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

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.)

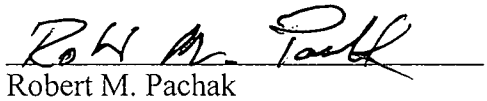
The Court went on to conclude that "when, as here, the previous alleged bad act is strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced."

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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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.

(L.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).

[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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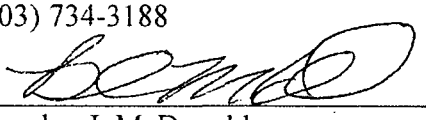

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September 12, 2011.

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Appeal from Horry County

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THE STATE,

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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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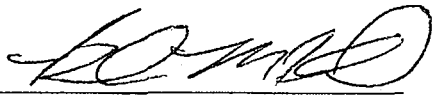
By: 

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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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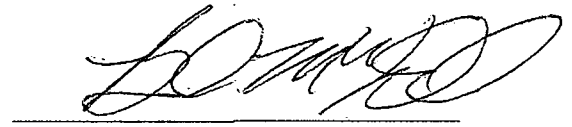
This 12th day of September, 2011.



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