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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Walton J. McLeod, IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MORGAN DAYLE CARR,

APPELLANT

APPELLATE CASE NO. 2023-000733

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court erred in refusing to grant a mistrial based on testimony that Appellant had previously stolen Decedent's Durango, where Appellant was on trial for the murder of Decedent and the theft of his Altima, since Rule 404(b), SCRE prohibits the admission of evidence of other crimes, wrongs, or acts to show propensity?

II. Whether the trial court erred in admitting evidence of prior bad acts contained in the Facebook messages, regarding Decedent's Jeep, where Appellant was on trial for the murder of Decedent and the theft of his Altima, since the evidence should have been excluded pursuant to Rule 404(b), SCRE?

III. Whether the trial court erred in admitting Facebook messages, where the State offered the messages pursuant to the business records exception to the hearsay rule, since the State did not lay the required foundation?

STATEMENT OF THE CASE

On March 11, 2019, a Lexington County Grand Jury indicted Morgan Carr (Appellant) for murder and armed robbery. R. *(indictments). Appellant proceeded to trial before the Honorable Walton J. McLeod, IV, and a jury, from April 24 – 28, 2023. Appellant was represented by Anna Yonge and Theo Williams. Sutania Fuller, Robert McNair, and Dante Esposito prosecuted the case. Tr. 1. Appellant was convicted as indicted, and she was sentenced to serve concurrent terms of forty years for murder and thirty years for armed robbery. R. *(sentence sheets); Tr. 953, l. 24 – 954, l. 16.

This appeal follows.

STANDARD OF REVIEW

The standard of review for all the issues is abuse of discretion. The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*; *see also State v. Brockmeyer*, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

A trial judge's decision denying a mistrial will be reversed on appeal if the denial amounts to an abuse of discretion. *State v. Rowlands*, 343 S.C. 454, 458, 539 S.E.2d 717, 719 (Ct. App. 2000). "Whether a mistrial is manifestly necessary is a fact specific inquiry. It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge." *Id.* at 457–58, 539 S.E.2d at 719 (internal quotations and citations omitted). Although the decision to grant or deny a mistrial is within the sound discretion of the trial court, the appellate court must reverse the ruling if the decision was an abuse of discretion amounting to an error of law. *State v. Dial*, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) (citing *State v. Wiley*, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010).

STATEMENT OF FACTS

Crime

At approximately 11:20 p.m. on July 11, 2018, Robert All, Jr. (Decedent) was shot and killed on Toole Smith Road, a dirt road in Swansea. The rental car that was being driven by Decedent, a silver Nissan Altima, was stolen. Tr. 210, l. 21 – 214, l. 20; Tr. 389, l. 9 – 392, l. 1; Tr. 204, l. 16 – 207, l. 5; Tr. 366, ll. 15-18; Tr. 153, l. 9 – 154, l. 16; Tr. 221, ll. 2-4. Three people were charged with the armed robbery and murder of Decedent: Appellant, Charlie "Corey" Robinson, III (Corey), and Robin Cunningham (Cunningham). Tr. 222, l. 22 – 7; Tr. 712, ll. 4-5. Appellant was romantically involved with Corey. Tr. 274, l. 9 – 275, l. 2. She had previously been romantically involved with Decedent. Tr. 386, l. 6 – 387, l. 19.

Appellant, Corey, Cunningham, and Decedent were together in the rental car just prior to Decedent's death. R. *(State's Exhibit #1). The State alleged Appellant got Decedent to give them a ride so that they could steal the rental car to give to a drug dealer, Theresa Wilson (Wilson). Wilson had already taken Appellant's mother's van in exchange for drugs, and the van was parked at Wilson's house on Toole Smith Road. The State alleged Appellant and Corey wanted to swap out Decedent's Altima for the van. Wilson stated the night of July 11, 2018, Appellant, Corey, and two other men pulled up to her house in a small car, with Corey in the back seat and Appellant in the front passenger seat. Wilson claimed that while she was speaking with Corey, Appellant got out of the car, came up to them, and told Wilson: "We'll be back with the car." After the car pulled off, Wilson heard gunshots. Tr. 273, l. 16 – 282, l. 22.

Jimmy Jeffers, Jr., and his fiancée, Melissa Henderson, also lived on Toole Smith Road. They were watching television when they heard gunshots. They looked out the window and saw a car. Jeffers and Henderson claimed they saw the silhouettes of more than one person running in

front of the headlights of the car. The car sat there for a minute and then "took off." Jeffers went out to the road and found Decedent's body in the road. Jeffers called 911. Tr. 153, l. 11 – 161, l. 21; Tr. 189, l. 2 – 197, l. 1. Decedent had been shot four times in the back, with the fatal shot entering the back of Decedent's head. Tr. 298, l. 24 – 305, l. 24. However, law enforcement found Decedent's body face-up in the road. Tr. 206, ll. 13-15. Decedent's car was missing, and he had no wallet on him. Tr. 206, l. 16 – 207, l. 5. Corey was seen driving Decedent's car the day after the murder and law enforcement zeroed in on him as a suspect. Tr. 349, l. 14 – 351, l. 23.

Corey's brother, Matthew Robinson (Matthew), claimed Appellant and Corey were dropped off at his home by Decedent the day before the killing. Matthew claimed he heard Appellant tell Corey that she wanted Corey to "beat up" Decedent and take his car. Matthew claimed he saw Appellant, Corey, Cunningham, and another man, Tim Watford, in the early morning hours of July 12, 2018, and they were in Decedent's car, but Decedent was not with them. Matthew claimed Corey seemed "distraught," and had a gun on his lap, but Appellant seemed "happy." Matthew's fiancée, Alaina Williams, also claimed she saw Appellant and Corey on July 12, 2018, and Appellant seemed happy while Corey seemed depressed. Tr. 445, l. 14 – 455, l. 7; Tr. 467, l. 9 – 468, l. 10.

Appellant was interrogated by law enforcement. Initially, she said she had not seen Decedent since he left to go to Carmax the evening before, around 8:00 or 9:00 p.m. Tr. 218, l. 12 – 221, l. 4. However, during a subsequent interrogation, Appellant admitted that after Decedent returned from Carmax, she left with Decedent, Corey, and Cunningham in Decedent's Altima. They went out to Toole Smith Road. Appellant admitted she knew Corey wanted to take Decedent's car but was "adamant" she had nothing to do with the robbery or shooting. Appellant stated Corey pointed a gun at Decedent and told him he was taking the car. Corey got out, talked

to someone at Wilson's house, got back in the car, and they pulled off. After they had driven just a short way, Appellant stated Corey ordered Decedent out of the car and shot him. Corey got back in the car, fired more shots at Decedent, and drove off. Appellant also stated Corey stole Decedent's wallet and got the key fob out of Decedent's pocket. R. *(State's Exhibit #1); Tr. 480, l. 6 – 490, l. 14.

However, according to the pathologist, Decedent's body being found face-up was not consistent with him being shot (in the back) from a car, since he could not have rolled over after the fatal shot. Tr. 308, l. 17 – 309, l. 21. Decedent's driver's license was found in the drawer of a tool chest in Appellant's bedroom. Tr. 361, ll. 7-25.

Corey had already pleaded guilty to these crimes and been sentenced to forty years. Tr. 223, ll. 9-11; Tr. 249, ll. 1-10. Corey testified during the defense's case in chief and stated Appellant and Cunningham were unaware he was going to rob or kill Decedent. Corey further testified he threatened Appellant and Cunningham at gunpoint afterwards. Tr. 715, l. 17 – 716, l. 23. The State impeached Corey with testimony from Officer Miller that Corey told law enforcement Appellant and Cunningham had talked about robbing Decedent earlier in the day. Tr. 797, l. 18 – 801, l. 2.

Mistrial

Relevant to Issue I, while Appellant's roommate, Meghan Carter (Carter), was being directly examined by the prosecutor the following exchange occurred.

Q. Now, prior to Robert's death, had you had any conversations with Morgan Carr about Robert's vehicle?

A. *The one that she had already stole? The Dodge and then the new one?*

Q. No. About the rental car.

Q. Yeah, the rental car.

Tr. 404, l. 22 – 405, l. 3 (emphasis added). Defense counsel objected and moved for a mistrial based upon this testimony.

> "Your Honor, the defense would move for a mistrial. The jury has, again, been tainted. They have—the solicitor elicited comments from the witness that she had previously stolen a vehicle. There is no grounds, foundation, any—like its completely outside the scope of anything that we have seen so far, your Honor, and I believe that it is, considering we are here for the armed robbery of a vehicle, ridiculously prejudicial.

Tr. 405, ll. 17-25.

The prosecution initially responded by saying it did not intend to elicit information about a prior theft. However, the prosecutor also argued that since it intended to introduce Facebook messages that showed Appellant wanted to steal Decedent's Jeep, "it goes towards her plan and her intent to steal Robert All's vehicle, whether it be a vehicle he drove previously or the vehicle at issue in this case." The prosecutor further stated the court should give a curative instruction. Tr. 406, ll. 3-23. Defense counsel responded the evidence was "prior bad acts" evidence and cited to *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). Counsel objected to a curative instruction, arguing the testimony was "a giant bell rung in front of the jury, and I don't think you can unring that with a curative instruction when she is on trial for the armed robbery of the victim's car." Tr. 407, ll. 2-25.

The court found the evidence was not *Lyle* evidence because the prosecutor did not intentionally elicit it. Tr. 407, ll. 12-14. The court ruled that it would not grant a mistrial at the moment because it needed to see what other evidence was admitted during the trial to determine whether prejudice from the testimony would deny Appellant a fair trial. "I'm not going to grant the mistrial at this time, but I certainly—I'm—would not deny it either. In essence, I'm going to

let them revisit that." Tr. 408, ll. 10-25. Carter went on to claim that Appellant had told her she and Corey were going to get Decedent's car because they "needed a ride." Tr. 410, ll. 16-23. Decedent's mother testified that his Dodge Durango had been stolen and totaled. After that, Decedent drove the Jeep. (And then the Altima.) Tr. 426, l. 23 – 427, l. 23.

At the close of the State's case in chief, Appellant renewed her mistrial motion. Defense counsel argued the Dodge Durango was a car that was driven by Decedent and stolen, and "we are here on an armed robbery charge with regards to a car." "[I]t is highly prejudicial, and I don't believe there's a way to cure it effectively." Although the State argued the evidence was similar to the Jeep evidence which went to a plan pursuant to *State v. Beck*, 342 S.C. 129, 536 S.E.2d 679 (2000), defense counsel noted the purported plan was to the Jeep, not the Durango. "It was not a plan regarding the Durango. It was in fact, a plan regarding the Jeep, and so that sets this up as an additional bad act where she has stolen some other vehicle[.]" Defense counsel argued that a plan to steal something was different from Carter's testimony that Appellant had simply stolen the Dodge Durango. The court denied the mistrial motion but stated it would give a curative instruction. Tr. 701, l. 3 – 704, l. 16. The court did not give a curative instruction.

Facebook records

Relevant to Issues II and III, a large part of the State's case consisted of Facebook messages between Appellant and others. A number of Facebook records were entered without objection: the State entered Facebook messages between Appellant and her roommate Meghan Carter during Carter's testimony. This included a message on July 10, 2018, from Appellant to Carter stating: "Corey wants the 25," which the State claimed was evidence of Appellant trying to procure a gun. Tr. 411, l. 15 – 422, l. 6. The State entered Facebook messages between Appellant and Decedent's mother, Michelle Bear, during Bear's testimony. This included a

message on July 12, 2018, from Appellant to Bear which stated Appellant last saw Decedent the night before around 10:00 p.m. Tr. 429, l. 14 – 434, l. 5. The State also entered Facebook messages between Appellant and Courtney Kenyon during Kenyon's testimony. This included a message on July 12, 2018, from Appellant to Kenyon which stated Decedent's death was the result of a bad drug deal. Tr. 435, l. 25 – 441, l. 15. The State also entered Facebook user records it purported were the user records of: Appellant, Corey, Cunningham, Tim Watford, and Decedent. These records contained information associated with various accounts, including "target numbers" (numeric account identifiers), email addresses, phone numbers, usernames, and the dates the accounts were created. However, no one connected the dots: no one testified that these birth dates, phone numbers, or numeric identifiers belonged to those actual people, and no one from Facebook testified. Instead, Officer Sherban (Sherban) testified he got a search warrant for Facebook records.[1] *See* State's Exhibits #51 – 59; Tr. 500, l. 18 – 517, l. 6.

Many Facebook records were admitted over objection: State's Exhibits #60 – 69; #71 – 80; and #82. These consisted of messages between Appellant and others. The State offered these records pursuant to S.C. Code Ann. § 19-5-520. Tr. 517, ll. 16-18. Some of the others were not people involved in the case, just people Appellant was texting innocuous things like "wyd" (i.e., What are you doing?) or messages regarding tattooing (Appellant was a tattoo artist). Tr. 275, ll. 22-24. These messages were State's #60 – 64 and #66: messages between Appellant and "Chad Crawford," Appellant and "Shaun Shearer," Appellant and "Dupree Livingston," Appellant and "Patrick Gottem Hating Jeffcoat," Appellant and "Spencer Branham," and Appellant and "Opie Taylor," and were from July 11 – 12, 2018. State's Exhibits #60 – 64 and #66. Appellant objected

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[1] Sherban explained the records displayed "UTC" time, which was four hours different from our time zone. "So you have to subtract four hours from everything that you see in there." Tr. 511, l. 15 – 512, l. 2.

to these records as hearsay, and objected to a lack of foundation. Appellant conceded that her own statements were admissible, but argued the responses purportedly by the others (Jeffcoat, Shearer, Crawford, Livingston, Branham, Taylor) were inadmissible. Appellant argued that none of these persons were present in court and there was no verification those people wrote the messages. Appellant noted people may use each other's Facebook accounts. The State argued the messages by the others were not offered for the truth of the matter asserted, just to show Appellant's activity online. The court overruled the objections. Tr. 517, ll. 19-21; 524, l. 11; Tr. 530, l. 9 – 531, l. 534, l. 9.

Other Facebook messages admitted over objection were messages between Appellant and others who were involved in the case. These messages were State's Exhibits #65; #67 – 69; #71 – 80; #82 (R. *): messages between Appellant and "Tim Watford," Appellant and "Robin Cunningham," Appellant and "Robert W All," Appellant and "Corey Robinson," Appellant and "Susan Powers." As to State's Exhibit #65, messages purported to be between Appellant and Tim Watford dated July 12, 2018, Appellant again objected to hearsay and foundation, arguing that the State had not shown the messages purported to be sent by "Tim Watford" were in fact written by Tim Watford. "We haven't had Tim Watford up here to even say what his handle was or that he had a Facebook or anything." One of the messages purportedly from Tim Watford stated: "You got the van?" R. *(State's Exhibit #65). The State argued the records were authenticated because they were business records, and again argued they were not offering the messages for the truth of the matter asserted. (The State further argued that since "You got the van?" was in the form of a question, it did not qualify as a "statement" under the hearsay rules. Unsurprisingly, the State cited no legal authority for this spurious argument. The prosecutor repeated this argument regarding additional exhibits.) The court cited to *State v. Green*, 427 S.C. 223, 830

S.E.2d 711 (Ct. App. 2019), and stated, "when it comes to social media and Facebook messages, proponent is offering it as—proponent offering the evidence made the point of it, is what they say it is. And, I mean, there's no doubt that these are Facebook records."[2] "And I suspect all of these texts we're going to end up with the same arguments . . . to the extent that you can argue they're statements, they aren't offered for a truth value. It's just showing that she was – the defendant was having these conversations at the time she was having them." The court admitted the exhibit. Tr. 524, l. 13 – 530, l. 8.

As to State's Exhibit #67, messages purported to be between Appellant and Robin Cunningham dated July 11 – 12, 2018, Appellant objected on the same grounds and the State made the same arguments in response. The State also argued State's Exhibit #56 authenticated this exhibit because it showed the account was Robin Cunningham's. These messages included a message purportedly from Cunningham saying he was "Here" a couple of hours before the murder. The court overruled the objections. Tr. 534, l. 10 – 541, l. 25; R. *(State's Exhibit #67).

As to State's Exhibit #68, messages purported to be between Appellant and "Robert W All" dated July 8, 2018 – July 12, 2018, Appellant made the same objections, but the exhibit was admitted. They included messages from the date of the murder such as: "Im at carmax waiting for Jordan to get done then im headed back," and "Im here." Tr. 542, l. 2 – 553, l. 21; R. *(State's Exhibit #68). The State wanted to enter messages only from July 10 – 12, 2018 in this exhibit, but after objecting to them, defense counsel requested that if the court overruled her objections, the State be required to include messages one and two days prior to those dates under the Rule of

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[2] Defense counsel stated she did not dispute these were "authentic Facebook records." However, counsel was simply conceding Officer Sherban got the records from Facebook. A fair reading of the record shows counsel repeatedly contested the records' authentication. Counsel made extensive arguments citing hearsay and foundation. Tr. 528, ll. 7-24.

Completeness (i.e., Rule 106, SCRE). The court admitted the messages dated July 8 – 12, 2018. Tr. 542, l. 2 – 553, l. 21. This was State's Exhibit #68.

As to State's Exhibit #69, messages purported to be between Appellant and "Corey Robinson" dated July 12, 2018, which included a message that stated, "I'm not gonna have a life to live I'm not going back to prison." Appellant objected pursuant to the same grounds and the court overruled the objections. Tr. 554, l. 10 – 555, l. 11; R. *(State's Exhibit #69).

As to State's Exhibit #74, messages purported to be between Appellant and "Susan Thomas Powers," dated June 25, 2018, Appellant objected on the same grounds and the court overruled the objections. This included a message, "You need to call me or I'm reporting the van stolen and I mean it." Tr. 613, l. 20 – 614, l. 4; R. *(State's exhibit #74).

As to State's Exhibit #75, messages purported to be between Appellant and "Corey Robinson," dated June 26 – 27, 2018, Appellant objected on the same grounds and the court overruled the objections. This included a message, "the van is safe it shouldn't be too much longer and I'll be getting released and I'll bring the van to you . . ." Tr. 613, l. 20 – 614, l. 4; R. *(State's exhibit #75).

As to State's Exhibit #77, messages purported to be between Appellant and "Tim Watford" dated July 29 – 30, 2018, Appellant objected on the same grounds and the court overruled the objections. This included the message, "What you mad at him?" referring to Decedent. Tr. 618, l. 18 – 620, l. 5; Tr. 645, ll. 16-25; Tr. 647, l. 15 – 651, l. 1; R. *(State's Exhibit #77).

As to State's Exhibit #79, messages purported to be between Appellant and "Robert W All" dated July 1 – 2, 2018, Appellant objected on the same grounds and the court overruled the objections. This exhibit included the message, "Why would I come over there when I know he

wants to steal the jeep?" and "I said the other day when you told me to come on an corey was there it felt like I was trying to be setup." Tr. 624, l. 14 – 626, l. 24; Tr. 645, ll. 16-25; Tr. 647, l. 15 – 651, l. 1; R. *(State's Exhibit #79).

As to State's Exhibit #82, messages purported to be between Appellant and "Corey Robinson," dated July 13, 2018, Appellant objected on the same grounds, and the court overruled the objections. This exhibit included the messages, "U told my baby momma that I killed him cause I was jealous," and "How im stuck hiding and you wad suppose to come get me last night." These records were taken from a phone extraction rather than a Facebook search warrant. State's Exhibit #81 was the extraction report. Tr. 683, l. 10 – 689, l. 12; R. *(State's Exhibit #82).

State's Exhibits #71 – 73; #76; #78; and #80 were the same messages as those discussed above, but compiled in a different format, between Appellant and others, from July 10 – 12, 2018; June 25 – 27, 2018; June 29, 2018; and June 30 – July 2, 2018. "[T]hese [are] essentially the records that we just went through and just merged together in chronological order[.]" Appellant objected on the same grounds and the court overruled the objections. Tr. 560, l. 21 – 561, l. 23; Tr. 614, ll. 9-23; Tr. 620, l. 18 – 621, l. 6; Tr. 627, ll. 4-16; Tr. 645, ll. 16-25; Tr. 647, l. 15 – 651, l. 1; R. *(State's Exhibits #71 – 73; #76; #78; #80).

The parties put a bench conference on the record and defense counsel memorialized that she had additionally objected to State's Exhibits #77 – 80 as "more prejudicial than probative grounds, in addition to evidence of prior bad acts." "It was a discussion about the Jeep with Tim Watford[.]" The State referenced *State v. Beck*, 342 S.C. 129, 536 S.E.2d 679 (2000), and argued the Jeep messages went to a "plan." The State also argued that "self-serving" statements admitted pursuant to Appellant's earlier Rule of Completeness objection made State's Exhibits #78 and 80 "more probative." Tr. 645, ll. 16-25; Tr. 647, l. 15 – 651, l. 1.

Additional damaging information was contained the various text messages. *See* State's Exhibits #65; #67 – 69; #71 – 80; #82 (R. *). Finally, Officer Sherban admitted that it was possible one person could use another's Facebook account to send messages. Tr. 698, ll. 6-9.

ARGUMENT

I. The trial court erred in refusing to grant a mistrial based on testimony that Appellant had previously stolen Decedent's Durango, where Appellant was on trial for the murder of Decedent and the theft of his Altima, since Rule 404(b), SCRE prohibits the admission of evidence of other crimes, wrongs, or acts to show propensity.

Under these circumstances, the claim Appellant stole Decedent's Durango was inadmissible and required a mistrial. "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." Rule 404(b), SCRE. "Rule 404(b) prevents the State from introducing evidence of a defendant's other crimes for the purpose of proving his propensity to commit the crime for which he is currently on trial." *State v. Perry*, 430 S.C. 24, 30, 842 S.E.2d 654, 657 (2020). However, such evidence is admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. *State v. Pagan*, 369 S.C. 201, 631 S.E.2d 262 (2006); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

To be admissible under the common scheme or plan exception, the bad act must logically relate to the crime with which the defendant has been charged. "There must be something in the defendant's criminal process that logically connects the 'other crimes' to the crime charged." *State v. Perry*, 430 S.C. at 41, 842 S.E.2d at 663. "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." *Id.* at 44, 842 S.E.2d at 665 (cleaned up). The logical relevancy test must be applied with "rigid scrutiny." *Id.* (quoting *State v. Lyle*, 125 S.C. 406, 118 S.E. at 807). "Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the

consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors. Hence, if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected." *Lyle*, 125 S.C. 406, 118 S.E. at 807.

"After conducting a *Lyle* analysis and finding evidence both relevant and admissible as a prior bad act, the trial court must conduct a Rule 403, SCRE analysis to determine whether or not the evidence is unduly prejudicial." *State v. Beck*, 342 S.C. 129, 136, 536 S.E.2d 679, 683 (2000). Even if otherwise admissible, prior bad act evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. *State v. Gillian*, 373 S.C. 601, 646 S.E.2d 872 (2007); Rule 403, SCRE.

Finally, "[i]f the prior bad act did not result in a criminal conviction, the State also bears the burden of proving the prior bad act by clear and convincing evidence." *Johnson v. State*, 433 S.C. 550, 556, 860 S.E.2d 696, 699 (Ct. App. 2021) (citing *State v. Smith*, 300 S.C. 216, 218, 387 S.E.2d 245, 247 (1989)).

Meghan Carter's testimony that Appellant had previously stolen Appellant's Dodge was prior bad act evidence. Tr. 404, l. 22 – 405, l. 3. It was not subject to a conviction, and Carter's bald assertion that Appellant had stolen Decedent's Dodge, combined with Decedent's mother's testimony that the Durango had in fact been stolen, was insufficient to prove Appellant committed the bad act by clear and convincing evidence. There was no basis given as to how Carter knew Appellant had stolen the Durango. The State did not establish a logical connection between the theft of the Durango and these crimes. This was pure propensity evidence, and given the crimes for which Appellant was on trial, it was explosively prejudicial. The evidence should not have come in.

Rule 404(b), SCRE; Rule 403, SCRE; *Lyle*, 125 S.C. 406, 118 S.E. at 807. The trial judge correctly recognized the testimony should not have been elicited, but erroneously denied the mistrial.

Whether a mistrial should be granted is "dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment." *State v. Prince*, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983). While a mistrial should be granted only when "absolutely necessary" and when a defendant can show error and resulting prejudice, a mistrial must be ordered when the incident "is so grievous that the prejudicial effect can be removed in no other way." *State v. Dial*, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013). A mistrial must be granted when there is "manifest necessity." *State v. Bilton*, 156 S.C. 324, 153 S.E. 269 (1930). This Court has held a "mistrial should only be granted when absolutely necessary, and a defendant must show both error and prejudice in order to be entitled to a mistrial." *State v. Wilson*, 389 S.C. 579, 585-586, 698 S.E.2d 862, 865 (Ct. App. 2010).

"[A]n instruction to disregard objectionable evidence usually is deemed to have cured the error in its admission unless on the facts of the particular case it is probable that notwithstanding such instruction the accused was prejudiced." *State v. Hale*, 284 S.C. 348, 354, 326 S.E.2d 418, 422 (Ct. App. 1985). "Because a trial court's curative instruction is considered to cure any error regarding improper testimony, a party must contemporaneously object to a curative instruction as insufficient *or* move for a mistrial to preserve an issue for review." *State v. Walker*, 366 S.C. 643, 658, 623 S.E.2d 122, 130 (Ct. App. 2005) (emphasis in original). "Generally, the consideration of whether there was any prejudice requires that a motion for mistrial be made after the trial judge attempts to cure the error." *State v. Craig*, 267 S.C. 262, 268, 227 S.E.2d 306, 309 (1976).

Appellant correctly argued a curative instruction would be insufficient to dispel the prejudice, and the court ultimately did not give a curative instruction. *Cf. State v. Kelsey*, 331 S.C. 50, 75, 502 S.E.2d 63, 76 (1998) (codefendant properly withdrew question of whether defendant had been convicted of forgery and trial court's curative charge was sufficient to remove any prejudice to defendant). A mistrial was absolutely necessary. Appellant was prejudiced on these facts—Appellant was alleged to have stolen Decedent's Durango and she was on trial for stealing decedent's Altima and killing him. Appellant's defense was mere presence. This was devastating propensity evidence. *State v. Lyle*, 125 S.C. 406, 118 S.E. at 807 ("the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors"). On these unusual facts, a mistrial should have been granted.

II. The trial court erred in admitting evidence of prior bad acts contained in the Facebook messages, regarding Decedent's Jeep, where Appellant was charged in the murder of Decedent and the theft of his Altima, since the evidence should have been excluded pursuant to Rule 404(b), SCRE.

The Jeep-related messages should have been excluded as prior bad act evidence. "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." Rule 404(b), SCRE. "Rule 404(b) prevents the State from introducing evidence of a defendant's other crimes for the purpose of proving his propensity to commit the crime for which he is currently on trial." *State v. Perry*, 430 S.C. 24, 30, 842 S.E.2d 654, 657 (2020). However, such evidence is admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. *State v. Pagan*, 369 S.C. 201, 631 S.E.2d 262 (2006); *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

To be admissible under the common scheme or plan exception, the bad act must logically relate to the crime with which the defendant has been charged. "There must be something in the defendant's criminal process that logically connects the 'other crimes' to the crime charged." *State v. Perry*, 430 S.C. at 41, 842 S.E.2d at 663. "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." *Id.* at 44, 842 S.E.2d at 665 (cleaned up). The logical relevancy test must be applied with "rigid scrutiny." *Id.* (quoting *State v. Lyle*, 125 S.C. 406, 118 S.E. at 807). "Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption

of guilt in the minds of the jurors. Hence, if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected." *Lyle*, 125 S.C. 406, 118 S.E. at 807.

"After conducting a *Lyle* analysis and finding evidence both relevant and admissible as a prior bad act, the trial court must conduct a Rule 403, SCRE analysis to determine whether or not the evidence is unduly prejudicial." *State v. Beck*, 342 S.C. 129, 136, 536 S.E.2d 679, 683 (2000). Even if otherwise admissible, prior bad act evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. *State v. Gillian*, 373 S.C. 601, 646 S.E.2d 872 (2007); Rule 403, SCRE.

Finally, "[i]f the prior bad act did not result in a criminal conviction, the State also bears the burden of proving the prior bad act by clear and convincing evidence." *Johnson v. State*, 433 S.C. 550, 556, 860 S.E.2d 696, 699 (Ct. App. 2021) (citing *State v. Smith*, 300 S.C. 216, 218, 387 S.E.2d 245, 247 (1989)).

State's Exhibits #77 – 80 were inadmissible prior bad act evidence. These messages included Appellant's texts: "Next chance I get, this Jeep is mine," and "bc he is supposed to be here to help me but he aint done shit.. all hes doing is sitting in the jeep getting high." R. *(State's Exhibits #77 – 78). They also included texts purportedly from Decedent: "I said the other day when you told me to come on an corey was there it felt like i was trying to be setup," and "Why would I come over there when i know he wants to steal the jeep?" They included a text from Appellant: "I TOLD YOU WHO WAS HERE.. WTF?? Lol. And set you up? For real?? Have I ever done you like that? No. Why the fuck would I set u up. Ive had chances and haven't. wtf is your problem." R. *(State's Exhibits #79 – 80).

These texts were used by the prosecution to show that Appellant and Corey previously conspired to steal Decedent's Jeep. The State did not show the necessary logical relevancy to qualify this bad act as fitting under the common scheme or plan exception to Rule 404(b). The State did not show a plan to take the Jeep. The only connection was that an Altima driven by Decedent was stolen in this case, and Appellant previously said she wanted his Jeep and Decedent suspected Appellant and Corey of wanting to steal the Jeep. *See State v. Perry*, 430 S.C. at 44, 842 S.E.2d at 665 (similarity is not enough, "there must be more"); *Beck*, 342 S.C. at 136, 536 S.E.2d at 683 ("Employee's testimony is admissible to identify Appellant as Victim's murderer because both perpetrators committed similar offenses within a relatively short period of time, using weapons belonging to Bullard and wearing his boots.").

Moreover, since this alleged conduct was not subject to a conviction, the State was required to prove the bad act by clear and convincing evidence—which it did not do. All the State showed was that Decedent suspected Appellant and Corey wanted to take the Jeep. It did not show clear and convincing proof of a plan to steal the Jeep by Appellant and Corey. Rule 404(b), SCRE.

Finally, even if the State met the above requirements, the evidence should have been excluded, as any arguable probative value was substantially outweighed by the danger of unfair prejudice to Appellant. Although the State argued the inclusion of messages from July 8, 2018, under the Rule of Completeness, as part of State's Exhibit #68 made this bad act evidence more probative, that is not borne out by the record. The messages from July 8, 2018, were regarding the Altima, not the Jeep. This was incredibly damaging propensity evidence. Appellant's defense was mere presence. Rule 403, SCRE; *State v. Lyle*, 125 S.C. 406, 118 S.E. at 807 ("the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors"). The admission of this evidence was error. Rule 404(b), SCRE; Rule 403, SCRE.

III. The trial court erred in admitting Facebook messages, where the State offered the messages pursuant to the business records exception to the hearsay rule, since the State did not lay the required foundation.

The trial court erred by admitting Facebook records without requiring the State to first meet its burden to lay the necessary foundation through authentication. The State failed to show the records were accurate. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute." Rule 802, SCRE.

Rule 803(6), SCRE, provides that the following is not excluded by the hearsay rule even though the declarant is available as a witness:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; provided, however, that subjective opinions and judgments found in business records are not admissible. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Similarly, S.C. Code Ann. § 19-5-510, the Uniform Business Records as Evidence Act, provides that:

> A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the

> sources of information, method and time of preparation were such as to justify its admission.

The prosecutor stated she was entering the records pursuant to S.C. Code Ann. § 19-5-520, which states in relevant part that:

> In addition to those matters provided by Rule 902, South Carolina Rules of Evidence, extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:
>
> (A) The original or a copy of a domestic record that meets the requirements of Rule 803(6), South Carolina Rules of Evidence, *as shown by a certification of the custodian or another qualified person* that complies with a state statute or a court rule. Before the trial or hearing, the proponent shall give an adverse party reasonable written notice of the intent to offer the record and shall make the record and certification available for inspection so that the party has a fair opportunity to challenge the record.

(emphasis added.)

Authentication requires the proponent of evidence to "make a prima facie showing that the true author is who the proponent claims it to be." *State v. Green*, 427 S.C. 223, 830 S.E.2d 711 (Ct. App. 2019) (cleaned up). "It is black letter law that evidence must be authenticated or identified in order to be admissible." *State v. Brown*, 424 S.C. 479, 488, 818 S.E.2d 735, 740 (2018) (citing *State v. Rich*, 293 S.C. 172, 173, 359 S.E.2d 281, 281 (1987)). "Upon adoption of the South Carolina Rules of Evidence, this common law rule was codified at Rule 901, SCRE." *Brown*, 424 S.C. at 488, 818 S.E.2d at 740. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a), SCRE. In addition, Rule 901 contains, by way of illustration, examples of "authentication or identification conforming with the requirements of this rule." Rule 901(b), SCRE. "The trial judge acts as the authentication gatekeeper, and a party may open the gate by laying a foundation from which a

reasonable juror could find the evidence is what the party claims." *Green*, 427 S.C. at 230, 830 S.E.2d at 714.

As seen, the Facebook records were introduced through Officer Sherban, who was a law enforcement officer instead of a "custodian or other qualified witness," or "person with knowledge" about Facebook's business. Sherban was unable to identify the Facebook records or testify to their mode of preparation, whether they were made in the regular course of business, and whether they were made at or near the time of the act, condition or event. The State failed to meet the requirements of two potential ways a foundation could have been laid for the records: testimony that a matter is what it is claimed to be (Rule 901(b)(1)); or appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances (Rule 901(b)(4)). That is because Officer Sherban did not pull the Facebook records from Facebook's data—they were provided to him. Nor did Sherban testify he could verify that the email addresses, phone numbers, or birthdates associated with the records he was given by Facebook were the same email addresses, birth dates, or phone numbers as the persons whose records he had sought. *See State v. McFarlane*, 279 S.C. 327, 330, 306 S.E.2d 611, 613 (1983) (affirming trial court's ruling in which it denied admission of medical records where police detective could not "testify to the identity and mode of preparation of the report or whether it was made in the regular course of business at or near the time of the accident"). Finally, although the prosecutor stated she was entering the records pursuant to S.C. Code Ann. § 19-5-520, she did not provide the court with a "certification of the custodian or another qualified person."[3]

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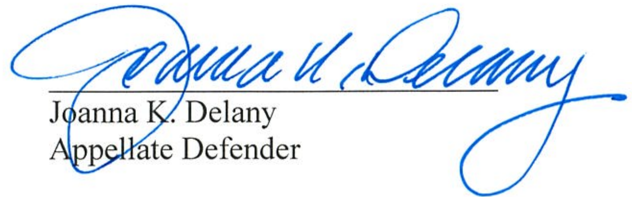
[3] Although Sherban obtained State's Exhibit #82 through a phone extraction instead of a Facebook search warrant, he did not lay the necessary foundation for this document either. His testimony regarding the extraction was insufficient to establish authentication.

The State did not provide the foundational testimony required for authenticating the Facebook records. The records were inadmissible hearsay as they did not qualify for admission under Rule 803(6) or the Business Records as Evidence Act. Rule 802, SCRE; Rule 901, SCRE; *Brown*, 424 S.C. at 488, 818 S.E.2d at 740. Appellant was prejudiced by the admission—the State relied heavily on the messages. They made up a large part of the State's case against Appellant.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse her convictions and sentences and remand for a new trial.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of June, 2024.