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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Hampton County

Honorable Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JARVISE TERRELL JENKINS,

APPELLANT

APPELLATE CASE NO. 2023-000197

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in allowing six different witnesses to testify about prior difficulties between Appellant and the deceased including testimony that the relationship was toxic, testimony about physical violence, to include a prior choking of the deceased, stalking behavior, advice to the deceased to get a protective order, prior threats to kill the deceased, to include a copy of a threatening Facebook message from eight months prior, when, viewed together, the probative value of all of the prior difficulty testimony and evidence was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE?

2. Did the trial judge err in admitting testimony that Appellant choked and threatened to kill another woman when the State failed to establish a logical connection between the other testimony and the crime charged such that the evidence of other testimony reasonably tended to prove a material fact in issue as required by Rule 404(b)?

3. Did the trial judge err in admitting testimony that during the course of Appellant choking and threatening to kill another woman he asked if she thought this was the first time he had done this when the testimony did not meet the identity exception to Rule 404(b)?

STATEMENT OF THE CASE

In April of 2021, the Hampton County Grand Jury indicted Appellant, Jarvise Terrell Jenkins, for murder, indictment #2019-GS-25-00536. (R. p. 339). On January 30, 2023, Appellant proceeded to jury trial before the Honorable Edward W. Miller. Courtney A. Gibbs represented Appellant at trial. Hunter P. Swanson prosecuted the case. The jury returned a verdict of guilty. Judge Miller sentenced Appellant to fifty (50) years in prison. A timely notice of intent to appeal was served on February 6, 2023. This appeal follows.

STANDARD OF REVIEW

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "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." Whitner, 399 S.C. at 557, 732 S.E.2d at 866.

In order to admit evidence of bad acts not resulting in conviction, the trial court must, "[a]s a threshold matter, ... determine whether the proffered evidence is relevant." Clasby, 385 S.C. at 154, 682 S.E.2d at 895; "If the trial judge finds the evidence to be relevant, the judge must then determine whether the bad act evidence [is admissible under the terms] of Rule 404(b)." Clasby, 385 S.C. at 154, 682 S.E.2d at 895. If the testimony is relevant and proffered for a permissible purpose, the trial court must next conduct a balancing test, pursuant to Rule 403; where the testimony's probative value is substantially outweighed by the danger of unfair prejudice, the trial court may exclude it. See State v. Gillian, 373 S.C. 601, 611, 646 S.E.2d 872, 877 (2007); see also Rule 403, SCRE ("[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ...").

ARGUMENTS

1. **The trial judge erred in allowing six different witnesses to testify about prior difficulties between Appellant and the deceased including testimony that the relationship was toxic, testimony about physical violence, to include a prior choking of the deceased, stalking behavior, advice to the deceased to get a protective order, prior threats to kill the deceased, to include a copy of a threatening Facebook message from eight months prior, when, viewed together, the probative value of all of the prior difficulty testimony and evidence was substantially outweighed by the danger of unfair prejudice.**

The jury found Appellant guilty of the murder of his recent ex-girlfriend, Anelia Garvin. In the early morning of December 5, 2018, Ms. Garvin was found strangled to death in her tub in the home where she lived with her grandfather and aunt. A cigarette butt with Appellant's DNA was found in the tub. (R. p. 78, lines 21-25; R. pp. 269-270). An expert in historical cell site analysis testified that based on the records he reviewed, there was no information from Appellant's phone between 1:46 AM and 4:37 AM on December 5, 2018. (R. p. 238, lines 9-17). There was no other forensic evidence linking Appellant to the death of Ms. Garvin. The remainder of the State's case against Appellant was based on prior difficulties between Appellant and the deceased and a subsequent incident and statement discussed in issue two.

Prior to trial Appellant moved to exclude prior bad acts or prior difficulties involving the deceased to include prior stalking behavior and propensity evidence as to domestic violence from family members and friends. (R. pp. 24-26). The State outlined some of the testimony sought, including testimony about threats and prior physical violence. (R. pp. 26-28). Appellant specifically objected to the testimony of Kimberly Williams that Appellant threatened to kill the deceased a few days prior to her death. (R. p. 34, lines 4-17). Counsel for Appellant noted, "What concerns me is this quickly can become a propensity case where they're going to all testify, they don't like him, he was a bad boyfriend, he was violent without specific, you know. . . " (R. p. 37, lines 10-13). The judge denied the motion to exclude the evidence and testimony

about the prior difficulties between Appellant and the deceased, including acts of violence, threats, and stalking, stating, "Well, we'll have to, you know, it's hard to make a definitive ruling at this stage. Thank you all for alerting me to it, but from what I've heard so far, I would be inclined to allow some limited, brief incident factual background . . . ." (R. p. 37, lines 14-18). The testimony and evidence introduced by the State, however, was not limited, brief incident factual background.

The State called six witnesses who testified about prior difficulties between Appellant and the deceased. Brian Townsend, the manager of Love's Travel Center in Yemassee where the deceased worked testified without objection that, "I gave her advice that if she felt that way, she needed to have a protective order, and that she possibly didn't need to go home if she didn't feel safe doing that." (R. p. 116, lines 12-14). Alexis Williams, a cousin of the deceased testified, without objection, that Appellant and the deceased fought a lot. (R. p. 120, lines 2-10). She testified that, "I told Anelia to, you know, call somebody, like, because this was getting out of range. Like, he would keep following us. So she called out –" (R. p. 123, lines 21-23). Counsel for Appellant renewed the prior objection to this testimony. (R. p. 124, lines 1-2). The judge stated, "Okay. Same ruling. Go ahead." (R. p. 124, line 3). The witness testified that she had seen Appellant follow the deceased before. (R. p. 124, lines 17-20).

Mariah Boles, a friend of the deceased, testified that she had seen Appellant get violent with the deceased in the club stating, "If something got out of hand between the two he would grab her up, but - -" (R. p. 129, lines 13-15). Counsel for Appellant renewed the prior objection. (R p. 129, lines 17-18). The judge stated, "Same ruling." (R. p. 129, line 19). Kimberly Williams, a cousin of the deceased, testified, without objection, that the relationship between Appellant and the deceased was "toxic." (R. p. 142, line 7). She testified that Appellant was

controlling, would take the deceased's phone, would follow the deceased and was jealous. (R. p. 142, lines 8-17). When asked if she saw Appellant get physical with the deceased, counsel for Appellant renewed the prior objection. (R. p. 143, lines 8-11). The judge stated, "Same ruling." (R. p. 143, line 12). Kimberly Williams testified that she witnessed Appellant choke the deceased. (R. p. 143, lines 14-21). Williams testified that she saw bruises on the deceased's face, neck, and arms. (R. p. 143, lines 22-25). She testified that Appellant followed the deceased countless times when Williams was in the car with her. (R. p. 144, lines 1-12).

The prosecutor asked Williams about a phone call she received in the early morning of December 2, 2018, from the deceased. (R. p. 145, lines 1 - 17). Counsel renewed the prior objection. (R. p. 145, lines 18-19). The judge stated, "Same ruling." (R. p. 145, line 20. Williams testified that she heard Appellant over speaker phone tell the deceased that ". . . he was going to kill her, she wasn't going anywhere, and she was his bitch." (R. p. 146, lines 12-15). The prosecutor asked the witness to review her statement and she then testified that she heard Appellant say to the deceased, "Yes. I'll kill you, bitch. You're not leaving. Here is the death do us part, you might get :12." (R. p. 146, lines 20-21).

Prior to calling the next witness, Erica Davenport, the prosecutor alerted the judge about a message sent to the witness from "Rico" eight months prior to the murder. (R. p. 150, lines 5-20). The prosecutor told the judge, "He messaged her about Anelia under the name Ricco [ph], and that's how she knew him. And he referenced wanting to choke her till her head fell off." (R. p. 150, lines 17-20). Counsel for Appellant objected to the admission of the message. (R. p. 150, line 22 – p. 151, 152, 153, lines 1-17). The judge ruled, "Well, I think we're just going to have to see how the testimony goes. I just need to think about it a little bit. It's close. How many witnesses – I understand you have five more today?"

Erica Davenport testified that she and the deceased were life-long friends. (R. p. 155, lines 8-20). When asked if she had ever seen Appellant and the deceased fighting she answered, "I never seen them fight, but I do remember when she came to the house one day with a black eye, and it came from him, and I remember myself putting makeup around her eye." (R. p. 157, 1-3). The prosecutor asked Davenport about copies of messages marked as State's exhibits #28, and #29. (R. p. 157, line 12 – p. 158, 159, lines 1-8). Davenport identified the messages as being sent to her from Appellant. (R. p. 158, line 22 – p. 159, lines 1-8). The State moved to admit the messages marked as State's exhibits #28, and #29. (R. p. 159, lines 9-10). Counsel for Appellant objected. (R. p. 159, lines 11-20). The judge ruled, "Well, I'm going to let it in for what it's worth." (R. p. 159, lines 21-22). Davenport read the message thread to the jury as follows, "It starts with, LOL, wow. And it says [indiscernible] why? And it says, Cause she just done too much. Drama pool. I want to choke her until her head fall off. Laughing my – off. And I said, Don't do that. And he said, I'm not. She's done calling :12. And I said, I thought – I can't see the J's part –was coming to issue." (R. p. 160, lines 11-16; R. pp. 335-338).

Stephanie Garvin, who is not related to the deceased but worked with her at Love's Travel Center, testified, without objection, that they had to ask their manager to tell Appellant to leave Love's where he had backed his car in next to the deceased's car. (R. p. 164, line 11 – p. 165, lines 1-16). The prosecutor then asked the witness about the relationship. (R. p. 166, line 2). The witness testified that, "It was rocky, very, very rocky." (R. p. 166, line 3). She testified that she had seen Appellant and the deceased fight verbally and physically. (R. p. 166, lines 4-7). When asked about physical violence the witness testified, "One night we was coming from – we was leaving the club and we was on our way home, and J.T. chased us halfway out of Walterboro, almost up to Sniders, and he ran us off the road. And when he ran us of the road, he

got out of the car and busted the window out of the car. And we had to rush – come back and rush Anelia to the hospital." (R. p. 166, lines 11-16). Counsel for Appellant renewed the prior objection. (R. p. 166, lines 17-18). When asked if the deceased was upset on the last night they worked together the witness testified, "No, she was actually perfectly fine. Everything was going by smoothly at work. We was just trying to get this rush down because we was working at a truck stop. But J.T. was sitting in the parking lot for like a good three hours. And we was ready to go, so when she started getting panicky and nervous, it's because he wouldn't leave, because she texted him to leave and go." (R. p. 167, lines 4-10).

The trial judge erred in failing to limit the prior difficulty testimony and evidence, as stated at the conclusion of the pre-trial hearing. (R. p. 37, lines 14-18). Rule 403, SCRE, provides, "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." The probative value of all the prior difficulty testimony and evidence presented by the State, when viewed together, was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE.

In State v. Perry, 430 S.C. 24, 44, 842 S.E.2d 654, 665 (2020), the South Carolina Supreme Court wrote:

> The State must also convince the trial court that the probative force of the evidence when used for this legitimate purpose is not substantially outweighed by the danger of unfair prejudice from the inherent tendency of the evidence to show the defendant's propensity to commit similar crimes. Rule 403, SCRE. Whether the State has met its burden "should be subjected by the courts to rigid scrutiny," considering the individual facts of and circumstances of each case. 125 S.C. at 417, 118 S.E. at 807.

Under rigid scrutiny, considering the individual facts and circumstances of this case and the cumulative effect of all of the prior difficulty testimony and evidence admitted, the State failed to meet its burden. The probative value of the combined evidence and testimony is substantially outweighed by the danger of unfair prejudice from the inherent tendency of the evidence to show Appellant's propensity to commit the crime charged. As the South Carolina Supreme Court wrote in State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007), "The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case. State v. Bell, 302 S.C. 18, 393 S.E.2d 364, *cert. denied,* 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990)."

In Gillian the Court found that evidence of the burglary of a Dems jewelry store was admissible to show identity. The Court, however, cited Rule 403, SCRE, and wrote, "The amount of evidence regarding the specifics of the Dems burglary was unnecessary." Gillian, 373 S.C. at 609, 646 S.E.2d at 876. As in Gillian, the amount of evidence of prior difficulties between the Appellant and the deceased in the present case was unnecessary. The amount of prior difficulty evidence in the present case tipped the scales in the Rule 403 analysis such that the probative value was substantially outweighed by the danger of unfair prejudice. Unlike Gilliam, the admission was not harmless as there was not overwhelming evidence of guilt. The trial judge abused his discretion in admitting all of the prior difficulty testimony.

2. **The trial judge erred in admitting testimony that Appellant choked and threatened to kill another woman when the State failed to establish a logical connection between the other testimony and the crime charged such that the other testimony reasonably tended to prove a material fact in issue as required by Rule 404(b).**

Prior to trial, in addition to moving to exclude the prior difficulties between Appellant and the deceased, counsel also moved to exclude testimony from April Cook. (R. p. 28, line 5 - p. 29, 30, 31, 32, 33, lines 1- 22). Although Ms. Cook was present in the courtroom (R. p. 28, lines 5-6; p. 29, lines 2-3), the State, instead of proffering her testimony, summarized her testimony. The prosecutor advised the judge that after the death of Anelia Garvin, Appellant and Cook became romantically involved. (R. p. 28, lines 5-11). The prosecutor told the judge that Cook would testify that Appellant was controlling and abused her, both verbally and physically. (R. p. 28, lines 12-16). The prosecutor noted that Cook reported an incident to law enforcement and claimed that while Appellant was choking her, he threatened to kill her and asked her if she thought this was the first time he had done this. (R. p. 28, lines 15-25).

The prosecutor characterized the testimony of Cook as a mixture of Rule 404(b), meeting the common plan or scheme exception, and a statement against interest meeting the identity exception to Rule 404(b)[1]. (R. p. 29, lines 3-12). Counsel for Appellant objected to the admission of Cook's testimony. (R. p. 29, line 13 – pp. 30 – 33). The judge asked, "I understand it's been said that his conduct with the deceased victim before and at the time of death is similar to his conduct with this other lady, which did not result in homicide, am I right?" (R. p. 30, lines 3-6). Counsel for Appellant argued that Cook's testimony did not meet the common scheme or plan exception to Rule 404(b). (R. p. 31, lines 4-6). The judge disagreed

[1] The identity exception is discussed below in issue three.

stating, "Just based on what the State has told me, it sounds like it does. And it's certainly prejudicial, no doubt about that." (R. p. 31, lines 7-9).

Counsel for Appellant argued that Cooks' testimony was not probative but the judge noted, "It's pretty, well, it's probative, you know that. You're just saying that the prejudice outweighs the probative value, and I'm, I don't know. The admission that he's done it before, I'm going to kill you, I've done it before, that's very, very probative, it's also very, very prejudicial." (R. p. 31, line 21 – p. 32, lines 1-2). The judge ruled, without requiring the State to proffer the testimony of Cook, stating, ". . . and it sounds to me like Ms. Cook would be, her testimony at this point to me sounds like it is admissible." (R. p. 37, lines 18-19). The trial judge erred in finding Cook's testimony met the common scheme or plan exception to Rule 404(b).

At trial Cook testified about the first incident of physical violence by Appellant telling the jury, "I told him he upset me talking through the door. And he wedged through the door, grabbed me on the top of my head and started beating me in my face." (R. p. 201, line 23 – p. 202, line 1). Counsel for Appellant renewed the prior objection. (R. p. 202, lines 2-4). The judge stated, "Okay. Same ruling, thank you." (R. p. 202, line 5).

Cook then testified about an incident on September 16, 2019. Cook testified that Appellant told her she made him feel like less of a man and he came in the room and punched her in the face. (R. p. 203, lines 13-21). Cook testified:

> At the time I just found out I was pregnant. By that time I was almost five months. And I turned over on my stomach – when he hit me in my face he jumped on top of me, he was choking me. So I turned on my stomach to get him off of me, and he grabbed me from behind, and he drug me off the bed. I had two chihuahuas, my girl jumped in front of me to protect my stomach. And he stood over me and almost like he was drooling from the mouth. He wasn't himself, he was very distorted. And he told me that – I told – he promised me he would never hit me when I was pregnant. That was an agreement that we made because the

> abuse was throughout the relationship. And I was telling him, "You said you would never hit me while I was pregnant." And he said, "You think this is the first time I did this? You think this is the first time? I'm trying to figure out right now what's," he said, "I'm trying to figure out right now how to get your body back to Walterboro.

(R. p. 203, line 20 – p. 204, lines 1-14). Cook testified that Appellant threatened to kill her and her mother and that he had a butcher knife. (R. p. 204, line 15 – p. 205, lines 1-5). Cook also testified that before Appellant could be arrested for assaulting her he took her dog and "would video him beating the dog." (R. p. 208, lines 1-11). Counsel for Appellant objected. (R. p. 208, lines 12-13). The judge sustained the objection stating, "Yeah, that's - - that's over the top." (R. p. 208, lines 14-15). The judge then instructed the jury to disregard the testimony. (R. p. 208, lines 12-19). The judge should have required the State to proffer Cook's testimony pretrial to allow the judge to hear the 404(b) testimony and avoid admission of Cook's "over the top" testimony. The judge erred in admitting Cook's 404(b) testimony.

Rule 404(b) of the South Carolina Rules of Evidence provides, "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. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." The State argued that Cook's testimony about the choking met the common scheme or plan exception to Rule 404(b). (R. p. 29, lines 6-8). The judge stated, during pretrial, that Cook's testimony appeared to meet the common plan or scheme exception. (R. p. 31, lines 4-9). The judge erred. Cook's testimony about Appellant choking her and threatening to kill her did not meet the common plan or scheme exception to Rule 404(b).

In State v. Perry, 430 S.C. 24, 44, 842 S.E.2d 654, 664–65 (2020), the South Carolina Supreme Court wrote:

> As we said in Lyle, "Whether evidence of other ... crimes properly falls within any of the recognized exceptions ... is often a difficult matter to determine." 125 S.C. at 416-17, 118 S.E. at 807. Rule 404(b) of our Rules of Evidence provides, "Evidence of other crimes, wrongs, or acts ... may ... be admissible to show ... the existence of a common scheme or plan ...." The trial court's standard for making this determination is the Lyle "logical connection" test. The State must demonstrate to the trial court that there is in fact a scheme or plan common to both crimes, and that evidence of the other crime serves some purpose other than using the defendant's character to show his propensity to commit the crime charged.
>
> Similarity can be important to meeting that burden, but as we held in Lyle and in all our decisions for over eighty years afterward, there must be more. The State must show a logical connection between the other crime and the crime charged such that the evidence of other crimes "reasonably tends to prove a material fact in issue." 125 S.C. at 417, 118 S.E. at 807.

During the pretrial motion to exclude Cook's testimony, the State discussed the similarities between the two relationships and the assaults on both women. (R. p. 32, line 21 – p. 33, lines 1-3). A similar relationship and a similar assault, however, is not sufficient. The State failed to establish the "logical connection" required for admission of the testimony. Cook's testimony was inadmissible propensity evidence. As noted in Perry:

> In any criminal case, however, evidence the defendant committed similar criminal acts has the inherent tendency to show this propensity. In the words of Rule 404(b), it "prove[s] the character of [the] person" and "shows[s] action in conformity" with that character. We discussed this tendency in State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). We stated, "Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty," and, "Its effect is to predispose the mind of the juror to believe the prisoner guilty." 125 S.C. at 416, 118 S.E. at 807. We described this type of evidence as having "the inevitable tendency ... to raise a legally spurious presumption of guilt in the minds of the jurors." 125 S.C. at 417, 118 S.E. at 807; see also 125 S.C. at 420, 118 S.E. at 808 (stating "such evidence strongly tends to induce the jury to believe that, merely because the defendant was guilty of the former crimes, he was also guilty of the latter"). Thus, evidence of a defendant's other crimes serves the prohibited purpose of showing he has a propensity to engage in criminal behavior.

430 S.C. at, 30, 842 S.E.2d at 657. The State failed to show that Cook's testimony about Appellant choking her and threatening to kill her served a legitimate purpose other than to just show bad character. The trial judge erred in admitting Cook's testimony. The error was not harmless.

Bad character evidence that is otherwise admissible under Rule 404(b) is still subject to the balancing test under Rule 403. State v. Garner, 304 S.C. 220, 403 S.E.2d 631 (1991). Under Rule 403 of the South Carolina Rules of Evidence, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013). Cook's testimony was not admissible under Rule 404(b). Alternatively, if this Court finds the State proved the testimony served some legitimate purpose, the probative value of Cook's testimony is substantially outweighed by the danger of unfair prejudice. During the pretrial motion to exclude the trial judge properly noted the highly prejudicial nature of Cook's testimony stating, "And it's certainly prejudicial, no doubt about that." (R. p. 31, lines 7-9). Although the judge instructed the jury to disregard Cook's testimony about Appellant beating her dog, the jury heard this highly inflammatory and prejudicial testimony in addition to Cook's testimony about the choking and threatening to kill. The State failed to establish the "logical connection" required for admission of Cook's testimony about the choking and threatening to kill. Cook's testimony was inadmissible propensity evidence. The trial judge abused his discretion in admitting Cook's testimony. The error is not harmless.

3. **The trial judge erred in admitting testimony that during the course of Appellant choking and threatening to kill another woman he asked if she thought this was the first time he had done this when the testimony did not meet the identity exception to Rule 404(b).**

In addition to Cook's testimony that Appellant choked her and threatened to kill her, counsel for Appellant also objected to her testimony that during the course of the assault Appellant asked if she thought this was the first time he had done this. (R. p. 29, line 20 – pp. 30-31). The State argued Cook's testimony about an alleged statement was admissible as a statement against interest meeting the identity exception to Rule 404(b). (R. p. 29, lines 8-10). The judge noted, "The admission that he's done it before, I'm going to kill you, I've done it before, that's very, very probative, it's also very, very prejudicial." (R. p. 31, line 23 – p. 32, lines 1-2). The judge did not have the benefit of Cook's testimony because the State did not proffer her testimony pretrial. Cook's trial testimony was somewhat different than what the judge stated.

At trial Cook testified that during the course of an assault Appellant said, "You think this is the first time I did this? You think this is the first time?" (R. p. 204, lines 10-12). She also testified that he said, "I'm trying to figure out right now how to get your body back to Walterboro." (R. p. 204, lines 13-14). As discussed above, bad act testimony should be viewed with scrutiny based on the potential danger that the testimony only shows propensity without some legitimate purpose. While identity is a legitimate purpose, in the present case the State failed to show that Cook's testimony identified Appellant as committing the murder of Garvin.

Again, Rule 404(b) of the South Carolina Rules of Evidence provides, "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. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Cook's

testimony about Appellant's alleged statement is easily distinguished from the evidence found admissible in State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), to refute the alibi defense. While identity was an issue in the Garvin murder case, the purported statement to Cook asking if she believed this was the first time Appellant had done this is not sufficient to show Appellant committed the Garvin murder.

Cook's testimony about the statement did not meet the identity exception to Rule 404(b). Even if this Court finds the State showed that the testimony somehow showed identity, its probative value is substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE. Like Cook's testimony about the choking and threatening to kill, Cook's testimony about the statement was inadmissible propensity evidence. The trial judge abused his discretion in admitting Cook's testimony. The error is not harmless.

CONCLUSION

Based on the above arguments, this Court should reverse the conviction and remand for a new trial.

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ATTORNEY FOR APPELLANT

This 18th day of March, 2024.

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SC Court of Appeals

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 April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 18th day of March, 2024.

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