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, 1013), Appellate Case No.2010-162287

THE STATE,

PETITIONER/RESPONDENT,

V.

BRIAN K. SPEARS,

RESPONDENT/PETITIONER.

APPENDIX TO STATE'S PETITION FOR WRIT OF CERTIORARI

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FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether 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?

STATEMENT OF THE CASE

Appellant was convicted of murder and three (3) counts of assault and battery with intent to kill after a jury trial held before the Honorable Larry B. Hyman, Jr. on May 10-13, 2010, in Horry County. Appellant was sentenced to thirty (30) years for murder and to twenty (20) years each on the remaining charges.

This appeal follows.

ARGUMENT

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.

Appellant, Jeffrey Bethea, and Nathaniel Douglas were in a gang from the southside of Lumberton, North Carolina. The victim was in a competing gang from the eastside of Lumberton. On May 27, 2007, the victim, his girlfriend, and several others decided to drive down to Myrtle Beach to see bike weekend. Appellant, Bethea and Douglas were also in Myrtle Beach that weekend. The victim was shot and killed that evening and three bystanders were hit by stray bullets. The State's theory of the case was one of accomplice liability and that the shooting was done by appellant, Douglas and Bethea. The killing was thought to have been done in retaliation because the victim had killed a member in appellant's gang. Nathaniel Douglas testified for the State and implicated Bethea. Bethea testified for State in exchange for more lenient treatment and implicated appellant. Appellant's defense was that Bethea was the (1) one shooter.

In an effort to prove that appellant was the shooter, the State wanted to put into evidence testimony from the victim's sister that appellant shot the victim at a Walmart parking lot in Lumberton about a month prior to the shooting in Myrtle Beach.

At an in camera hearing, Danyell Hammonds, the victim's sister, testified that the victim came home one night in April of 2007 with blood on his shirt and said that he got shot at Walmart by "Bos" who is appellant's nickname. She also said her brother was in a rival gang and gotten out of prison about a month prior to this shooting. He had been

convicted of accessory after the fact of murder. The victim in that case was in the gang appellant belonged to. (R. p. 141, line 6 – p. 144, line 17).

After much discussion, the trial court held that the victim's sister could testify to what her brother told her because it was an excited utterance under Rule 803(2), SCRE. (R. p. 183, line 11 – p. 184, line 14). Defense counsel had argued earlier that the evidence should not come in under Rule 403, SCRE because of unfair prejudice. (R. p. 182, lines 7-10; p. 159,line 20 – p. 160, line 1). Later, the trial court allowed the solicitor the opportunity to put on the record that she was also putting in this evidence as a prior bad act under Rule 404, SCRE. She said it went to motive, intent, common scheme of plan, continuous scheme of plan and identity. The trial judge found there was clear and convincing evidence of the prior bad act. (R. p. 186, line 18 – p. 187, line 14). The decision to admit this evidence was in error.

Rule 403, SCRE provides that "evidence may be excluxded if its probative value is substantially outweighed by the danger of unfair prejudice..." "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis." State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146 (1991). If we assume that the victim's sister is telling the truth about what her brother told her,[1] there is still the danger that the jury will conclude that , if appellant shot the victim once, he must also be the one who shot him a second time.

In State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984) the Court wrote:

> Under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial

[1] In "most cases, proof that the event occurred is furnished either by testimony other than the declarant, or by circumstantial evidence that something out of the ordinary occurred." Weinstein's Federal Evidence §803. 04 [2][a] at p 803-20-21 (March, 1977 ed).

> rather than prior criminal or immoral acts. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Furthermore, where bad acts did not result in a conviction, guilty plea, indictment, or arrest of the appellant, this Court has limited the State's use of evidence. State v. Smith, 279 S.C. 440, 308 S.E.2d 794 (1983). (Appellant's lover improperly related instance of the appellant's unconvicted sexual battery upon her in his trial for murder of another woman); State v. Rivers, 273 S.C. 75, 254 S.E.2d 299 (1979). (In trial for criminal sexual conduct with the prosecutrix, the court erred in receiving testimony from the appellant's wife regarding his prior unconvicted acts of sexual misconduct on her). State v. Conyers, 268 S.C. 276, 233 S.E.2d 95 (1977). (Allegations that the appellant poisoned her first husband not admissible because the evidence was not clear and convincing); State v. Drew, 316 S.E.2d 367 (S.C. 1984). (Cross-examination and reply testimony regarding unconvicted act of burning a combine not proper in criminal conspiracy trial for burning a business.)

The Court went on to conclude that "when, as here, the previous alleged bad act is strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced."

The trial court in this case failed to conduct a balancing test to determine whether the probative value of the prior bad act substantially outweighted its prejudicial effect. See, State v. Colf, 337 S.E.2d 622, 525 S.E.2d 246 (2000); Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000). At the end of the case the trial court remarked that , "I don't know the basis for the jury's finding of guilt, whether it be that the jury felt that you were the shooter or you were an accomplice." (R. p. 577, lines 10-12). Appellate counsel would suggest that the basis was the unfair prejudice of the prior bad act.

CONCLUSION

Appellant's conviction should be reversed.

Respectfully submitted,

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT.

This 12th day of September, 2011.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 12th, 2011

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THE STATE,

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 12th day of September, 2011.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 12th day of September, 2011.

(E.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014 .

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APPELLANT'S QUESTION PRESENTED

Whether 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?

RESPONDENTS' COUNTER QUESTION PRESENTED

Whether the argument presented on appeal is preserved for appellate review where trial counsel argued a completely different rationale for exclusion of the evidence at issue during trial.

INTRODUCTION

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 and the wounding of Krystal Fowler, Lasheika Felton and Dajuan Monroe. (R. 50, 74-75, 134-45, 89, 107). The ensuing investigation led to the indictment and subsequent conviction of Brian "Bos" Spears ("Appellant"). (#2007-GS-26-3387, #2007-GS-26-3388, #2007-GS-26-3389, #2007-GS-26-3390, R. 669-70).

STATEMENT OF THE CASE

Appellant was 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, Appellant's case was called to trial before the Honorable Larry B. Hyman, Jr. and a jury. (R. 8). At trial, Appellant 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, Appellant 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).

STATEMENT OF THE FACTS

On May 26, 2007, Appellant, Nathaniel "June" Douglas, Ishmael "Ish" Douglas,[1] and Thomas "T.C." Shaw (collectively Appellant's 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, Appellant's 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

[1] Ishmael "Ish" Douglas is also known as Wa-Gee. (R. 214).
[2] Appellant, 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).

Ocean Boulevard, Appellant's group was joined by Jeffrey "Bird" Bethea, who, like Appellant and Nathaniel Douglas, was from Lumberton and was a member of 41-Curve. (R. 289-90). At the time of the incident, Appellant was wearing a white t-shirt and a black t-shirt underneath 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] (App. 288-89, 299). Bethea, who did not know Appellant's group was coming to Myrtle Beach, wore a black shirt with colorful combination locks on it, a black hat, and blue jean shorts. (App. 295-96, 441, 297, 298).

Shortly after Bethea's arrival, a member of Appellant's group stated they had observed Aaron Hammonds ("Victim"), a high-ranking member of Lumberton's East Side Bloods who had previously been implicated in the murder of fellow 41-Curve member Eric Floyd, walking down Ocean Boulevard.[4] (App. 365, 273-75, 290-91, 572). Following this comment, Lemark Irons, another member of Lumberton's East Side Bloods, crossed Ocean Boulevard and approached Appellant's group to compliment them on their clothes and jewelry stating "we need to stop beefing and get money together." (R. 195-96, 197-98, 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, Hammonds and others on the opposite side of the street. (R. 219, 115-16).

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[3] Danyell Hammonds, who was the victim, Aaron Hammonds' 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, Appellant's former cellmate in the detention center, Timothy Smith, testified that Appellant told him he received a phone call that Aaron Hammonds was in Myrtle Beach for bike week prompting Appellant's and his friends to come to Myrtle Beach. (R. 426-27).

[4] Eric Floyd was also known as "G-Black" or "Turk." (R. 193).

Immediately after the initial altercation, Bethea, who was a high-ranking member of 41-Curve, became angry and began talking to Appellant who was a foot soldier in the gang and did not get along with Victim. (R. 208, 358, 220, 228, 365-67). Specifically, Appellant expressed to Bethea his belief that Irons and his group, which included Victim, were going to kill someone in Appellant's group, unless Appellant 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 the crime scene, authorities interviewed multiple witnesses and were able to produce a composite sketch matching Bethea's description. (R. 272-73). After interviewing Bethea, authorities also spoke with Appellant in Lumberton on June 4, 2007. (R. 273). In the June 4th interview, Appellant repeatedly denied being in Myrtle Beach on the date in question instead claiming he was in Lumberton all weekend. (R. 276-77, 279). Additionally, Appellant informed authorities that he did not hang around Bethea. (R. 277). Following the first interview Appellant was charged with one count of Murder and three counts of ABWIK. (R. 281-82).

After waiving extradition, Appellant was transported back to Myrtle Beach where he was interviewed a second time on June 7, 2007. (R. 281-82). In his second statement, Appellant admitted he was in Myrtle Beach on the date in question, but insisted that after the altercation between Bethea and Irons he walked away with Nathaniel Douglas and, when he heard gunshots, fled the scene. (R. 285-86).

At trial, the State presented testimony the there were eight (8) shell casings recovered from the crime scene and three bullets recovered from Victim's body during the autopsy. (R.79-81, 91-92). SLED Agent Suzanne Cromer then testified that both the shell casings and bullets came from a .25 caliber automatic weapon. (R. 349-50).

The State also introduced eyewitness testimony from Brittney Maynor, who was dating Victim and had accompanied Irons and Victim to Myrtle Beach. (R. 111). Maynor testified that the shooter was a black male who was approximately five-foot-seven (5'7) and was wearing a red shirt, a red bandana over his face, and a red fitted hat with another red bandana on his wrist.[5] (R. 121-22, 127, 129). She further noted that the shooter crossed the road and was right in front of her when she saw him begin shooting. (R. 112, 121, 124). Maynor then told the jury that she turned and began running when she heard "five or six" shots. (R. 125, 128). Maynor described the gun as a silver and black .380 that was small enough to fit in the palm of her hand. (R. 129).

Additionally, the State presented testimony from Appellant's co-defendants, Nathaniel Douglas and Jeffrey Bethea. (R. 205-268, 355-417). Nathaniel Douglas testified that after Irons' initial dispute with Bethea, he walked off while Appellant remained with the rest of the group. Continuing, Nathaniel Douglas informed the jury that approximately ten minutes after he left Appellant's group, he heard gunfire and saw Appellant and the other members of his group running up the street. (R. 220, 222-23). Nathaniel Douglas also confirmed that Appellant had a medium black and titanium handgun in his waistband on the night in question, which was around the size of a .380, while also noting that Bethea did not appear to be carrying a gun. (R. 220-22). Meanwhile, Bethea confirmed that Nathaniel Douglas left the group and explained that he and Appellant subsequently approached Irons' and Victim's group and attacked them. (R. 367). Specifically, Bethea told the jury that Appellant pulled out a small caliber handgun from his waistband and began shooting. (R. 368-69).

To corroborate Bethea's version of the shooting, the State also introduced rap lyrics written by Appellant which indicated Appellant had killed Victim to avenge Eric Floyd's death.

[5] A South Carolina Department of Corrections incarcerated inmate search lists Appellant's height at five-foot-nine (5'9).

(R. 211-13, 324-25, 333). There was also testimony from Appellant's former cellmate Timothy Smith, who shared a cell with Appellant while he was awaiting trial. (R. 417-40). Smith told the jury that Appellant informed him he had pushed through the crowd and shot Victim because he believed Bethea would not do it. (R. 424-25). Smith further added that Appellant said he would kill Bethea, his brother, his children and his whole family because he "snitched" on him. (R. 424-25).

Following the close of the State's case, the defense presented testimony from eyewitness Alexis Brown who was part of Irons' and Victim's group on the night of the shooting. (R. 448). Brown testified that the composite generated by authorities was Bethea, but confirmed that the shooter was wearing a red bandana over his face and pulled a gun from his waistband. (R. 449-50, 452-53).

Finally, Appellant testified in his own defense. (R. 467-513). Specifically, Appellant explained he had walked off following the dispute between Irons and Bethea, heard gunshots and ran back to the K-Mart parking lot to meet with the rest of his group. (R. 477-78). He added that he did not shoot anyone. (R. 468). On cross-examination, Appellant admitted he brought a gun to Myrtle Beach, but left it in the car. (R. 491). Appellant also admitted he owned a .380, but gave it away. (R. 502).

PRESENTATION OF ISSUE ON APPEAL

At trial, the State proceeded under the theory that either Appellant 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, Appellant had shot and grazed Victim outside of a Wal-Mart in Lumberton. (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 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 Appellant had shot him and further informed her that he and Appellant 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) Appellant 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, 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). 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). 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 [Appellant] 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. (R. 187).

STANDARD OF REVIEW

In criminal cases, appellate courts sit only to review errors of law and are bound by the factual findings of the trial court unless they are found to be clearly erroneous. State v. Hernandez, 386 S.C. 655, 659, 690 S.E.2d 582, 584 (Ct. App. 2010). The materiality, relevance and admissibility of evidence are within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. State v. Rosemond, 335 S.C. 593, 596, 518 S.E.2d 588, 589 (1999). "An abuse of discretion occurs when the conclusions of the trial court lack evidentiary support or are controlled by an error of law." State v. Anderson, 386 S.C. 120, ---, 687 S.E.2d 35, 38 (2009). Moreover, the trial court is afforded considerable latitude in ruling on the admissibility of evidence and its rulings will not be disturbed absent a showing of probable prejudice. State v. Kornahrens, 290 S.C. 281, 288, 350 S.E.2d 180, 185 (1986).

ARGUMENTS

I. The argument presented on appeal is not preserved for appellate review as trial counsel argued a completely different rationale for exclusion of the evidence at issue during trial

Appellant contends the trial court erred in admitting Danyell's testimony that Appellant shot Victim approximately one month before Victim's murder because it was unfairly prejudicial under Rule 403, SCRE. Br. of App. p. 3. Specifically, Appellant argues this 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." Br. of App. p. 6. To that end, Appellant notes 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." Br. of App. p. 7. In response, the State notes an on-the-record Rule 403, SCRE, balancing test was not performed because defense counsel never requested the trial court exclude the prior bad act evidence on the basis that it was too similar to the charged offense as Appellant now argues. Accordingly, the State submits this issue is not preserved for appellate review. 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, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (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 issue unless the issue was raised to and ruled upon by the trial court).

In I'On, the Supreme Court of South Carolina explained the preservation requirement placed on an appellant 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.

While defense counsel admittedly cited Rule 403, SCRE and its balancing test as a rationale for exclusion of the prior bad act evidence, defense counsel's intent in doing so was clearly not rooted in concerns related to the similarity between the prior bad act and the offense

for which Appellant was charged. Specifically, as noted above, defense counsel submitted her Rule 403, SCRE objection twice. (R. 159-60, 182).

In her first objection, counsel stated:

> 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 following day, after thoroughly discussing whether Victim's statement to Danyell amounted to an excited utterance, defense counsel, when asked whether she had anything else to add, alerted the trial court to her prior objection stating:

> 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).

The State submits defense counsel's rationale for exclusion in this objection was clearly not related to a concern that the jury would conclude Appellant shot Victim on this occasion, because he had previously shot him a month prior. Rather, the objection is obviously based upon defense counsel's belief that the prior bad act had not been proven by clear and convincing evidence, and as such, the introduction of the prior bad act would unfairly prejudice her client. 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 in the way that Appellant is now interpreting the objection. Accordingly, the States asks this Court to find Appellant's current argument is not preserved for appellate review. See State v. Smith, 391 S.C. 353, 365, 705 S.E.2d 491, 497 (Ct. App. 2011) (concluding appellant did not preserve for review arguments that trial court conducted an improper analysis under Rule 403, SCRE, where the arguments were never presented to the trial judge).

II. Even assuming the question presented on appeal is preserved for appellate review, the record demonstrates that Appellant's prior bad act is admissible pursuant to Rule 403, SCRE as the probative value of the prior bad act testimony is not substantially outweighed by the danger of unfair prejudice

Assuming this Court finds the argument advanced by Appellant is available for appellate review, the State submits the trial court did not abuse its discretion in admitting the testimony regarding the prior shooting.[6] Specifically, the testimony, along with the supporting video and incident report, all of which prove the prior shooting by clear and convincing evidence, establish Appellant's motive and intent in the current action—exacting revenge on Victim for his role in Eric Floyd's death. 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).

Appellant maintains the trial court came down on the wrong side of the Rule 403, SCRE, analysis because the jury could have concluded, "if appellant shot the victim once, he must also

[6] Moreover, the State notes the two cases which Appellant cites to for the proposition that the trial court is required to conduct a balancing test to determine whether the probative value of a prior bad act is substantially outweighed by its prejudicial effect do not stand for such a proposition. Specifically, State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000) and Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000) deal with Rule 609(b), SCRE (Colf) and Rule 609(a)(1), SCRE (Green) and make no reference to when a trial court is required to employ a Rule 403 balancing test.

be the one who shot him a second time." Br. of App. p. 6. In support of this proposition, Appellant cites to State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984). In Gore, the South Carolina Supreme 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.").

Here, unlike Gore, the State indisputably established motive and intent pursuant to Rule 404(b), SCRE, by clear and convincing evidence. (R. 187). Thus, the only question left for this Court to consider is whether the trial court abused its discretion in admitting the prior bad acts testimony under Rule 403, SCRE where the prior bad act was proven by clear and convincing evidence and went to both motive and intent.

"Evidence is relevant and admissible if it tends to establish or make more or less probable the matter in controversy." Wiles, 383 S.C. at 157-58, 679 S.E.2d at 175-76. 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 361, 705 S.E.2d at 496. In other words, "[u]nfair prejudice means an undue tendency to suggest decision on an improper basis." Wiles, 383 S.C.at 158, 679 S.E.2d at 176. Similarly, "[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).

At the outset, the State notes that appellate courts must give "great deference to the trial court's judgment under Rule 403 and . . . should be reversed only in exceptional circumstances." Smith, 391 S.C. at 364, 705 S.E.2d at 497 (citing State v. Holland, 385 S.C. 159, 171-72, 682 S.E.2d 898, 904 (Ct. App. 2009). Quite simply, this case is not one of those exceptional circumstances. Indeed, the State submits the prior shooting did not go to show Appellant's general propensity to shoot people, which also would be at odds with the general rule expressed in the first portion of Rule 404(b), but was instead extremely probative as it provided the jury with Appellant's motive for killing Victim—seeking vengeance for his friend and fellow 41-Curve member, Eric Floyd. Likewise, the prior shooting was clearly probative of Appellant's intent in shooting Victim, namely malice.

Furthermore, while this evidence may be prejudicial to Appellant in that it makes it more likely that Appellant shot Victim, such prejudice is not "unfair prejudice" as the prior bad act was proven by clear and convincing evidence. (R. 187). Similarly, any unfair prejudice which may exist as a result of the admission of the prior shooting does not substantially outweigh its probative value. See State v. Braxton, 343 S.C. 629, 636, 541 S.E.2d 833, 836-37 (2001) (concluding 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). Specifically, the same motive that existed during the prior shooting—revenge—still existed when Appellant fired and fatally shot Victim in Myrtle Beach. The same can be said for Appellant's 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 Appellant's co-defendant Nathaniel Douglas' statement to Danyell 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, Appellant's co-defendant, got into an argument with Irons after Irons suggested the two groups "stop beefing and get money together." (R. 219). In response, Appellant 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).

CONCLUSION

For the aforementioned reasons, the State respectfully requests this Court affirm the rulings of the trial court as it did not abuse its discretion in admitting the evidence now at issue.

Respectfully Submitted,

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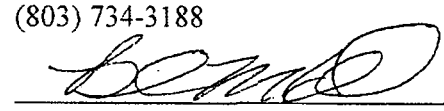

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ATTORNEY(S) FOR RESPONDENTS

September 12, 2011.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRIAN K. SPEARS,

APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR. The undersigned also certifies that the Final Brief is in compliance with the South Carolina Supreme Court's Order of August 13, 2007.

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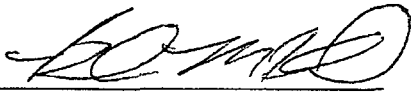
By: 

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THE STATE,

RESPONDENT,

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BRIAN K. SPEARS,

APPELLANT

PROOF OF SERVICE

I, Brendan J. McDonald, Counsel for Respondent, certify that I have this date served the ***Final Brief of Respondent***, dated September 12, 2011, on Appellant by depositing two copies of the same in the United States mail, first class postage prepaid, addressed to his attorney of record:

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ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Brian K. Spears, Appellant.

Appellate Case No. 2010-162287

Appeal From Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Published Opinion No. 5119
Heard January 17, 2013 – Filed April 17, 2013

REMANDED

Appellate Defender Robert M. Pachak, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Attorney General Brendan Jackson McDonald, all of Columbia, and J. Gregory Hembree, of Conway, for Respondent.

PIEPER, J.: Brian K. Spears appeals his convictions for murder and three counts of assault and battery with intent to kill (ABWIK). On appeal, Spears argues the trial court improperly admitted evidence of a prior shooting incident between Spears and Aaron Hammonds (Victim) that occurred one month before Victim was killed. Spears contends the trial court failed to conduct a balancing test to determine if the probative value of the prior shooting testimony was substantially outweighed by the danger of unfair prejudice to Spears. We remand.

FACTS

On May 27, 2007, Victim was fatally shot on Ocean Boulevard in Myrtle Beach. Upon responding to the scene, Detective Michael Hull interviewed eyewitnesses. Detective Hull created a composite of the suspected shooter that resembled Jeffrey Bethea. After seeing the composite on the news, Bethea turned himself in to the police. Bethea told Detective Hull that Spears and Nathaniel Douglas were responsible for Victim's death. Thereafter, Bethea, Spears, and Douglas were each charged with murder and three counts of ABWIK. As part of an agreement with the State, Bethea pled guilty to voluntary manslaughter. As a result of Bethea's plea, Douglas and Spears became codefendants in the case.

During pretrial motions, the solicitor argued Victim's death was a gang-related revenge killing. The solicitor contended that Victim's death was connected to the murder of Eric Floyd. Prior to his murder, Victim pled guilty to accessory after the fact in connection with Floyd's murder and served a four-year sentence. Approximately one month after Victim was released from prison, Spears allegedly shot Victim in a Wal-Mart parking lot in North Carolina. Spears argued any introduction of gang evidence would be prejudicial under Rule 403, SCRE. The trial court asked the solicitor "what about the shooting the month before, was, is there some way to connect that with this gang as well. . . I'm just wondering are you going to be able to get that in." The solicitor responded that she would not know if she could lay the foundation for the Wal-Mart shooting until Danyell Hammonds' testimony was proffered. Spears then argued testimony about the Wal-Mart shooting should be excluded because it was hearsay and because there was not clear and convincing evidence of the shooting as required by Rule 404(b), SCRE. Upon completion of the arguments, the trial court found the gang affiliation evidence was relevant and the probative value of the gang affiliation evidence was not substantially outweighed by any danger of unfair prejudice it might have caused. Spears then questioned whether the trial court ruled on the admissibility of the shooting incident at Wal-Mart. The trial court, in response to Spears' question about the Wal-Mart shooting, took the matter under advisement and withheld its ruling pending the presentation of evidence at trial.

After the trial began, the court held an in camera hearing to proffer the testimony of Hammonds, Victim's sister, who intended to testify regarding Victim's statements about the Wal-Mart shooting. Hammonds testified that one month before Victim was fatally shot, Victim told her "Bos" shot him outside of a Wal-

Mart in North Carolina. Hammonds indicated she knew Bos to be Spears.[1] According to Hammonds, Victim and Lemark Irons came to her house and ran to her room where she saw wet blood on Victim's shirt. Hammonds explained that she believed the shooting had just occurred because the blood in Victim's hand was still wet. Hammonds testified that Spears was a member of the 41-Curve gang and Victim was a member of the East Side Blood gang. Hammonds also testified a group of 41-Curve members told her that they were "going to get" Victim.

The trial court expressed its concerns that Hammonds' testimony was hearsay and questioned the solicitor about how she would get Hammonds' testimony regarding the Wal-Mart shooting admitted into evidence. Before the solicitor responded, Spears argued against introducing Hammonds' testimony of the prior shooting incident, stating "it's a 4[04](B) 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." Spears also argued that the testimony was hearsay and "taking it together with the whole more prejudicial than probative thing and you've got my argument." The solicitor then argued Victim's testimony fell under the excited utterance hearsay exception.

Before adjourning for the night, the trial court discussed with Spears and the solicitor whether Hammonds' testimony was hearsay. The next day, Spears renewed his Rule 403, SCRE, argument. After further discussion on whether Hammonds' testimony was hearsay, the trial court admitted Hammonds' testimony about the Wal-Mart shooting under the excited utterance exception to hearsay. Next, the solicitor proffered the video of the Wal-Mart shooting to introduce Hammonds' testimony as prior bad act evidence pursuant to Rule 404(b), SCRE. The trial court asked the solicitor the purpose for which she was offering the prior shooting evidence under Rule 404(b). The solicitor responded the prior shooting was necessary to show motive, intent, common scheme or plan, and identity. Spears objected and argued the evidence was not clear and convincing. Spears also renewed all of his previous objections. The trial court found clear and convincing evidence existed to support admission of the Wal-Mart shooting testimony and admitted Hammonds' testimony of the Wal-Mart shooting as a prior bad act.

A jury found Spears guilty. The trial court sentenced Spears to thirty years' imprisonment for murder and twenty years' imprisonment for each ABWIK count, to be served concurrently. This appeal followed.

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[1] Bos is Spears' street name.

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless the findings are clearly erroneous. *State v. McEachern*, 399 S.C. 125, 135, 731 S.E.2d 604, 609 (Ct. App. 2012). "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011).

LAW/ANALYSIS

Spears' sole issue on appeal is that the trial court erred by failing to conduct an on-the-record balancing test to determine whether the probative value of the prior bad act testimony was substantially outweighed by the danger of unfair prejudice. We agree.

South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged, except to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; or (5) the identity of the perpetrator. Rule 404(b), SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." *State v. Gilchrist*, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App. 1998). "Once bad act evidence is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE." *State v. Wallace*, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009) (emphasis added). The court may exclude the 404(b) evidence if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. *Id.*

This court has held if "an on-the-record Rule 403 analysis is required, [we] will not reverse the conviction if the trial judge's comments concerning the matter indicate he was cognizant of the evidentiary rule when admitting the evidence of [a defendant's] prior bad acts." *State v. King*, 349 S.C. 142, 156, 561 S.E.2d 640, 647

(Ct. App. 2002). In *King*, this court determined the trial court's ruling was "a compressed Rule 403/404(b) analysis" with "some indicia of his consideration of whether admission of the testimony was fair to King (*i.e.*, more probative than prejudicial)." *Id.* at 157, 561 S.E.2d at 647.

Here, the trial court ruled Hammonds could testify as to Victim's statements about the Wal-Mart shooting pursuant to the excited utterance exception to hearsay. Immediately thereafter, the solicitor proffered the video of the Wal-Mart shooting. The trial court indicated it understood the solicitor was offering the evidence of the prior shooting "under 404 or evidence of a prior bad act." The solicitor argued testimony regarding the prior shooting was necessary to show motive, intent, common scheme or plan, and identity. Spears objected, arguing the evidence was not clear and convincing and renewed all of his previous objections, including his earlier objection that the unfair prejudice of the Wal-Mart shooting testimony substantially outweighed its probative value. The trial court found clear and convincing evidence existed to support the prior bad act, but the trial court made no further findings. We recognize the trial court did spend time expressing its concerns and questioned the solicitor on the prior shooting. However, other than finding there was clear and convincing evidence of the prior shooting and Hammonds' testimony was admissible, the trial court made no specific findings on the record as to why the testimony had probative value, the nature of the unfair prejudice, or whether the probative value of the testimony was substantially outweighed by the danger of unfair prejudice.[2]

Furthermore, we find 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. Unlike the trial court in *King*, here, the trial court made no indication that it considered Rule 403. Thus, if the trial court did consider the unfair prejudice of the Wal-Mart shooting testimony, it is not readily implicit or apparent from the record. For the foregoing reasons, we find the trial court erred by failing to conduct an on-the-record Rule 403 balancing test.

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. South Carolina has not addressed the procedure for when an appellate court is unable to determine from the record whether the trial court considered Rule 403 in admitting

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[2] Admission under an excited utterance theory would also be subject to a 403 objection and balancing analysis. *See* Rule 403, SCRE.

a prior bad act under Rule 404(b). However, our courts have discussed the procedure for when the trial court fails to include a Rule 609, SCRE, balancing test on the record. *See State v. Colf*, 337 S.C. 622, 629, 525 S.E.2d 246, 249 (2000). In *Colf*, the court of appeals undertook its own Rule 609(b) balancing test. *Id.* On appeal, the supreme court held that this court should have remanded the question to the trial court instead of conducting the balancing test itself. *Id.* The court reasoned that "[i]t is difficult, if not impossible, for an appellate court to balance the interests at stake when the record does not contain the specific facts and circumstances necessary to a decision." *Id.* Furthermore, the supreme court explained, "[t]he balancing test required by Rule 609(b) must be conducted by the trial court." *Id.* (emphasis added).

Similarly, in *State v. Scriven*, this court was unable to determine whether the trial court "conducted a meaningful analysis to balance the impeachment value of these prior convictions, if any, against the prejudicial impact, as clearly required under Rule 609(a)(1)." 339 S.C. 333, 344, 529 S.E.2d 71, 76 (Ct. App. 2000). Because the court was unable to ascertain whether the error was harmless, we remanded to the trial court with instructions to hold a hearing on the admissibility of the prior convictions and to carefully weigh the probative value of impeachment of the prior convictions against the prejudice to the defendant. *Id.* at 344, 529 S.E.2d at 77. We further instructed that in "the event the State does not carry its burden, or the court determines that the prejudicial impact to Scriven outweighed the probative value for impeachment, the court shall order a new trial. Otherwise, subject to further appellate review, the conviction is affirmed." *Id.*

More recently, this court found that the trial court erred by not conducting a proper Rule 609(b) balancing test because it provided no analysis of the prejudicial impact of admitting the defendant's prior conviction. *State v. Howard*, 384 S.C. 212, 223, 682 S.E.2d 42, 48 (Ct. App. 2009). We followed the procedure set forth in *Scriven*, and remanded for an on-the-record balancing test. *Id.*

We have reviewed other jurisdictions and found that when appellate courts cannot ascertain whether the trial court conducted a Rule 403 balancing test on the record, these courts have either: (1) determined whether the error was harmless; (2) conducted a de novo review and made a balancing decision; or (3) remanded for an on-the-record Rule 403 balancing test.

As indicated, some courts have ascertained whether the trial court's failure to conduct a Rule 403 balancing test is harmless. In *Wardlow v. State*, the Alaska Court of Appeals found the trial court committed error when it failed to conduct a

balancing test under Rule 403 in admitting a witness' testimony as evidence pursuant to Rule 404. 2 P.3d 1238, 1248 (Alaska Ct. App. 2000). However, the court determined the defendant failed to establish he was unfairly prejudiced. *Id.* Therefore, the court held the trial court's error in failing to conduct a Rule 403 balancing test was harmless. *Id.* Similarly, the Mississippi Supreme Court has held the failure to apply a Rule 403 balancing test on the record could be harmless error. *McKee v. State*, 791 So.2d 804, 805 (Miss. 2001). In *McKee*, the trial court admitted testimony regarding the defendant's prior use of crack cocaine over the defendant's objection. *Id.* at 806. The court found the trial court erred by not applying the Rule 403 balancing test on the record. *Id.* at 810. However, the court also found the error was harmless based on the overwhelming evidence of the defendant's guilt. *Id.*

Other courts have found the trial court's failure to conduct an on-the-record Rule 403 balancing test is not reversible error when the appellate court can undertake a de novo review of the record and conduct its own balancing test. The Tenth Circuit held it had authority to "conduct a *de novo* balancing where the trial court failed to make explicit findings to support a Rule 403 ruling" on the admission of Rule 404(b) evidence. *United States v. Lazcano-Villalobos*, 175 F.3d 838, 847 (10th Cir. 1999).[3] Additionally, the Ninth Circuit explained that it reviews "for

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[3] Rule 403 of the Federal Rules of Evidence is worded differently than the South Carolina rule and provides: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Rule 404(b) further provides:

> (b) Crimes, Wrongs, or Other Acts.
>
> (1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of

abuse of discretion a district court's decision to exclude evidence at trial." *United States v. Leo Sure Chief*, 438 F.3d 920, 925 (9th Cir. 2006). "However, when the district court excludes evidence under Federal Rule of Evidence 403 but does not engage in explicit balancing, we review such a determination de novo." *Id.* (footnote omitted).

Finally, other courts have determined that remand is appropriate when the appellate court is unable to determine from the record whether the trial court implicitly made a Rule 403 finding. In *State v. Taylor*, the Arizona Supreme Court reversed and remanded for a Rule 403 determination. 817 P.2d 488, 492-93 (Ariz. 1991). The *Taylor* court recognized that even though the trial court did not specifically mention Rule 403 or prejudice in its analysis, "the record indicates that the court *may have been* weighing the prejudice against the probative value." *Id.* at 492. However, the court also found it could not determine whether the trial court excluded the prior conviction because it was irrelevant or because the prejudice outweighed the probative value. *Id.* The court noted that "[a] remand with instructions to conduct a Rule 403 determination may be ordered when uncertainty in a trial court's ruling might be removed." *Id.* (quoting *Shows v. M/V Red Eagle*, 695 F.2d 114, 118 (5th Cir. 1983)). Accordingly, the court remanded this issue with instructions to the trial court "to make an on-the-record finding based on specific facts and circumstances." *Id.* at 493.

Likewise, in *State v. McFarland*, the West Virginia Supreme Court held that because "the factors used by the circuit court in conducting the Rule 403 balancing test do not appear on the record, this Court is unable to effectively review the circuit court's decision to admit" the prior bad act evidence in question. 721 S.E.2d 62, 73 (W. Va. 2011). Therefore, the *McFarland* court held that the circuit court

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> accident. On request by a defendant in a criminal case, the prosecutor must:
>
> (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
>
> (B) do so before trial -- or during trial if the court, for good cause, excuses lack of pretrial notice.

Fed. R. Evid. 404(b).

erred in failing to conduct an on-the-record balancing test required by Rule 403. *Id.* The court reversed and remanded to the trial court for a new trial. *Id.*[4]

Having discussed the options considered by other courts, we decline to conduct a de novo Rule 403 balancing test. This decision is consistent with our supreme court's prior decision that an appellate court should not conduct its own balancing process when the trial court does not perform a Rule 609(b), SCRE, balancing test in admitting a prior conviction. *See Colf*, 337 S.C. at 629, 525 S.E.2d at 249 (noting an appellate court should not undertake the Rule 609(b) balancing test itself, but should remand the question to the trial court).

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[4] In the absence of on-the-record prejudice versus probative value findings as to the admission of a Rule 404(b) evidence, the Fifth Circuit has found it is "obliged to remand unless the factors upon which the probative value/prejudice evaluation were made are readily apparent from the record, and there is no substantial uncertainty about the correctness of the ruling." *United States v. Robinson*, 700 F.2d 205, 213 (5th Cir. 1983). In *Robinson*, the court determined that its review of the record led to uncertainty concerning the admissibility of the extrinsic offense testimony and remanded the case to the trial court for an on-the-record balancing test. *Id.* at 214. Additionally, the Seventh Circuit recognizes the district court's deference in admitting Rule 404(b) evidence, but also recognizes the appellate court's authority to "reverse if the district court failed to consider the prejudicial nature of the Rule 404(b) evidence before allowing it to be admitted." *United States v. Ciesiolka*, 614 F.3d 347, 357 (7th Cir. 2010). "A 'perfunctory' analysis is insufficient." *Id.* In *Ciesiolka*, the court held that:

> [T]he district court abused its discretion in failing to propound reasons for its conclusion that the probative value of [defendant's prior bad acts] was not substantially outweighed by the risk of unfair prejudice. We have reviewed the transcript of the district court's Rule 404(b) hearing, but could find no portion within it where the court explained its bare-bones conclusion that "the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."

Id.

We note the potential prejudice to Spears upon the introduction of this evidence. Spears was tried for shooting and killing Victim. The prior bad act testimony involved Spears shooting the Victim a month before the incident herein. Based upon these similarities, the jury could have determined Spears was guilty on an improper basis by relying on the Wal-Mart testimony as propensity evidence. *See State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) ("Unfair prejudice means an undue tendency to suggest decision on an improper basis."); *State v. Johnson*, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987) ("[E]vidence of other crimes or prior bad acts is inadmissible to show criminal propensity."); *State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984) (stating when a "previous alleged bad act is strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced"); *State v. Taylor*, 399 S.C. 51, 61, 731 S.E.2d 596, 601 (Ct. App. 2011) (recognizing the prejudicial effect of admitting "evidence of other crimes, wrongs, or acts based upon the degree of similarity with the charged crime"). Moreover, based upon the record herein, we are unable to say that the admission of the prior bad act testimony was harmless error. *See Black*, 400 S.C. at 27, 732 S.E.2d at 890 ("In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt."); *Scriven*, 339 S.C. at 344, 529 S.E.2d at 77 ("On the basis of this record, we are unable to say that the admission of these prior convictions was harmless error."). Accordingly, we find it appropriate to remand for an on-the-record Rule 403 balancing test.

CONCLUSION

Based on the trial court's 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, we remand with instructions for the trial court to conduct an on-the-record balancing test. If upon remand the trial court determines the probative value of the prior shooting testimony is substantially outweighed by the danger of unfair prejudice to Spears, the court should order a new trial. If the trial court determines the probative value of the prior shooting testimony is not substantially outweighed by the danger of unfair prejudice to Spears, the conviction shall be affirmed subject to the right of appellate review.

REMANDED.

FEW, C.J., and WILLIAMS, J., concur.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman Jr., Circuit Court Judge

Appellate Case No. 2010-162287

THE STATE,

RESPONDENT,

V.

BRIAN K. SPEARS,

APPELLANT

PETITION FOR REHEARING *EN BANC*

Comes now Respondent, above named, by and through the Attorney General of South Carolina, and pursuant to Rule 221(a), SCACR, hereby respectfully petitions this Court for rehearing *en banc*.

INTRODUCTION

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). Appellant, Brian "Bos" Spears ("Appellant") 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, Appellant's case was called to trial before the Honorable Larry B. Hyman, Jr. and a jury. (R. 8).

At trial, Appellant 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, Appellant 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, Appellant, represented by Robert M. Pachak, sought review in this Court 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[.]" Br. of App. at 3. 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. Br. of Resp. at 11; Br. of Resp. at 14.

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[.]" State v. Spears, Op. No. 5119 (Ct. App. filed April 17, 2013) (emphasis added). The State now seeks rehearing *en banc* as the panel clearly overlooked or misapprehended 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 rehearing 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 Synder'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, "Appellant," Nathaniel "June" Douglas, Ishmael "Ish" Douglas,[1] and Thomas "T.C." Shaw (collectively Appellant's 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, Appellant's 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, Appellant's group was joined by Jeffrey "Bird" Bethea, who, like Appellant and Nathaniel Douglas, was from Lumberton and was a member of 41-Curve. (R. 289-90). At the time of the incident, Appellant was wearing a red t-shirt along with a black and red New

[1] Ishmael "Ish" Douglas is also known as Wa-Gee. (R. 214).
[2] Appellant, 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).

York Yankees hat, while fellow gang member Nathaniel Douglas, was wearing a red O.J. Simpson jersey.[3] (App. 288-89, 299). Bethea, who did not know Appellant's group was coming to Myrtle Beach, wore a black shirt with colorful combination locks on it, a black hat, and blue jean shorts. (App. 295-96, 441, 297, 298).

Shortly after Bethea's arrival, a member of Appellant's 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] (App. 365, 273-75, 290-91, 572). After seeing Victim, Appellant's group looked on as Lemark Irons, another East Side Blood, crossed Ocean Boulevard, approached Appellant's group, and complimented them on their clothes and jewelry stating "we need to stop beefing and get money together." (R. 195-96, 197-98, 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 Appellant who was a foot soldier in the gang and did not get along with Victim. (R. 208, 358, 220, 228, 365-67). Specifically, Appellant expressed to Bethea his belief that Irons and his group, which included Victim, were going to kill

[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, Appellant's former cellmate in the detention center, Timothy Smith, testified that Appellant told him he received a phone call saying Victim was in Myrtle Beach for bike week prompting Appellant and his friends to come to Myrtle Beach. (R. 426-27).

[4] Eric Floyd was also known as "G-Black" or "Turk." (R. 193).

someone in Appellant's group, unless Appellant 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 Appellant 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, Appellant 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 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 Appellant had shot him and further informed her that he and Appellant 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) Appellant 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

[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 Lumberton 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. at 10-11.

(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).

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 [Appellant] is facing." (R. 186). Finally, the State noted that

[6] Appellant 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).

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 overlooked or misapprehended the State's preservation argument, and South Carolina's preservation requirement, when it found the trial court erred in failing to conduct an on-the-record, Rule 403 balancing test

In the statement of issues on appeal, Appellant argued the trial court erred in admitting Danyell's testimony that Appellant shot Victim approximately one month before Victim's murder claiming the testimony was unfairly prejudicial under Rule 403, SCRE. Br. of App. p. 3. Within his brief, Appellant 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." Br. of App. p. 6. Near the conclusion of his brief, Appellant 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." Br. of App. p. 7.

[7] Appellant 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).

In response, the State argued Appellant's 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. Br. of Resp. at 13-14. Similarly, in addressing Appellant's 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. Br. of Resp. at 12. 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. Br. of Resp. at 12-14.

In its ruling, the appellate panel neglected to address the State's preservation argument, further characterized Appellant'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 Appellant advanced, for the first time, in his appeal. See State v. Spears, Op. No. 5119 (Ct. App. filed April 17, 2013). 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, clearly overlooked or misapprehended such an argument, 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), the Supreme Court of South Carolina 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 Supreme 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, the South Carolina Supreme 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 trial) when, at trial, he simply failed 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, Appellant 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 overlooked or misapprehended South Carolina law when it found the trial court erred and remanded the case for further proceedings.

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] Similarly, 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." Spears, Op. No. 5119 at 5 (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 conduct a balancing test to determine whether the probative value of the prior bad act substantially outweighed its prejudicial effect." Br. of App. p. 7. Thus, because the record, and indeed the appellate panel's opinion, reflects that the argument which is now the basis for the

[8] Furthermore, the State notes this issue, which is now the appellate panel's basis for the remand, was never included in its 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).

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). The State therefore asks this Court to grant rehearing *en banc*, or in the alternative, substitute an opinion affirming Appellant's conviction and sentence.

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 Appellant 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 evidence. Indeed, both opposing counsel and the trial court clearly came away with the same

[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.").

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.[11] However, there is simply no support for such an assertion in the record. Therefore, the State submits this issue would be

[11] 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 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.").

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.[12] 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." Spears, Op. No. 5119 at 5 (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 its petition for rehearing *en banc*, or in the alternative, substitute an opinion affirming Appellant's conviction and sentence.

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

The State submits the evidence regarding Appellant's 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

[12] 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).

balancing test is error, such an error is not prejudicial meaning the admission of the evidence was not an abuse of discretion.[13] 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 Synder'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, the 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 Appellant 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 Spears, Op. No. 5119 at 5 ("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 conduct a Rule 403 analysis on the record is not prejudicial. As such, the State now seeks rehearing *en banc*, or in the alternative, asks for a substituted opinion explaining the trial court's failure to conduct a Rule 403 analysis was not prejudicial.

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[13] 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 Synder'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. the Appellant has the burden of demonstrating prejudice, it seems a reviewing court must first determine whether Appellant 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.

Applicable Law

"Evidence is relevant and admissible if it tends to establish or make more or less probable the matter in controversy." Wiles, 383 S.C. at 157-58, 679 S.E.2d at 175-76. 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 Appellant's 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 Appellant's 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.[14]

In particular, in State v. Clinkscales, 231 S.C. 650, 654-55, 99 S.E.2d 663, 665 (1957) the Supreme Court of South Carolina 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 Supreme Court of South Carolina 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 State v. Braxton, 343 S.C. 629, 636, 541 S.E.2d 833, 836-37 (2001) the Supreme Court of South Carolina determined that a previous encounter between the victim and

[14] 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).

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,[15] 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 Appellant 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.

[15] 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 Appellant 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, Appellant cites to State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984). In Gore, the South Carolina Supreme 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 Appellant's 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 Appellant 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 Appellant in that it makes it more likely that Appellant 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 Appellant fired and fatally shot Victim in Myrtle Beach. The same can be said for Appellant's 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 Appellant's 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, Appellant's co-defendant, got into an argument with Irons after Irons suggested the two groups "stop beefing and get money together." (R. 219). In response, Appellant 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 Appellant 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. Therefore, the appellate panel, by failing to consider the requirements of the standard of review, clearly overlooked or misapprehended South Carolina law. Accordingly, rehearing *en banc* is warranted, especially since the record conclusively shows Appellant 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 Appellant's character.

CONCLUSION

For the aforementioned reasons, the State respectfully requests rehearing *en banc* to: (1) correct the appellate panel's misapprehension of South Carolina's preservation requirement and (2) to 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. In the alternative, the State asks this Court to substitute an opinion consistent with the concerns addressed above.

Respectfully Submitted,

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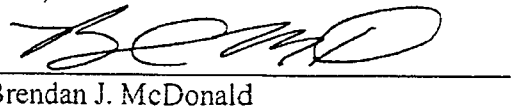


Brendan J. McDonald
ATTORNEY(S) FOR RESPONDENTS

April 26, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2010-162287

THE STATE,

RESPONDENT,

v.

BRIAN SPEARS,

APPELLANT

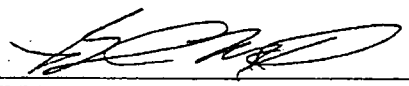
PROOF OF SERVICE

I, Brendan McDonald, counsel for the Respondent, certify that I have served the within ***Petition for Rehearing,*** on Appellant by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record:

Robert M. Pachak, Esq.
SCCID/Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589

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

This 26th day of April, 2013.



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April 26, 2013.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

BRIAN K SPEARS,

APPELLANT

APPELLATE CASE NO. 2010-162287

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5119

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, appellant petitions this Court for rehearing on the following points that may have been overlooked or misapprehended. The solicitor in this case failed to specify why the Wal-Mart shooting was admissible under Rule 404(b). Instead, she merely made a rote recitation of all of the exceptions to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Counsel has found in the past when a solicitor can not specify the exception, the real motive is to prejudice the defendant with the prior bad act.

This Court found and concluded that it was "unable to say that the admission of the prior bad act at testimony was harmless error." If the error was not harmless, remanding the case for a Rule 403, SCRE balancing test would lead only to prejudice and confusion, it is respectfully submitted.

CONCLUSION

Appellant's petition for rehearing should be granted and his convictions should be reversed.

Respectfully submitted,

Robert M. Pachak
Appellate Defender

This 2nd day of May, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRIAN K SPEARS,

APPELLANT

APPELLATE CASE NO. 2010-162287

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Brendan J. McDonald, Esquire, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 2nd day of May, 2013.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 2nd day of May, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

The South Carolina Court of Appeals

The State, Respondent,

v.

Brian K. Spears, Appellant.

Appellate Case No. 2010-162287

ORDER

Respondent filed a petition for rehearing on April 26, 2013. Appellant filed a petition for rehearing on May 2, 2013. After careful consideration of each party's petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, Appellant's petition for rehearing and Respondent's petition for rehearing are denied.

John Cannon Fw C.J.

J.

Daniel E. Pieper J.

Columbia, South Carolina

cc:
Brendan Jackson McDonald
Robert M. Pachak
Larry B. Hyman, Jr.

FILED
June 14, 2013