THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions

Larry B. Hyman Jr., Circuit Court Judge

Opinion No. 5119 (S.C. Ct. App. filed April 17, 2013), Appellate Case No. 2010-162287

THE STATE,

PETITIONER/RESPONDENT,

v.

BRIAN K. SPEARS,

RESPONDENT/PETITIONER.

STATE OF SOUTH CAROLINA'S PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner, pursuant to Rule 242(d)(1), SCACR, certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals.

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QUESTIONS PRESENTED

I. Whether the appellate panel erred when it ignored the State's preservation argument, found the trial court erred in failing to conduct an on-the-record, Rule 403 balancing test and then remanded the case to the trial court to rule, for the first time, whether the probative value of evidence indicating Spears shot the victim about a month prior to the shooting death for which he was on trial was substantially outweighed by its risk of unfair prejudice.

II. Whether the appellate panel erred when it declined to determine whether the trial court's failure to conduct an on the record Rule 403 balancing test was prejudicial.

STATEMENT OF THE CASE

On May 27, 2007, gunfire rang out near the intersection of 11th Ave. North and Ocean Boulevard in Myrtle Beach resulting in the death of Aaron Hammonds ("Victim") and the wounding of Krystal Fowler, Lasheika Felton and Dajuan Monroe. (R. 50, 74-75, 134-45, 89, 107). Brian "Bos" Spears was subsequently indicted on one count of Murder and three counts of Assault and Battery with Intent to Kill ("ABWIK"). (#2007-GS-26-3387, #2007-GS-26-3388, #2007-GS-26-3389, #2007-GS-26-3390). On May 10, 2010, Spear's case was called to trial before the Honorable Larry B. Hyman, Jr. and a jury. (R. 8). At trial, Spears was represented by Barbara Pratt, while the State was represented by Assistant Solicitors Donna Elder and Lawrence Filiberto. (R. 1). Three days later, on May 13, 2010, Spears was convicted of all charges and sentenced to thirty (30) years on the murder charge along with twenty (20) years concurrent on each ABWIK charge. (R. 571-72, 575).

Following his conviction, Spears, represented by Robert M. Pachak, sought review in the South Carolina Court of Appeals contending, "the trial court erred in admitting evidence that appellant shot the victim about a month prior to the shooting death for which appellant was on trial because it was unfairly prejudicial under Rule 403, SCRE[.]" (App. 6). In response, the State argued: (1) Appellant's argument was "not preserved for appellate review as trial counsel argued a completely different rationale for exclusion of the evidence at issue during trial;" and (2) even if the argument was preserved, the record demonstrates the evidence was admissible under Rule 403. (App. 23, 26).

Ruling on the issue, the appellate panel issued a published opinion remanding the case to the trial court because of its "*failure to conduct a Rule 403 balancing test* to determine if the probative value of the prior shooting testimony is substantially outweighed by the danger of

unfair prejudice to Spears[.]" (App. 43). The State now seeks certiorari as the panel erred in ignoring the State's preservation argument and in so doing, turned a blind-eye to South Carolina's preservation rules, ignoring decades of precedent, all of which require, at a minimum, *that an issue be both raised to and ruled upon by the trial court in order to preserve the issue for appellate review.* See Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640 (2011) ("At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge."); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000) (holding South Carolina's preservation rules require "that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments."); Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). The State further seeks certiorari as the appellate panel, after finding error in the trial court's failure to conduct a Rule 403 analysis, overlooked the fact that it was required by the standard of review to determine whether such an error was prejudicial. See State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003) ("A trial judge's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant."); see also Snyder's Auto World, Inc. v. George Coleman Motor Co., Inc., 315 S.C. 183, 186, 434 S.E.2d 310, 312 (Ct. App. 1993) ("The burden is on the Appellant to show not only error, but also prejudice.").

BACKGROUND

On May 26, 2007, Spears, Nathaniel "June" Douglas, Ishmael "Ish" Douglas,[1] and Thomas "T.C." Shaw (collectively Spears' group) left Lumberton, North Carolina and headed to Myrtle Beach over bike weekend.[2] (R. 213-14, 468-69). Upon arriving in Myrtle Beach that night, Spears' group, who had not made arrangements for a place to stay, parked their car at a nearby K-Mart and proceeded to Ocean Boulevard. (R. 215). Once they were on Ocean Boulevard, Spears' group was joined by Jeffrey "Bird" Bethea, who, like Spears and Nathaniel Douglas, was from Lumberton and was a member of 41-Curve. (R. 289-90). At the time of the incident, Spears was wearing a red t-shirt along with a black and red New York Yankees hat, while fellow gang member Nathaniel Douglas, was wearing a red O.J. Simpson jersey.[3] (R. 288-89, 299). Bethea, who did not know Spears' group was coming to Myrtle Beach, wore a black shirt with colorful combination locks on it, a black hat, and blue jean shorts. (R. 295-96, 441, 297, 298).

Shortly after Bethea's arrival, a member of Spears' group stated they observed Victim, a high-ranking member of Lumberton's East Side Bloods who was previously implicated in the murder of fellow 41-Curve member Eric Floyd, walking down Ocean Boulevard.[4] (R. 365, 273-75, 290-91, 572). After seeing Victim, Spears' group looked on as Lemark Irons, another East Side Blood, crossed Ocean Boulevard, approached the group, and complimented them on their clothes and jewelry stating "we need to stop beefing and get money together." (R. 195-96, 197-

[1] Ishmael "Ish" Douglas is also known as Wa-Gee. (R. 214).
[2] Spears, along with June, was a member of 41-Curve, a Lumberton gang affiliated with Gangster Disciples and Folk Nation. (R. 192-93, 206, 207, 278-79, 283, 357, 486).
[3] Danyell Hammonds, who was Victim's younger sister and lived with him, would later testify that her brother was a Blood and that Bloods wear red. (R. 197-98). However, Danyell Hammonds further explained that when gang members would "go to do something" they would wear opposite colors. (R. 279-80). Additionally, Spears' former cellmate in the detention center, Timothy Smith, testified that Spears told him he received a phone call saying Victim was in Myrtle Beach for bike week prompting Spears and his friends to come to Myrtle Beach. (R. 426-27).
[4] Eric Floyd was also known as "G-Black" or "Turk." (R. 193).

98, 271, 273, 277, 279-81, 301). Irons, whose right arm was in a sling, then attempted to shake Bethea's hand with his left hand, which Nathaniel Douglas would later explain, was considered a sign of disrespect. (R. 301). In response to Irons' gesture, Bethea slapped Irons' hand and began cursing at him. (R. 219, 230). Irons then left the group and crossed Ocean Boulevard once again joining Victim and others on the opposite side of the street. (R. 219, 115-16).

Immediately after the initial altercation, Bethea, who was a high-ranking 41-Curve member, became angry and began talking to Spears who was a foot soldier in the gang and did not get along with Victim. (R. 208, 358, 220, 228, 365-67). During the course of their conversation, Spears expressed to Bethea his belief that Irons and his group, which included Victim, were going to kill someone in Spears' group, unless he and Bethea killed someone from Irons and Victim's group first. (R. 365-66). Following this conversation, a shooting occurred resulting in Victim's death. (R. 121-29, 134-36). In addition, three bystanders were wounded. (R. 50, 74-75, 89, 107).

At trial, the State proceeded under the theory that either Spears or Bethea shot Victim to avenge Eric Floyd's death. (R. 12-15, 43-44). To that end, the State proffered testimony from Victim's sister, Danyell Hammonds ("Danyell") that approximately one month before Victim was fatally shot, Spears had shot and grazed Victim outside of a Wal-Mart in Lumberton.[5] (R. 141-43). Specifically, in her proffer, Danyell explained that "around midnight" Victim and Lemark Irons came into the house and went straight to her room where she observed wet blood on Victim's shirt. (R. 146, 142). She then asked Victim what happened. (R. 142). Victim, who

[5] Prior to trial, defense counsel made a motion *in limine* regarding the Wal-Mart incident arguing it was inadmissible hearsay and the video taken from the Lumber ton Wal-Mart "cannot identify that it was my client." (R. 14-15). Notably, defense counsel, in her pre-trial motions, *never argued that the Wal-Mart incident was inadmissible under Rule 403, SCRE.* Rather, the only pre-trial, Rule 403 objection raised by defense counsel was whether the State could refer to the gang element of the crime. (R. 9) ("I believe that any introduction of gang evidence would be more prejudicial than probative under Rule 403."); see also (R. 10-11).

Danyell described as "shocked[,]" explained he had just been shot at Wal-Mart. (R. 147, 142). Danyell then asked Victim who had shot him. (R. 142). In response, Victim told Danyell that Spears had shot him and further informed her that he and Spears did not get along. (R. 142). Danyell, who was studying to be a nurse at the time, further testified in the proffer that she believed the shooting had just occurred because Victim had blood on his hand and the blood was still wet. (R. 145, 142-43).

Additionally, Danyell testified during the proffer that: (1) Victim was an East Side Blood (R. 143); (2) Spears was a member of 41-Curve (R. 143); (3) Victim was previously "locked up" for his role in the murder of Eric Floyd (R. 144); (4) Floyd was also a member of 41-Curve (R. 144); (5) Victim was released from custody approximately one month before the Wal-Mart shooting (R. 144); and (6) a group of 41-Curve members, including Nathaniel Douglas, had recently told her that they were going to get Victim. (R. 154-155).

Following the proffer, the State argued Victim's statement to his sister identifying the shooter was admissible as an excited utterance. (R. 161). Meanwhile defense counsel argued Danyell's testimony regarding the Wal-Mart shooting was inadmissible hearsay. (R. 158). Additionally, defense counsel maintained:

> It's a 4(B) (sic) issue; my client has not been convicted of it. It's a prior bad act. It's not clear and convincing evidence of his guilt of it. There is a video, but you can't identify my client in it so I have a lot of problems as far as that, and put those together and taking it together with the whole more prejudicial than probative thing you've got my argument.

(R. 159-60). The State then responded arguing Danyell's testimony regarding the prior shooting was admissible as an excited utterance; the prior bad act was admissible under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) and they would proffer the Wal-Mart video which would show the shooting occurred after midnight on April 17, 2007. (R. 160, 165-66). After continued

discussion, the trial court recessed for the day and instructed counsel to research the issue overnight and argument would continue on the objections the next day. (R. 168-69).

The next morning, during additional argument on the issue, defense counsel, when asked by the trial court if she had anything further, stated:

> I would just reiterate my 403 argument from yesterday as well with it being a clear and convincing standard if the court looks at that rather than simply a statement, ball statement like what's coming out here and we do not have a conviction and we do not have his face on the video and we don't have a witness that's going to say it was him[.]

(R. 182).

Responding to defense counsel' argument, the State first noted the clear and convincing evidence standard applied only to evidence admitted pursuant to Rule 404(b), SCRE, but maintained that because they were initially seeking admission under an excited utterance theory, Rule 404(b)'s clear and convincing evidence standard did not apply. (R. 182). After the State noted this distinction, the trial court observed that the proffered testimony may also need to be analyzed under Rule 404(b), SCRE. (R. 183). Following this comment, the trial court ruled that the statement made by Victim to his sister regarding the identity of the Wal-Mart shooter was admissible as an excited utterance.[6] (R. 183-84). Defense counsel again responded stating, "I understand that you've ruled, I would just like to say something that just occurred to me that I just think maybe we need to look at that video before that testimony happens." (R. 184). Continuing, defense counsel noted her belief that the video would show Victim punched the shooter which counsel believed could affect whether the statement was an excited utterance. (R. 184). The trial court then asked the State to play the video from the Wal-Mart shooting. (R. 185).

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[6] Spears did not appeal from the trial court's ruling on this issue thereby making it law of the case. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling, right or wrong, becomes the law of the case).

After reviewing the video, the State proffered additional photographs showing the time stamp on the video and proffered an incident report which noted the date and time at which the incident occurred. (R. 186). The trial court then questioned the State on its' intent in offering the additional proffers. (R. 186). Responding to the trial court's inquiry, the State explained that it was offering the additional proffer as evidence of the prior bad act and stated the entire event went to "motive and intent[.]" (R. 186). Continuing, the State further argued the evidence was "certainly relevant to the charges [Spears] is facing." (R. 186). Finally, the State noted that outside of Lyle, the evidence at issue was admissible pursuant to the excited utterance exception. (R. 187).

Defense counsel then reiterated that under Lyle there must be clear and convincing evidence of the prior bad act. (R. 187). The trial court responded by finding the prior bad act was proven by clear and convincing evidence.[7] (R. 187). At no point did defense counsel ever argue that *the admission of the prior bad act evidence required a Rule 403, SCRE balancing test.* Likewise, defense counsel *never argued the prejudicial effect of the Wal-Mart incident substantially outweighed its probative value on the basis of being improper propensity evidence.*

ARGUMENTS

I. The appellate panel erred when it ignored the State's preservation argument, found the trial court erred in failing to conduct an on-the-record, Rule 403 balancing test and then remanded the case to the trial court to rule, for the first time, whether the probative value of evidence indicating Spears shot the victim about a month prior to the shooting death for which he was on trial was substantially outweighed by its risk of unfair prejudice

In the statement of issues on appeal, Spears argued the trial court erred in admitting Danyell's testimony that he shot Victim approximately one month before Victim's murder

[7] Spears also did not appeal whether evidence of the Wal-Mart incident was admissible under Rule 404(b), SCRE or whether the Wal-Mart incident was proven by clear and convincing evidence meaning these issues, like the excited utterance ruling, are law of the case. See M.L.-Lee Acquisition Fund, L.P., 327 S.C. at 241, 489 S.E.2d at 472 (holding an unappealed ruling, right or wrong, becomes law of the case).

claiming the testimony was unfairly prejudicial under Rule 403, SCRE. (App. 6). Within his brief, Spears elaborated on this argument reasoning the evidence was unfairly prejudicial because the jury could have concluded, "if appellant shot the victim once, he must also be the one who shot him a second time." (App. 7). Near the conclusion of his brief, Spears changed course noting the trial court "failed to conduct a balancing test to determine whether the probative value of the prior bad act substantially outweighed its prejudicial effect." (App. 8).

In response, the State argued Spears' claims that the trial court erred in terms of the application of Rule 403 were not preserved because defense counsel never registered a contemporaneous Rule 403 objection on the basis of propensity (i.e. that the prejudicial effect of the Wal-Mart incident substantially outweighed its probative value because it was improper propensity evidence), and even if it did, the trial court never ruled upon such an objection. (App. 23-25). Similarly, in addressing Spears' contention that the trial court failed to conduct a Rule 403 analysis, the State noted defense counsel never requested such a ruling, and even if it did, never argued the trial court was *required* to do so after analyzing the issue under Rule 404(b), SCRE, meaning the trial court could not have ruled on such an argument. (App. 23-26). Accordingly, the State reasoned that because defense counsel failed to present these arguments to the trial court, but instead argued them for the first time on appeal, the issues were not preserved for appellate review. (App. 26).

In its ruling, the appellate panel neglected to address the State's preservation argument, further characterized Spear's argument as a claim that the trial court erred in failing to conduct a Rule 403 analysis, and remanded the case to the trial court to consider the propensity argument that Spears advanced, for the first time, in his appeal. (App. 34). In so holding, the State submits the appellate panel, by failing to even address the State's preservation argument, or

explain its rationale for doing so, erred and in reaching the underlying issue, ignored South Carolina precedent requiring an argument to be both raised to and ruled upon by the trial court in order to preserve the question for appellate review.

Applicable Law

In I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000), this Court explained the rationale supporting its' strict preservation rules stating, the "preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered *all relevant facts, law, and arguments*." 338 S.C. at 422, 526 S.E.2d at 724 (emphasis added). Elaborating, the I'On Court found, "the requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve - intentionally or by chance - in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." Id.

This proposition was reaffirmed in Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011) when the Court further stated, "[i]ssue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." 395 S.C. at 465, 719 S.E.2d at 642 (quoting Queen's Grant II Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)). In Herron, this Court, on remand from the Supreme Court of the United States, who vacated its' previous decision, declined to reach a federal preemption question because "the matter of preemption was not preserved in the South Carolina proceedings." Id. at 465, 719 S.E.2d at 642. Continuing, the Herron Court wrote, "the question Appellant presented to the United States Supreme Court, namely whether the [Federal Arbitration Act] preempted our state's legislative policy as set forth

in the Dealers Act, was raised neither to the trial court nor to our Court." Id. at 469, 719 S.E.2d at 644. Continuing, the Herron Court opined:

> We are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner. Yet, because Appellant can point to no instance where preemption was properly raised or ruled upon, to disregard our issue preservation rules under these circumstances would render them meaningless. As this Court observed, issue preservation rules prevent [] a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via reversal, give him another opportunity to prove his case.

Id. at 470, 719 S.E.2d at 644-45 (internal quotations omitted) (internal citation omitted).

Thus, both I'On and Herron make it clear that South Carolina's preservation requirement exists to serve essentially two functions: (1) to require parties to thoroughly research and prepare their case by contemplating their respective legal positions; I'On, 338 S.C. at 422, 526 S.E.2d at 724, and (2) to ensure trial courts and their respective judgments are not reversed for reasons which were never presented to them. Herron, 395 S.C. at 465, 719 S.E.2d at 642. Implicit in both of these positions is the underlying theme of judicial economy, that is, an appellant should not get a second bite at the apple (i.e. a new proceeding) when, at trial, he simply failed to make the argument that is the basis for a potential reversal on appeal. I'On, 338 S.C. at 422, 526 S.E.2d at 724; Herron, 395 S.C. at 470, 719 S.E.2d at 644-45.

Analysis

Understanding the policy behind South Carolina's preservation requirement, the State submits that if the appellate panel's ruling goes undisturbed, Spears will have the opportunity to utilize the "ace card" from I'On and Herron—in this case the trial court's failure to conduct an on-the record Rule 403-balancing test, an issue which was never mentioned to the trial court—and, via a remand, receive another opportunity to argue against the admission of evidence on a completely different theory than that which was first advanced at trial. This is clearly at odds

with South Carolina law since I'On explains the argument presented on appeal, must be first raised to and ruled upon by the trial court. See I'On, 338 S.C. at 422, 526 S.E.2d at 724 ("[The] preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered *all relevant facts, law, and arguments*.") (emphasis added). Thus, because both the legal issue which constitutes the basis for the remand along with the issue which is to be considered on remand were not preserved for appellate review, the appellate panel erred when it remanded the case to the trial court to consider a question which was never ruled upon in Spears trial. Accordingly, the State asks this Court to grant certiorari.

A. Defense Counsel's Failure to Object, and the Trial Court's Failure to Rule on Whether Admission of Rule 404(b) Evidence Requires an on-the Record, Rule 403 Balancing Test

The record, as detailed above, clearly demonstrates the trial court was never asked to consider whether the admission of the Wal-Mart incident under Rule 404(b), required an on the record, Rule 403 balancing test.[8] Likewise, defense counsel never objected to the trial court's failure to conduct a Rule 403 balancing test. As a result, the trial court obviously never ruled on such a question. This was acknowledged by the appellate panel who found "it is not implicit or apparent from the record that the trial court considered whether the probative value of the Wal-Mart shooting testimony was substantially outweighed by unfair prejudice." (App. 38). (emphasis in original). In fact, this argument was not raised until the argument section of Appellant's brief when, for the first time, appellate counsel stated the trial court, "failed to

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[8] Furthermore, the State notes this issue, which is now the appellate panel's basis for the remand, was never included in Spears' statement of issues on appeal. See Atlantic Coast Builders and Contractors, LLC v. Lewis, 396 S.C. 323, 331 n.4, 730 S.E.2d 282, 286 n.4 (2012) ("If a question is not presented for our review, we should not answer it no matter how much we may want to do so. For as former Chief Judge Alex Sanders famously wrote, 'appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.' ") (quoting Langley v. Boyter, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct. App. 1984), quashed on other grounds, 286 S.C. 85, 332 S.E.2d 100 (1985)); see also See Rule 208(b)(1)(B), SCACR, ("[O]rdinarily, no point will be considered which is not set forth in the statement of issues of appeal."); Tobias v. Rice, 379 S.C. 357, 365, 665 S.E.2d 216, 220 (Ct. App. 2008) overruled on other grounds (holding it is error for an appellate court to consider issues not properly raised to it).

conduct a balancing test to determine whether the probative value of the prior bad act substantially outweighed its prejudicial effect." (App. 8). Thus, because the record, and indeed the appellate panel's opinion, reflects that the argument which is now the basis for the remand was never advanced at trial or ruled upon by the trial court, the issue is not preserved.[9] See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."); I'On, 338 S.C. at, 422, 526 S.E.2d at 724 (holding an appellant must present both his issues and arguments to the lower court and obtain a ruling before presenting the issues and arguments on appeal); State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) (concluding appellate courts will generally not address an argument unless it was first raised to and ruled upon by the trial court).

B. Defense Counsel's Failure to Object, and the Trial Court's Failure to Rule on Whether the Testimony and Evidence Regarding the Wal-Mart Incident was Unfairly Prejudicial Propensity Evidence under Rule 403

Similarly, the record plainly reflects defense counsel never argued the testimony or evidence regarding the Wal-Mart incident constituted unfairly prejudicial propensity evidence under Rule 403. Accordingly, the trial court never ruled on such an issue. In particular, the State notes defense counsel's rationale for objecting to the admission of the Wal-Mart incident was clearly not related to a concern that the jury would conclude Spears shot Victim on this occasion, because he had previously shot him a month prior.[10] Rather, the objection was based upon defense counsel's belief that the prior bad act had not been proven by clear and convincing

[9] The State further notes that because the record is silent as to whether defense counsel was even aware that a Rule 403 balancing test was required pursuant to State v. Wallace, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009) or State v. King, 349 S.C. 142, 156, 561 S.E.2d 640, 647 (Ct. App. 2002) and is further silent as to whether defense counsel thought to object or had a strategic reason for failing to do so, this issue is best resolved in post-conviction relief proceedings.

[10] Such an argument would appear to be more of question regarding improper character evidence under Rule 404(b), SCRE. See e.g. Rule 404(b), SCRE (West 2013) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.").

evidence.[11] Indeed, both opposing counsel and the trial court clearly came away with the same impression in light of their subsequent responses. Specifically, the State responded to defense counsel's argument stating that the clear and convincing evidence standard only applied to exceptions under Lyle and clarified that the clear and convincing standard did not apply to an excited utterance. (R. 182). Similarly, the trial court indicated, "we may be looking at Lyles (sic) because this is a prior bad act. It may have to come in under that analysis." (R. 183). At no point did the State or the trial court interpret defense counsel's objection as an argument that the prejudicial effect of the Wal-Mart incident substantially outweighed its probative value on the basis of propensity under Rule 403.

Moreover, even if one could argue that defense counsel's "whole more prejudicial than probative thing" objection was an attempt at advancing some sort of Rule 403 concerns, it is abundantly clear defense counsel *never explained why the Wal-Mart incident was unfairly prejudicial* meaning Appellant simply failed to preserve the argument raised in his appellate brief. See I'On, 338 S.C. at 422, 526 S.E.2d at 724 ("[The] preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered *all relevant facts, law, and arguments.*") (emphasis added). In particular, the word "propensity" *never appears in any of defense counsel's objections related to the Wal-Mart incident.* In fact, in order to address the issue under I'On's preservation rules, one would have to assume, "the whole more prejudicial than probative thing" was an argument that the Wal-Mart incident was unfairly prejudicial because it was allegedly improper propensity evidence.[12] However, there is simply

[11] See e.g. State v. Gore, 283 S.C. 118, 119-21, 322 S.E.2d 12 (1984) (reversing a defendant's voluntary manslaughter and arson conviction where the State elicited testimony on cross-examination regarding a strikingly similar incident, but failed to prove the incident by clear and convincing evidence pursuant to Rule 404(b), SCRE).
[12] See e.g. State v. Smith, 391 S.C. 353, 362, 705 S.E.2d 491, 496 (Ct. App. 2011) ("Under Rule 403, the trial judge must determine whether the logical connection articulated by the State is sufficiently strong that the probative value found in the connection is not substantially outweighed by the tendency of the evidence to show propensity, or by

no support for such an assertion in the record. Therefore, the State submits this issue would be better resolved in post-conviction relief where defense counsel could explain the purpose of her objection and the legal theory behind it.

Finally, even if one could assume defense counsel's objection of "the whole more prejudicial than probative thing" was an argument that the prejudicial effect of the Wal-Mart incident substantially outweighed its probative value on the basis of being improper propensity evidence, it is clear the trial court failed to rule on such an argument. Indeed, as described above, the trial court interpreted defense counsel's objection as being premised upon the State's purported failure to prove the Wal-Mart incident by clear and convincing evidence.[13] In fact, the appellate panel actually agreed there was no Rule 403 ruling at all finding, "it is not implicit or apparent from the record that the trial court considered whether the probative value of the Wal-Mart shooting testimony was substantially outweighed by unfair prejudice." (App. 38) (emphasis in original). Therefore, because the record clearly shows the argument which was included in Appellant's statement of issues on appeal was never raised to or ruled upon by the trial court, and if not revisited would be the subject considered on remand, the State asks this Court to grant certiorari.

II. Even if defense counsel somehow preserved the argument that the trial court erred in failing to conduct an on the record, Rule 403 balancing test, and the trial court erred in failing to do so, the appellate panel overlooked the fact that it was required to determine whether such an error was prejudicial, and had it done so, would have determined the admission of the Wal-Mart incident was not prejudicial and therefore, not an abuse of discretion

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some other form of unfair prejudice. If the trial judge determines not to exclude the evidence under this Rule 403 analysis, then the State may admit it.").

[13] See Rule 404(b), SCRE Notes (West 2013) ("The rule does not set forth the burden of proof required for the admission of bad acts not the subject of a conviction and, therefore, case law would control.") (citing State v. Smith, 300 S.C. 216, 387 S.E.2d 245 (1989) (explaining that in criminal cases evidence of other crimes or bad acts must be clear and convincing if the acts are not the subject of a conviction).

The State submits the evidence regarding Spears' prior bad act is admissible pursuant to Rule 403, SCRE and, as a result, even if the trial court's failure to conduct an on the record balancing test is error, such an error is not prejudicial meaning the admission of the evidence was not an abuse of discretion.[14] See State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003) ("A trial judge's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant."); see also Snyder's Auto World, Inc. v. George Coleman Motor Co., Inc., 315 S.C. 183, 186, 434 S.E.2d 310, 312 (Ct. App. 1993) ("The burden is on the Appellant to show not only error, but also prejudice."). As explained above, it is not enough to show the trial court erred in admitting evidence, rather, an appellant must also show that the admission of such evidence is prejudicial and therefore an abuse of discretion. Id. In this case, the appellate panel overlooked the fact Spears was required to show not just error, but prejudicial error under Adams. Indeed, a review of the appellate panel's opinion confirms it failed to consider whether the trial court's purported error was prejudicial as the standard of review requires. See App. at 38 ("Having determined that the trial court erred by failing to conduct an on-the-record Rule 403 balancing test, we must next determine the proper remedy."). Thus, because the record shows the evidence of the Wal-Mart incident was admissible, any error by the trial court in failing to

[14] While the State recognizes the appellate panel determined a remand was the appropriate remedy for the trial court's failure to conduct an on the record, Rule 403 analysis, the State questions whether this is consistent with the standard of review. See e.g. State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003) ("A trial judge's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant."); see also Snyder's Auto World, Inc. v. George Coleman Motor Co., Inc., 315 S.C. 183, 186, 434 S.E.2d 310, 312 (Ct. App. 1993) ("The burden is on the Appellant to show not only error, but also prejudice."). In particular, because Adams explains the abuse of discretion standard requires that an error be prejudicial and under Snyder's Auto World, Inc., Spears, as the appellant has the burden of demonstrating prejudice, it seems a reviewing court must first determine whether Spears has shown prejudice prior to contemplating what remedy, if any, is needed. Understanding this, the appellate panel's determination that a remand is the proper remedy for an error that was never determined to be prejudicial would seem to be at odds with the abuse of discretion standard of review.

conduct a Rule 403 analysis on the record is not prejudicial. As such, the State now seeks certiorari on this issue.

Applicable Law

"Evidence is relevant and admissible if it tends to establish or make more or less probable the matter in controversy." State v. Wiles, 383 S.C. 151, 157-58, 679 S.E.2d 172, 175-76 (2009). Furthermore, "evidence of other crimes, wrongs, or acts is generally not admissible to prove the character of a person in order to show action in conformity therewith; however, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Wiles, 383 S.C.at 158, 679 S.E.2d at 176 (internal quotations omitted) (citing Rule 404(b), SCRE). Additionally, evidence which is "logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused's guilt of another crime." Id.

Nevertheless, otherwise admissible evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" Rule 403, SCRE. Pursuant to Rule 403, SCRE, "the trial judge must determine whether the logical connection articulated by the State is sufficiently strong that the probative value found in the connection is not substantially outweighed by the tendency of the evidence to show propensity, or by some other form of unfair prejudice." Smith, 391 S.C. at 362, 705 S.E.2d at 496. "Unfair prejudice means an undue tendency to suggest decision on an improper basis" Wiles, 383 S.C.at 158, 679 S.E.2d at 176 and "[t]he determination of the prejudicial effect of the challenged evidence must be based on the entire record, and the result will generally turn on the facts of each case." State v. Holder, 382 S.C. 278, 293, 676 S.E.2d 690, 698 (2009).

Discussion

A. Evidence of the Wal-Mart Incident is Extremely Probative as it Establishes Spears' Motive for the Shooting in the Present Case as well as his Intent when he Fired the Weapon

Here, because the testimony, along with the supporting video and incident report, all prove the prior shooting by clear and convincing evidence and establish Spears' motive and intent in the current action—exacting revenge on Victim for his role in Eric Floyd's death, the evidence at issue is extremely probative. See State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (concluding evidence which is logically relevant to establish a material element of the offense charged should not be excluded simply because it reveals that the defendant is guilty of another crime). In fact, in a homicide prosecution, evidence which relates to previous quarrels, ill feelings or hostile acts between the parties is admissible under the common law, a fact which underscores the probative value of evidence relating to motive and intent.[15]

In particular, in State v. Clinkscales, 231 S.C. 650, 654-55, 99 S.E.2d 663, 665 (1957) this Court affirmed the trial court's admission of evidence indicating the appellant had previously shot the victim six or seven weeks prior as it was probative of animus. The same is true in State v. Williams, 321 S.C. 327, 336, 468 S.E.2d 626, 631 (1996) where the Court explained evidence of marital difficulties, including loud altercations and controversial conversations between the appellant and his wife, who he was accused of murdering, were admissible to show "that animus probably existed at the time of the homicide." Likewise, in

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[15] See State v. Braxton, 343 S.C. 629, 636, 541 S.E.2d 833, 836-37 (2001) ("In homicide cases, evidence of previous quarrels and ill feelings or hostile acts between parties is admissible to show that animus probably existed between the parties at the time of the homicide."); State v. Williams, 321 S.C. 327, 336, 468 S.E.2d 626, 631 (1996) ("[E]vidence of previous quarrels and ill feelings or hostile acts between parties is admissible to show that animus probably existed between the parties at the time of the homicide."); State v. Clinkscales, 231 S.C. 650, 654-55, 99 S.E.2d 663, 665 (1957) ("[I]t is well settled that in assault and battery and homicide cases, evidence that the accused and prosecuting witness or the deceased had a previous difficulty is admissible . . ."); State v. Brooks, 79 S.C. 144, --, 60 S.E. 518, 518 (1908); see also Blakely v. State, 360 S.C. 636, 639, 602 S.E.2d 758, 759 (2004) ("It is well-settled that evidence of previous threats by the defendant is admissible to show malice."); State v. Alford, 264, S.C. 26, 33, 212, S.E.2d 252, 254 (1975) (holding previous threats made against the companion of the victim at the time of assault is also admissible as evidence of malice).

State v. Braxton, 343 S.C. 629, 636, 541 S.E.2d 833, 836-37 (2001) this Court determined that a previous encounter between the victim and the appellant, which demonstrated the victim was scared of the appellant, was admissible as evidence of the relationship between the parties. Thus, it seems clear that evidence regarding Appellant's motive for the shooting and his intent when he fired the weapon—malice—is obviously extremely probative.

B. The Prejudicial Effect of the Wal-Mart Incident does not Substantially Outweigh its Probative Value

Additionally, because evidence of the Wal-Mart Incident was only admitted for the purpose of proving motive and intent (R. 186-87); was only argued as being evidence of motive and intent (R. 43, 44, 533); and the jury, which is presumed to follow the law,[16] was instructed that the evidence was only admissible pursuant to the Rule 404(b) exceptions and could not be used as character evidence (R. 548); the prejudicial effect of the admission of the Wal-Mart incident did not substantially outweigh its probative value.

Specifically, the State never attempted to cast the evidence now at issue as propensity evidence, but instead presented a theory that the shooting was a revenge killing making it unlikely the jury would have utilized the Wal-Mart incident as propensity evidence. This is most apparent in opening and closing arguments where the State emphasized Spears was seeking revenge for Floyd's death. (R. 43, 44, 533, 534). Therefore, combining this with the fact the jury was instructed that the evidence related to the Wal-Mart incident could only be admitted pursuant to the Rule 404(b) exceptions and not as character evidence, the risk of unfair prejudice is *de minimus*. (R. 548). This is especially true since the jury took an oath to follow the law and, under South Carolina law, are presumed to do so as detailed in Foye.

[16] See State v. Dunlap, 346 S.C. 312, 319, 550 S.E.2d 889, 893 (Ct. App. 2001), aff'd as modified on writ of cert., 353 S.C. 539, 579 S.E.2d 318 (2003) (quoting Foye v. State, 335 S.C. 586, 590 n.1, 518 S.E.2d 265, 267 n. 1 (1999) ("A jury is presumed to [have followed the trial judge's] instructions.").

Moreover, while Spears maintains the jury could have concluded, "if appellant shot the victim once, he must also be the one who shot him a second time" both the law and the record refute such a position. In support of this proposition, Spears cites to State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984). In Gore, this Court reversed a voluntary manslaughter and arson conviction in which appellant burnt down a trailer containing his ex-girlfriend when the State cross-examined appellant on a previous incident which was strikingly similar to the charged offense. 283 S.C. at 119-21, 322 S.E.2d at 12-13. However, despite reversing appellant's convictions, the Gore Court clearly noted in footnote one, that had the prior bad act been proven, the evidence of the prior misconduct could have been admissible under a Lyle exception. See Gore, 283 S.C. at 121 n.1, 322 S.E.2d at 13 n.1 ("If provable, evidence of this prior misconduct could have been admissible under Lyle to show motive or common scheme or plan. However, the State properly concedes that the proof was insufficient to connect appellant to the setting of the previous trailer fire.").

In Spears' case, unlike Gore, the State indisputably established motive and intent pursuant to Rule 404(b), SCRE, by clear and convincing evidence. (R. 187). Additionally, because Spears' failed to appeal from the 404(b) ruling, it is law of the case. Thus, while it is true the evidence may be prejudicial to Spears in that it makes it more likely he shot Victim, such prejudice is not "unfair prejudice" as the prior bad act was proven consistent with the requirements of Rule 404(b), SCRE. (R. 187).

Similarly, any prejudice which may exist as a result of the admission of the prior shooting does not substantially outweigh its probative value. Specifically, the same motive that existed during the prior shooting—revenge—still existed when Spears fired and fatally shot Victim in Myrtle Beach. The same can be said for Spears' intent, he obviously wanted to kill Victim the

first time he shot him and nothing within the record demonstrated that this changed within the month prior to the second shooting. To the contrary, the record clearly reflects that many members of 41-Curve wanted revenge against Victim. This was expressed throughout the record, including Spears' co-defendant Nathaniel Douglas' statement to Danyell Hammonds that he and his fellow 41-Curve members were going to get Victim. (R. 154-55). In fact, this was evident even in the minutes leading up to the shooting where Bethea, Spears' co-defendant, got into an argument with Irons after Irons suggested the two groups "stop beefing and get money together." (R. 219). In response, Spears and Bethea, rather than shaking Irons' hand and calling an end to the violence, promptly walked across the street to kill them. (R. 365-66).

In light of these facts, the State submits that because Spears is required to prove the trial court's error was prejudicial and under the standard of review, the appellate court is required to make such a determination, the appellate panel, by failing to consider whether the failure to conduct a Rule 403 analysis was prejudicial, clearly erred. Accordingly, granting certiorari is warranted, especially since the record conclusively shows Spears was not prejudiced by the trial court's failure to conduct a Rule 403 analysis. Indeed, as detailed above, there is simply no risk the jury would have construed the Wal-Mart incident as propensity evidence when it was not offered as such and the jury was instructed it could not consider the evidence as evidence of Spears' character.

CONCLUSION

For the aforementioned reasons, the State respectfully asks this Court to grant certiorari in order to: (1) correct the appellate panel's misapprehension of South Carolina's preservation requirement and (2) address the appellate panel's failure to determine whether the trial court's

error in not conducting a Rule 403 analysis was prejudicial as is required under the standard of review.

Respectfully Submitted,

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July 12, 2013.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions

Larry B. Hyman Jr., Circuit Court Judge

Opinion No. 5119 (S.C. Ct. App. filed April 17, 1013), Appellate Case No. 2010-162287

THE STATE,

RESPONDENT,

v.

BRIAN K. SPEARS,

PETITIONER.

CERTIFICATE OF SERVICE

I, Brendan McDonald, counsel for the Respondent, certify that I have served the within ***State of South Carolina's Petition for Writ of Certiorari,*** on opposing counsel by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney:

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I further certify that all parties required by Rule to be served have been served on this 12th day of July, 2013.

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