THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of General Sessions

Clifton Newman, Circuit Court Judge

Appellate Case No. 2023-001446

The State of South Carolina, Respondent,

v.

Rita M. Pangalangan, Appellant.

INITIAL BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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STATEMENT OF THE CASE

On August 6, 2020, the Colleton County Grand Jury indicted Appellant, Rita Pangalangan, for murder. (R.*). The Colleton County Grand Jury also indicted Appellant for great bodily injury on a child ("GBIC") on October 6, 2022, and Criminal Conspiracy on November 3, 2022. (R.*). The Grand Jury also indicted Appellant's co-defendant, Larry King, for the same offenses.

On August 28, 2023, Appellant and her co-defendant proceeded to a joint trial before the Honorable Clifton Newman and a jury. (Vol. I Tr. 1–220; Vol. II Tr. 221–458; Vol. III Tr. 459–811).[1] Dayne Phillips represented Appellant, John Loy and Gil Gatch represented Co-Defendant King, and Solicitors Duffie Stone and Sean Thornton prosecuted the case on behalf of the State.

On September 1, 2023, the jury returned guilty verdicts against Appellant and Co-Defendant King for murder and GBIC, and a not guilty verdict for criminal conspiracy. (Vol. III Tr. 762, line 12 – 763, line 25). The Trial Court sentenced Appellant to thirty-seven years imprisonment for the murder conviction and to twenty years imprisonment on the GBIC conviction. (Vol. III Tr. 809, line 7-10). The Trial Court ordered concurrent sentences. (Vol. III Tr. p. 809, lines 11-12).

On September 8, 2023, Appellant filed a Notice of Appeal. (R.*). This appeal follows.

[1] Please note there are a significant number of errors in the transcript (e.g., incorrectly listing the speaking party and providing the wrong word that is similar to the correct word).

STATEMENT OF THE FACTS

Background

On August 5, 2019, Appellant's thirteen-year-old disabled daughter died from hyperthermia[2] after being inside Appellant's car for over five hours in the front yard of Co-Defendant King's residence. Specifically, Co-Defendant King asked Appellant to leave his residence after a disagreement and put her daughter in the car for them to go home. (Vol. III Tr. 565 – 566). Co-Defendant King testified that the car engine was running, and he believed the air-conditioner was on, or he would not have left Appellant's daughter in the car. (Vol. III Tr. 568, lines 4-9).

It is undisputed that Appellant and Co-Defendant King left his residence to get another key fob after being unable to open the car doors several hours later, and Co-Defendant King called a local locksmith for help to unlock the car. (Vol. III Tr. 609 – 615). Co-Defendant King further testified that Appellant did not want her daughter to die. (Vol. III Tr. 603). Notably, Co-Defendant King's home surveillance cameras recorded this incident.

At trial, the State played the surveillance video recordings for the jury and presented evidence from an expert witness regarding the potential temperatures inside the car at different time intervals, a pathologist to explain the cause and manner of her the Child's death, and an expert witness to explain the potential effects of methamphetamine use on cognitive impairment and behavior. The State argued that Appellant and Co-Defendant King were high on methamphetamine at the time of this incident, and that the jurors could infer malice based on their reckless conduct.

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[2] Hyperthermia is an abnormally high body temperature caused by a failure of the heat-regulating mechanisms of the body to deal with the heat coming from the environment. *See* National Institutes of Health, *Hyperthermia: too hot for your health*, https://www.nih.gov/news-events/news-releases/hyperthermia-too-hot-your-health-1 (last visited on September 6, 2024).

Motion for Attorney-Conducted Voir Dire

Pre-trial, Appellant moved for supplemental attorney-conducted *voir dire*. (Vol. I Tr. 42, line 2 – 45, line 2). Specifically, Appellant argued that attorney-conducted *voir dire* is "necessary in the interest of justice to obtain an impartial jury, with the intelligent exercise of rendering challenges by counsel, informed consideration of the court, [and] . . . challenges for cause." (Vol. I Tr. 43, lines 2-6). The Trial Court admitted Appellant's written motion for attorney-conducted *voir dire* as Court's Exhibit Number 1. (Vol. I Tr. 44, line 22 – 45, line 2; R. *).

In response, the State objected and maintained that "the entire procedure we use in South Carolina is best left to the General Assembly, and, of course, the Supreme Court setting out our rules." (Vol. I Tr. 45, lines 12-16). The State also specifically objected to the proposed questions.

The Trial Court ultimately held, "I know about the effort to try to put South Carolina in a category of attorney conducted voir dire, I don't believe there's any authority anywhere in this State for that at this point in time in history[.]" (Vol. I Tr. 50, lines 1-6).

Motion to Suppress Prior Bad Act Character Evidence

Pre-Trial, Appellant moved for the State to disclose prior bad act evidence and objected to the State presenting inadmissible propensity evidence. (Vol. I Tr. 187, lines 1-8). In response, the State indicated its intent to present the testimony of Brittany Honeycutt and Lindsey Lewis under *res gestae*. (Vol. I Tr. 188, lines 1-6). The State argued, "This happened on a Monday . . . [Appellant] left her child with this babysitter [Lindsay Lewis on a] Friday, Saturday, and Sunday, and she describes, basically, [Appellant] leaving the child with her and taking off, and she doesn't see her for the full weekend, didn't know she was leaving." (Vol. I Tr. 188, lines 15-21). The Prosecutor also maintained that Appellant's former roommate, Brittany Honeycutt, would testify that Appellant told her, "'Just take the child with you to work, and put her in the car, that's what I always do.'" (Vol. I Tr. 189, lines

11-13).

In response, Appellant argued:

> Thank you, Your Honor. Any evidence of that nature that's not resulting from a conviction must be . . . proved by clear and convincing evidence to be admissible, and pursuant to State v. [Gore], when a prior bad act, or similar to the one, where a person's being tried, the danger of unfair prejudice is enhanced. So not only under 404(b), if an exception applies, we argue that it doesn't, but if an exception applied, you still have the 403 analysis that the probative value of the evidence is substantially outweighed by its prejudicial effect. And here it's not a result of a conviction, and it's highly similar, so the danger of unfair prejudice is enhanced under the case law.

(Vol. I Tr. 190, lines 2-17). Appellant's Counsel also submitted a written motions. (Vol. I Tr. 193, lines 1-4; Vol. II Tr. 235, lines 11-22; R.* Motions to Disclose 404(b) evidence and objection to 404(b) evidence).

The Trial Court initially stated that he does not rule in advance on "critical issues". (Vol. I 194, line 22 – 195, line 1). However, after Appellant subsequently reiterated this argument to the Trial Court when moving to limit the scope of the State's opening statement, the Trial Court held:

> As far as the res gestae it also shows - - could show the state of mind of the Defendants. I find the relevance outweighs any danger of unfair prejudice, due to the State's burden of proof and weighing both things that it's admissible, whether or not the State will establish that by clear and convincing evidence under Rule 403 and 404[(b), SCRE]. . . . I find that those - - that prior conduct is likewise admissible, as part of the res gestae, as it relates to matters that occurred the week before the death of the child. At this time, the motion is denied.

(Vol. II Tr. 240, lines 15-22).

At trial, Appellate objected during the State's direct examination of the babysitter, Lindsay Lewis, when the State asked if she saw anything unusual when she put the Appellant's daughter to bed, and Ms. Lewis replied, "I can't remember - - it was bed bugs." Specifically, Appellant objected and cited Rules 401, 403, and 404(b), SCRE, noting "all previously given to Your Honor." (Vol. II

Tr. 322, lines 22-25). The Trial Court overruled the objection. (Vol. II Tr. 323, line 2).

Appellant also objected during the State's direct examination of Appellant's former roommate, Brittany Honeycutt, when the State asked about whether she had "watch[ed]" Appellant's daughter: "And, Your Honor, this is subject to our prior objection." The Trial Court responded, "Yes, proceed." (Vol. II Tr. 329, line 20 – 330, line 6). The State then presented the following testimony from Appellant's former roommate:

Solicitor: *Did [Appellant] ever just leave the child with you without asking you to take care of her*?

Honeycutt: Yes.

Solicitor: And how did that happen0?

Honeycutt: So there was an incident where there was a Sunday night in July, where she had asked me to watch her for just overnight, and I said that was fine. So - - I'm sorry, that was also on Monday.

Solicitor: Okay.

Honeycutt: And she came back the next day, because I had told her I had to work. So she did come back home that morning, and she told me was gonna (sic) be home all day.

And when I was ready to go to work, or sorry, I am so sorry, I got my days mixed up. So when the - - when I first watched her the first night, that was an agreement. The next day it was she wasn't going anywhere, and then it was she gave her - - I remember her giving her a bath I remember getting ready for bed, and she would close her door, and she did the normal routine.

And then I went to bed with my kids, because I had to work the next day, and the next thing I know, *the next morning I woke up [the Child] was in her room, trying to get out of the bed.*

Solicitor: So she - - when [the Child's] in the room, is she locked in the room?

Honeycutt: I don't know if the door was locked, but I know she could not open the door.

Solicitor: Because of the hands?

Honeycutt: Yes.

Solicitor: Did [the Child] - - [Appellant] - - and let me go - - now we're gonna go right up until August when you left.

Honeycutt: Uh-huh.

Solicitor: You ended up leaving the Thursday before this event - -

Honeycutt: Yes.

Solicitor: - - took place; is that correct?

Honeycutt: Yes.

Solicitor: Okay. Leading up close to that time did you have a discussion with [Appellant] about you babysitting [her daughter], and whether or not you were able to do that?

Honeycutt: Yes.

Solicitor: Please tell us about that.

. . .

Honeycutt: Sorry. [Appellant] came up to me and had asked me if I could watch her. I had let her know I had to go into work for a few hours, and she kept asking me over and over.

And, finally, when the answer didn't change it was no, obviously, she told me to leave [her daughter] in my car with the windows down, because she does it all the time.

Appellant: Same as our objection. Your Honor.

Trial Court: Objection is overruled.

Solicitor: And, I'm sorry, I keep interrupting you, could you - - she – you said you couldn't, because you had to go to work?

Honeycutt: Yes.

Solicitor: Pick it up from there.

Honeycutt: So when I told her the first time, she kept asking me over and over again. *And when she realized that the answer was not gonna (sic) change from no, she had told me that I could still take her [daughter], and leave her in my car with the windows down, and - - because she does it all the time, because she does it all the time.*

Solicitor: She being?

Honeycutt: Appellant.

(Vol. II Tr. 330, line 20 – 334, line 1) (emphasis added).

Motion to Suppress Photographs

Pre-trial, Appellant noted her objection to the admission of any unfairly prejudicial photographs. (Vol. I Tr. 195, lines 2-7). The State indicated that they were only going to present photographs of the crime scene. (Vol. I Tr. 196, lines 9-13; Tr. 197, lines 1-2). Appellant moved to suppress these photographs:

> Specifically, our position is that we move for suppression of the evidence . . . based - - that the photos have little to no probative value, as to any disputed fact, or to an element of murder. . . . [U]nder our 403 objection another case that was recently decided by our Supreme Court, State v. Jones, that was filed on March 29th, . . . 'It is well settled - - or well established that photographs that are calculated to arouse the sympathies and prejudice of the jury are excluded, if they're irrelevant and unnecessary with the issues at trial.
>
> And, of course, . . . that the jury would make a decision based on an improper basis, not based on the evidence.
>
> Seeing the photos alone would invoke such a response, that the jury would not base their decision on - - their verdict solely on the evidence, but based on the graphic nature of the photographs, that any probative value of those photographs are substantially outweighed.

(Vol. I Tr. 199, line 6 – 200, line 4). Appellant further explained his objection to the proposed photographs, "[O]ur specific issue is just that a pathologist will be able to testify, explain the injuries,

that the State will have other means of evidence that they can present through testimony of the pathologist [and] through the people that were present at the scene." (Vol. I Tr. 200, lines 13-21).

At trial, Appellant renewed his prior objection to the admission of these photographs *in camera*. (Vol. II Tr. 276, line 15 – 277, line 12). The Trial Court held, State's "Exhibits Number 2 and 4 are admitted over objection, that depict the scene at the time the officers arrived, and being further described through testimony, and that the pictures are not of such a nature the prejudice exceeds probative value." (Vol. II Tr. 279, line 25 – 280, line 5; R.* State's Exhibits 2 and 4).

Appellant also provided the following argument as to the exclusion of State's Exhibit Numbers 1 and 3:

> Based on Your Honor's decision to admit those two [State's Exhibits 2 and 4], our argument would be, again, that there's nothing that testimony can't provide that's not already contained within those two photographs that would be highlighted by those.
>
> *That is not how she was found at the scene. As the Coroner's tag has a sheet behind her, [the other photograph] is, obviously, an enhanced photograph with the injuries.* These photos are nothing more than to inflame the passion and prejudice of the jury, to have them make a decision on an improper basis, not the evidence themselves[.]
>
> And to me those additional two photographs - - I mean the probative value would be substantially outweighed by its prejudicial effect.

(Vol. II Tr. 282, lines 5-23; R.* State's Exhibit Numbers 1 and 3) (emphasis added). The Trial Court ultimately held, "These two photographs 1 and 2 [State's Exhibit Numbers 1 and 3] are admitted, over objection, to show the bruising on the child, and it further shows the condition at the time. They will be admitted over objection." (Vol. II Tr. 284, lines 17-21; Tr. 285, lines 17-24).

Over Appellant's objection, the Trial Court also admitted photographs of a gun located in a bag that was found in the car and allowed testimony about the gun being loaded. (Vol. 300, lines 21-25; Tr. 302, lines 15-23; Tr. 303, lines 3-7; R. * State's Exhibit Numbers 10 and 11).

State's Closing Argument

During the State's closing argument, Prosecutor Stone argued, "*If they had walked up to her and shot her, she wouldn't have suffered the pain that she suffered in this case.*" The Trial Court overruled Appellant's contemporaneous objection. (Vol. III Tr. 691, lines 2-7) (emphasis added).

Motions for Mistrial

During a break, Appellant moved for a mistrial, arguing:

> Based on the prior objections, now the testimony from Brittany Honeycutt and Lindsey Lewis, we believe it would be appropriate to move for a mistrial, specifically, under the objections we had under Rule 404(b), as well as Rule 403. I believe at this point the prejudice has manifested a necessity that this has now denied [Appellant] the right to a fair trial.

(Vol. II Tr. 352, lines 12-20). The Trial Court denied the motion. (Vol. II Tr. 353, lines 12-13).

At the close of the State's case-in-chief, Appellant renewed all prior motions and motion for a mistrial on the same basis. (Vol. III Tr. 539, lines 7-21). Appellant again renewed all prior motions and motion for a mistrial after resting her case. (Vol. III Tr. 670, lines 6-9). After the Trial Court instructed the jury on the law, Appellant renewed the motion for a mistrial based on the State's closing argument:

> [T]hank you, Your Honor. Based on what was presented in closing, I'd renew the prior motion for a mistrial, specifically, highlighting the Solicitor's comments about shooting her in the head, referring the [Appellant's daughter], and the previously sustained hearsay objection I had, regarding what [Appellant] said, you had sustained that during the trial inadmissible statement in his closing.
>
> There was a photo of the gun that I previously objected to, as well as the testimony from Lindsey Lewis and Brittany Huneycutt, that I would argue was under 401, not relevant, 404(b) inadmissible propensity evidence, and [Rule] 403, that any probative value was substantially outweighed by its prejudicial effect.
>
> I believe we touched on a mistrial regarding the – that's been a deprivation of [Appellant's] right to a fair trial. The closing

> calculated to rose the passions and prejudice of the jury. It crossed the threshold and rose to the level of a mistrial. Thank you.

(Vol. III Tr. 738, lines 3-24). The Trial Court replied, "All right, everything is a matter of record, and the record is preserved, and I overruled the motion that's currently being made and all other motions that I previously overruled or denied." (Vol. III Tr. 740, lines 9-15).

ARGUMENT

I. THE TRIAL COURT ERRED BY ALLOWING THE STATE TO PRESENT UNFAIRLY PREJUDICIAL PRIOR BAD ACT CHARACTER EVIDENCE WHEN THE PROPENSITY EVIDENCE IS NOT *RES GESTAE*, IS STRIKINGLY SIMILAR TO THE ONE FOR WHICH APPELLANT IS BEING TRIED, IS NOT A RESULT OF A CRIMINAL CONVICTION, AND IS NOT PROVEN BY CLEAR AND CONVINCING EVIDENCE.

Standard of Review

"Decisions regarding the admissibility of evidence . . . are within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion." *State v. Sweet*, 374 S.C. 1, 4-5, 647 S.E.2d 202, 204 (2007). "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.*, 374 S.C. at 5, 647 S.E.2d at 204-05.

Law

Typically, evidence of a person's character is not admissible to prove the person acted "in conformity therewith on a particular occasion." Rule 404(a), SCRE. Evidence of a person's "other crimes, wrongs, or acts" are generally inadmissible to prove a person's general character "in order to show action in conformity therewith." Rule 404(b), SCRE (commonly referred to as prior bad act or *Lyle* evidence). The proponent of prior bad act evidence must demonstrate it has a legitimate purpose, "i.e., the evidence does something more than prove a person has propensity to commit crimes". *Johnson v. State*, 433 S.C. 550, 555, 860 S.E.2d 696, 699 (Ct. App. 2021). Under Rule 404(b), SCRE, there are only five legitimate purposes for the admission of prior bad act evidence: to prove "motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."

This Court addressed the proper approach to determining the admissibility of prior bad act evidence in *State v. Perry*, 430 S.C. 24, 842 S.E.2d 654 (2020). In a criminal case, the State must

convince the trial court that the prior bad act evidence is logically relevant to a material fact at issue in the case: "If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime." *Lyle*, 125 S.C. at 417, 118 S.E. at 807.

If, after applying the logical relevancy test with "rigid scrutiny," the trial court concludes the prior bad act evidence serves some purpose other than to show the defendant's proclivity for criminal conduct (and that purpose is one of the five listed in Rule 404(b)), then the evidence is admissible unless its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE; *see Perry*, 430 S.C. at 44, 842 S.E.2d at 665.

Notably, if 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*, 433 S.C. at 556, 860 S.E.2d at 699. The danger of unfair prejudice is enhanced when the prior bad act is "strikingly similar" to the one for which the appellant is being tried. *State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984).

Prior bad act evidence "is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Michelson v. United States*, 335 U.S. 469, 475–76 (1948) (footnote omitted). The Court of Appeals reiterated the purpose of barring prior bad act evidence to prove character in *Johnson*, deeming it useless to the factfinder:

> The law's disdain of character evidence draws from notions of basic fairness tied together by the "golden thread"—the presumption of

> innocence—so one is rightly judged by whether the government has proven what it has charged, regardless of who it has charged. That is, after all, the spirit of the rule of law.

Johnson, 433 S.C. at 556, 860 S.E.2d at 700.

Under the theory of *res gestae*, the State can argue that evidence is necessary for a full presentation of the case without fragmentation. *See generally State v. Simmons*, 352 S.C. 342, 573 S.E.2d 856 (Ct. App. 2002).

Discussion

In this case, the Trial Court erred in allowing the State to present unfairly prejudicial prior bad act character evidence when the propensity evidence is not *res gestae*, is "strikingly similar" to the one for which Appellant is being tried, is not a result of a criminal conviction, and is not proven by clear and convincing evidence. *See generally Johnson*, 433 S.C. at 556, 860 S.E.2d at 699; *Gore*, 283 S.C. at 121, 322 S.E.2d at 13 (finding the danger of unfair prejudice is enhanced when the prior bad act is "strikingly similar" to the one for which the appellant is being tried).

Specifically, the Trial Court erroneously allowed the State to present the following unfairly prejudicial testimony from Appellant's former roommate, Brittany Honeycutt, when it was not necessary for the full presentation of the State's case:

> [Appellant] came up to me and had asked me if I could watch her. I had let her know I had to go into work for a few hours, and she kept asking me over and over.
>
> And, finally, when the answer didn't change it was no, obviously, *she told me to leave [her daughter] in my car with the windows down, because she does it all the time.*
>
> ...
>
> So when I told her the first time, she kept asking me over and over again. And when she realized that the answer was not gonna (sic) change from no, *she had told me that I could still take her [daughter], and leave her in my car with the windows down, and - - because she does it all the time, because she does it all the time.*

(Vol. II Tr. 330, line 20 – 334, line 1) (emphasis added).

The State failed to present any corroborating evidence to satisfy its burden of proving this prior bad act (that is not the result of a conviction) by clear and convincing evidence. Notably, the former roommate's prior bad act testimony mirrored this allegation, served only as propensity evidence, and enhanced the prejudice to Appellant.

Assuming arguendo, even if an exception applied under Rule 404(b), SCRE, the probative value of this evidence is substantially outweighed by the danger of the unfair prejudice to Appellant. *See* Rule 403, SCRE; *Perry*, 430 S.C. at 44, 842 S.E.2d at 665. Therefore, the Trial Court erred in allowing the State to present unfairly prejudicial prior bad act character evidence when the propensity evidence is not *res gestae*, is "strikingly similar" to the one for which Appellant is being tried, is not a result of a criminal conviction, and is not proven by clear and convincing evidence. *See generally Johnson*, 433 S.C. at 556, 860 S.E.2d at 699; *Gore*, 283 S.C. at 121, 322 S.E.2d at 13.

II. THE TRIAL COURT ERRED BY REFUSING TO SUPPRESS UNFAIRLY PREJUDICIAL PHOTOGRAPHS WHEN THE PHOTOS WERE UNNECESSARY TO THE ISSUES AT TRIAL AND WERE CALCULATED TO AROUSE THE SYMPHATHIES AND PREJUDICES OF THE JURY, THEREBY INFLUENCING THE JURY'S VERDICT ON AN IMPROPER BASIS.

Standard of Review

"Decisions regarding the admissibility of evidence and whether to grant or deny a mistrial are within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion." *State v. Sweet*, 374 S.C. 1, 4-5, 647 S.E.2d 202, 204 (2007). "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.*, 374 S.C. at 5, 647 S.E.2d at 204-05.

Law

Under Rule 403, SCRE, relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice. Moreover, "[I]t is well-established that photographs calculated to arouse the sympathies and prejudices of the jury are to be excluded if they are irrelevant or unnecessary to the issues at trial." *State v. Jones*, 440 S.C. 214, 891 S.E.2d 347 (2023) (quoting *State v. Middleton*, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986)).

Photographs are relevant if they "depict the bodies of the murder victims in substantially the same condition in which the defendant left them." *State v. Kornahrens*, 290 S.C. 281, 289, 350 S.E.2d 180, 185 (1986); Rule 401, SCRE. Even if relevant, photographs are unfairly prejudicial if they "create a 'tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.'" *State v. Franklin*, 318 S.C. 47, 55, 456 S.E.2d 357, 361 (1995) (quoting *State v. Alexander*, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)).

In *State v. Collins*, our Supreme Court acknowledged that the photographs were graphic, but concluded that the photos were "highly probative, corroborative, and material in establishing

the elements of the offenses charged; their probative value outweighed their potential prejudice; and the court of appeals should not have invaded the trial court's discretion in admitting this crucial evidence based on its emotional reaction to the subject matter presented." 409 S.C. 197, 535, 763 S.E.2d 22, 28 (2014). The *Collins* Court further noted that photographs should not be excluded just because they are gruesome. *Id.* at 535-36, 763 S.E.2d at 28.

Discussion

In this case, the Trial Court erred by refusing to suppress unfairly prejudicial photographs when the photos were unnecessary to the issues at trial and were calculated to arose the sympathies and prejudices of the jury, thereby influencing the jury's verdict on an improper basis. *See generally Jones*, 440 S.C. 214, 891 S.E.2d 347; *Collins*, 409 S.C. at 535, 763 S.E.2d at 28. Appellant moved for suppression of the photographs based on the photos having little-to-no probative value as to any disputed fact. *See State v. Nelson*, 440 S.C. 413, 891 S.E.2d 508 (2023).

Specifically, Appellant also argued that the scant evidentiary value the photos may have is negated by the responding officers' and pathologist's testimony. *See Middleton*, 288 S.C. at 24, 339 S.E.2d at 693. The average juror could understand the extent of the Child's injuries from hearing the responding officers' and pathologist's testimony that the Child died as a result of being inside a hot car for several hours. Appellant provided the following argument as to the exclusion of State's Exhibit Numbers 1 and 3:

> Based on Your Honor's decision to admit those two [State's Exhibits 2 and 4], our argument would be, again, that there's nothing that testimony can't provide that's not already contained within those two photographs that would be highlighted by those.
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> *That is not how she was found at the scene. As the Coroner's tag has a sheet behind her, [the other photograph] is, obviously, an enhanced photograph with the injuries.* These photos are nothing more than to inflame the passion and prejudice of the jury, to have them make a decision on an improper basis, not the evidence themselves[.]

> And to me those additional two photographs - - I mean the probative value would be substantially outweighed by its prejudicial effect.

(Vol. II Tr. 282, lines 5-23; R.* State's Exhibit Numbers 1 and 3) (emphasis added).

Notably, the additional photographs showing the Coroner's tag and highlighting the Child's injuries served no legitimate purpose other than to enhance the unfair prejudice to Appellant. Despite there being absolutely no relevance, the Trial Court erroneously admitted a photograph of a gun that was located in a bag found in the car, and allowing testimony about the gun being loaded. (Vol. II Tr. 300, lines 21-25; Tr. 302, lines 15-23; Tr. 303, lines 3-7; R. * State's Exhibit Numbers 10 and 11). *See* Rules 401 and 403, SCRE. Therefore, the Trial Court erred by refusing to suppress unfairly prejudicial photographs when the photos were unnecessary to the issues at trial and were calculated to arose the sympathies and prejudices of the jury, thereby influencing the jury's verdict on an improper basis. *See generally Jones*, 440 S.C. 214, 891 S.E.2d 347; *Collins*, 409 S.C. at 535, 763 S.E.2d at 28.

III. THE TRIAL COURT ERRED BY REFUSING TO GRANT A MISTRIAL AFTER ALLOWING THE STATE TO PRESENT UNFAIRLY PREJUDICIAL PRIOR BAD ACT EVIDENCE AND PHOTOGRAPHS, AND WHEN THE PROSECUTOR'S COMMENT DURING CLOSING ARGUMENT WAS CALCULATED TO AROUSE THE PASSIONS AND PREJUDICE OF THE JURORS TO DENY APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL.

Standard of Review

"Decisions regarding the admissibility of evidence and whether to grant or deny a mistrial are within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion." *State v. Sweet*, 374 S.C. 1, 4-5, 647 S.E.2d 202, 204 (2007). "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.*, 374 S.C. at 5, 647 S.E.2d at 204-05.

Law

In determining whether to grant a mistrial, our Supreme Court has noted that "[t]he less than lucid test is . . . whether the mistrial was 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). Specifically, the trial court is to consider the following factors when ruling on a motion for mistrial: (1) the character of the testimony; (2) the circumstances under which it was offered; (3) the nature of the case; (4) other testimony in the case; and (5) "perhaps other matters." *State v. Craig*, 267 S.C. 262, 269, 227 S.E.2d 306, 310 (1976). Therefore, although the decision to grant or deny a mistrial is within the trial court's discretion, such discretion is not unfettered. *See State v. Edwards*, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007).

"On appeal, an appellate court will review the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the

defendant's guilt." *State v. Rudd*, 355 S.C. 543, 549, 586 S.E.2d 153, 157 (Ct. App. 2003). "The appropriate determination is whether the solicitor's comment so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.*

Our Supreme Court has directly addressed this issue:

> While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done. The solicitor's closing argument must, of course, be based on this principle. The argument therefore must be carefully tailored so as not to appeal to the personal bias of the juror nor be calculated to arouse his passion or prejudice.

State v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) (quoting *State v. Linder*, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981)); *Rudd*, 355 S.C. at 549, 586 S.E.2d at 156 (holding a solicitor's "argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it.") (citation omitted)).

"The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002 (finding "[i]mproper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument."); *See State v. Hornsby*, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997 ("A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice.").

In *State v. McGill*, 191 S.C. 1, 3 S.E.2d 257, 261 (1939), our Supreme Court held that a Solicitor "is a quasi judicial officer, and . . . that a solicitor must not, because of the high position he holds, say things, or do things, which would have any effect to prevent a citizen, however humble, from obtaining the fair and impartial trial he is entitled to under the law". *See generally State v. Cannon*, 229 S.C. 614, 93 S.E.2d 889 (1956) (finding a prosecuting attorney has a duty to

treat the defendant in an impartial manner); *State v. Craig*, 267 S.C. 262, 265, 227 S.E.2d 306, 308 (1976) (noting that "[a]s a general rule, conduct of the prosecutor calculated to arouse prejudice against the accused, and to prevent him from having a fair trial will not be tolerated"); *see also State v. Quattlebaum*, 338 S.C. 441, 527 S.E.2d 105 (2000) (finding "[p]rosecutors are ministers of justice and not merely advocates . . . A prosecutor has special responsibilities to do justice and is held to the highest standards of professional ethics. . . . We will not tolerate deliberate prosecutorial misconduct which threatens rights fundamental to liberty and justice").

Discussion

In this case, the Trial Court erred by refusing to grant a mistrial after allowing the State to present unfairly prejudicial prior bad act evidence and photographs, and when the Prosecutor's comment during closing argument was calculated to arouse the passions and prejudice of the jurors to deny Appellant's due process right to a fair trial. *See generally Prince,* 279 S.C. at 33, 301 S.E.2d at 472; *Rudd*, 355 S.C. at 549, 586 S.E.2d at 156 (holding a solicitor's "argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it.") (citation omitted)).

During the State's closing argument, Prosecutor Stone argued, "*If they had walked up to her and shot her, she wouldn't have suffered the pain that she suffered in this case.*" The Trial Court overruled Appellant's contemporaneous objection. (Vol. III Tr. 691, lines 2-7) (emphasis added). The Prosecutor deliberately made this improper argument to prejudice Appellant, and the Trial Court erroneously overruled the objection. Appellant renewed the motion for a mistrial again after the Trial Court instructed the jury on the law:

> [T]hank you, Your Honor. Based on what was presented in closing, I'd renew the prior motion for a mistrial, specifically, highlighting the Solicitor's comments about shooting her in the head, referring the [Appellant's daughter], and the previously sustained hearsay

> objection I had, regarding what [Appellant] said, you had sustained that during the trial inadmissible statement in his closing.
>
> There was a photo of the gun that I previously objected to, as well as the testimony from Lindsey Lewis and Brittany Huneycutt, that I would argue was under 401, not relevant, 404(b) inadmissible propensity evidence, and [Rule] 403, that any probative value was substantially outweighed by its prejudicial effect.
>
> I believe we touched on a mistrial regarding the – that's been a deprivation of [Appellant's] right to a fair trial. The closing calculated to rose the passions and prejudice of the jury. It crossed the threshold and rose to the level of a mistrial. Thank you.

(Vol. II Tr. 738, lines 3-24).

Manifest necessity dictated that the Trial Court should have granted a mistrial based on the totality of unfair prejudice against Appellant based on the the character of the testimony, the circumstances under which it was offered, and the nature of the case. *See Craig*, 267 S.C. at 269, 227 S.E.2d at 310. Therefore, the Trial Court erred by refusing to grant a mistrial after allowing the State to present unfairly prejudicial prior bad act evidence and photographs, and when the Prosecutor's comment during closing argument was calculated to arouse the passions and prejudice of the jurors to deny Appellant's due process right to a fair trial.

IV. THE TRIAL COURT ERRED BY REFUSING TO ALLOW ATTORNEY-CONDUCTED *VOIR DIRE* WHEN THE CURRENT PROCEDURE DENIES APPELLANT'S RIGHT TO A FAIR TRIAL BY A PANEL OF IMPARTIAL JURORS WHO WERE SELECTED USING A FUNDAMENTALLY FAIR PROCEDURE.

The Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 3 and 14 of the South Carolina Constitution guarantee criminal defendants a fair trial by a panel of impartial jurors who were selected using a fundamentally fair procedure. *See Estelle v. Williams*, 425 U.S. 501 (1976); *Irvin v. Dowd*, 366 U.S. 717 (1961). "'[I]n order to fully safeguard this protection, it is required that the jury render its verdict free from outside influences of whatever kind and nature.'" *State v. Bryant*, 354 S.C. 390, 395, 581 S.E.2d 157, 160 (2003) (quoting *State v. Cameron*, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct. App. 1993)).

The purpose of supplemental attorney conducted *voir dire* is to expose any known or unknown bias or prejudice of the prospective jurors against a defendant and/or the nature of the criminal charge alleged by the State. *See Mu'Min v. Virginia*, 500 U.S. 415 (1991) ("*Voir dire* examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges."); *cf. State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998) (holding a juror's failure to disclose certain information does not warrant a new trial where the juror was not specifically asked to disclose the information during *voir dire* examination).

Adequate *voir dire* is critical in protecting a defendant's constitutional right to an impartial jury. *See Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (noting "[w]ithout an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled."); *see also Connors v. United States*, 158 U.S. 408, 413 (1895) (finding "Voir Dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury

will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able to impartially follow the court's instructions and evaluate the evidence cannot be fulfilled.").

The Supreme Court of the United States has explained the importance of *voir dire* examination and its role in the process of impaneling an impartial jury:

> Voir Dire examination serves to protect that right by exposing possible biases, *both known and unknown*, on the part of potential jurors. Demonstrated bias in the responses to questions on Voir Dire may result in a juror being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges. The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.

McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 554 (1984) (emphasis added).

> In cases of extensive publicity, *defense counsel should be accorded more latitude in personally asking or tendering searching questions that might root out indications of bias, both to facilitate intelligent exercise of peremptory challenges and to help uncover factors that would dictate disqualification for cause.* Indeed, it may sometimes be necessary to question on voir dire prospective jurors individually or in small groups, both to maximize the likelihood that members of the venire will respond honestly to questions concerning bias, and to avoid contaminating unbiased members of the venire when other members disclose prior knowledge of prejudicial information.

Nebraska Press Assn. v. Stuart, 427 U.S. 539, 602 (1976) (emphasis added).

In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court of the United States held that the Equal Protection Clause prohibits challenging potential jurors "solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.*, 476 U.S. at 79. Thus, peremptory challenges must be made in a non-racially discriminatory manner in order to be constitutional. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (holding that the discriminatory exercise of peremptory

challenges on the basis of gender is unconstitutional).

The Court ultimately created a procedure for a party to establish a prima facie case of discriminatory use of peremptory challenges. *See State v. Adams*, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996) (adopting the *Batson* procedure set forth in *Purkett v. Elem*, 513 U.S.765, 1 (1995)). The opponent of the strike must show that the race-or-gender neutral explanation provided is mere pretext. *Id.* Notably, the burden of persuading the trial court that a *Batson* violation occurred remains on the opponent of the strike. *Id.*

"If conducted properly, *voir dire* can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. *Voir dire* provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently."

The current law on jury selection in South Carolina is found in Chapter7 of Title 14 in the South Carolina Code of Laws. *See* S.C. Code Section 14-7-1020.

Discussion

In this case, the Trial Court erred by refusing to allow attorney-conducted *voir dire* when the current procedure denies Appellant's right to a fair trial by a panel of impartial jurors who were selected using a fundamentally fair procedure. *See Estelle v. Williams*, 425 U.S. 501 (1976); *see also Cage v. Louisiana*, 498 U.S. 39 (1990). Attorney-conducted *voir dire* is necessary in the interest of justice to obtain an impartial jury through the intelligent exercise of peremptory challenges by counsel and informed consideration by the court of any challenges for cause. *See Mu'Min v. Virginia*, 500 U.S. 415 (1991) ("*Voir dire* examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges."); *Stuart,* 427 U.S. at 602 (Brennan, J., concurring in judgment) (*voir dire* "facilitate[s]

intelligent exercise of peremptory challenges and [helps] uncover factors that would dictate disqualification for cause").

Attorney-conducted *voir dire* also aids the parties in complying with the requirements of *Batson v. Kentucky* and its progeny. Adequate *voir dire* is a basic premise of the rationale in *Batson* and its progeny for two reasons. First, adequate *voir dire* eliminates any need to improperly rely on generalizations and stereotypes about prospective jurors. *See J.E.B.*, 511 U.S. 127. Second, the Court has noted, "[n]o doubt the voir dire process aids litigants in their ability to articulate race-neutral explanations for their peremptory challenges." *Id.* at 144 n. 17. Therefore, this burden requires counsel to have sufficient information to adequately argue a *Batson* challenge and attorney-conducted *voir dire* will aid the parties in complying the requirements of *Batson* and its progeny.

Appellant moved for attorney-conducted *voir dire*. (Vol. I Tr. 42, line 2 – 45, line 2). Specifically, Appellant argued that attorney-conducted *voir dire* is "necessary in the interest of justice to obtain an impartial jury, with the intelligent exercise of rendering challenges by counsel, informed consideration of the court, [and] . . . challenges for cause." (Vol. I Tr. 43, lines 2-6). The Trial Court admitted Appellant's written motion for attorney-conducted *voir dire* as Court's Exhibit #1. (Vol. I Tr. 44, line 22 – 45, line 2; R. *). The Trial Court ultimately held, "I know about the effort to try to put South Carolina in a category of attorney conducted voir dire, I don't believe there's any authority anywhere in this State for that at this point in time in history[.]" (Vol. I Tr. 50, lines 1-6).

According to a joint survey by the National Center for State Courts and the State Justice Institute, less than ten (10) state courts rely on judge only conducted *voir dire*. (R.* Hon. Gregory E. Mize (ret.), Paula Hannaford-Agor, J.D. & Nicole L. Waters, Ph.D.; *The State-of-the-states Survey of Jury Improvement Efforts: a Compendium Report*, National Center for State Courts and

State Justice Institute, April 2007). This study explained, "Empirical research supports the contention that juror responses to attorney questions are generally more candid because jurors are less intimidated and less likely to respond to *voir dire* questions with socially desirable answers. (R.*).

Additionally, the study noted "attorneys are generally more knowledgeable about the nuances of their cases and thus are better suited to formulate questions on those issues than judges." (R.* page 28 (internal footnote citation omitted)). Notably, this study found that "*South Carolina consistently reported the shortest average voir dire time (30 minutes) in both felony and civil trials, with Delaware and Virginia closely following (1 hour or less).*" (R.* *Id.*, p. 29 (emphasis added)). Therefore, the Trial Court erred by refusing to allow attorney-conducted *voir dire* when the current procedure denies Appellant's right to a fair trial by a panel of impartial jurors who were selected using a fundamentally fair procedure.

CONCLUSION

Based on the foregoing reasons, Appellant Rita Pangalangan respectfully requests that this Court reverse her convictions and sentences and remand this case to the Colleton County Court of General Sessions for a new trial.

Respectfully submitted,

s/ Dayne Phillips

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