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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Horry County
The Honorable William A. McKinnon, Circuit Court Judge

THE STATE,

PETITIONER,

v.

JOHNATHAN LAMAR HILLARY,

RESPONDENT.

Appellate Case No. 2019-001048

PETITION FOR REHEARING

Pursuant to Rules 221, 240, and 267, SCACR, Respondent petitions this Court for rehearing as to the merits of Appellate Issue II. only due to the fact this Court misapprehended or overlooked certain facts in the record and misapprehended or overlooked certain law as applied to those facts in its published Opinion in this case. *State v. Hillary*, ___ S.C. ___, 2023 WL 525 0223 (Ct. App. 2023).¹ Respondent petitions for rehearing only on Appellate Issue II and does not disagree with this Court's finding of harmless error on this issue or this Court's determination of any other Appellate Issue in this case. Respondent would show this Honorable Court that it misapprehended or overlooked certain facts in the record and misapprehended or overlooked certain law as follows:

¹ Johnathan Hillary ("appellant"), with the assistance of his girlfriend Bernithia Young ("Bernithia"), murdered Timothy Buckley ("Victim") on September 29, 2016, in Horry County.

1. In its published Opinion in this case, on Appellate Issue II, this Court misapprehended and overlooked that the lower court, the Honorable William A. McKinnon, Circuit Court Judge, admitted the evidence in question not only as common scheme or plan evidence under Rule 404(b), SCRE, but also as evidence of motive and intent under Rule 404(b). **(R. 161, ll. 3-23).**² The State raised the admissibility of this evidence to show motive and intent under Rule 404(b) below. **(App. 849-855 [Motion to Admit Subsequent Bad Acts & Memorandum of Law in Support of Motion to Admit Subsequent Bad Acts]).** In fact, the State raised to the lower court that this evidence was admissible to show motive, intent, identity, *and* common scheme or plan at the pre-trial hearing and in its pre-trial filings. **(App. 155-61; 849-55).** Respondent argued in its brief the fact that evidence is admissible under Rule 404(b) to prove motive, intent, identity, absence of mistake or accident, and as a common scheme or plan and, as the trial court found, the evidence of the Bah robbery proved appellant's intent and motive when Victim was murdered as well as when Bah was robbed, i.e. to commit a robbery. **(FBOR, pp. 23-29).** Respectfully, this Court only really addressed, or properly addressed, the common scheme or plan basis for admitting this evidence. *Hillary*, ___S.C.___, 2023 WL 5250223, pp. 6-8 (Ct. App. 2023).³ As Judge McKinnon held below, the evidence was admissible to prove motive and intent. See *State v. Ford*, 334 S.C. 444, 513 S.E.2d 385 (Ct. App.

² Respectfully, this Court specifically omitted this portion of Judge McKinnon's findings of fact and conclusions of law from its Opinion in this case. See *Hillary*, *supra*, p. 3; Compare R. p. 161, ll. 17-23).

³ There is only a brief mention in this Court's Opinion at 2023 WL 5250223, p. 7 that because there is no phone contact between Victim and Bernithia on September 29th, that there is not sufficient enough connection between the 2 crimes to be admissible for *the exceptions* found in *Lyle*. *Id.* at p. 7. Respondent submits this is also a misapprehension or overlooking of the record evidence and law as will be discussed further herein. Furthermore, a bad act does not have to be similar or a common scheme or plan to be admissible to prove **motive, intent, identity**, or **absence of mistake** under Rule 404(b), SCRE. *Id.* That would defeat the Rule itself and is not consistent with caselaw. This Court conducted no real analysis or proper analysis of whether the subsequent act against Bah was admissible to prove motive or intent. *Hillary*, *supra*

1999)(fact that defendant had robbed and attempted to rob victim on 2 prior occasions was highly probative of their guilt on robbery and conspiracy, especially where they disputed motive and intent; evidence was admissible as evidence of motive, intent, and common scheme). See also *State v. Simmon*, 310 S.C. 439, 442-43, 427 S.E.2d 175 (1993)(prior attacks on women admissible to show intent in committing this burglary). Furthermore, a bad act does not have to be a common scheme or plan to be admissible to prove **motive, intent, identity, or absence of mistake** under Rule 404(b), SCRE. *Id.* That would defeat the Rule itself and is not consistent with caselaw. *Id.* Respectfully, this Court conducted no real analysis or the correct analysis of whether the subsequent act against Bah was admissible to prove motive or intent. *Id.* This Court and our Supreme Court have repeatedly admitted prior or subsequent bad acts that are not similar to show motive and intent. For example, a prior rape or domestic assault of the victim may be admissible to prove the motive or intent when the defendant actually kills or assaults a prior victim later. *State v. Sweat*, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004); *State v. Sharpe*, 239 S.C. 258, 122 S.E.2d 622 (1961); *State v. Thomas*, 248 S.C. 573, 151 S.E.2d 855 (1966). As another example, a prior armed robbery or murder that is nothing like the present crime is admissible to show the motive for the murder of a police officer who stops the defendant. *State v. Thomas*, 264 S.C. 159, 213 S.E.2d 452 (1975). As another example, a prior crime has been admitted when a witness to that crime is later murdered by the defendant to show motive or intent. *State v. Hughes*, 160 S.C. 474, 158 S.E. 833 (1931); *State v. South*, 285 S.C. 529, 331 S.E.2d 775 (1985). As a final example, prior bad acts have been admitted to show the defendant committed a murder to *cover up the prior bad act which is not at all similar*. Respectfully, the analysis on this issue, to the extent it was conducted by this Court, is a misapprehension of the record and a misapprehension of the law as applied to the facts. There was sufficient connection

because the subsequent crime along with all of the other evidence showed this was evidence of motive, malice, and intent. As will be discussed below, Judge McKinnon found this evidence was evidence of intent and motive and was more probative because it disputed appellant's statement to police that the killing was in self-defense. (R. 161, ll. 3-23). Respectfully, this Court's Opinion in this case is a published Opinion and the Court's analysis on this issue, to the extent it was conducted, would confuse both the bench and bar and is simply not consistent with this Court's and the Supreme Court's prior case law on admission of this type of evidence.

2. Further, this Court misapprehended or overlooked the fact that Judge McKinnon found that given appellant's statement to police that he acted in self-defense because he was in fear of his life when he shot and killed the victim, the subsequent armed robbery of Bah was relevant to prove motive *and* intent **and** because of appellant's claims in his statement of fear and self-defense, the probative value to this evidence **to prove motive and intent** outweighed any prejudice. (R. 161, ll. 3-23). In fact, the lower Court stated, "this is strong evidence of motive or intent that ...counteracts the self-defense evidence, and its probative value, therefore, substantially outweighed the prejudice" such that it was admissible. (R. 161, 17-23). This finding is supported by the record because appellant and Bernithia Young were acting together at the time of both Victim's murder and Bah's armed robbery according to their cell phone records, cell site information (CSLI), and video surveillance of the Myrtle Beach area, and even more importantly they robbed the deceased Victim of his truck, gun, holster, wallet, phone and any cash on him, just as they did Bocar Bah of his wallet, phone, and cash, and stolen items of both victims was found at appellant and Bernithia's town home in Atlanta, Georgia. Additionally, there was other evidence found at their townhome indicating they had done the same to others, including another out of state, which this Court noted in its Opinion. In those cases where the

defendant has advanced a certain motive for the conduct of the defendant, the prosecution is allowed to present evidence to refute such motive. *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000); *State v. Griffin*, 277 S.C. 193, 285 S.E.2d 631 (1981); *State v. Benjamin*, 345 S.C. 470, 549 S.E.2d 248 (2001).

3. The Court also overlooked the fact that this evidence was admissible to show that both Bernithia and appellant worked together using their cellphones and the white Impala when committing crimes together regardless of whether there was evidence of a phone call between the deceased victim and Bernithia on the night of his death. As this Court recognized, and as Respondent conceded in its letter to this Court, there was no phone call from Victim to Bernithia on the phone record evidence available, but there was phone activity of Bernithia's phone and Victim's phone in the same area, near Victim's camper, shortly before the time of the crime. The record evidence shows that both Bernithia and appellant traveled to the area of the Victim's campground on the night of Victim's murder [the early morning hours of September 29th] around 3:00 a.m. to 3:23 a.m., while dark, not necessarily together.⁴ Victim actually could have picked up Bernithia in the Myrtle Beach area and been followed by appellant in the white sedan.⁵ CSLI showed that between 3:02 and 3:17 a.m., *Victim's phone and Bernithia's phone* used a cell

⁴ Respondent's attorney realized after this Court pointed out at oral argument that there was no phone call between Victim and Bernithia around 3:00 a.m., and upon further review of the record evidence, that Victim could have picked up Bernithia anywhere in the Myrtle Beach area before going to his camper, and appellant could have followed in the Impala without Victim's knowledge. As this Court and opposing counsel pointed out, Victim was driving around Myrtle Beach for some time before going to his camper. (R. 503-06; 543-49). This is when the contact with Bernithia could have been made.

⁵ Victim was riding around the Myrtle Beach area for a significant period of time before eventually ending up in the area of his camper. (R. 503-06; 543-49). He could have picked up Bernithia at her hotel, a bar, a restaurant, or on the street. It is also possible appellant and Bernithia rode together to the area of Victim's camper in the white sedan and Victim did not know appellant was in the car with Bernithia. There is no question, Bernithia drove the white sedan back to her hotel, while appellant drove Victim's truck to Hwy. 17 and eventually to Los Palmas Rd. and dumped Victim's body.

tower near victim's camper and campground. At around 3:15 to 3:23 a.m., *Victim's phone was slightly away from the camper, and appellant's phone is using the same tower.* By 3:45 a.m., *all 3 phones are using the same tower in the same area.* Bernithia and appellant are texting each other. Victim never made another phone call or text and was never heard from again. After the murder, Bernithia's CSLI and other evidence shows she returned to her hotel in her white Impala, while in contrast, appellant traveled from the area of Victim's camper to Hwy. 17 in Victim's truck and drove to Hwy. 501 and onto Los Palmas Rd. where Victim's body was dumped. During this time, appellant and Bernithia stayed in contact by phone. And, they stayed in contact by phone as appellant returned to Myrtle Beach, and she then followed him in her white Impala from her hotel to where appellant dumped the Victim's truck, and she picked him up shortly after talking to him by phone. They both returned to her hotel together in the white Impala where she had registered him under a false name, *Fernando Cannon.* The same is true of the Bah armed robbery, where they communicated by phone in setting up and completing the armed robbery and then left the scene in the white Impala, she pretending to be a kidnapping victim when we know that she was not, because she and appellant resided together in Atlanta, Georgia. They also attempted to register at their temp. agency in Myrtle Beach, as brother and sister, until they were found out.

4. The Court also overlooked that this evidence contradicted appellant's statement to police where he claimed he and Bernithia had broken up shortly after their time in Myrtle Beach and had not gotten back together until shortly before police raided their apartment. The Bah robbery shows he and Bernithia were still together 5 weeks after Victim's murder committing another crime together in Summerville, S.C.

5. The Court also overlooked, as argued in Respondent's brief, that Bah's testimony was admissible to show appellant's possession of a semi-automatic pistol, consistent with that used to kill Victim, a 9mm pistol, just 5 weeks after the incident, while perpetrating a crime together with Bernithia Young and it was he who carried the weapon in the crime with Bernithia, not her, which also corroborates his admission in his statement that he was the shooter of Victim. See *State v. Southerland*, 316 S.C. 377, 447 S.E.2d 862 (1994)(defendant's theft of shotgun 2 weeks before the murder, of weapon consistent with the murder, and sale of gun after the murder, was admissible and established that he possessed shotgun at time of murder), overruled on other grounds by *State v. Chapman*, 317 S.C. 302, 454 S.E.2d 317 (1995). And, it corroborates the 9mm bullet found in Bernithia's car in Atlanta and the 9mm pistol found under the couch in the Atlanta townhome where appellant resided.

6. This Court also overlooked the testimony of Bah that appellant pointed the firearm at him during the robbery which is evidence of identity of the shooter of the deceased victim under Rule 404(b), which is an additional sustaining ground. *State v. Forney*, 321 S.C. 353, 468 S.E.2d 641 (1996)(evidence that defendant was the gunman in an earlier robbery was admissible to prove that he, not his co-defendant, shot a police officer); *State v. Beck*, 342 S.C. 129, 136, 536 S.E.2d 679, 683 (2000)(defendant set up prostitutes, fact that defendant set up another prostitute days before murder, using same or similar weapons, was admissible to prove identity as shooter in victim's murder). See also *State v. Southerland*, 316 S.C. 377, 447 S.E.2d 862 (1994)(defendant's theft of shotgun 2 weeks before the murder, of weapon consistent with the murder, and sale of gun after the murder, was admissible and established that he possessed shotgun at time of murder), overruled on other grounds by *State v. Chapman*, 317 S.C. 302, 454 S.E.2d 317 (1995). Bah identified the 9mm pistol found in the townhome as consistent with the

one used to rob him. A 9mm bullet was also found in the white sedan in Atlanta. While it appears this Court did not rule on this issue or ruled incorrectly, it was raised by the State to the trial court and is an additional sustaining ground for admitting the subsequent bad act. (**App. 849-55**).

7. This Court also misapprehended the law in its legal analysis when it found the subsequent act was proven by clear and convincing evidence, which is true, but continued to refer to the Bah armed robbery as *an alleged crime* or *alleged armed robber* in the Opinion, which appears to have permeated the court's legal analysis of whether the subsequent act was admissible or not. There was more than clear and convincing evidence of the armed robbery of Bah. This was not *an alleged crime*. Bah reported the armed robbery at the time of the incident. He identified both appellant and Bernithia from separate photo line-ups. Bah testified pre-trial and in this trial to setting up a sexual liaison with Bernithia, and to being armed robbed by appellant as Bah was getting out of the car at a hotel to commit the sex act with Bernithia. Bernithia was driving the same white car. Bah identified the type of weapon used to rob him. Phone records showed appellant and Bernithia were communicating with each other before the crime, and she set Bah up and signaled appellant when to rob Bah. Bah complied with the armed robbery where the murdered Victim did not. Bernithia drove she and appellant away from the Bah crime in the same white car used the night of the murder of Victim to return to her hotel and to pick up appellant after he disposed of the body and Victim's truck. Bah's stolen driver's license, credit card, and phone, were found in appellant and Bernithia's bedroom in their townhome in Atlanta Georgia, the same townhome where the deceased victim's stolen gun and molded holster were found. Again, this was no *alleged crime*. This Court's Opinion was a

published Opinion and at least suggests or implies the doubtfulness of the subsequent bad act plays some role in the Court's analysis of the admissibility of this evidence under Rule 404(b).

8. Further, this Court overlooked and misapprehended the record and the law in finding the Bah armed robbery was not admissible as a common scheme or plan under Rule 404(b), SCRE. This Court overlooked that both the deceased victim and Bah were married men who were more likely not to report a crime such as this. The fact that there was no phone call from the deceased victim to Bernithia on the phone in question, does not mean there was no contact before the crime, as this Court also recognized. Both the victim and Bernithia worked at ocean resorts. There is no question at around 3:00 a.m. in the morning of September 29th, the deceased Victim was near the area of his camper and shortly thereafter so was Bernithia. We know this because of her CSLI **and** she drove the white Impala back to her hotel after the crimes. Appellant was also nearby at the time of the crimes based on his CSLI and his admission he shot Victim. Victim was shot on the passenger side of his car trying to escape from his distinctive truck, and his gun, wallet, holster, and truck **were stolen by appellant, the same man who shot him.** Appellant then drove from the area of the campground in Victim's truck down Hwy. 17 with Victim's body in it, while Bernithia drove a different road, Ocean Blvd. back to her hotel, but the two of them stayed in contact, by phone, as appellant disposed of the body off Hwy. 501 and as he returned to the hotel, where she then followed him in the same white Impala to where he dumped Victim's truck at an apartment complex. She then picked him up in the same white car, and they drove back to the hotel where she had registered him under a false name *Fernando Cannon*, because both she and appellant were planning on committing a criminal act that night, and did so, together. While the Court admitted that 2 crimes did not have to be *exactly the same* to be admissible as a common scheme or plan, the Court then found the Bah robbery and the

victim's murder were not sufficiently similar; however, this was a misapprehension and overlooking of the record and case law. The record shows the motive for both crimes was robbery. The record shows both victims were married men on their own. The crimes were accomplished in a similar fashion as both Bernithia and appellant were acting together using the same white car, a firearm, and their cell phones to communicate. After the crimes, they returned to their townhome in Atlanta. And, the items stolen from the 2 robberies were recovered in the same townhome, that of Bernithia and appellant. While this Court relied on *State v. Cope*, in *State v. Taylor*, 399 S.C. 51, 731 S.E.2d 596 (2012) the prior bad act was 8-9 months apart so 4 to 5 weeks is close enough in this situation under these peculiar facts. The 2 crimes in this case are logically connected, and Judge McKinnon did not err, abuse his discretion, in admitting the evidence of the Bah armed robbery by Bernithia and appellant. Further, common scheme or plan evidence and identity exceptions are interrelated as evidence of a common scheme or plan can prove identity. *State v. Kennedy*, 339 S.C. 243, 528 S.E.2d 700 (2000). Here the evidence proves the identity of Victim's shooter. All of the evidence shows appellant wields the gun when he and Bernithia rob a victim. This corroborates appellant's statement as well that he was the trigger-man.

9. Finally, the probative value of this evidence is not substantially outweighed by the prejudice to appellant. Victim's stolen items and Bah's stolen items found in same apartment, appellant and Bernithia's apartment. There was also other evidence in their bedroom this had been done to other people. The evidence proves Bernithia, is "in on it." And, the 9mm that Bah identifies as consistent with what appellant held on him is what was found in the townhome and is consistent with what killed Victim. And, the 9mm bullet found in Bernithia's car with items from Myrtle Beach is consistent with the same evidence. Appellant and Bernithia left Myrtle

Beach the day after the murder of Victim and eventually went to Summerville and robbed Bah. The 2 of them didn't let up in their criminal scheme to rob others. Beck. This evidence's probative value was enhanced because of this, and the deceased's Victim's murder was committed in the dark and there was no surviving victim but we know appellant and Bernithia committed the robbery and murder of Victim from other evidence. In the 404(b) case, the victim Bah survived, so the curtain is pulled back, and it is shown how appellant and Bernithia operate, together. She is still residing with appellant after the murder and armed robbery and another armed robbery. Evidence from both crimes is found in their home. They are working together. The probative value is also enhanced because it shows defendant is lying in his statement to police. He claimed he and Bernithia broke up after Myrtle Beach and did not get back together until night before his arrest. Not true. Five (5) weeks after Victim's murder they are still together still acting together. Appellant did not want the police to know he and Bernithia acted together in armed robbing victims. Further, as Judge Hood found, appellant claimed the killing of Victim was self-defense in his statement, but the 404(b) evidence shows the intent and motive was to rob Victim as they did Bah so the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

CONCLUSION

Based on all of the above, Respondent respectfully petitions this Court for rehearing and asks this Court to grant its Petition for Rehearing only on the issue of the admissibility of the subsequent bad act, Appellate Issue II., the armed robbery of Bah by appellant and Bernithia Young, and revise its Opinion and hold the evidence of the subsequent bad act was admissible for the reasons stated herein.

Respectfully Submitted,

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August 31, 2023.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

Facts

Jonathan Hillary (“appellant”) and his girlfriend Bernithia Young (“Bernithia”), murdered Tim Buckley (“Victim”), a retired N.Y.P.D. officer, in Horry County. The crime occurred at *approximately* 3:15 a.m. to 3:30 a.m. on September 29, 2019, near Victim’s camper located at Springmaid Pier Campground inside Victim’s distinctive Ford F-150 pick-up truck with a metal truck bed cover. The night of the murder, appellant and Bernithia were staying at a hotel where she was registered, and she had registered him for that night under a false name, *Fernando Cannon*. She registered him under a false name because they were intent on robbing someone that night and did not want any evidence of appellant’s presence. They had originally registered with their temp. agency as brother and sister. They were not; they were lovers.

Based on Victim’s cell-site information (CSLI), he was in the area of his camper at Springmaid Pier Campground at the time of his murder. Victim was married, but his wife was terminally ill, and he used the camper as a getaway. There is no question from the physical evidence, Victim was murdered inside his distinctive Ford F-150 King Cab 4 door truck while trying to exit the passenger door with it open. Victim’s blood and brain matter was spattered on the inside passenger door and blood was on the passenger side running board and copious amounts of blood in the front passenger seat. There was no bullet hole in the passenger side door or window, leading officers to deduce from the physical evidence that Victim was shot trying to escape from the passenger side of his own truck when shot. Victim was armed robbed.

The circumstantial evidence was Victim was murdered at or near his camper. There is no question, Victim’s distinctive truck, his gun, molded holster with a broken buckle, cell phone,

wallet, and any cash on his person were stolen. Victim was a valet at an ocean resort and always had cash on him. Appellant and Bernithia were employed at hotels and resorts in the area as custodians by a temp agency. Appellant and Bernithia lived in Atlanta, Georgia in a townhome.

Cell phone records, cell site information (CSLI), and surveillance cameras showed **both** Bernithia and appellant were working together to commit a crime that night⁶ and went to the area of Victim's camper, **around** 3:00 a.m. to 3:30 a.m., not necessarily together. That was the last that was heard from Victim. Importantly, we know, Bernithia returned back on Ocean Blvd. in her white Chevy Impala to her hotel on the Grand Strand, where video surveillance would later show both she and appellant were staying together that night. Appellant did not go to the Hotel at that time but in a different direction.

Cell side location information (CSLI) of Victim's phone shows he was driving around the area of Myrtle Beach before he went to the area of his camper where he was murdered. (R. 503-06; 543-49). It is possible Victim picked up Bernithia in Myrtle Beach and drove to his camper with her in his truck. Appellant could have followed in the white Impala sedan without Victim's knowledge. It is also possible that Bernithia and appellant rode together to the area of Victim's camper before Victim was murdered. In any event, on the night of Victim's murder, September 29, 2016, around 3:00 a.m., Victim was near his camper at Springmaid Pier Campground. (R. 505-07). Between 3:02 and 3:17 a.m., **Victim's phone** and **Bernithia's phone** both used a cell tower near Victim's camper. (R. 516-17). At or around 3:15 to 3:23 a.m., **Victim's phone** was slightly away from the camper, and **appellant's phone** was using the same tower. (R. 517). By

⁶ Both of their cell phones pinged in the area of Victim's camper, around the same time, 3:00 to 3:20 a.m., and then after the murder, Bernithia traveled back to Ocean Blvd. to her hotel, while appellant's cell phone traveled in a different direction, away from the area of Victim's campground and onto Hwy. 17, then to Hwy. 501, and then to Los Palmas Rd. where Victim's body was dumped. Appellant was in Victim's truck with Victim's body driving to the dump site.

3:45 a.m., **all 3 phones are using the same tower in the same area.** (R. 517-18). Bernithia and Hillary are texting each other. (R. 518-19). Victim was never heard from again. Victim never made another call from his cell phone. When his truck was recovered several days later, at another location, it contained Victim's blood, containing his DNA, on the passenger side and spattered on the passenger door. (R. 190, 207-10, 214-18; 248-54, 257-61, 288-92, 332-33).

Instead of returning to Bernithia's hotel after the murder, appellant drove from the area of Victim's camper in Victim's truck onto Bus. Hwy. 17 onto Hwy. 501 toward Columbia, S.C. to a location behind Chic-Fil-A & Waccamaw Outlets. Even though Victim never made another phone call or text, appellant and Bernithia's phones stayed in contact with each other. The location where appellant drove to with victim's body was a secluded road named Los Palmas Road near a hotel where appellant had previously stayed earlier in the month. That is where Victim's body was dumped by appellant. Victim's body was found weeks later by accident, and it was determined Victim was shot in the back of the head, through and through, and in the back with a gun consistent with 9mm. (R. 517-34; 503-32; State's Ex. 187).

After dumping Victim's body, appellant then returned to Myrtle Beach by way of Los Palmas Rd. then on Hwy 501 headed into Myrtle Beach. He was communicating with Bernithia by cell-phone as he returned to Myrtle Beach in Victim's truck, and he was captured on video cameras driving to Bernithia's hotel where Bernithia then followed him to an apartment complex in the same white sedan. This is captured on video as well. At the apartment complex, appellant dumped Victim's distinctive truck which was filled with blood and brain matter. There is video-tape of appellant walking away from this area talking on a cell phone and holding items in his hands. Bernithia picked him up in her white sedan, recorded on video, and the 2 of them returned to her hotel where they were captured entering her hotel on video. Appellant is wearing

the same clothing as he is wearing in other surveillance video, holding an orange neoprene vest. Bernithia is driving the white Impala when she picked up appellant, and appellant got in the passenger seat. They leave town the next day after collecting their pay checks at the temp agency. (R. 309-11; 313; 318-19; 329; 320, 321-22; 314; 323-25; 331-32; 324-26; 346-53; 354-55; State's Ex. 171)

Just 5 weeks later Bernithia and appellant committed another armed robbery in a similar fashion setting up Bocar Bah and robbing him. Bernithia posed as prostitute. Once again appellant and Bernithia were communicating with each other by phone as she set up Mr. Bah. She told appellant when Bah was ready to be robbed and signaled appellant by cell-phone. Bah complied with the armed robbery and was not shot. Once again, Bernithia and appellant used the white sedan owned by Bernithia to commit the crime and to escape from the area. They stole Bah's wallet, cash, phone. Bernithia pretended to be a victim as well, and pretended to be kidnapped by appellant after Bah was robbed. She drove appellant away from the scene. Unknown to Bah, both Bernithia and appellant returned to their townhome in Atlanta, Georgia. (R. 653-68).

Police in Horry County eventually determined who the perpetrators of the murder and armed robbery of Victim were through video of the white sedan and appellant and Bernithia, hotel records, and phone records and CSLI of appellant, Bernithia, and Victim. Police obtained phone numbers of appellant and Bernithia from the temp agency that employed them while they were in Myrtle Beach. Police also determined where they lived during that time, at various hotels, and where they lived in Atlanta. (R. 321-25; 346-53; 313-14; 354-58; 368-841; 371-72; 376-82).

Police went to appellant and Bernithia's residence in Atlanta. There they found a 9mm semi-automatic pistol, consistent with the weapon used to murder Victim, under the couch. This gun was also consistent with what was used to rob Bah. Police also found Victim's pistol hidden in a cut out in the bathroom wall underneath the bathroom sink and the distinctive molded holster. Also found in Bernithia and appellant's bedroom was Bocar Bah's stolen driver's license, credit card, and cell phone and numerous other individuals' driver's licenses and credit cards and 11 cell phones in a bag. In Bernithia's white sedan used in both crimes, police found an unfired 9mm bullet, and items linking Bernithia and appellant to Myrtle Beach during the time of Victim's murder. (R. 583-587; 579; 589-90; 594-98; 612; 605-12).

Appellant was questioned after Bernithia gave a statement. He initially admitted to numerous incriminating things before any of the investigators conduct challenged under Appellate Issue I. Appellant eventually admitted he shot Victim, claiming it was self-defense, but the statement was not consistent with the physical evidence of how the crime actually occurred. It was also inconsistent with how the crime actually occurred according to phone records, CSLI, and how he and Bernithia committed the crime against Bah, i.e. Bernithia was involved in both crimes and their intent was robbery. The statement is also inconsistent with the fact Victim was robbed of his personal items as Bah was. Appellant also claimed in his statement that he and Bernithia broke up shortly after the crimes in Myrtle Beach and had only recently gotten back together. However, the armed robbery of Bah in Summerville just 5 weeks after the crimes in Myrtle Beach shows this is patently false. Appellant and Bernithia were still together committing crimes, another armed robbery, 5 weeks after Victim's armed robbery and murder. (R. 22-23; 780-89; 795-96; 801-812; 825-39; 653-58; State's Ex. 3).

What Occurred Below as to Appellate Issue II.

The State filed a pre-trial “Motion to Introduce Subsequent Bad Acts.” (R. (Motion)). In the pre-trial hearing, the State presented testimony from Bocar Bah, one of Bernithia’s and appellant’s victims. (R. 118-142). Bah was a truck driver. (R. 128). His stolen driver’s license, credit card, and cell phone were found in the Atlanta townhome with Bernithia and appellant. This was the same townhome where the deceased Victim’s stolen revolver and distinctive holster were found. (R. 594– 97).

Bah testified he met Bernithia at a store on I-20 in South Carolina. and they exchanged phone numbers. (R. 128–29). Bah, who was married with children, kept in touch with Bernithia. (R. 653– 55; 131). Later, on November 1, 2016, when he was to be in this state, Bah phoned Bernithia using his cell phone. Bernithia said she could not meet at a truck stop because *there were police there*. Instead, Bernithia agreed to meet Bah at a Walmart parking lot. Bah parked his rig at the Walmart in Summerville and got into Bernithia’s car, a white Chevrolet Impala sedan. (R. 131-33). They first went to a gas station where Bah bought Bernithia some wine. (R. 132). They next went to a hotel to get a room. (R. 131–33). Bah noticed Bernithia was texting someone on her cell phone as they pulled into the hotel parking lot. (R. 134-35). Bah asked her who she was texting, and Bernithia said no one. She parked away from the lobby area of the hotel. (R. 132-33). When Bah opened the door, appellant pointed a gun consistent with a 9mm pistol at him. Bah did not resist and appellant took his wallet. (R. 133, 135; see also 664-66). Appellant told Bernithia, “You’re going to take me out of here,” and Bernithia said she would not make any trouble. (R. 134). Appellant and Bernithia then drove off together in Bernithia’s white sedan. (R. 134, 136). Bah then went to a clerk from the hotel who happened to be on her phone outside and asked her to call the police that he had been robbed. (R. 136; see also 669).

The cell phone records and CSLI of appellant and Bernithia showed they were acting together in the armed robbery of Bah and were texting each other as she went to meet Bah, as she met Bah at the Walmart, and as she took Bah to a hotel for what Bah believed was going to be sex. Once they arrived at the hotel, Bernithia texted appellant and told him the victim [Bah] was ready to be robbed and she would signal appellant with her brake lights. She did so and appellant committed the armed robbery. Instead of trying to escape, Bah submitted to the armed robbery and told appellant to take whatever he wanted. Appellant and Bernithia stole Bah's wallet and cell phone and left the area together in Bernithia's white Chevrolet Impala. They returned to Augusta, Georgia where they kept the stolen items of both the murdered Victim and Bah in the townhome they occupied. (R. 124, 133, 148, 687-90).

The robbery of Bah happened in November 2016, just 5 weeks after Victim was armed robbed and murdered and disappeared. (R. 118, 160, 653-68). The State argued evidence of Bah's robbery was so similar to victim's disappearance that it was admissible as a common scheme or plan under Rule 404, SCRE. The State argued the evidence of Bah's armed robbery **also proved** Bernithia and appellant's **intent and motive** on the night they went to meet Victim, to armed rob him, **which was contrary to appellant's statement to police.** (R. 121-25, 155-58; pre-trial motion and memorandum in support [849-855]). Appellant argued the 2 incidents were not at all similar – particularly since Bah was not killed – were too far apart, and Rule 404 and *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923) prohibited admission. (R. 118-120, 148-54, 158-61).

After hearing the testimony of Bah and the investigating officer in Bah's armed robbery who testified to Bah's identification of appellant and Bernithia from photo line-ups, Judge McKinnon admitted the evidence, finding a "strong logical connection" to Victim's murder and

it was evidence of **motive** or **intent**, where appellant claimed in his statement to police that he killed Victim in the present case, Timothy Buckley, in self-defense. (R. 161). Judge McKinnon found the State presented clear and convincing evidence that supported finding a common scheme or plan – a male victim, alone, use of the white sedan, cash/wallet stolen, and “the strongest parallel is the communications between Mr. Hillary [appellant] and Ms. Young [Bernithia].” (R. 161). Further the evidence showed Bah’s armed robbery occurred just 5 weeks after Victim’s armed robbery and murder, (see R. 160), and there was evidence appellant and Bernithia acted together in the murder and robbery of Victim as they did in Bah’s robbery, including phone and text messages, and Bernithia used the same vehicle to drive appellant away from the location where appellant dumped Victim’s truck in Myrtle Beach, as she did to drive away from the armed robbery of Bah (R. 161). Judge McKinnon also found, noting appellant’s claim of self-defense in his statement, that “this is strong evidence of **motive** or **intent** that ... counteracts the self-defense evidence, and its probative value, therefore, substantially outweighs the prejudice” such that it was admissible. (R. 161)(emphasis added).

This Court *misapprehended* and *overlooked* both **the findings of fact and conclusions of law of Judge McKinnon**, which are supported by the record, and misapprehended or overlooked **the law to be applied to the facts**. Judge McKinnon did not err in admitting this evidence under **Rule 404(b), SCRE** because it was logically connected to the circumstances of Victim’s death, which is the test. *State v. Perry*, 430 S.C. 24, 44, 842 S.E.2d 654, 665 (2020).

The admissibility of other acts evidence was first addressed in *Lyle*, 125 S.C. 406, 118 S.E. 803. In *Lyle*, the Court held that clear and convincing evidence of other crimes that is logically relevant to prove **intent** is admissible if its probative value outweighs its prejudicial effect. Evidence is admissible if “logically relevant to establish a material fact or element, it

need not be 'necessary' to the State's case in order to be admitted." *State v. Sweat*, 362 S.C. 606 S.E.2d 508 (2004). Evidence which is logically relevant to a material **element of the offense charged, such as malice**, should not be excluded merely because it may also show guilt of another crime. *State v. Hamilton*, 327 S.C. 440, 486 S.E.2d 512 (1997). Proof of a **conviction** of the other crimes is not required. *State v. Blanton*, 316 S.C. 31, 32 446 S.E.2d 438, 440 (Ct. App. 1994); *State v. McClellan*, 283 S.C. 389, 323 S.E.2d 772 (1984).

Appellant argues there is no evidence Bernithia was involved in Victim's armed robbery and murder as in Bah's. Appellant is simply wrong. While this Court is correct that there is no phone call between Victim and Bernithia in the early morning hours of September 29th, CSLI evidence shows that Bernithia's phone and Victim's phones were in the area of the Victim's camper at the same time [previously referenced], the *approximate* time of Victim's death, **3:00-3:30 a.m.** (R. 517-18 [see also Respondent's letter]). Additionally, there is no question Bernithia drove back to her motel in the white sedan after the murder and armed robbery of Victim. The jury could infer from this evidence that Victim believed he was going to meet Bernithia or was meeting Bernithia or had met Bernithia but did not know appellant would be coming. Victim worked at an ocean resort, as a valet, and Bernithia worked at different ocean resorts through a temp agency. The jury could infer that at some point, their paths crossed, including earlier that night. The night of the crime, Bernithia listed appellant under an alias, *Fernando Cannon*, from which the jury could infer she and appellant were planning on committing a crime that night and wanted no written evidence of appellant's presence at Bernithia's hotel. CSLI showed both Bernithia and appellant were in the area of Victim's camper and campground *around* 3:00 -3:30 a.m. in the morning, a suspicious time of night, under cover of darkness, at approximately the same time. They had to travel to the area of Victim's camper in a some type of car. Bernithia

could have been picked up in Myrtle Beach by Victim. She also could have ridden with appellant in the white Impala; however, there is no question based on the CSLI, phone records, and what happened after the murder and armed robbery that appellant and Bernithia were near Victim's campground at the time of the murder of Victim. When Bernithia arrived near the Victim's campground according to her CSLI, and then appellant arrived according to his CSLI, appellant robbed Victim at gunpoint, as he did Bah later, with a semi-automatic 9mm pistol, and shot Victim at gunpoint when Victim attempted to escape the armed robbery out the passenger door of his truck. Appellant admitted to police he shot Victim, but claimed Bernithia was not involved, and the circumstances were entirely different from what the evidence, including CSLI, and forensic evidence showed. Appellant's CSLI showed he was in the same area of Victim's camper and campground around the time of the murder and armed robbery. So was Bernithia. He was not alone. The evidence largely mirrors the events with Bah – Victim was robbed by appellant, at gunpoint, just as Bah was. Bernithia drove the white sedan away. The only difference being Victim resisted and attempted to escape his truck, but Bah admittedly complied with the armed robbery. As a result, in Victim's murder, Bernithia had to return to the hotel with the white sedan, and appellant had to get rid of Victim's body and truck. She still drove him away after he disposed of incriminating evidence. Appellant and Bernithia communicated by phone in both crimes as if using walkie talkies. Both [victim's] men's wallet and cell phones were stolen by appellant. Both the deceased Victim's gun and stolen revolver holster and Bah's stolen license and credit cards were later found in appellant and Bernithia's townhome in *Atlanta, Georgia*. (R. 579, 587, 589-90, 594-98; 612).

Because appellant had murdered Victim, appellant had to dispose of Victim's body and truck. CSLI of Bernithia shows she drove from the area of Victim's campground back to her

hotel. She had to drive the white sedan [the Impala]. In contrast, appellant drove Victim's truck containing Victim's body onto Hwy. 17 and onto Hwy. 501 to a location near where Hillary had stayed earlier in September, and dumped the body in a secluded area where it would not be found for weeks until it was severely decomposed. (R. 517-534, 371-73, 265-68). During the drive to get rid of the body, Hillary was in contact with Bernithia by cell phone either calling or texting her. After dumping the body, appellant then drove Victim's distinctive truck back into Myrtle Beach on Hwy. 501, with Victim's truck being captured on a license plate reader. Appellant stayed in contact with Bernithia by cell phone as he returned to the City of Myrtle Beach in Victim's stolen truck. (See State's 187). He was captured on video driving in the City of Myrtle beach in Victim's truck alone. He then met up with Bernithia at her hotel, and she followed him in the same white car to the location where appellant dumped Victim's truck, staying in contact by phone. She waited nearby at an intersection as he dumped the truck in an apartment complex parking lot, where it would not be found for several days, and she picked him up in her white sedan, appellant getting in the passenger side as he did in Summerville after robbing Bah, and the two, Bernithia and appellant, left the scene together in the same white Chevrolet Impala they left the crime scene in Summerville in, and they returned to the Ocean Plaza Hotel where they both were staying that night. (R. 324-26). Bernithia drove just as she did in the Bah robbery. Appellant and Bernithia were captured on video re-entering her hotel where he was registered under a false name ("*Fernando Cannon*") for that night, indicating they had pre-planned some criminal behavior. (R. 349, 358-59).

This evidence falls squarely within the requirement of having a logical connection and a close similarity and it was not error for Judge McKinnon to admit it as a common scheme or plan.

Regardless, this Court has overlooked and/or misapprehended the facts and law with regard to the admissibility of this evidence. Evidence of other crimes is competent to prove the specific crime charged when it *tends to establish one or more of the following*:

- (1) **motive;**
- (2) **intent;**
- (3) **identity;**
- (4) **the absence of mistake or accident;**
- or (5) **common scheme or plan.**

Rule 404(b), SCRE (emphasis added); *State v. Lyle*, 125 S.C. 406, 416-17; 118 S.E. 803, 807 (1923). Evidence of a bad act, **if relevant**, is admissible *regardless* if the act in question occurred **prior or subsequent** to the case for which a defendant is being tried. *State v. Atkins*, 309 S.C. 542, 424 S.E.2d 554 (Ct. App. 1992).

After hearing this testimony, Judge McKinnon found and concluded that the evidence was admissible on multiple basis, not just common scheme or plan. (R. 161). He found the evidence was admissible because it was evidence of motive, intent, *and* common scheme or plan. (R. 161). And, he found its probative value was enhanced and substantially outweighed any prejudice because it contradicted the defendant's own statement to police claiming the killing was totally in self-defense. (R. 161). In fact, this finding is omitted from the Court's Opinion in this case. Hillary, *supra*. Judge McKinnon did not err because the armed robbery of Bah is logically connected to Victim's murder. *State v. Perry*, 430 S.C. 24, 842 S.E.2d 654 (2020) As to common scheme or plan, the evidence showed;

- (a) Appellant and Bernithia set up people to rob them. Victim resisted here. Bah did not.

- (b) Appellant and Bernithia work together when committing armed robberies as in Victim's murder and Bah's robbery.
- (c) Appellant and Bernithia use the same car when committing crimes, a white sedan.
- (d) And, Appellant and Bernithia use cell phones to communicate during the perpetration of the crimes and thereafter as if using walkie talkies.
- (e) Appellant wields the gun. Bernithia participates including driving the white sedan.
- (f) Both appellant and Bernithia armed rob victims outside the State of Georgia;
- (g) Appellant and Bernithia return to Georgia after the crimes where they store the stolen items.

Judge McKinnon also properly found the evidence proved motive. (R. 161). Rule 404(b), SCRE. The State argued this below in its brief and at the pre-trial hearing, and Respondent argued this in its brief to this Court. The subsequent bad act proved the motive on the night of Victim's death at about 3:00 to 3:30 a.m. in the morning was armed robbery. Victim was shot and killed trying to escape from the passenger side of his truck and then his wallet, gun, holster, any cash he had on him, and his truck was stolen. Bah was likewise armed robbed just 5 weeks later by both Bernithia and appellant. Victim's gun and holster were taken back to Bernithia and appellant's townhome as were the items stolen from Bah. Appellant and Bernithia communicated by phone during the armed robberies of both Victim and Bah and used the same white car to escape after the crimes. *State v. Ford*, 334 S.C. 444, 513 S.E.2d 385 (Ct. App. 1999)(evidence that defendant had robbed and attempted to rob victim on 2 prior occasions was highly probative of guilt especially where defendants disputed State's allegations about their motives and intent, thus the probative value of the evidence substantially outweighed any prejudice that might result

from its admission as evidence of **motive and intent**, and **common scheme**); *State v. Benjamin*, 345 S.C. 470, 549 S.E.2d 258 (2001)(where defendant claimed duress, it was proper to introduce prior bad act to show he willingly participated in prior robbery of another convenience store); see also *State v. Cheeseboro*, 346 S.C. 526, 552 S.E.2d 300 (2001).

And, in those cases where the defendant has advanced a certain motive for the conduct of the defendant, the prosecution is allowed to present evidence to refute such motive. *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000); *State v. Griffin*, 277 S.C. 193, 285 S.E.2d 631 (1981); *State v. Benjamin*, 345 S.C. 470, 549 S.E.2d 248 (2001). As Judge Hood found, the evidence also showed malice, an essential element of the crime of murder, when combined with the other evidence that appellant and Bernithia committed this present crime together as they did the Bah armed robbery. (R. 161).

The evidence also proved identity of Victim's killer, i.e. appellant and Bernithia are the killers, but appellant is the shooter. See *State v. Forney*, 321 S.C. 353, 468 S.E.2d 641 (1996) (evidence defendant was the gunman in an earlier robbery was admissible to prove he, not his co-defendant, shot police officer); *State v. Beck*, 342 S.C. 129, 136, 536 S.E.2d 679, 683 (2000)(where evidence showed defendant set up prostitutes, and set up another prostitute days before murder, using same or similar weapons). Common scheme evidence also proves identity. *Kennedy*.

The trial court also properly admitted the evidence as evidence of **intent**. *State v. Simmons*, 310 S.C. 439, 442-43, 427 S.E.2d 175 (1993). Appellant admitted in his statement that he shot and killed the victim but claimed self-defense, i.e. he alleged Victim attacked him in an unwanted sexual advance. The 404(b) evidence showed this was not self-defense but Victim was set up to be armed robbed and was shot while he attempted to escape from his truck. This is

supported by what was found at appellant and Bernithia's apartment, the stolen items of both Victim and Bah. Appellant's statement does not match the physical evidence at the scene; appellant was not on the passenger side and did not shoot back into the truck from outside the passenger side. The intent was to rob Victim, as they did Bah and as they did Victim. The evidence belonging to both victims at appellant and Bernithia's apartment is highly probative in showing their intent was to rob both victims, the deceased Victim and Bah, and that keeping Victim's items was not an after-thought. *State v. Ford*, 334 S.C. 444, 513 S.E.2d 385 (Ct. App. 1999). As Judge McKinnon found, this is also evidence of malice, an essential element of the crime of murder. A murder in the commission of an armed robbery is a malicious killing.

The Court also overlooked, as argued in Respondent's brief, that Bah's testimony was admissible to show appellant's possession of a semi-automatic pistol, consistent with that used to kill Victim, a 9mm pistol, just 5 weeks after the incident, while perpetrating a crime together with Bernithia Young, and it was he who carried the weapon in the crime with Bernithia, not her, which also corroborates his admission in his statement that he was the shooter of Victim. See *State v. Southerland*, 316 S.C. 377, 447 S.E.2d 862 (1994)(defendant's theft of shotgun 2 weeks before the murder, of weapon consistent with the murder, and sale of gun after the murder, was admissible and established that he possessed shotgun at time of murder), overruled on other grounds by *State v. Chapman*, 317 S.C. 302, 454 S.E.2d 317 (1995). And, it is corroborated by the 9mm bullet found in Bernithia's car in Atlanta and the 9mm pistol found under the couch in the Atlanta townhome where appellant resided.

This Court also overlooked the testimony of Bah that appellant pointed the firearm at him during the robbery is evidence of identity of the shooter of the deceased victim under Rule 404(b), which is an additional sustaining ground. *State v. Forney*, 321 S.C. 353, 468 S.E.2d 641

(1996)(evidence that defendant was the gunman in an earlier robbery was admissible to prove that he, not his co-defendant, shot a police officer); *State v. Beck*, 342 S.C. 129, 136, 536 S.E.2d 679, 683 (2000)(defendant set up prostitutes, fact that defendant set up another prostitute days before murder, using same or similar weapons, was admissible to prove identity as shooter in victim's murder). See also *State v. Southerland*, 316 S.C. 377, 447 S.E.2d 862 (1994)(defendant's theft of shotgun 2 weeks before the murder, of weapon consistent with the murder, and sale of gun after the murder, was admissible and established that he possessed shotgun at time of murder) overruled on other grounds by *State v. Chapman*, 317 S.C. 302, 454 S.E.2d 317 (1995). Bah identified the 9mm pistol found in the townhome as consistent with the one used to rob him. A 9mm bullet was also found in the white sedan in Atlanta. While it appears this Court did not rule on this issue or ruled incorrectly, as previously discussed, it was raised by the State to the trial court and is an additional sustaining ground for admitting the subsequent bad act. (App. 849-55).

Furthermore, a bad act does not have to be similar or a common scheme or plan to be admissible to prove **motive, intent, identity, or absence of mistake** under Rule 404(b), SCRE. Id. That would defeat the Rule itself and is not consistent with caselaw. Id. That is why each purpose of admitting the evidence under the Rule is listed separately with *common scheme or plan* last. Id. Respectfully, this Court conducted no real analysis, or the correct analysis, of whether the subsequent act against Bah was admissible to prove motive or intent. Id.⁷ This Court and our Supreme Court have repeatedly admitted prior or subsequent bad acts that are **not at all similar** to show motive and intent. For example, a prior rape or domestic assault of the

⁷ As stated in the petition itself, there is only one brief statement in the Opinion that because there was no call to Bernithia from Victim, there was not a sufficient connection to the Bah crime for this evidence to be admissible under any of the exceptions of *Lyle. Hillary*, supra, at p. 7.

victim may be admissible to prove the motive or intent when the defendant actually kills or assaults the prior victim later. *State v. Sweat*, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004); *State v. Sharpe*, 239 S.C. 258, 122 S.E.2d 622 (1961); *State v. Thomas*, 248 S.C. 573, 151 S.E.2d 855 (1966). As another example, a prior armed robbery or murder that is nothing like the present crime is admissible to show the motive for the murder of a police officer who stops the defendant. *State v. Thomas*, 264 S.C. 159, 213 S.E.2d 452 (1975). As another example, a prior crime has been admitted when a witness to that crime is later murdered by the defendant to show motive or intent. *State v. Hughes*, 160 S.C. 474, 158 S.E. 833 (1931); *State v. South*, 285 S.C. 529, 331 S.E.2d 775 (1985). As a final example, prior bad acts have been admitted to show the defendant committed a murder to *cover up the prior bad act which is not at all similar*. The analysis on this specific issue, to the extent it was conducted by this Court, is a misapprehension of the record and a misapprehension of the law as applied to the facts. As will be discussed below, Judge McKinnon found this evidence was more probative because it disputed appellant's statement to police that the killing was in self-defense. (R. 161, ll. 3-23). It showed motive, intent, and malice. While the 2 crimes are not exactly the same; they don't have to be. And, they do not have to be similar under Rule 404(b) to prove motive, intent, and malice. What there has to be is a sufficient connection to the case, which there is between the 2 crimes in this case based on all the evidence to prove motive, intent, and malice. Respectfully, this Court's Opinion in this case is a published Opinion and the Court's analysis on this issue [i.e. motive, intent, malice, and absence of mistake or accident], to the extent it was conducted, would confuse both the bench and bar and is simply not consistent with this Court's and the Supreme Court's prior case law on the admission of evidence under Rule 404(b) as to motive, intent, or absence of mistake, or to refute the defendant's claimed defense [self-defense] and prove malice.

Finally, Judge McKinnon appropriately found the subsequent bad act evidence also proves appellant is lying in his statement to police about Victim's murder; therefore, it was admissible to be considered by the jury. Again, appellant claimed he acted in self-defense. He also claimed he and Bernithia broke up after they left Myrtle Beach. He and Bernithia did not break up after Myrtle Beach. They were not broke-up until the night before police entered their apartment. Five (5) weeks after the murder, appellant and Bernithia were committing an armed robbery together. This also shows why appellant is saying what he is saying in his statement. He tries to convince police in his statement that he and Bernithia do not work together, but this is false, i.e. he and Bernithia do work together in committing crimes.

Further, the probative value of this evidence is not substantially outweighed by the prejudice to defendant. Victim's stolen items and Bah's stolen items were found in same apartment, appellant and Bernithia's apartment. There was other evidence in appellant and Bernithia's bedroom they had done similar acts to other people. There is no question Bernithia is "in on it," the criminal behavior of armed robbing people and enjoying the proceeds. And, the 9mm that Bocar identifies as consistent with what appellant held on him, is found under the couch of Bernithia and appellant's townhome. It is also consistent with what killed Victim. And, the 9mm bullet found in Bernithia's car, with items from Myrtle Beach, is consistent with the weapon used to kill Victim and the gun used on Bah. Appellant and Bernithia left Myrtle Beach, S.C., the day after the murder of Victim and just 5 weeks later went to Summerville, S.C., and robbed Bah. They did not let up. See *Beck*, 405 S.C. 317, 748 S.E.2d 194. This Court relied on *State v. Cope*. While *Cope* did address later crimes as opposed to prior crimes, the distinction was in the character of the crimes – particularly, the distinctions between the child victim as compared to adult victims in other crimes, and, varied differences in completion of the crime,

method of assault and entry. *See Id.* at 338, 748 S.E.2d at 205. When the crimes are in a distinctive pattern and closely connected, as they are here, Rule 404 allows admission. There is no limitation or qualification on admissibility based upon some distinction between prior as opposed to subsequent crimes. See Rule 404(b), SCRE; *State v. Atkins*, 309 S.C. 542, 424 S.E.2d 554 (Ct. App. 1992). *State v. Taylor*, 399 S.C. 51, 731 S.E.2d 596 (2012) recognized a 9-month difference was not prohibitive of admission of bad act evidence.

This evidence probative value was enhanced because Victim's murder and armed robbery was committed in the dark and there is no surviving victim or independent witness, but we know appellant and Bernithia committed the crimes acting together from other evidence. In the 404(b) case [the armed robbery of Bah], the victim survived, so the curtain is pulled back, and the jury is shown how appellant and Bernithia operate when working together to commit a crime. Note, she is still living with appellant in the same townhome in Atlanta after a murder and armed robbery in South Carolina and another armed robbery in South Carolina where the victim complied. The evidence of both crimes is found in their home. They are working together to set up victims and rob them outside of Georgia.

The probative value of this evidence is also enhanced by the fact appellant claimed he acted in self-defense in killing Victim and that he and Bernithia were not acting together. However, the 404(b) evidence, along with the other evidence in Victim's murder shows they were acting together in committing both crimes.

Finally, Bah could place the 9mm gun in Hillary's hand which shows access to a gun other than the one taken from Buckley when he was with Bernithia committing a crime. Second, the evidence of items taken from Bah would be admissible because those items, along with others, were found in the Atlanta townhome where Victim's gun was found, and the items would

corroborate Bah's testimony of seeing appellant in possession of a 9mm with Bernithia. Third, the evidence from cell phones, cell phone records, CSLI, from surveillance video, from hotel management, and from Bernithia's cell phone all show a concerted effort to act together for the instant crime of murder, and even in the disposal of Victim's body. And fourth, the Bah evidence was limited to necessary facts to show the connection. But the Bah evidence, with its distinctive plan to lure men for purposes of robbery, not only explains the evidence obtained in the search of the townhome, it is strongly probative of intent and motive. Given that Hillary eventually conceded to being in the truck (after he saw pictures of himself), he did not concede the malice aforethought or an intent to rob Victim. Again, the clear and convincing evidence specifically addressed that motive. Judge McKinnon did not abuse his discretion in admitting the evidence in these circumstances.

To be admissible, a prior or subsequent bad act need only be proven by clear and convincing evidence. *State v. Pierce*, 326 S.C. 176, 485 S.E.2d 913 (1997). The testimony of a witness, which is corroborated in some measure, will usually satisfy the clear and convincing requirement. *State v. Gilchrist*, 329 S.C. 621, 496 S.E.2d 424 (Ct. App. 1998); *State v. Aiken*, 322 S.C. 177, 470 S.E.2d 404 (Ct. App. 1996). Where a witness testimony is the sole evidence of a bad act, the determination of the witness's credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate the witness's veracity. *State v. Kirton*, 381 S.C. 7, 671 S.E.2d 107 (Ct. App. 2008); *State v. Tutton*, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003). Should the trial judge determine the witness testimony clearly and convincingly establishes that the bad act occurred, an appellate court is bound by the trial judge's factual findings unless they are clearly erroneous. *Id.* An appellate court will not conduct a *de novo* review of a trial judge's ruling on the admissibility of bad act evidence on the issue of

whether the evidence rises to the level of clear and convincing evidence. *State v. Cheeseboro*, 346 S.C. 526, 552 S.E.2d 300 (2001); *State v. Wilson*, 345 S.C. 1, 545 S.E.2d 827 (2001). A trial judge's ruling admitting bad act evidence will be upheld on appeal if it is supported by any evidence. *Cheeseboro*, 346 S.C. 526, 552 S.E.2d 300; *Wilson*, 345 S.C. 1, 545 S.E.2d 827; *Sweat*, 362 S.C. 117, 606 S.E.2d 508. While this Court cited this authority, and found the evidence clear and convincing, it repeatedly referred to this subsequent bad act as *an alleged armed robbery or alleged crime*, which it was not, as if it did not really occur, and this appears to have permeated the Court's analysis and ultimate rejection of this admissible evidence, which is contrary to the case law.

Here the evidence of the subsequent bad act was more than clear and convincing, it was in fact beyond a reasonable doubt, and this was no alleged armed robbery or alleged crime as this Court repeatedly termed it in its analysis of this issue. Bah testified under oath pre-trial *and* during appellant's trial, to planning a sexual encounter with Bernithia by phone. He testified they met up, and she eventually drove him to a hotel in her white sedan while she was texting someone. He asked her who she was texting, and she told Bah, "no one." She intentionally parked away from the lobby of the hotel. Once there, appellant approached the car from around the corner of the hotel and robbed Bah at gun point, with a semi-automatic pistol consistent with a 9mm. **Phone records of appellant and Bernithia introduced in evidence established** Bernithia and appellant were working together to set up and rob Bah at the motel and then did so. Bernithia signaled appellant when Bah was ready to be robbed and did so with her brakes. Bernithia even pretended to be a victim too and drove appellant away from the scene. However, Benithia and appellant returned to their townhome in Atlanta. She was not a victim. Bah identified both Bernithia and appellant, in whose home Bah's stolen items were later found, from

separate photographic line-ups. The investigator from Summerville testified to Bah's identification of appellant and Bernithia. Finally, Bah's stolen credit cards and i.d. were found in appellant and Bernithia's townhome in Atlanta, in fact, **in their bedroom**. There was **more than clear and convincing evidence** of the bad act. *Gilchrist*, 329 S.C. 621, 496 S.E.2d 424; *Aiken*, 322 S.C. 177, 470 S.E.2d 404. *See also State v. Ford*, 334 S.C. 59, 512 S.E.2d 500 (1999) (testimony by victim that he was previously robbed by the defendant, which was partially corroborated by a detective, was deemed clear and convincing evidence of the prior bad act). Respectfully, this was no *alleged armed robbery or alleged crime*, and the Court's finding and discussion on this issue shows this improperly permeated the legal analysis and decision to reverse the trial judge and not admit this evidence. Respectfully, this was a published Opinion, and to not correct this Opinion would lead to confusion of both the bench and bar regarding whether a prior bad act is admissible in evidence where it is conclusively proven to have occurred. Consequently, the trial judge did not abuse his discretion in admitting this evidence under Rule 404(b), SCRE. As a result, respectfully, Respondent petitions this Court to grant rehearing on the issue of the admissibility of the Bah armed robbery and revise its Opinion in this case on this specific issue and find the contested evidence was in fact admissible for the reasons fully stated above.

CONCLUSION

For the above stated reasons, Respondent respectfully asks this Court to grant it rehearing only on the issue of the admissibility of the Bah armed robbery and revise its Opinion and find this evidence was admissible for the reasons more fully stated above.

Respectfully Submitted,

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ATTORNEYS FOR PETITIONER

August 31, 2023

RECEIVED

Aug 31 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Horry County
The Honorable William A. McKinnon, Circuit Court Judge

THE STATE,

PETITIONER,

v.

JOHNATHAN LAMAR HILLARY,

RESPONDENT.

Appellate Case No. 2019-001048

PROOF OF SERVICE

I, Donna D'Alessio, am an employee of the Petitioner, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Petition for Rehearing has been forwarded to Respondent's counsel, David Alexander, Esq., via email today, August 31, 2023 to dalexander@sccid.sc.gov, and to his assistant spollard@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 31st day of August, 2023.

s/ Donna D'Alessio

Donna D'Alessio,
Legal Assistant to J. Anthony Mabry
Senior Assistant Attorney General