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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAYLEN WESTLY BELL,

APPELLANT

APPELLATE CASE NO. 2022-001541

INITIAL BRIEF OF APPELLANT

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II.

Whether the trial court reversibly erred by permitting the State to impeach Appellant with photos from social media posts depicting Appellant with guns where the photos were never entered into evidence, yet where the State orally published the extrinsic evidence to the jury by describing and mischaracterizing the gun in the photo as the "exact same gun" used by Appellant in the present case?

STATEMENT OF THE CASE

Appellant Jaylen Westly Bell was indicted by the Richland County Grand Jury on April 14, 2022, for murder and possession of a weapon during the commission of a violent offense. Tr. 9, ll. 1-9; Tr. 19, ll. 3-24; Tr. * (Indictments). An immunity hearing was held on February 18, 2022, before the Honorable Alison Renee Lee. Appellant was represented by Zoe Bruck and Kathleen Warthen, while Dale Scott represented the State. In a written order signed on June 23, 2022, Judge Lee denied Appellant immunity from trial. Tr. * (Order Denying Immunity).

Appellant's case then proceeded to trial before the Honorable Robert E. Hood and a jury from September 6th through 9th, 2022. Tr. 1.[1] Appellant was again represented by Zoe Bruck and Kathleen Warthen, while Dale Scott and Walt Whitmire represented the State. Tr. 1. The jury found Appellant guilty on both charges, and the trial court imposed the following concurrent sentences: thirty-five (35) years for murder; and five (5) years for possession of a weapon during the commission of a violent offense. Tr. 625, l. 18—Tr. 626, l. 4; Tr. 641, l. 19—Tr. 642, l. 2.

[1] A mistrial was declared in the first attempt to try Appellant's case due to COVID complications. Tr. p, l. 16—Tr. 10, l. 10.

STATEMENT OF THE FACTS

At approximately 9:00 p.m. on November 24, 2019, Appellant Jaylen Westly Bell, his girlfriend Stephanie Jackson (Jackson), Jackson's infant child (Infant), and Appellant's cousin Jaquala Scipio (Jaquala) all arrived at the home of his Aunt Neco Millhouse (Neco) in Columbia, South Carolina. Appellant stayed outside by the burn barrel in the yard along with his cousin Cornelius Green. Jaquala, Jackson, and Infant went inside; Jaquala was going to get a plate of lasagna for Appellant that was made earlier in the day, and Jackson was going to wash bottles and get milk for Infant. Tr. 141, ll. 7-12; 169, l. 23—Tr. 170, l. 5; Tr. 183, ll. 6-7; Tr. 212, l. 16—Tr. 213, l. 7; Tr. 450, l. 6–Tr. 451, l. 7. Neco and her husband Melzie Hammond (Hammond) were inside the small home asleep in their bedroom at the time. Tr. 185, ll. 17-25; Tr. 260, ll. 7-12; Tr. 218, ll. 3-5; Tr. 263, ll. 14-15. Jaquala's teenage daughter (Minor) was inside as well. Tr. 213, ll. 5-8.

Once inside, Jackson washed baby bottles in the kitchen, while Jaquala checked on her boyfriend, Demetrius "Meatball" Floyd (Meatball) in the back bedroom where they occasionally stayed. Tr. 138, l. 24—Tr. 139, l. 20; Tr. 213, l. 4—Tr. 214, l. 18; Tr. 256, ll. 17-22; Tr. 257, ll. 11-16. Jaquala and Meatball were heard arguing through the closed door, and they both eventually came out into the kitchen. Jackson was still washing bottles and Minor was changing Infant's diapers when Jackson heard somebody get smacked. Tr. 213, l. 16—Tr. 215, l. 11. According to Jaquala, Meatball—who had been drinking that day—physically abused her in the kitchen in front of Minor. Tr. 278, ll. 3-23. Minor responded, saying "that's not cool," and asked to be taken to her father's home. Shortly after, Meatball made a comment, reached down to pick-up Infant, and was told not to do so by Jackson. Meatball swatted at Infant as Infant was

picked-up by Jackson. Jackson took Infant and went outside to her car with Minor. Tr. 215, ll. 6-25; Tr. 268, l. 16—Tr. 269, l. 9.

Appellant went to the car after finishing his cigarette and seeing Jackson, Minor, and Infant come outside; the four then began to leave Neco's. He asked Jackson what happened, and Minor briefly told him what occurred. Although Appellant was aware of Meatball's prior conduct toward Jaquala, he was surprised that it happened in front of Minor. Appellant offered to have Minor stay with Jackson and him rather than her father's home, and Minor agreed. Tr. 451, l. 10—Tr. 455, l. 19. They turned the car around at the end of Neco's driveway and stopped back in front of the home. Minor got out of the car to get her clothes; Appellant went with Minor as well to get lasagna[2] and to "make sure [Minor] was straight going into the house where it had happened at." Tr. 455, l. 16—Tr. 456, l. 11; Tr. 474, ll. 2-17. Minor went straight to the room she used when at Neco's and gathered clothes. Meanwhile, Appellant saw Jaquala in the kitchen, and noticed her face was red. He asked what was going on, but received no response. Tr. 456, ll. 13-21. Appellant walked over, checked on Minor as she was gathering clothes, and as he looked down the hall he saw Meatball in the bedroom at the end. Tr. 456, l. 22—Tr. 457, l. 4; Tr. * (Defendant's Exhibit #1).

Around 9:30 p.m., Appellant walked to the end bedroom, and stopped at the threshold of the room.[3] He saw Meatball sitting toward the head of the bed; Appellant inquired what was going on and why he put his hands on Jaquala in front of Minor. Tr. 191, l. 17-19; Tr. 457, ll. 4-

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[2] Appellant was never able to get his lasagna. Tr. 475, ll. 7-8.

[3] According to Jaquala, she believed she heard the door close and that Appellant and Meatball may have been crushing pills. However, Jaquala also admitted she did not see drugs being used by either Appellant or Meatball, and was only assuming they were. Moreover, no drugs were ever found in the back bedroom in particular or in Neco's house in general, nor were any substances other than alcohol found in Meatball's system. Tr. 269, l. 20—Tr. 271, ln. 9; Tr. 285, ll. 6-23; Tr. 333, ll. 4-8; Tr. 423, l. 6—Tr. 424, l. 10.

15. After Meatball gave a response unrelated to what was asked, Appellant simply asked again. Tr. 457, l. 16—Tr. 458, l. 7. Meatball responded by threatening to physically assault Appellant. Tr. 459, ll. 13-21. He stood up and fished in his pocket for what Appellant believed may have been "a knife or something." Tr. 459, l. 24—Tr. 460, l. 3. Rather than pulling out the knife that was later found in his pocket, Meatball instead shoved Appellant, and Appellant shoved him back. Tr. 294, ll. 15-20; Tr. 338, ll. 8-10; Tr. 360, ll. 13-19; Tr. 460, ll. 4-21. When Meatball shoved Appellant again, Appellant pushed Meatball hard enough that he stumbled onto the bed. Tr. 460, ll. 22-25.

According to Appellant, Meatball then reached over between the mattress and the wall, produced a silver and black Smith & Wesson 9mm handgun, and pointed it at Appellant while saying, "yeah, yeah."[4] Tr. 461, ll. 1-22. Although scared that Meatball would shoot and kill him, Appellant tried to think fast and told Meatball that "he could pump fake[5] all he wanted to, that I wasn't scared." Tr. 461, ll. 23-25; Tr. 462, l. 25—Tr. 463, l. 4. Meatball briefly looked up the hall past Appellant. Appellant took the opportunity to shove Meatball's left hand holding the gun against the doorframe, disarmed Meatball and shoved him back towards the bed. Tr. 463, ll. 10-15; Tr. 465, ll. 2-23. As Meatball fell back, Appellant told him to calm down; however, Meatball stumbled, hit the bed, and bounced back up, lunging toward Appellant with a closed fist. Appellant closed his eyes, and in "the heat of the moment" shot the 9mm pistol

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4 Although Neco had a rule that guns and drugs were not allowed in her house, she acknowledged that she did not search the bedroom or mattress used by Jaquala and Meatball. Tr. 140, ll. 2-5; Tr. 148, ll. 4-13.

5 Appellant indicated "pump fake" was in reference to a basketball term, and agreed that in his situation it meant he was "telling Meatball [he] can't get a reaction out of me" in an effort to buy time. Tr. 462, ll. 1-24.

approximately eight (8) times.[6] Tr. 466, l. 1—Tr. 467, l. 12; Tr. 498, ll. 4-16. Appellant indicated he then left the back bedroom, and threw the pistol onto the couch.[7] Tr. 467, ll. 13-18.

Jackson remained in the car with the music turned on trying to keep Infant from being fussy for approximately five (5) to seven (7) minutes. She observed Minor walk out of Neco's house, pause for a moment by the steps, and then continue coming to the car. Appellant soon followed, and the four drove to Jackson's home. Tr. 222, l. 17—Tr. 225, l. 14; 467, ll. 20-24. Appellant was quiet and calm, but Jackson explained Appellant is "a quiet person." Tr. 225, ll. 1-8. Jackson received a call during the drive and asked Appellant what happened, but Appellant did not talk on the ride to Jackson's home in Ridgefield, South Carolina. Tr. 226, ll. 1-11; Tr. 227, l. 1-13; Tr. 467, l. 25—Tr. 468, l. 6; Tr. 509, 15-20. After arriving home, Jackson told Appellant he could not stay. Appellant asked to be taken to his relative's home on Colonial Drive, and Jackson dropped him off there. Tr. 228, ll. 23; Tr. 206, ll. 21-23; Tr. 468, ll. 8-15; Tr. 509, ll. 20-25; Tr. 514, ll. 6-21. Appellant later went to the home of his brother's girlfriend, where he was arrested at 4:45 a.m. on November 27, 2019. Tr. 152, ll. 17-23; Tr. 514, ll. 23-25. He was taken to the Richland County Sheriff's Office Headquarters, interrogated by Investigator Ronnie Hinson (Inv. Hinson), and provided a statement. Tr. 152, l. 24—Tr. 153, l. 9.

His case proceeded to trial from September 6th through 9th, 2019. Tr. 1. During pretrial motions, Counsel for Appellant (Counsel) moved to suppress *inter alia* an autopsy photograph depicting Meatball's foot and blood in his crotch area. Tr. 93, ll. 3-14. The trial court held that the State was permitted to demonstrate the wound to Meatball's foot with a picture showing the

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[6] Although the pathologist would later testify to multiple gunshot wounds, cause of death was two gunshot wounds to the torso. Tr. 345, l. 13–Tr. 346, l. 14; Tr. 367, ll. 17-19; Tr. 370, ll. 2-8.

[7] No firearm was found or recovered. Tr. 311, l. 19—Tr. 312, l. 1.

foot with a trajectory rod through it if the State cropped-out the excessive blood from Meatball's crotch area in order to let the State show the angle of the wound. Tr. 93, l. 23—Tr. 94, l. 20.

Counsel maintained the objection to the photoshopped autopsy picture again immediately prior to the pathologist's testimony on the basis of Rule 403, and that there were other accurate ways to show the same information to the jury without resorting to the autopsy photograph. The court again determined the photograph was admissible, subject to proper foundation. Tr. 341, ll. 4-22. Dr. Darren Monroe (Dr. Monroe) testified for the State as an expert in forensic pathology, and utilized two diagrams depicting most of the wounds on Meatball found during autopsy except the wound to the foot, and testified in depth regarding the same based upon the diagrams. Tr. 342, l. 25—Tr. 343, l. 4; Tr. 344, ll. 15-16; Tr. 346, l. 11—Tr. 357, l. 18; Tr. * (State's Exhibit #13); Tr. * (State's Exhibit #14). Yet the State still sought admission of the photoshopped autopsy photograph of Meatball's foot with a rod through it; Counsel objected during Dr. Monroe's testimony, and the court admitted the photograph. Tr. 358, ll. 11-17; Tr. * (State's Exhibit #12). Dr. Monroe testified to the contents of the photograph. He also demonstrated the locations of all of Meatball's entry and exit wounds—including the foot—on a mannequin before the jury. Tr. 361, ll. 14-17; Tr. 362, l. 17—Tr. 366, l. 15.

Appellant also testified at his trial. Prior to Appellant taking the stand, Counsel objected to the State's introduction of photographs that were purportedly printed from Appellant's social media and only shown to Counsel during the break immediately beforehand, arguing that they were highly prejudicial. Tr. 438, ll. 7-11. The State acknowledged as much as follows:

> They're from his Facebook account and they show him with various weaponry. One is almost identical to the one he describes used in this incident and I do not intend to introduce them. I intend to show him on the stand, again depending on the line of questioning, you know, I, I think it's relevant here based on the facts of this case.

Tr. 438, ll. 13-19. The court determined that the matter would have to be taken up as it came. Tr. 438, ll. 20-21. During direct examination, Appellant denied bringing a gun to Neco's house on November 24, 2019. Tr. 469, ll. 14-15. On cross-examination, Appellant admitted he owned guns in the past, but that he stopped "toting guns after a certain point in time" and no longer had them. Tr. 480, l. 15—Tr. 481, l. 16.

Further, on redirect examination, Appellant explained he stopped carrying guns before meeting Jackson, but after he met her, part of their relationship meant "[n]o guns, no drugs, [and] getting [an] education." Tr. 530, l. 13—Tr. 531, l. 5. During recross-examination, the State asked the following questions in open court:

> Q. Are we were to believe that you did not have a gun on this particular night?
>
> A. Correct.
>
> Q. Even though *we got a picture of you posing with the exact same gun*?

Tr. 535, ll. 17-21 (emphasis added). Counsel immediately objected as Appellant attempted to answer the State's question as mischaracterization. Tr. 535, l. 22—Tr. 536, l. 6. The trial court overruled Counsel's objection stating, "He answered." Tr. 536, l. 5. Appellant continued to explain the guns in pictures from his social media posts were BB guns and props. Tr. 535, l. 25—Tr. 536, l. 2; Tr. 537, ll. 11-18. Yet the prosecutor further linked the details of the photograph with the firearm in the case:

> Q. Okay, same kind you posed with in the picture, a chrome and black Smith & Wesson? That's what it was?
>
> A. Nah, the pictures that you got are just props and BB guns.

Tr. 537, ll. 11-15.

After deliberations, the jury ultimately found Appellant guilty on both counts. The trial court imposed an aggregate sentence of thirty-five (35) years incarceration.

This appeal follows.

ARGUMENT

I. The trial court reversibly erred in admitting into evidence an autopsy photograph depicting the decedent's foot with a rod shoved through the gunshot wound where the cause of death was neither caused by the wound to decedent's foot, nor was the cause of death at issue, and where the wound was illustrated by other evidence.

The trial court erroneously admitted an autopsy photograph into evidence depicting a Meatball's foot with a metal rod stuck through a hole in it. Tr.* (State's Exhibit # 12). Counsel timely objected based upon Rule 403, and maintained that there were other accurate ways to show the same information to the jury without resorting to the autopsy photograph. Tr. 341, ll. 4-22. The court again determined the photograph was admissible, subject to proper foundation. Tr. 341, ll. 4-22. This was error as the photograph was not necessary to substantiate material facts or conditions, and its probative value was substantially outweighed by the danger of unfair prejudice by creating a tendency to suggest a decision on an improper basis.

"Although photographs may be used to corroborate other evidence, it is well established that photographs calculated to arouse the sympathies and prejudices of the jury are to be excluded if they are irrelevant or unnecessary to the issues at trial." State v. Middleton, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986) (internal citations omitted) (reversing and remanding where the information contained in the photographs was not really at issue, and other testimony negated any arguable evidentiary value of the photographs); see State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997) (agreeing with the same evidentiary principles, but factually different); State v. Waitus, 224 S.C. 12, 77 S.E.2d 256, 263 (1953); State v. Elders, 386 S.C. 474, 483, 688 S.E.2d 857, 862 (Ct. App. 2010) (agreeing with the same evidentiary principles, but factually different); see also Rule 401, SCRE (defining relevant evidence); Rule 402, SCRE (prohibiting admission of irrelevant evidence). Stated differently, "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are . . . not *necessary* to substantiate

material facts or conditions." State v. Collins, 398 S.C. 197, 202, 727 S.E.2d 751, 754 (Ct. App. 2012) (emphasis in original) (internal quotations omitted) (quoting State v. Torres, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010)).

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." 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."). In order to constitute unfair prejudice, "the photographs must create a tendency to suggest a decision on an improper basis, commonly, although not necessarily, an emotional one." Kelley, 319 S.C. at 178, 460 S.E.2d at 370-71 (quoting State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991); see also State v. Nelson, Op. No. 28171 (S.C Sup.Ct. filed Aug. 9, 2023) (Howard Adv.Sh. No. 31 at 30) (holding "it was error to admit the photos because their minimal probative value was substantially outweighed by the danger of unfair prejudice.").

In the present case, the autopsy photograph utilized by the State was not necessary to establish any material facts or circumstances. By the time the State elicited testimony regarding the autopsy photograph and was permitted to enter it into evidence, Dr. Monroe had already utilized two diagrams depicting most wounds on Meatball found during autopsy excluding the foot, and testified in depth to the same—including the two fatal shots to the torso—based upon the diagrams. Tr. 342, l. 25—Tr. 343, l. 4; Tr. 344, ll. 15-16; Tr. 346, l. 11—Tr. 357, l. 18; Tr. * (State's Exhibit #13); Tr. * (State's Exhibit #14). In fact, after introducing the autopsy photograph of Meatball's foot, the State had Dr. Monroe further demonstrate the locations of all gunshots on a mannequin before the jury—including the gunshot wound to Meatball's foot. Tr.

361, ll. 4-17; Tr. 364, l. 19—Tr. 365, l. 22. Moreover, to the extent that the gunshot wound to Meatball's foot was relevant to the State's theory of what occurred in the bedroom on November 24, 2019, Dr. Monroe's testimony on cross-examination confirmed that he could neither determine the order in which the multiple gunshots occurred, nor could he say what position Meatball was in when shot with any of the shots. Tr. 369, ll. 23-24; Tr. 374, ll. 16-20. Thus, the autopsy photograph was not necessary to establish any material facts or circumstances.

Additionally, the photographs were not needed to prove the elements of murder.[8] The cause of death by two gunshot wounds to the torso was established by Dr. Monroe's testimony and through the use of his diagrams. Additionally, the wound to Meatball's foot was likewise described by testimony and demonstrated before the jury on a mannequin. Therefore, the photoshopped autopsy picture of meatball's foot was not necessary to substantiate material facts; rather, it was hardly 'necessary, and was of little significance to the State's case. Collins, 398 S.C. at 202, 727 S.E.2d at 754 (citing Torres, 390 S.C. at 623, 703 S.E.2d at 228). Accordingly, the probative value of the photographs in question was, at best, minimal.

Yet the autopsy photograph served to create an unfair prejudice against Appellant; it displayed to the jury close-up imagery of Meatball's remains with a rod shoved through a hole in his foot. As in Waitus, the information contained in these photos was not disputed, and was established by testimony. 224 S.C. 12, 77 S.E.2d at 263 (reversing where four pictures of the victim at the crime scene that showed marks, bruises and abrasions, and the condition of the victim's clothes, were admitted into evidence even though that those facts were not disputed and were already established by testimony); see also Collins, 398 S.C. at 203-04, 727 S.E.2d at 755.

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8 Murder is defined as "the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (West, Westlaw current through end of 2023 Sess); see also State v Dickerson, 395 S.C. 101, 119 n.5, 716 S.E.2d 895, 905 n.5 (2011).

Therefore, the probative value was substantially outweighed by the danger of unfair prejudice as the only remaining value of the autopsy photograph was to arouse the sympathies and the prejudices of the jury. Middleton, 288 S.C. at 24, 339 S.E.2d at 693; Kelley, 319 S.C. at 178, 460 S.E.2d at 370-71 (quoting State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)); see also Rule 403, SCRE. Accordingly, the trial court erred in admitting the autopsy photograph in Appellant's trial, and Appellant was prejudiced by the erroneous admission Id. (emphasis in original) (citing Waitus, 224 S.C. 12, 77 S.E.2d 256, and State v. Edwards, 194 S.C. 410, 10 S.E.2d 587 (1940); see also Nelson, Op. No. 28171 (S.C Sup.Ct. filed Aug. 9, 2023) (Howard Adv.Sh. No. 31 at 30) (holding "it was error to admit the photos because their minimal probative value was substantially outweighed by the danger of unfair prejudice.").

II. The trial court reversibly erred by permitting the State to impeach Appellant with photos from social media posts depicting Appellant with guns where the photos were never entered into evidence, yet where the State orally published the extrinsic evidence to the jury by describing and mischaracterizing the gun in the photo as the "exact same gun" used by Appellant in the present case.

The trial court erroneously permitted the State to impeach Appellant by describing before the jury extrinsic photographs purportedly from Appellant's multimedia account, and insisting that in one of them Appellant held "the exact same gun" as the one used in the incident resulting in Meatball's death. By verbally publishing the photograph that was not in evidence, the State violated Rule 608 the prohibition against using extrinsic evidence to show specific instances of conduct for the purpose of attacking credibility. Furthermore, rather than living with the answer provided by the witness, the State grossly mischaracterized what the photograph depicted by insisting the silver and black gun was not a BB gun but rather the "exact same gun" used to shoot Meatball.

Rule 608(b) of the South Carolina Rules of Evidence provides in pertinent part as follows:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, *may not be proved by extrinsic evidence.* They *may*, however, in the discretion of the court, if probative of truthfulness or untruthfulness, *be inquired into* on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness....

Rule 608(b), SCRE. As our Supreme Court explained in Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002), "Rule 608(b) permits inquiry into specific instances of a witness' conduct during cross-examination, if such conduct is probative of the witness' truthfulness or untruthfulness. The Rule specifically states that such instances of conduct may not be proved by extrinsic evidence." Id. 351 S.C. at 400, 570 S.E.2d at 180. The Mizell Court further stated that

"extrinsic evidence can be oral or written, as it is the source of the evidence that determines whether it is extrinsic, not whether it is introduced in oral or written form at trial." Id. Thus, the Rule "allows specific instances of conduct to be *inquired into* on cross, but does not allow those instances of conduct to be proved by extrinsic evidence." Id. 351 S.C. at 401, 570 S.E.2d at 180 (emphasis in original). Simply stated, Rule 608(b) is still violated even if the actual item of extrinsic evidence of prior conduct was not entered into evidence as an exhibit, but the party using it nonetheless publishes its content as proof of the conduct. For example, "[r]eading a jury interrogatory into the record is more than inquiry into past conduct; the purpose of doing so is to prove past conduct." Id. 351 S.C. at 401, 570 S.E.2d at 181.

In the case at bar, the State's use and mischaracterization of photographs—especially the photograph of Appellant purportedly holding a silver and black pistol—allegedly taken from Appellant's social media amounted to using extrinsic evidence to prove prior conduct. Prior to Appellant taking the stand, the State—for the first time—showed Counsel five photographs purportedly printed from Appellant's social media. Counsel objected to the State's photographs as highly prejudicial. Tr. 438, ll. 7-11. The State acknowledged as much as follows:

> "They're from his Facebook account and they show him with various weaponry. *One is almost identical to the one he describes used in this incident* and I do not intend to introduce them. *I intend to show him on the stand*, again depending on the line of questioning, you know, I, I think it's relevant here based on the facts of this case."

Tr. 438, ll. 13-19 (emphasis added). During recross-examination, the State asked the following questions in open court:

> Q. Are we were to believe that you did not have a gun on this particular night?
>
> A. Correct.

> Q. Even though *we got a picture of you posing with the exact same gun*?

Tr. 535, ll. 17-21 (emphasis added). Counsel immediately objected as Appellant attempted to answer the State's question as mischaracterization. Tr. 535, l. 22—Tr. 536, l. 6. The trial court overruled Counsel's objection stating, "He answered." Tr. 536, l. 5. Appellant continued to explain the guns in pictures from his social media posts were BB guns and props. Tr. 535, l. 25—Tr. 536, l. 2; Tr. 537, ll. 11-18. Yet the prosecutor further linked the details of the photograph with the firearm in the case:

> Q. Okay, same kind you posed with in the picture, a chrome and black Smith & Wesson? That's what it was?
>
> A. Nah, the pictures that you got are just props and BB guns.

Tr. 537, ll. 11-15.

The trial court's ruling was erroneous as the State's oral descriptions mischaracterizing the photographs crossed over from inquiry into past alleged conduct under Rule 608, SCRE, and into proof of the past conduct. While the State would have been permitted to ask Appellant if he had posed with a silver and black pistol, it went decidedly further: the prosecutor not only insinuated that Appellant had an actual gun rather than a BB gun in the picture, but also that the gun in the picture "was the exact same gun" used in the incident. Tr. 535, ll. 17-21. Further, the prosecutor's unequivocal statement that "*we got a picture of you posing with the exact same gun*" vouched for the truth of what the object was in the picture, yet no witnesses testified ever to seeing Appellant with a black and silver Smith & Wesson 9mm firearm before, during, or after the incident inside Neco's home. In so doing, the State's oral description and mischaracterization went beyond mere inquiry and into the impermissible area of proving prior

conduct using extrinsic evidence—the photograph. Mizell, 351 S.C. at 401, 570 S.E.2d at 180; Rule 608(b). Accordingly, the trial court erred.

Further, Appellant was prejudiced by the trial court's error, as it was evidence attacking Appellant's credibility in a case where Appellant's credibility was central to his defense. Under Rule 608(b), "evidence of specific bad conduct must go to the witness's credibility." State v. Grace, 350 S.C. 19, 28, 564 S.E.2d 331, 335 (Ct. App. 2002) (citing State v. Knox, 98 S.C. 114, 117-18, 82 S.E. 278, 279 (1914)). Further, "error which substantially damages the defendant's credibility cannot be held harmless where such credibility is essential to his defense." State v. Outlaw, 307 S.C. 177, 180, 414 S.E.2d 147, 148 (1992) (quoting State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990)).

In the present case, the State was undoubtedly aware of the importance of Appellant's credibility in the case. Tr. 534, l. 24—Tr. 525, l. 3. It used the photograph as proof that Appellant indeed had "the exact same gun" prior to November 24, 2019, and therefore had to have brought it with him and used it that night. No firearm was found in the case. Tr. 311, l. 19—Tr. 312, l. 1. As such, the State could not test the pistol to disprove Meatball possessed it. Instead, the State relied upon testimony that guns were not allowed in Neco's house, and that Jaquala previously told police that Meatball did not have a gun. Tr. 140, ll. 2-5; Tr. 267, ll. 12-14. However, Jaquala's trial testimony also indicated that she did not know if Meatball had a gun with him in their room, and Neco never checked. Tr. 148, ll. 4-13; Tr. 266, ll. 6-16. Moreover, Jaquala also indicated drugs were being used or possessed in the back bedroom, which would also be a violation of Neco's rules. Tr. 271, ll. 2-9. Thus, the fact that Neco did not want guns or drugs in her house was not dispositive of whether guns or drugs were actually in the back bedroom of her house.

Additionally, Appellant indicated he did not bring a gun to Neco's the night of the incident, and no witnesses saw him in possession of one that night either—much less a silver and black Smith & Wesson 9mm. Tr. 250, ll. 6-17; Tr. 252, ll. 2-4; Tr. 287, ll. 16-20; Tr. 469, ll. 12-17; Tr. 504, ll. 13-15; Tr. 531, ll. 1-5. Rather, Appellant testified that it was Meatball who pulled a gun from between the mattress and the wall and pointed it at him, and it was Meatball who lunged at him with a closed fist after control of the gun waws wrested away. Then and only then did Appellant close his eyes and shoot. Tr. 461, ll. 1-22; Tr. 463, ll. 10-15; Tr. 465, ll. 2-23; Tr. 466, 1—Tr. 467, l. 12; Tr. 498, ll. 4-16. Under such circumstances, Appellant's credibility as to the events that occurred in the back bedroom of Neco's house was the heart of his claim of self-defense. Accordingly, Appellant was prejudiced by the State's use and mischaracterization of the photograph as extrinsic proof that Appellant indeed had "the exact same gun" prior to November 24, 2019, and therefore had to have brought it with him and used it the night of the incident, as it directly subverted Appellant's credibility regarding his version of events and claim of self-defense. See, e.g., Outlaw, 307 S.C. at 180, 414 S.E.2d at 148.

CONCLUSION

For the foregoing reasons, Appellant Jaylen Bell respectfully requests reversal of his convictions, and remand for a new trial.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of August, 2023.