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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

ERNEST CONDRE BETHEL,

APPELLANT.

Appellate Case No. 2023-000669

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STATEMENT OF ISSUE ON APPEAL

I. Whether the trial court erred by admitting evidence of appellant's alleged involvement in a prior shooting at the same location when the State failed to prove the prior bad act by clear and convincing evidence, the propensity evidence was not logically relevant to a material fact at issue, and the striking similarity of the evidence enhanced the substantial unfair prejudice to appellant?

STATEMENT OF THE CASE

On August 22, 2019, appellant Ernest C. Bethel ("Bethel") murdered Christopher Lott and Tolliver Wise and attempted to murder Cameron Jenkins and Gregory Martin all in Richland County. On December 18, 2019, the Richland County Grand Jury indicted Bethel for 2 counts of murder, 2 counts of attempted murder, and 1 count of possession of a weapon during a violent Crime (Indictment Nos. 2019-GS-40-8050 through 8054). Deputy Solicitor Dan Goldberg and Assistant Solicitor Nicholas Fowler prosecuted the case for the State. Justin Kata, Esquire, represented Bethel on the charges. On April 17, 2023, Bethel proceeded to a jury trial before the Honorable Clifton E. Newman, Circuit Court Judge. On April 20, 2023, the jury found Bethel guilty of both murders, both attempted murders and the weapon charge. Judge Newman sentenced Bethel to 50 years for each murder, 30 years for each attempted murder, and 5 years on the weapon charge. (Tr. pp. 1-421; Indictments). Bethel directly appealed to this Court raising 1 issue. (IBOA). This is the Initial Brief of Respondent.

RESPONDENT'S STATEMENT OF FACTS

Approximately 1 to 2 weeks before the murders of Christopher Lott and Tolliver Wise and the attempted murders of Cameron Jenkins and Gregory Martin, appellant Ernest C. Bethel ("Bethel") was inside *McCary's* Bar and Grill (hereinafter *McCary's*) on Bush River Road in Columbia, S.C. While there, Bethel got into an altercation with a female patron of the bar. This led to a further altercation with the Assistant Manager of *McCary's*, Kerry Ross, who intervened in the altercation between Bethel and the female patron. Bethel eventually punched Ross in the face. Bethel left out the front door of the bar and eventually circled to the parking lot area at the back of the bar. Ross started out the front door behind Bethel and told him to his face that he was banned from *McCary's* and not to return. Ross then decided to go through the bar and to go out the rear door in pursuit of Bethel. When Ross opened the back door of the bar, Bethel was standing outside the back door with a firearm [a pistol] in his hand, and Bethel fired several shots up into the air. Ross then told the manager of *McCary's* and the bar tender that Bethel was banned from *McCary's*. (Tr. 147-53; 102-10; 180-92). There were 2 other witnesses to this incident beside Ross, Gregory Martin, who worked at the bar, and Amiracle Wright, a patron of the bar. (Tr. 147-53; 102-10; 180-92). Martin witnessed the same altercation between Bethel and Ross, and after Bethel left the bar, Martin heard gunshots fired outside the bar in the parking lot area. (Tr. 102-10). Amiracle Wright witnessed the same altercation Bethel had with Ross after Bethel got into an altercation with a female in the bar prompting Ross to intervene. Wright was then outside the bar in the parking lot area after this altercation between Bethel and Ross and witnessed Bethel firing the gun into the air. (Tr. 180-92).

A week or 2 later, on **August 22, 2019**, Bethel had 2 acquaintances drive him to *McCary's* at approximately 2:25 a.m. after first visiting 2 other bars in the area and drinking.[1] Bethel later admitted to police he was drunk when he arrived at *McCary's* on August 22nd. Bethel got out of the car first, leaving his 2 friends in their car. He approached the front door of *McCary's* this time carrying a loaded semi-automatic pistol hidden on his person and peered through a glass window in the front door to see who was inside. When Bethel did not see Assistant Manager Ross with whom he had the previous altercation and who had banned him from returning to *McCary's*, Bethel entered *McCary's* through the front door. After Bethel was able to enter the establishment, his 2 accompanying friends got out of their car and entered *McCary's* as well. Bethel's actions and the crimes he committed on August 22, 2019, were all recorded on several surveillance cameras, the footage of which was played for the jury. (Tr. 63-66; 66-98; 99-111; 179-94; 147-53; 296-98; State's Ex. 4 [McCary's video]; State's Ex. 65 [compilation of surveillance videos]; Tr. 231-47; State's Ex. 3 [neighboring business surveillance video).

Immediately upon entry through the front door of *McCary's* on August 22, 2019, Bethel was met by Tolliver Wise, a regular patron, who shook Bethel's hand and hugged Bethel and eventually told Bethel he was not allowed to come in the bar. John Miller and Christopher Lott, 2 other regular patrons of *McCary's*, also walked over and told Bethel he needed to leave because he was banned from *McCary's*.[2] Bethel told the men he wanted to talk to someone who worked

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[1] At the previous bar, Bethel ran into Amiracle Wright. Bethel told Wright that he was going to *McCary's* next. Wright warned Bethel that he should not go to *McCary's* because Bethel knew he had been banned from that establishment because of the previous incident. Bethel stated he was going anyway and would tell *McCary's* employees that it was his twin brother who was involved in the prior incident 1 to 2 weeks earlier. (Tr. 180-92).

[2] There was testimony *McCary's* and its regular patrons were a "community" that watched out for each other, hence several regular patrons of the bar told Bethel he had to leave because of the prior incident *1 to 2 weeks* earlier. (Tr. 95, ll. 16-18; 69, ll. 16-20; 70, ll. 10-24; 74, ll. 3-10; 90;).

there. Cameron Jenkins, the bartender on duty, and Gregory Martin, the cook, walked over to diffuse the situation and told Bethel he was banned from *McCrary's* and he had to leave. Bethel refused to listen to either man and argued with them and the nearby patrons. Bethel eventually stuck his hand in the face of 1 of the patrons, John Miller, as they were arguing, and Miller threw a drink on Bethel.[3] Bethel responded by pushing and punching Miller and the 2 began to fight and went to the floor. Jenkins, the bartender, grabbed Bethel around the waist in an attempt to separate Bethel and Miller. Someone else grabbed Miller and restrained him. Jenkins eventually was able to pull Bethel away from Miller and with the help of others, push Bethel out the front door of *McCary's*. As the front door was shutting, Tolliver Wise, who had hugged Bethel when he entered the bar, saw Bethel outside the front door of the establishment reaching for his gun.[4] Christopher Lott grabbed the front door handle from the inside of *McCary's* as the door was shutting and held the front door shut. After the door shut, Wise drew his gun because he anticipated what Bethel was going to do, fire shots. Wise was correct. (Tr. 63-66; 66-98; 99-111; 179-94; 301-04; State's Ex. 4; State's Ex. 65).

Video surveillance captured Bethel outside the front door of *McCary's* after the front door closed completing drawing his semi-automatic pistol and take several steps. Bethel then raised and pointed his semi-automatic pistol at the front door of *McCary's* and fired 7 shots through the

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[3] It appears on the surveillance video that Bethel actually touched Miller's face. As a result, Miller threw a drink on Bethel's person. (State's Ex. 4 & 65; See Tr. 63-66; 231-47; See also 366, ll. 16-21; 345-46).

[4] There were multiple surveillance cameras which captured what occurred simultaneously both outside and inside *McCary's*. (Tr. 63-66; 231-47; State's Ex. 4; State's Ex. 3; State's Ex. 65). The cameras also showed what was occurring down to the seconds on a digital clock. At trial the State showed the actual surveillance video from *McCary's* [State's Ex. 4] and a separate exhibit showing each camera angle from *McCary's* side by side simultaneously as the crimes occurred [State's Ex. 65]. (Tr. 63-66; 231-47). This allowed the jury to see what was occurring outside *McCary's* at the same time as was what occurred inside *McCary's*. (Tr. 63-66; 231-47; State's Ex. 65; See also Tr. 356-57; 366-69).

front door striking 4 different victims, Wise, Lott, Jenkins, and Martin. Wise, who saw and heard the shots coming through the front door, was struck in the chest by 1 bullet but was able to get off return fire with a 9mm semi-automatic pistol after first telling his sister, Amiracle Wright, and a friend of hers to flee to the bathroom. Wise's sister thought Bethel was shooting up in the air again like the prior incident 1 to 2 weeks earlier, but Wise signaled to her that Bethel was shooting through the door and that she and her friend needed to flee to the bathroom. (Tr. 66-98; 99-111; 122-25; 179-94; 147-53; 167-78; 208-15; 223-31; State's Ex. 4; State's Ex. 65).

Two (2) of the victims, Christopher Lott and Tolliver Wise, died from the gunshot wounds inflicted by Bethel. The bar tender, Cameron Jenkins, who testified at trial, identified Bethel, and recounted exactly what occurred before the shooting, suffered a gunshot wound to the neck, and the fired bullet remained in his neck at trial. Gregory Martin, the cook, who also testified at trial, identified Bethel, and testified to what occurred, suffered catastrophic injuries and multiple surgeries but was able to survive the multiple gunshot wounds he received from Bethel. (Tr. 66-98; 99-111; 144-47; 179-94; 208-215; 223-31; 167-178; State's Ex. 4; State's 65).

After the crimes, Bethel ran to his acquaintances' car in the parking lot, turned, and fired 5 more shots back at *McCary's* indiscriminately. Bethel then fled the crime scene in his acquaintances' car. (Tr. 63-66; 122-25; 195-207; 282-86; 322-27; State's Ex. 4 [*McCary's* surveillance video]; State's Ex. 65 [surveillance video compilation]; State's Ex. 3 [surveillance video of neighboring business]). Bethel disposed of the semi-automatic pistol; therefore, it was never recovered. However, SLED's firearms expert was able to testify that all of the fired shell casings found outside *McCary's*, 12 in all, were fired by the same weapon. (Tr. 122-25; 195-207).

Bethel was arrested and charged with 2 counts of murder and 2 counts of attempted murder. Bethel was questioned several days later by the FBI. Bethel admitted he was present at the bar

and drunk. He denied he had a gun and denied he fired any bullets. He admitted at trial that he lied to police when interviewed about whether he had a gun or fired any shots. (Tr. 290-325).

Bethel testified at trial. He admitted he fired the 7 shots through the front door of *McCary's* and that he struck 4 separate people, killing 2, and severely wounding 2 others. He claimed he fired additional shots, only 2, when he got to his friend's car. He actually fired 5 shots near the car. He claimed he acted without malice and was merely acting in self-defense or defense of others [his friends] when he fired his weapon. The jury rejected the claim of self-defense finding the State had disproved self-defense. (Tr. 267-85; 290-325; 395-405).

Notably, in his closing argument to the jury, Deputy Solicitor Dan Goldberg pointed out to the jury that the surveillance video of the actual crimes showed Bethel's actions on a digital clock down to the second. The same cameras showed Wise's actions in response to Bethel's actions down to the second. Goldberg pointed out that the jury could watch the surveillance videos and see that Bethel reached for his gun before the front door even closed and Wise saw Bethel go for his gun, but Bethel could not see Wise pull his gun because of Bethel's position and seconds passed before Wise drew his gun. Goldberg also pointed out that in the video Bethel can be seen finishing drawing his weapon after the front door closed, and Bethel can be seen taking several steps and then pointing his firearm at the exterior of the front door and firing 7 shots into the front door of *McCary's* where the men who had just ejected Bethel would have been standing, striking and eventually killing Christopher Lott and Tolliver Wise and severely wounding the bartender Jenkins and the cook Martin. And, Goldberg pointed out that Bethel fired the 7 shots through the front door of *McCary's* before Wise was able to return fire. (Tr. 356-57; 366-69; See also State's Ex. 4 & State's Ex. 65; Tr. 231-47).

ARGUMENT I.

Judge Newman did not err in admitting the prior incident as it was *res gestae* of the crime evidence, evidence of malice, evidence of prior difficulties between the parties, and proper evidence under Rule 404(b) and 403, SCRE; further, the admission of the prior incident was harmless where it was cumulative to unobjected to testimony of Bethel being banned from the bar for a prior incident and there was overwhelming evidence of Bethel's guilt including video surveillance from multiple cameras capturing the crimes and disproving self-defense, and eyewitness' testimony of 2 surviving victims and also an eyewitness.

Bethel argues that Judge Clifton Newman erred in admitting evidence of the prior incident he was involved in at *McCary's* 1 to 2 weeks before the murders and attempted murders because it was allegedly improper SCRE 404(b) evidence that was not relevant to the case and not proved by clear and convincing evidence, and because of its similarity to the actual crimes its probative value was substantially outweighed by the danger of its' prejudicial effect under Rule 403, SCRE. (IBOA). Bethel is simply wrong.

The evidence was admissible because the prior incident was relevant to the issues in the case and was *res gestae* of the crime evidence, evidence of malice, evidence of prior difficulties between the parties, and proper Rule 404(b) evidence where the State proved the prior incident by clear and convincing evidence and the evidence was relevant where it showed motive, intent, and absence of mistake in shooting the victims where Bethel claimed self-defense at trial. Further, the probative value of this evidence was not substantially outweighed by the danger of prejudice under Rule 403, where the probative value of the prior incident was high since it led directly to Bethel being removed from *McCary's* the night of the crimes which directly led to Bethel shooting each victim and in the prior incident Bethel did not shoot anyone but only fired his gun up into the air. For each of these reasons, Judge Newman must be affirmed.

Further, even assuming *arguendo* error in admitting this evidence, its admission was harmless given the unobjected to testimony Bethel was banned from *McCary's* and the

overwhelming evidence of guilt including the detailed video surveillance footage of what occurred, the testimony of the surviving victims, another eyewitness' testimony, and Bethel's admissions at trial that he was the shooter, and he fired the shots the State contended he fired, and the jury rejected his self-defense argument as it should.

Standard of Review

The admission or exclusion of evidence is in the sound discretion of the trial judge who will only be reversed for an abuse of discretion. State v. Pittman, 373 S.C. 527, 577, 647 S.E.2d 144, 170 (2007); State v. Oglesby, 384 S.C. 289, 293, 681 S.E.2d 620, 622 (Ct. App. 2009). To constitute an abuse of discretion, the conclusions of the trial court must lack evidentiary support or be controlled by an error of law. Id.

Res gestae of the Crime

The evidence of the prior incident was admissible as "*res gestae* of the crime evidence." This is a different basis to admit such evidence than Rule 404(b). *See* Anderson v. State, 354 S.C. 431, 435, 581 S.E.2d 834, 836 (2003) (holding appellant's threatening statement to victim formed part of the *res gestae* of the crime). "As such[,] the bar against admitting prior bad acts is not applicable." Anderson, 354 S.C. at 435, 581 S.E.2d at 836. Evidence of other acts of the defendant or even crimes may be admitted under the *res gestae* of the crime theory:

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae' " or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ...' [and is thus] part of the res gestae of the crime charged." And where evidence is admissible to provide this "full presentation" of the offense, "[t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "res gestae."

State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370–71 (1996)(quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir.1980)), *overruled on other grounds,* State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014). *Res gestae of the crime* recognizes evidence of other 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. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001), *overruled on other grounds* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004); State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). Under this theory, it is important that the temporal proximity of the other act be closely related to the charged crime. State v. Hough, 325 S.C. 88, 480 S.E.2d 77 (1997).

The evidence of Bethel's actions during the prior incident 1 to 2 weeks before was properly admitted under the *res gestae* of the crime because it provided the whole context of the crimes in this case. *See* Adams, 322 S.C. at 122, 470 S.E.2d at 370–71. Admission of the testimony was necessary and relevant to a full presentation of the evidence in this case. What occurred in the prior incident provided context for the crimes at issue because the prior incident resulted in Bethel's being banned from *McCary's*, caused him to return the night of the crimes with a loaded firearm, caused him to look through the front door glass before entering *McCary's* on the night of the crimes, and caused the confrontation just inside the front door, and caused him to be removed from the bar physically, which directly led to the murders and attempted murders. The testimony regarding what occurred in the prior incident was relevant to show the complete, whole, unfragmented story regarding the crimes and why they occurred. *See* State v. Simmons, 352 S.C. 342, 573 S.E.2d 856 (Ct.App.2002).

Furthermore, the acts were temporally related. Sweat, 362 S.C. 117, 606 S.E.2d 508 (prior CDV 2 months before murder was not too remote and was admissible). The prior shooting incident occurred only *1 to 2 weeks before the crimes*. On the night of the crimes, Bethel spoke to 1 murder victim's sister at another bar before Bethel had his 2 acquaintances drive him to *McCary's*. (Tr. 179-94). The murder victim's sister told Bethel while at the other bar that Bethel could not go to *McCary's* because he was banned from *McCary's* because of the prior shooting incident. (Tr. 179-94). Bethel stated he was going to *McCary's* anyway, and he was going to tell the bouncer or whoever checked him at the door that it was his twin brother who had committed the prior shooting incident. (Tr. 179-94). When Bethel arrived at *McCary's,* he approached the front door alone, armed with a loaded firearm hidden on his person, and peered through the front door to see who was inside before entering because of the prior incident. (Tr. 293-94; 296-97; State's Ex. 4 & 65). Bethel admitted at trial he peered through the window before he entered *McCary's* because he wanted to see if the assistant manager, Ross, was there before entering. (Tr. 293-94; 296-97). Ross was the assistant manager who banned him from the bar because of the prior shooting incident. (Tr. 147-53; 296-97).

At trial, Bethel claimed the prior incident as described by the State's witnesses did not occur at all; therefore, when he entered *McCary's* on the night in question, there was no reason or cause for an employee or patron to approach him and tell him he was banned and had to leave the bar. He denied he struck Assistant Manager Ross or fired a gun up in the air in the prior incident. According to Bethel, on the night of the crimes, the employees and patrons of *McCary's* were the aggressors, not him. The prior incident and Bethel's previous banning from *McCarry's* established Bethel was not without fault in bringing on the difficulty in a trial where Bethel claimed self-defense. The prior incident and Bethel's banning also established Bethel was the aggressor the

night of the crimes and should not have been at *McCary's* on the night of the crimes much less armed with a loaded pistol secreted on his person. The prior incident also established Bethel's *intent* when he was physically removed from *McCary's* on the night of the crimes, retribution, and the prior incident established Bethel's *malice* toward McCary's and its employees and patrons. The prior incident is so related to the actual crimes as to be inextricably intertwined. *See* Adams, 322 S.C. at 122, 470 S.E.2d at 371 ("The use of the cocaine here was inextricably intertwined with the robbery and murder. Under these circumstances, such evidence was properly admitted as part of the *res gestae* of the crime."). Indubitably, Bethel's prior actions 1 to 2 weeks before the murders and attempted murders was part of the entire scenario regarding the victims' murders and attempted murders. The prior incident at *McCary's* was the very reason Bethel was removed from *McCary's* the night of the crimes immediately before the shooting started and the 4 victims were shot. State v. Johnson, 439 S.C. 331, 887 S.E.2d 127 (2023)(defendant's acts in Dillon and Marlboro Counties most definitely provides context under res gestae theory to the Marion County domestic violence case); State v. Wood, 362 S.C. 520, 528, 608 S.E.2d 435, 439 (Ct. App. 2004)(defendant's murder of trooper 2 hours earlier was *res gestae* of failure to stop for a blue light and AWIK trial in another county); State v. Hough, 325 S.C. 88, 480 S.E.2d 77 (1997)(defendant's act after the crime of purchasing crack cocaine with money from the armed robbery for which he was on trial was part of the *res gestae* of the crime).

Bethel's prior actions toward Assistant Manager Ross **and** *McCary's* were admissible as *res gestae* of the crime. Sweat, *supra* (prior CDV was admissible evidence of *res gestae* of the crime of burglary and assault 2 months later after release from jail for CDV); Gillian, 360 S.C. 433, 601 S.E.2d 61 ("Under the res gestae theory, evidence 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.")(*citing* Owens, 346 S.C. 637, 552 S.E.2d 745; Adams, 354 S.C. 361, 580 S.E.2d 785). Here, Bethel was on trial for the murder of 2 patrons of *McCary's* and the attempted murder of 2 employees of *McCary's* after the victims either asked or told Bethel to leave because he was banned from *McCary's* because of the prior incident. It was necessary for a full presentation of the case and for context, for the jury to understand the full nature of the relationship between Bethel **and** the patrons and employees of *McCary's*, including the prior incident that resulted in Bethel being banned and told not to return to *McCary's* which he did anyway. Because of what occurred in the prior incident, it explained why the patrons and employees acted as they did on the night of the crimes.[5] As a result, the prior incident was admissible as *res gestae* of the crime, especially where the altercation or dispute the night of the murders was directly related to the prior incident which resulted in Bethel being banned from the establishment. Adams, 322 S.C. at 122, 470 S.E.2d at 370-71 (1996)(evidence of other crimes is admissible when it furnishes the context of the crime or is necessary for a full presentation of the case and is necessary to complete the story of the crime on trial by proving its context); Sweat (prior act of domestic abuse gave victim opportunity to escape her relationship with defendant; as a result she moved out, and he spent time in jail; he was upset, and 11 days after his release the crimes for which he was on trial occurred; the October abuse and events that followed provided the fact finder with an appropriate context in which to place the later attack).[6]

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[5] Wright testified that on the night of the crimes she initially thought Bethel was shooting up in the air *as he did 1 to 2 weeks earlier*. It was not until her brother, Wise, signaled her that she realized Bethel was shooting through the front door. It was then that she and a friend fled toward the bathroom of *McCary's*. (Tr. 179-94).

[6] *See also* King, 334 S.C. at 512, 514 S.E.2d at 582 (*res gestae* recognizes evidence of other bad acts may be an integral part of the crime or may be needed to aid the fact finder in understanding the context in which the crime occurred.); Wiles, 383 S.C. at 158-59, 679 S.E.2d at 176 (evidence of other crimes which supplies the context of the crime, or is intimately connected with and explanatory of the crime, is admissible as *res gestae*); State v. Martucci, 380 S.C 232, 669 S.E.2d

Moreover, the probative value of the evidence was not substantially outweighed the danger of its prejudicial effect. *See* Owens, 346 S.C. at 653, 552 S.E.2d at 753; State v. Wood, 362 S.C. 520, 527–29, 608 S.E.2d 435, 439–40 (Ct. App. 2004). Bethel's actions on the previous occasion are all part of the *res gestae* of these crimes and were intertwined with and fully explained what occurred on the night of the crimes and why each person acted as they did. United States v. Wright, 392 F.3d 1269, 1276 (11th Cir.2004); ("[E]vidence of [defendant's resistance to arrest] prior to the discovery of the firearm gives the jury the body of the story, not just the ending. Such evidence was 'inextricably intertwined' with the charged offense."). The prior incident explained why these crimes occurred and everyone's actions on the night of the crimes, including Bethel's, and proved Bethel's animus, malice, intent, and motive in perpetrating the shootings, and disproved he was without fault in bringing on the difficulty where he claimed self-defense and defense of others at trial, and the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice where in the prior incident Bethel did not shoot anyone, was not arrested, and only fired his gun up in the air after being told he was banned from *McCary's*. *See* Johnson, 439 S.C. at 342–43, 887 S.E.2d at 132–33 (2023)("The significant probative value of Johnson's acts in Dillon and Marlboro Counties was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or any other consideration pertinent to a Rule 403 analysis")

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598 (Ct. App. 2008)(admission of prior incidents of abuse or neglect was needed to present overall view of the facts and to provide context in which the crime occurred, and demonstrated the culminating impact upon the child; evidence regarding the prior bad acts was relevant to show the complete, whole story relating to the charge of homicide by child abuse; *See* State v. Bolden 303 S.C. 41, 43, n. 1, 398 S.E.2d 494 (1990) (noting *res gestae* does not fit squarely within any of the 5 categories in Lyle); State v. Smith, 309 S.C. 442, 451, 424 S.E.2d 496, 501 (1996) (Toal, J. dissenting)(although there is some overlap between *Lyle* and the *res gestae*, *res gestae* is a separate method where other evidence of criminal acts can be admitted).

Evidence of Malice and Prior Difficulties between the Parties

Additionally, separate from *res gestae* of the crime, Judge Newman did not err in admitting the prior incident because it was separate evidence of Bethel's malice toward *McCary's* and its employees **and** prior difficulties between the parties, i.e. prior difficulties between Bethel **and** *McCary's* and its' employees. Contrary to Bethel's argument, the evidence was admissible not only under Rule 404(b), SCRE, to show motive, intent, and absence of mistake or accident where he claimed self-defense, but also under other case authority as evidence of malice, including prior difficulties between the parties, and of Bethel's state of mind. Blakely v. State, 360 S.C. 636, 602 S.E.2d 758 (2004); State v. Cooley, 342 S.C. 63, 536, S.E.2d 666 (2000); State v. Beck, 343 S.C. 129, 536 S.E.2d 679 (2000).

First, testimony that a defendant had threatened the victim before the crimes is admissible to show malice toward the victim. Blakely, 360 S.C. 636, 602 S.E.2d 759 ("It is well-settled that evidence of previous threats by the defendant is admissible to show malice."); Beck, 342 S.C. 129, 134, 536 S.E.2d 679, 682 (noting appellant's statement of intent to commit a crime was admissible as a statement or declaration made by one accused of a crime). "As such[,] the bar against admitting prior bad acts is not applicable." Anderson, 354 S.C. at 435, 581 S.E.2d at 836. Bethel's actions in the prior incident were in the nature of a threat. He punched Assistant Manager Ross in the face and then went outside the bar and just outside the back door raised a pistol in the air and fired several shots in the air in Ross's presence shortly after being told by Ross that he was banned from *McCary's* and not to return. A defendant's threats to injure or harm the victim are not necessarily prior bad acts that fall under Rule 404(b) but are independent evidence that is admissible to show malice, the defendant's criminal intent, and the defendant's state of mind. Beck, 342 S.C. 129, 536 S.E.2d 679. Such threats are admissible because they are relevant under Rule 401 & 402,

SCRE. Evidence is relevant and admissible if it tends to establish or make more or less probable a fact in issue or a matter in controversy. State v. Wiles, 383 S.C. 151, 158-59, 679 S.E.2d 172, 176 (2009); Beck, *supra* (testimony that defendant had made a statement of his intent to perpetrate certain crimes – albeit 4 months prior to the crime – was highly probative as to a manifestation of an intent to commit a fatal attack upon the victim; the evidence bore directly on the defendant's identity as the killer as well as the establishment of motive, and was therefore admissible under Rule 401; the temporal attenuation between the defendant making the statement and the crime being committed, was of no moment in assessing its admissibility, and at most, the 4 month lapse was a matter bearing on the weight of the evidence, which was for the jury to determine); State v. Glenn, 328 S.C. 300, 492 S.E.2d 393 (Ct. App. 1997)(statements made by defendant 1 year before the incident, were relevant where the defendant was accused of injuring his victim in the same manner).

As a result, Bethel's punching Assistant Manager Ross and firing a gun up in the air after being ejected from *McCary's* and banned from the same just 1 to 2 weeks before the actual crimes was admissible under Rule 401 & 402, SCRE, because it established Bethel's malice toward the bar and its' employees, his criminal intent when returning later, and his state of mind upon returning to the bar on April 22nd with a loaded firearm concealed on his person. Blakely, *supra*; Beck; Glenn, 328 S.C. 300, 492 S.E.2d 393. Further, the probative value of this evidence was enhanced where Bethel asserted the defense that the shooting of all 4 victims was in self-defense or defense of others and without malice. Furthermore, the probative value of this evidence was enhanced where Bethel asserted the prior actions did not occur and he was never banned from McCarry's. Any unfair prejudice was minimal where Bethel was not arrested for the prior incident and he only fired a gun up in the air; he did not shoot anyone. As a result, the probative value of

this evidence was not substantially outweighed by the danger of any unfair prejudice to Bethel. Rule 403, SCRE.

All of the evidence of the prior incident was also admissible to show prior difficulties between the parties. Bethel had animus and malice toward *McCary's* and its' employees because of the prior incident, and he returned 1 to 2 weeks later with a loaded firearm secreted on his person and looked through the front door to see if he could see Assistant Manager Ross before he entered. In a homicide case, prior difficulties between the parties are admissible to prove motive. State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004); Cooley, 342 S.C. 63, 536 S.E.2d 666 (evidence that accused and decedent had previous difficulties are admissible). The evidence is admissible to show the animus between the parties, including whether there was an abusive relationship between the defendant and the victim, and to aid the jury in deciding who was the probable aggressor. State v. Taylor, 333 S.C. 159, 168, 508 S.E.2d 870, 874 (1998); State v. Clinkscales, 231 S.C. 650, 99 S.E.2d 663 (1957); Cooley, *supra.*

Here, the prior difficulties between Bethel and *McCary's* and its' employees were just 1 to 2 weeks before the crimes. These acts were not so remote as to be unfairly prejudicial and require exclusion under Rule 403, SCRE. Sweat, 362 S.C. 117, 606 S.E.2d 508 (prior CDV 2 months before murder was not too remote and was admissible); Beck, *supra* (4 months between statement or threat and the crime went only to the weight of the evidence not its admissibility); Glenn, *supra* (statements made by defendant 1 year before the incident, were relevant where the defendant was accused of injuring his victim in the same manner); Cooley (where son's testimony about father's domestic abuse of mother was over 2 years prior to the date of the killing and son had not lived with his parents since then, son's testimony should have been excluded under Rule 403); State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999)(excluding evidence of Defendant's bad acts that

occurred more than 1 year before the crime on trial). This is true especially, where Bethel claimed the shooting of the victims in this case was in self-defense **and** Bethel returned to McCary's armed with a secreted semi-automatic weapon *just 1 to 2 weeks* after the prior incident where he was ejected and banned from the bar. (Tr. 310-34; 262-89).

The evidence was also admissible under 404(b), SCRE

Pursuant to Rule 404(b), SCRE,

> 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), of the SCRE, provides for the admission of such evidence, not to prove action in conformity therewith, but to prove motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. Rule 404(b), SCRE. The substance of Rule 404(b) is the same as the rule of evidence stated in State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), followed prior to the adoption of the SCRE. Lyle, 125 S.C. at 416-17, 118 S.E. at 807. As noted, evidence of other bad acts or crimes is inadmissible, unless it can be shown by the prosecution the evidence is necessary to establish a material element of the crime charged. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987). In State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990), the Court defined the term "necessary" as being synonymous with the term relevant:

> Bell requests that this Court limit the Lyle rule by finding that other acts evidence is admissible only if necessary. Relying mainly on State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987), Bell argues that the trial judge erred in admitting the other acts evidence because it was not needed. Bell notes that the testimony of an eyewitness who identified Bell as the abductor as well as other evidence linking him to the crime. In Johnson, we stated that evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged. 293 S.C. at 324, 360 S.E.2d at 319. Consistent with our rulings since Lyle, we define necessary as synonymous with relevant. Thus, evidence of other crimes is never admissible unless relevant to establish a material fact or element of the crime charged.

Bell, 302 S.C. at 27-28, 393 S.E.2d at 369.

Proof of Bad Act by Clear and Convincing Evidence

Bethel first claims the State did not prove the prior incident occurred by clear and convincing evidence because Bethel was not arrested or convicted for the prior incident. Bethel is simply wrong. "To be admissible, other crimes that are not the subject of conviction must be proved by clear and convincing evidence." State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Appellate courts do not review a trial court's ruling on the admissibility of other bad acts by determining *de novo* whether the evidence rises to the level of clear and convincing. If there is any evidence to support the admission of the bad act evidence, the trial [court]'s ruling will not be disturbed on appeal. Id. at 6, 545 S.E.2d at 829.

Evidence of bad acts does not have to be proof beyond a reasonable doubt but need only be proven by clear and convincing evidence. State v. Pierce, 326 S.C. 176, 485 S.E.2d 913 (1997); Bell, 302 S.C. 18, 393 S.E.2d 364. Clear and convincing is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established, and such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal. *See* State v. Fletcher, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008). Where a witness's testimony is the sole evidence of a bad act, the determination of the witness's credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate the witness's veracity. State v. Kirton, 381 S.C. 7, 671 S.E.2d 107 (Ct. App. 2008); State v. Tutton, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003). Should the trial judge determine the witness's testimony clearly and convincingly establishes the bad act occurred, an appellate court is bound by the trial judge's factual findings unless clearly erroneous. State v. Scott, 405 S.C. 489, 748 S.E.2d 236 (Ct. App. 2013); Kirton,

381 S.C. 7, 671 S.E.2d 107; Tutton, 354 S.C. 319, 580 S.E.2d 186. An appellate court will not conduct a *de novo* review of a trial judge's ruling on the admissibility of bad act evidence on the issue of whether the evidence rises to the level of clear and convincing evidence. State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001); State v. Perry, 420 S.C. 643, 803 S.E.2d 899 (Ct. App. 2017). A trial judge's ruling admitting bad act evidence will be upheld on appeal if it is supported by any evidence. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300; State v. Smith, 391 S.C. 353, 705 S.E.2d 491 (Ct. App. 2011), *reversed on other grounds*, 406 S.C. 215, 750 S.E.2d 612 (2013); Sweat.

Here, contrary to Bethel's first argument in his brief, the State proved the facts of the prior incident, by clear and convincing evidence through the testimony of 3 different witnesses, which was sufficient. **(Tr. 147-53; 99-111; 179-194)**. Here, Assistant Manager Kevin Ross testified to the prior incident **(Tr. 147-53)**; Gregory Martin also testified to the incident **(99-111)**; and, Amiracle Wright also testified to the prior incident **(179-194)**. State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424 Ct. App. 1998)(testimony of co-defendant with defendant when prior bad acts were committed was sufficient to meet the clear and convincing standard); State v. Aiken, 322 S.C. 177, 470 S.E.2d 404 (Ct. App. 1996)(testimony of co-defendant that defendant had been involved in prior robberies constituted clear and convincing evidence); Kirton, *supra* (testimony of 1 witness was clear and convincing evidence of prior bad act).[7] This portion of Bethel's argument has no merit.

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[7]See Sweat (in prosecution for burglary, ABWIK and AHAN, evidence of prior CDV for which defendant was arrested, but never convicted, after victim signed a statement the event did not actually happen, was nevertheless admissible at trial, where victim testified incident in fact occurred, and she only copied the statement at the request of defendant's sister and acquiesced in signing it because all she wanted was out of the situation; and, there was also testimony by a witness he saw bruises on victim's arms after the incident); State v. Ford, 334 S.C. 59, 512 S.E.2d 500 (1999)(testimony by victim he was previously robbed by the defendant, which was partially

The evidence was relevant

Bethel next argues in his brief that the prior incident was not relevant to any issue in the case and did not fit under any exception to Rule 404(b). Again, Bethel is wrong. *See* State v. Brooks, 341 S.C. 57, 61, 533 S.E.2d 325, 327 (2000) (stating there must be a logical relevance between the prior bad act and the crime for which the defendant is accused).

Bethel claimed at trial that the shootings of the 4 victims were in self-defense and defense of others. Bethel claimed the prior incident 1-2 weeks earlier as described by State's witnesses did not even occur, and he was not banned from *McCary's*. Bethel testified he did not hit Assistant Manager Ross in the prior incident, and he did not fire a gun up in the air 1-2 weeks earlier. Bethel claimed, as a result, when he entered *McCary's* on the night of the crimes, the patrons and employees had no reason to approach him, argue with him or remove him from the bar. According to Bethel, he was without fault in bringing on the difficulty, he acted reasonably, and he had no other means of avoiding the difficulty. (Tr. pp. 267-325).

The State's evidence showed to the contrary. Bethel's actions 1 to 2 weeks before the crimes are directly relevant to this case because the prior incident was what led to Bethel being banned from *McCary's* and what directly led to the confrontation just inside the front door on the night of the crimes. On the night of the crimes, Bethel was told to leave by employees and patrons of *McCary's* because of the prior incident which resulted in him being banned from *McCary's*, and

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corroborated by a detective, was clear and convincing evidence of prior bad act); Scott, 405 S.C. 489, 748 S.E.2d 236 (in prosecution for CSC on a minor and lewd act, court did not err in allowing prior bad act testimony under 404(b) from 2 witnesses, where prior bad acts occurred 20 years before the defendant's arrest----the proffered 404(b) testimony was very specific and appeared credible; deference afforded to a trial judge's findings in this regard, and the court did not err in finding the bad act evidence was clear and convincing); State v. Atkins, 309 S.C. 542, 424 S.E.2d 554 (Ct. App. 1992)(prosecution failed to prove a subsequent bad act by clear and convincing evidence, where there was no identification of the defendant as the perpetrator).

he refused to leave even when told by employees of *McCary's* that he had to leave. Bethel continued to argue and eventually stuck his hand in the face of Miller and Miller threw a drink on Bethel resulting in the fight between Bethel and Miller that Jenkins and Martin tried to break up. This led directly to Bethel being pushed out of the front door of the bar and the door shut. Whereupon Bethel fired 7 shots indiscriminately into *McCary's* with the loaded weapon he carried secreted on his person killing 2 and wounding 2.

The prior incident also showed Bethel was the aggressor. The evidence of the prior incident showed Bethel knew he was banned from *McCary's*, and instead of staying away, he returned to *McCary's* 1-2 weeks later in a different vehicle carrying a loaded semi-automatic pistol hidden on his person, and then tried to enter *McCary's* without being caught. Upon being stopped and told by patrons and employees that he must leave because he was banned, Bethel did not leave but escalated the situation and continued to argue and eventually stuck his hand in the face of a patron instigating a physical conflict. This was especially relevant where Bethel claimed he acted in self-defense. This evidence negated that Bethel was without fault in bringing on the difficulty or that he acted reasonably in shooting indiscriminately into a crowded bar, or that he did not have another means of avoiding the difficulty. This evidence showed Bethel was at fault in bringing on the difficulty, he did not act reasonably, and he had other means of avoiding the difficulty. Bethel could have simply not returned to an establishment from which he was banned on the night of the crimes. Bethel's argument that the prior incident had no relevance to this case is simply false.

The evidence was admissible to prove motive, intent, and absence of mistake or accident

Bethel next argues that the prior incident does not fall under any exception to Rule 404(b), SCRE. Again, Bethel is wrong. Bethel's actions 1 to 2 weeks before the crimes were admissible to show motive, intent, and the absence of mistake or accident especially where he claimed self-

defense. Rule 404(b), SCRE. Here, Bethel's defense at trial was self-defense and defense of others and that he did not intentionally or maliciously shoot anyone or act with gross recklessness. He claimed the fact that he hit 4 people was an accident or mistake while acting in self-defense, not an intentional shooting with malice. As a result, his prior actions *1 to 2 weeks previous* at *McCary's*, his altercation with a female patron there and physical abuse of Assistant Manager Ross, and his firing a gun up in the air after being ejected and banned from the bar were admissible and their probative value increased to show motive, malice, intent, and the lack of accident or mistake in the shooting of the 4 victims in this case. State v. Key, 277 S.C. 214, 284 S.E.2d 781 (1981)(fact that defendant had threatened victim with a pistol on 2 or 3 different occasions was admissible in prosecution for ABHAN to show absence of mistake or accident in shooting the victim); State v. Smith, 337 S.C. 27, 522 S.E.2d 598 (Ct. App. 1999)(in murder and ABWIK prosecution, fact that defendant had previously been convicted for CDV against victim and made prior threats to kill the victim with a pistol, was admissible to refute defendant's claim the shooting was an accident); Martucci, 380 S.C. 232, 669 S.E.2d 59 (admission of prior incidents of abuse or neglect were not error where evidence was admissible as proof of intent and absence of accident, this was especially true because defendant disputed motive and intent to commit homicide by child abuse).[8]

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[8] *See also* Smith, 391 S.C. 353, 705 S.E.2d 491 (court did not err in admitting evidence defendant had broken child's leg about 3 months before child's death, the femur injury was highly relevant to show defendant's motive for attempting to "chemically restrain" the child with medicine, and was critical to show the overdose leading to death was not a mistake or accident); State v. Gaines, 380 S.C. 23, 667 S.E.2d 728 (2008)(where defendant was convicted of criminal solicitation of a minor, involving solicitation over the internet of a person defendant thought was a minor, but in fact a police officer, evidence of the defendant's previous chats with a Pennsylvania police officer were properly admitted under Rule 404(b), to prove among other things the absence of mistake, where defendant subsequently engaged in similar chats with a S.C. officer); State v. Talley, 77 S.C. 99, 57 S.E. 618 (1907)(where defendant was on trial for obtaining goods by false pretenses, having allegedly submitted a false claim for payment to a county, it was proper for the State to cross-examine him as to other duplicate claims which he had made against the county in the past; the State's case depended on whether the defendant had obtained double pay for services rendered

Bethel quotes State v. Robinson, 438 S.C. 421, 439, 882 S.E.2d 883, 893 (Ct. App. 2023)(citing Johnson, 433 S.C. at 559, 860 S.E.2d at 701) for the proposition that the evidence of the prior incident in this case is precisely what Rules 403 and 404(b) of the South Carolina Rules of Evidence seek to exclude from trials. Again Bethel is wrong. Robinson involved the State introducing into evidence a large amount of inadmissible *testimony about gang affiliation, membership, and conduct or activity* in a murder case in which there was testimony the shooting was provoked by a prior shooting earlier in the night, which was admissible. Robinson, 438 S.C. 439, 882 S.E.2d 883. In Johnson also, the evidence that was properly admitted was gang affiliation and activity where the murder **was directly related to gang activity and explained why the victim was murdered.** Id. Here, the prior incident was admissible for the reasons previously stated; it was *res gestae* of the crime, it was prior difficulties and threats between Bethel and *McCary's*; it proved motive, state of mind, intent, and who was the aggressor on the night of the crimes, and it proved malice toward *McCary's* and its employees and patrons, the absence of mistake or accident where the defendant claimed self-defense, and Bethel was not without difficulty in causing the conflict, did not act reasonably, and could have avoided the difficulty altogether by not returning to *McCary's* on August 22 armed with a loaded firearm, a place from which he was properly banned. The evidence also showed the reasonableness of the actions of the victims on the night in question, which could not be understood and comprehended without the jury understanding the details of the prior incident.

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by fraud or by honest mistake; the burden being on the State to prove fraudulent intent, it was competent to prove past similar offenses); State v. Turbeville, 275 S.C. 534, 273 S.E.2d 764 (1981)(evidence of night-hunting was introduced in homicide trial to prove the absence of mistake or accident by the defendant).

The evidence was admissible under Rule 403, SCRE

Finally, Bethel also claims the probative value of this evidence was substantially outweighed by the danger of unfair prejudice to him under Rule 403, SCRE. Again, Bethel is wrong. The prior incident was just *1 to 2 weeks before* the murders and attempted murders in this case. The dispute Bethel had with patrons and employees immediately before the crimes in this case was directly related to the prior incident resulting in Bethel being banned from returning to the bar.

In addition to establishing the requirements for admissibility under Rule 404(b), the State must show "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." State v. Perry, 430 S.C. 24, 44, 842 S.E.2d 654, 665 (2020); *see* Rule 403, SCRE (providing a trial court may exclude relevant evidence when the 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. Gilchrist, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App. 1998).

A trial judge's weighing of probative value verses prejudicial effect under Rule 403, SCRE, is reviewed under and abuse of discretion standard and should be reversed only in exceptional circumstances. State v. Gadson, 439 S.C. 278, 886 S.E.2d 719 (Ct. App. 2023)(referencing State v. Brooks, 428 S.C. 618, 635, 837 S.E.2d 236, 245 (Ct App. 2019)(quoting Collins, 409 S.C. at 534, 763 S.E.2d at 28); Sweat, *supra*. "A trial [court's] balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise due to a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." State v. Holland, 385 S.C. 159, 682 S.E.2d 898 (Ct. App. 2009); *quoting* State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593-94 (Ct. App. 2001),

overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). Only exceptional circumstances justify reversing the Circuit Court Judge's decision on 403 grounds. State v. Huckabee, 419 S.C. 414, 423, 798 S.E.2d 584, 589 (2017); Hamilton, 344 S.C. at 357, 543 S.E.2d at 593. "If there is any evidence to support the admission of the bad act evidence, the trial [courts]'s ruling will not be disturbed on appeal." *See* Wilson, 345 S.C. at 6, 545 S.E.2d at 829.

The prior incident and what occurred were necessary for the jury to understand why Bethel was banned from *McCary's* before the night in question and why everyone acted the way they did on the night of the crimes, i.e. approaching Bethel and telling him to leave. Rule 403, SCRE. The challenged evidence also showed without question that Bethel was not without fault in bringing on the difficulty on the night of the crimes because he had been banned from the bar for previously striking the Assistant Manager of the bar and shooting a gun up in the air, and he returned to the same bar again, after being warned by 1 victim's sister he should not return to *McCary's* because he was banned, but he did so anyway this time with a loaded semi-automatic pistol secreted on his person and argued with patron's and management about why he was banned leading to his expulsion from the club and then Bethel shooting through the front door 7 times indiscriminately. Further, no one contended Bethel shot at anyone in the prior incident, but he simply fired the gun up in the air. Nor was he arrested for the prior incident. As a result, there was no unfair prejudice to Bethel. Judge Newman's determination must be affirmed. State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008)(the determination of whether the danger of unfair prejudice outweighs the probative value of evidence must be based on the entire record and will turn on the facts of each case).

The probative value of bad act evidence may be shown by the similarity of the crime charged, or whether a real connection can be drawn between the 2 incidents, and whether the

evidence is relevant to a material issue. Lyle, 125 S.C. 406, 118 S.E. 803; State v. Kennedy, 339 S.C. 243, 528 S.E.2d 700 (Ct. App. 2000). Here, after hearing argument on the admissibility of the evidence under 404(b) and Rule 403, Judge Newman implicitly found the testimony was relevant and its probative value was not substantially outweighed by the danger of prejudice to Bethel. The learned trial judge appropriately determined the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice to Bethel. Holland, 385 S.C. 159, 682 S.E.2d 898. Bethel has failed to show Judge Newman abused his discretion in admitting this evidence in this case. Id. Judge Newman's determination is fully supported by the record.[9]

Three (3) different witnesses testified to the prior incident which occurred only *1 to 2 weeks* before the murders and attempted murders. (Tr. 147-53; 99-104; 179-94). *McCary's* Assistant Manager Kevin Ross testified Ross punched him in the face. (147-53). Ross told Bethel to leave, and he was banned from returning to *McCary's*. (147-53). All 3 witnesses saw Bethel leave *McCary's* after the prior incident. And, 1 witness, Gregory Martin, then heard gunshots immediately outside the bar. (Tr. 99-104). Two (2) witnesses, Ross and Amiracle Wright, testified Bethel was holding a firearm [a pistol] in the parking area behind the bar and shooting the gun up into the air after the incident inside *McCary's*. (Tr. 147-53; 179-94). No one testified Bethel shot anyone on the prior occasion or shot at anyone, Bethel just shot up in the air. (Tr. 147-53; 179-94; 99-104). Just *1 to 2 weeks later*, Bethel returned to *McCary's* from which he was banned armed

[9] Bethel cites to State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984). However, Gore dealt with the State questioning the defendant on trial for arson and murder, about a prior trailer fire involving another person the defendant lived with, in which the State admitted on appeal there was no probative evidence linking the defendant to the prior fire. The State did not even attempt to prove Gore committed the prior fire, just questioned him about the coincidence of a prior fire in the home of someone he lived with, prejudicing him before the jury. Id. Here, the State proved Bethel committed the prior incident by the testimony of 3 witnesses; the prior incident was just 1 to 2 weeks prior to the crimes; and the prior incident involved *McCary's* and 1 of its employees.

with a loaded semi-automatic pistol hidden on his person. Before going to *McCary's*, Bethel had 2 friends drive him to several other bars. At 1 of those bars, Amiracle Wright saw Bethel, and Bethel stated to Wright that he was going to *McCary's* bar. (Tr. 179-94). Wright told Bethel he could not go to *McCary's* because he was banned because of the prior incident. Bethel told Wright he was going anyway and would tell employees at *McCary's* it was his twin brother who committed the prior incident in order to get in the bar. (Tr. 179-94). Bethel then had his 2 friends drive him to *McCary's* where he approached the front door alone and looked inside to see if Assistant Manager Ross was present. When he did not see Ross, he immediately entered the bar and so did his 2 friends who followed. Bethel was then confronted by patrons and staff who informed him he would have to leave because he was banned because of the prior incident. An argument ensued. The tussle between Bethel and Miller then ensued where the bartender Jenkins was able to pull Bethel away from Miller and push Bethel out of the bar with help from others. Once the door closed, within seconds, Bethel fired 7 shots through the front door killing 2 and severely wounding 2 others. Judge Newman did not abuse his discretion in admitting this testimony as its probative value in the case was not substantially outweighed by the danger of unfair prejudice to Bethel because the prior incident and its details established the *res gestae* of the crime, Bethel's malice toward *McCary's* and anyone associated with *McCary's* including employees and patrons, prior difficulties between the parties, malice, intent, and showing Bethel was the aggressor, and Bethel's intent when he fired back into the club indiscriminately was malicious and his motive was retribution for being ejected from the bar, not self-defense. There is no merit to this appellate ground. Judge Newman must be affirmed.

Harmless error

Even assuming *arguendo* error in admitting any of the prior incident, it was harmless and

could not have affected the verdict. "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006); This Court will not set aside a conviction for an insubstantial error not affecting the result when guilt is conclusively proven by competent evidence and no other rational conclusion could be reached. State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995); State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

The admission of any of the details of the prior incident was harmless. There was overwhelming un-objected to evidence Bethel was banned from *McCary's* because of something he did in a prior incident. (Tr. 71, ll. 21-24; 72; 74, 76-77; 88-89, 102, ll. 3-6). There was overwhelming evidence of Bethel's guilt including video surveillance footage of all of the crimes he committed and what occurred inside and outside *McCary's* at the time of the incident down to the second **(State's Ex. 4; State's Ex. 65; State's Ex. 3; Tr. 63-66; 231-47)**, along with eyewitness' testimony of the bartender and surviving victim Jenkins **(Tr. 67-98)**; the cook and surviving victim Martin **(99-111)**; and, patron Amiracle Wright **(Tr. 179-94)**. Further, ballistics showed Bethel fired a semi-automatic pistol 12 times indiscriminately into a crowded bar killing 2 and severely wounding 2 others. (Tr. 195-208; 208-15; 223-230; 167-78). Finally, identity was not an issue as Bethel admitted he was the shooter. State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004), *affirmed*, 373 S.C. 601, 646 S.E.2d 872 (2007)(Although trial judge erred in not limiting the amount of the evidence presented as to bad acts, such error was harmless, where other evidence established defendant's guilt beyond a reasonable doubt). As a result of the overwhelming evidence of Bethel's guilt, any error in the admission of the challenged evidence was harmless beyond a reasonable doubt on this record. State v. Brown, 424 S.C. 479, 493, 818 S.E.2d 735, 743 (2018)("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 of the trial is considered harmless.'") (quoting State v. Byers, 392 S.C. 438, 447, 710 S.E.2d 55, 60 (2011)).

CONCLUSION

For the above stated reasons, Bethel's convictions and sentences for 2 counts of murder, 2 counts of attempted murder, and possession of a weapon during the commission of a violent crime must be affirmed.

Respectfully submitted,

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