitioner physically assaulted the victim two months prior to her death because the prior assault was not probative of intent or lack of mistake or accident, and any probative value was substantially outweighed by the danger of unfair prejudice. The state moved pretrial to admit testimony from one of petitioner's daughters and a police officer that petitioner had physically assaulted King in March of 2017 and been arrested for domestic violence as a result. R. 14, ll. 18 – 24. The solicitor argued that State v. Smith, 337 S.C. 27, 522 S.E.2d 598 (1999) permitted the introduction of the prior domestic violence to establish "intent and lack of mistake or accident." R. 15, ll. 4 – 14. The solicitor maintained that she needed to be able to show a lack of mistake or accident based on statements that petitioner made which "[did not] correspond with the medical findings and trie[d] to sort of make a case for an accident or some sort of mistake." R. 15, ll. 15 – 25.

Defense counsel responded that she was not raising an accident or mistake defense and it was the solicitor who was seeking to introduce petitioner's statements. Counsel maintained that the prior domestic violence abuse was improper and inadmissible. R. 17, l. 9 – 19, l. 5. The judge disagreed and ruled that testimony regarding the physical assault from two months prior to King's death was admissible. R. 23, ll. 6 – 13.

Petitioner's daughter, Naomi Belk, testified that in March of 2017 she was visiting her parents for her birthday at their hotel room. R. 135, l. 17 – 136, l. 18. Belk claimed that her parents had been drinking that day and were "exchanging words" that night while Belk was trying to get to sleep. R. 137, ll. 4 – 10. Belk said that she "heard" King getting hit so she called 911. R. 137, ll. 10 – 11. According to Belk, King had bruises on her face after the incident and petitioner was arrested by the police that night. R. 137, ll. 12 – 22.

The state also called Trisha Brubaker with the Beaufort Police Department who responded to Belk's 911 call regarding petitioner assaulting King. Brubaker testified that she responded to the hotel and heard a male yelling at someone inside the room. R. 138, l. 18 – 139, l. 12. When Brubaker knocked on the door, petitioner answered and "denied that there was a disturbance" and told Brubaker that she must have the wrong room. R. 139, ll. 13 – 24. Brubaker maintained that she observed several injuries to King including a contusion on her forehead, swelling on her left eye, and swelling to her lower lip. R. 140, ll. 1 – 17. A photograph of King's injuries from that night was introduced over defense counsel's renewed objection. R. 140, l. 18 – 141, l. 8.

On appeal, the Court of Appeals held as follows on this issue:

We hold King's argument that the trial court erred by admitting testimony about alleged prior difficulties between Decedent and King is not preserved for appeal because King failed to contemporaneously renew his objection to the testimony at trial. *See State v. Johnson*, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) ("To preserve an issue for review there must be a contemporaneous objection that is ruled upon by the trial court."); *State v. Smith*, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999) ("A pretrial ruling on the admissibility of evidence is preliminary and is subject to change based on developments at trial."); *State v. Mueller*, 319 S.C. 266, 268, 460 S.E.2d 409, 410 (Ct. App. 1995) ("Because the evidence developed during trial may warrant a change in the ruling, the losing party must renew his objection at trial when the evidence is presented in order to preserve the issue for appeal.").

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.” “It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual.” State v. Gillian, 360 S.C. 433, 443, 602 S.E.2d 62, 67 (Ct. App. 2004). Furthermore, in order to be admissible, “[t]he bad act must logically relate to the crime with which the defendant has been charged.” Id.

If the prior bad act which the state seeks to introduce against the defendant is not the subject of a criminal conviction, then “evidence of the bad act must be clear and convincing.” State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009). However, even if there is clear and convincing evidence of the prior bad act, admission of the evidence is still subject to Rule 403, SCRE. Id.

Rule 403, SCRE, permits relevant evidence to be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice.” Rule 403, SCRE. “Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis.” State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013). “Under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than prior criminal or immoral acts.” State v. Gore, 283 S.C. 118, 120, 322 S.E.2d 12, 13 (1984).

In State v. Smith, 337 S.C. 27, 31, 522 S.E.2d 598, 600 (1999), the Supreme Court found that evidence of the defendant’s prior conviction for domestic violence was admissible to establish his intent to kill and the absence of mistake or accident. In Smith, the defendant shot and killed his six-week-old daughter while his wife was holding her. Id. at 29, 522 S.E.2d at

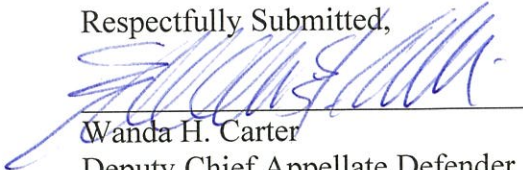
599. Petitioner claimed the shooting was an accident in a written statement. Id. at 31, 522 S.E.2d at 600. Because the state relied on the doctrine of transferred intent, the Court found that the prior domestic violence was admissible as evidence of the defendant's intent to kill *the mother*. Id. at 33, 522 S.E.2d at 601 n.5. Furthermore, because the defendant claimed in a written statement that the gun fired accidentally while he was removing it from his pants pocket, the prior conviction was probative in negating this claim. Id. at 33, 522 S.E.2d at 601.

In this case, the state sought to create its own exception to Rule 404(b), SCRE, by imputing to petitioner a claim of accident which the defense never raised at trial. Defense counsel specifically stated that she was not raising an accident or mistake defense and petitioner did not testify. The state elicited testimony from its lead investigator that during his second interview of petitioner, petitioner commented that *if* he had done something to King, it was unintentional. The state did not introduce petitioner's statement in its entirety, nor did defense counsel request the admission of petitioner's statement. The Court of Appeals erred with respect to its ruling regarding this inadmissible prior bad act testimony.

CONCLUSION

Based on the foregoing arguments, counsel for petitioner would request that this Court grant this petition and allow full briefing on the issues raised therein.

Respectfully Submitted,


Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of July, 2023.