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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Honorable Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2022-001387

THE STATE, ...RESPONDENT,

v.

OSMAN S. SHABAZZ, JR., ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1. In this murder trial, did the trial judge err in allowing a former sheriff's deputy to testify that, a year before the fatal shooting, Appellant reported that the deceased threatened to expose a video of a sexual encounter between the two that occurred six years earlier when the probative value of the testimony was substantially outweighed by the danger of unfair prejudice?

2. Did the trial judge err in sentencing Appellant to five years for possession of a weapon during the commission of a violent crime in violation of S.C. Code § 16-23-490 when the judge sentenced Appellant to life in prison for murder?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether Judge Gibbons properly allowed a former deputy to testify that a year before the murder, Appellant reported to him that the victim was threatening to release a six-year-old video of their sexual encounter when it was direct motive for murder, when it was not a prior bad act, and when was part of the res gestae of the crime?

2. Whether this Court should fix the sentencing issue itself or remand to the trial court per *State v. Plumer*, 439 S.C. 346, 887 S.E.2d 134 (2023), as the State concedes Judge Gibbons issued an illegal sentence?

STATEMENT OF THE CASE

Appellant was indicted at the July 2021 term of the grand jury for Fairfield County for murder, possession of a weapon during the commission of a violent crime, and grand larceny. 2021-GS-20258, -259, and -260. Indictments. He was prosecuted by Deputy Solicitor Riley Maxwell and Assistant Solicitor Julie Hall, and was represented by William Frick, Esq., and Kay Boulware, Esq. Tr. 1. On September 26, 2022, Appellant proceeded to trial by jury before the Honorable Brian M. Gibbons, after which Appellant was found guilty on September 30th of all three charges. Tr. 675-676. He was sentenced by Judge Gibbons to life in prison and five years concurrent for each of the other two indictments. Tr. 680.[1] Appellant timely filed a notice of intent to appeal his convictions and sentence and subsequently submitted a Brief in support of his Appeal. This Brief of Respondent follows.

[1] When issuing his sentence, the judge told Appellant, "I think you're a cold, calculated killer who manipulated the entire situation as well as those around you. May God have mercy on your soul." Tr. 680.

STATEMENT OF FACTS

On Sunday, January 31, 2021, 21-year-old Gabriel Brisbon ("victim") picked up his sister around 3:00 or 4:00 PM to take her to the store, and she asked if anything was on his mind. Tr. 113-115, Tr. 118. He said yes but did not want to elaborate. Tr. 115. He asked her to buy something for his friend to drink, and then dropped her back off at her place after telling her he was going to his friend's house. Tr. 115-116. That was the last time she would see him alive.

Meanwhile, 22-year-old Osman Shabazz ("Appellant") was texting Gabriel to meet up. Appellant told him to meet him at his grandma's house on the corner of US Highway 321 South and Peach Road so they could smoke pot together. Tr. 331-338, Tr. 449; State's Exhibit 28 (texts between Appellant and the victim).[2] [3] The two were friends, having met in their school choir. Tr. 141, Tr. 163, Tr. 169, Tr. 179. Unbeknownst to the victim, Appellant also texted his girlfriend's 17-year-old autistic brother Michael to meet him there too. Tr. 336, Tr. 361-364, Tr. 451-452; State's Exhibit 92 (text messages). Appellant, Michael, and Sylvia all lived together at an apartment on Chinquapin Road at the time. Tr. 454-456.

Sylvia and Appellant drove to the property in Appellant's black Nissan Maxima, but Sylvia thought they were only going to the property to feed her dogs. Tr. 467, Tr. 469. However, when they got there, Sylvia discovered Appellant and not been feeding them as they were very skinny, so she made Appellant take her to the Dollar General to buy dog food. Tr. 470-471. While they were there, she heard Appellant say into the phone, "No, it's just me." Tr. 471-472.

At 5:00 PM, Appellant texted Michael, "When I come out, act like you're running up on us." He also said, "Behind the shed at 5:00 PM." Tr. 364-365; State's Exhibit 92. When they got

[2] Appellant admitted to law enforcement that he had gone to his grandma's house to smoke with the victim that day. Tr. 338.

[3] Appellant frequently went over to the property because he helped his grandma with her mail (she lived in Alabama) and housed his girlfriend's dogs there. Tr. 330, Tr. 347-348, Tr. 459.

there, Appellant told Sylvia to go hide behind a fence at the side of his grandma's house because he did not want her to see the person who was coming to see him. Tr. 472-473. Sylvia then saw a tall black male arrive in a light-colored Honda, who she later testified was the victim, Gabriel Brisbon. Tr. 474-477. Appellant lured the victim toward the four abandoned trailers that were in the lot next to his grandma's house and ordered Michael to kill him. Michael fired five rounds into the victim's head, another into his right arm, and a seventh into his back. Tr. 311, Tr. 318, Tr. 350-352, Tr. 480. Afterward, Appellant ordered Sylvia and Michael to drive the victim's car. Tr. 483-484. Michael had blood on his face, and told her, "I shot someone." Tr. 486. She and Michael then threw the victim's phone in the river. Tr. 488.

Late in the afternoon on Monday, February 1st, Appellant told Sylvia he wanted to spray paint the victim's vehicle. Tr. 492. The pair therefore went to Lowe's to buy black, glitter, and pink spray paint, gloves, and toilet bowl cleaner (as it had acid in it), and then went across the street to an AutoZone to buy Sylvia accessories for her new car. Tr. 343-344; Tr. 374-379, Tr. 493-495; State's Exhibit 99 (still photograph of the pair in the Lowe's parking lot). Some of the same cans were later found in the victim's vehicle. Tr. 376-377. They then drove the cars back to the Hwy. 321 property and spray painted it, and Appellant told Sylvia he was going to try to dig a hole. Tr. 499-501; State's Exhibits 21-24 (photographs of the post-spray-painted vehicle). Appellant ordered Michael to move the body and get the bullets off the ground. Tr. 500-502.

On Tuesday, February 2nd, Gabriel's mother reported him missing and told the investigator the victim's car loan company had placed a GPS tracker on his car for insurance purposes. Tr. 132-133. The loan company told Inv. Mike Autry that it was parked at 801 Chinquapin Road at the Creekside Place Apartments. Tr. 132-133. Law enforcement found it parked right next to Appellant's Nissan around 11 PM that night, spray painted black with pink

rims and pink trim. Tr. 133-139, Tr. 353-354. Deputies found a pink paint-stained latex glove full of shell casings matching ones from the scene, the AutoZone receipt, and mail addressed to Appellant inside. Tr. 342-348, Tr. 354. A license plate that belonged to Appellant's Nissan was also found on the back of the victim's vehicle. Tr. 342, Tr. 497.

A neighbor directed Inv. Autry to Appellant's apartment upstairs. Tr. 139, Tr. 199. Appellant opened the door and gave Inv. Autry a myriad of conflicting and confusing stories regarding why he had possession of the victim's vehicle. Tr. 140-141. First, he said a random black guy with dreads knocked on the door in the middle of the night and handed him his keys, saying, "I need you to watch my car." Tr. 140-141. Then he said his girlfriend Sylvia had purchased the vehicle off the side of the road. Tr. 144-145. Sylvia and Appellant then went to the police station. Tr. 154-170. Appellant next admitted to spray painting the victim's vehicle, and then elaborated on his previous story, saying *both he and* Sylvia purchased the vehicle on the side of the road for $600. Tr. 161-166. He then admitted to texting the victim on the day he was killed and showed deputies the texts between them on his phone. Tr. 165-166, Tr. 170.

On Wednesday, February 3rd, Appellant was interrogated by Inv. Autry and Captain Talbert. Tr. 174-176. Appellant continued to tell conflicting stories about why he had the vehicle, relaying a third story about how the victim and a guy named Eli had come to his apartment to sell them the victim's car because they were a couple and were going to run off together. Tr. 176-185. Sylvia, on the other hand, maintained that she had purchased the vehicle on the side of the road for $600. Tr. 188, Tr. 193.

On Thursday, February 4th, deputies were told by a witness that Appellant, Shelia, and Mike had packed in a hurry and had left in the middle of the night on February 3rd. Tr. 200-201, Tr. 327, Tr. 348. Officers executed a search warrant at their empty Chinquapin Road apartment

on February 5th and found the victim's driver's license inside. Tr. 348-351. The victim's family, who had been searching since February 2nd, knew Appellant and the victim had hung out at the Hwy. 321 property, so they went there to look. Tr. 220, Tr. 290-291, Tr. 351-352. Gabriel's brother Christopher saw flip flops belonging to the victim inside one of the abandoned trailers, and then saw a trail of blood leading out the back door of one of them. Tr. 210-215. He went out the back and saw his brother's head sticking out of a pile of leaves. Tr. 215. Marks on the grass on the backside of Appellant's grandma's property showed a vehicle had been spray painted black and pink there. Shell casings were found in a trailer that matched a 9mm gun. Tr. 195-196.

On Sunday, February 7th, Inv. Autry got a tip that Appellant's Nissan had been seen at a Humphrey Drive address where Sylvia used to live. Tr. 292-294, Tr. 521. Sylvia later admitted they had gone there to dump the Nissan and hide but left quickly. Tr. 521-524. Two days later, Sylvia texted Michael and told her Appellant wanted his black gun, and to bring it to them. Tr. 368-369, Tr. 526-528. On Thursday, February 11th, Crime Stoppers received a tip that Appellant and Sylvia were holed up in the Magnuson Hotel on Parklane Road under false names. Tr. 296-297, Tr. 356, Tr. 524-525. Law enforcement arrested the pair, and inside found the black .9 mm murder weapon that matched shell casings found at the scene, found in the victim's vehicle, and bullets found inside the victim. Tr. 295, Tr. 358, Tr. 419, Tr. 426, Tr. 432-434. Appellant's fingerprints were on the weapon. Tr. 392-393, Tr. 398-399. Sylvia testified that Appellant told her the victim had threatened to force himself on Appellant sexually, and that the two were supposed to meet up to fight about it. Tr. 463.

STANDARD OF REVIEW

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Wise*, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004).

ARGUMENT

I. Judge Gibbons did not err when he allowed a deputy to testify to Appellant's motive: a year before the murder, the victim threatened to release a six-year-old video of a sexual encounter between the two of them, and Appellant reported it to the police. It was not a prior bad act, and it was part of the res gestae of the crime.

Appellant argues the trial judge erred by allowing a sheriff's deputy to testify that a year before the murder, Appellant filed a police report about the victim's threats to expose a 6-year-old video of their sexual encounter, because the danger of unfair prejudice substantially outweighed any probative value. The State disagrees and submits Appellant's argument is without merit. Overwhelming is not a strong enough word to describe the amount of evidence at trial that proved Appellant was guilty of the three crimes, such that there is no possible way Appellant could prove prejudice. Plus, the police report Appellant filed was a public record demonstrating his motive for the crime, and testimony about the situation was properly admitted as part of the res gestae of the crime. This Court should affirm.

The judge heard the defense's motion to exclude any mention of the video[4] before the trial began. Tr. 12-15. The defense stated the video was of a sexual encounter between Appellant and the victim, and Appellant had gone to the Sheriff's Department on February 5, 2020 to report the victim was threatening to publish it on social media. Tr. 12-13. Fairfield County Sheriff's Deputy Bryant Goodwin wrote up an incident report about it, and the State intended to call him as a witness to talk about it. Tr. 13-14. The incident report said, "The offender stated that he performed fellatio on the victim and there's a video recording of it on [the victim's] phone." Tr. 14. The defense stated they had issues with the remoteness of the video, but the trial court ruled it was more probative than prejudicial and that mention of the video was admissible. Tr. 15. The

[4] Neither the video or the incident report was shown or admitted at trial.

deputy testified on transcript pages 593-600 that he went and took the report from Shabazz at Shabazz' grandma's house.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. All relevant evidence is admissible unless the prejudicial effect substantially outweighs the probative value. Rule 403, SCRE. In *State v. Braxton*, our Supreme Court affirmed that "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" as the evidence was extremely relevant. *State v. Braxton*, 343 S.C. 629, 636-637, 541 S.E.2d 833, 836-837 (2001); *see also State v. Williams*, 321 S.C. 327, 468 S.E.2d 626 (1996) (evidence of controversial telephone calls and loud altercations between victim and defendant were admissible to establish strained nature of parties' relationship); *State v. Clinkscales*, 231 S.C. 650, 99 S.E.2d 663 (1957); *State v. Brooks*, 79 S.C. 144, 60 S.E. 518 (1908); 22A C.J.S. Criminal Law § 721 (1989) (evidence of relations existing between accused and victim prior to crime are admissible). "Prior disputes between the defendant [and the victim] may be relevant to establish the accused's motive for committing the crime and motive may have bearing on the identity of the accused as a perpetrator of the crime." *State v. Braxton*, 343 S.C. at 636, 541 S.E.2d at 837; *State v. Atkins*, 303 S.C. 214, 399 S.E.2d 760 (1990); *State v. Plyler*, 275 S.C. 291, 270 S.E.2d 126 (1980).

Appellant admitted this issue does not fall under Rule 404(b), SCRE, as the video (and testimony about it) was not a prior bad act by Appellant. IBOA p. 9. However, he argues the judge should have considered the fact the video was six years old in making his ruling, citing *State v. Scott*, 405 S.C. 489, 748 S.E.2d 236 (Ct. App. 2013). Appellant makes an argument that

does not line up with case law, as *State v. Scott* is a case about the admission of 404(b) evidence, and the rules about temporal remoteness and the judge's duty to analyze it apply only to 404(b) evidence, which again, Appellant admits the video is not.

Temporal remoteness is only one factor among many a judge may consider in a totality of the circumstances 403 balancing test analysis, and it is not given as much weight in a 403 analysis as it is in a 404(b) analysis. Rule 403, SCRE. And here, the testimony was direct evidence of motive (admissible even under Rule 404(b)), making it extremely relevant and probative. The judge conducted the proper 403 balancing test on the record, and issued his ruling in line with Rule 403, SCRE, case law. Judges are not required to put all the reasons why they are ruling the way they are in a 403 ruling as they are in Rule 404(b) rulings; they must simply put on the record they weighed and balanced both the prejudicial effect and probative value of the evidence and found one way or the other. There is no error here as Judge Gibbons did just that. This Court should affirm.

As even a prior bad act of the defendant's may be admitted as part of the res gestae of a crime, direct evidence of a motive for the murder that was *not* a prior bad act by Appellant should undoubtedly be admitted. "The res gestae theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred." *State v. King*, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) (cleaned up); *State v. Johnson*, 439 S.C. 331, 341, 887 S.E.2d 127, 132 (2023). Here, testimony that Appellant filed a police report a year before the murder that the victim was threatening to release a video of the two having a sexual encounter gave the jury context for the crime and was necessary to a full presentation of the case. Appellant's argument that the testimony had less probative value because the State did not have

to prove motive does not make sense. No, the State did and does not have to prove motive as an element of the crime, but when they *can* prove motive, it only helps them show malice existed in the defendant's mind all the more and makes it even more likely the defendant committed the crime. Motive is not required, but it is always admissible.

Further, the State so thoroughly proved Appellant's guilt at trial that even if there had been error here (which there was not), it was harmless. *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) ("Where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached,' an insubstantial error that does not affect the result is considered harmless."); *State v. Benton*, Op. No. 28185 at 3 (S.C. Sup. Ct. filed January 17, 2024) (finding the probative value of the photographs of the victim's burned body at the crime scene was not outweighed by their prejudicial effect, and that even if there was error in their admission, it was harmless because of the overwhelming evidence of guilt.)

To summarize some of the evidence against Appellant:

- ✓ Text messages showed Appellant invited the victim to his grandma's property that day.
- ✓ Appellant admitted to law enforcement he had met the victim there.
- ✓ Appellant was angry with the victim and told Sylvia he wanted to fight him. Motive.
- ✓ Text messages show Appellant conspired with Michael to ambush the victim.
- ✓ Appellant was seen on the Lowe's surveillance video buying spray paint.
- ✓ He spray painted the victim's car at his grandma's house then parked it at his apartment.
- ✓ He gave wildly conflicting stories about why he had the victim's vehicle.
- ✓ The victim's driver's license was found inside Appellant's apartment.
- ✓ He was found in possession of the murder weapon.

This Court should affirm.

II. The State concedes Judge Gibbons issued an illegal sentence for possession of a weapon during the commission of a violent crime.

Appellant argues the trial judge erred under S.C. Code § 16-23-490 by sentencing Appellant to five concurrent years for possession of a weapon during the commission of a violent crime when he also sentenced Appellant to life in prison for murder. The State concedes this was an illegal sentence, and that under *State v. Plumer*, this Court may either correct the issue itself or remand to the trial court for it to correct the issue, even though the issue was not raised to the trial court. *State v. Plumer*, 439 S.C. 346, 350-351, 887 S.E.2d 134, 137 (2023).

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, convictions, and sentences (with exception of the 5-year possession of a weapon sentence) of the lower court be affirmed, and requests that this Court fix the 5-year possession of a weapon sentence on its own without a remand.

Respectfully submitted,

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