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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Richland County
The Honorable DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

CHARLES BARHAM,

PETITIONER.

Appellate Case No. 2024-001495

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the trial court's admission of testimony of Floyd Owen concerning Petitioner's alleged participation in a prior burglary?

2. Did the trial court err in admitting the testimony of Laurin Barnes that Charles Kusko said Petitioner stole his tools?

3. Was the cumulative effect of the trial court's errors so prejudicial as to deny Petitioner a fair trial?

STATEMENT OF THE CASE

On September 6, 2015, petitioner Brandon Barham and co-defendant Floyd Owen murdered Charles Kusko in his home in Richland County. Police arrested Barham and Owen for the murder of Kusko in August of 2017. Barham was then indicted by the Richland County grand jury for murder, burglary 1st degree, conspiracy to commit murder, and possession of a weapon during a violent crime (2017-GS-40-7158,-62,-65,-66). Barham proceeded to a jury trial August 26-30, 2019 before the Honorable DeAndrea G. Benjamin. The jury found Barham guilty as indicted. Barham filed a "Motion for New Trial" based on alleged error in admitting certain evidence pursuant to the "opening the door" doctrine. The State filed a response. The motion was heard and denied October 14, 2019. On November 18, 2019, Judge Benjamin sentenced Barham to 40 years for murder and burglary 1st and 5 years for conspiracy and the gun charge. Barham moved for reconsideration, which was denied May 26, 2020. Barham appealed raising 3 issues. The Court of Appeals affirmed in an Unpublished Opinion. State v. Brandon Barham, 2024 W.L. 2319301, 2024-UP-182 (Ct. App. Filed May 2024). Barham now petitions for a writ of certiorari to review the Court of Appeals Opinion. This is Respondent's Return to the Petition for Certiorari.

BRIEF STATEMENT OF FACTS

On September 6, 2015, Brandon Barham ("Barham") and Floyd Owen ("Owen") murdered Charles Kusko ("Victim") in his home in Richland County. Owen was the triggerman, and Barham drove Owen to Victim's home, gave him the gun, waited for Owen to complete the murder, and then drove himself and Owen away from the crime scene. Owen pled guilty to murder and burglary 1st degree and testified at Barham's trial.[1] Owen testified the murder was the result of multiple

[1] The State's case against Barham was not limited to Owen's testimony, but included text messages between Barham, Owen and Victim, video surveillance footage near Victim's home, the testimony

grievances both men had against Victim. Barham was the nephew of Victim, and Barham and Victim had worked on construction projects together, but Victim had failed to pay Barham for thousands of dollars of work Barham had performed for Victim. This was a months long dispute leading up to the murder, which included text messages between Victim and Barham, the testimony of attorney Neal Lourie who employed Barham and Victim, and Victim admitting to his own daughter he owed Barham money but was not going to pay Barham until Barham returned Victim's tools. During the same time-period, Barham also discovered Victim was stealing money from Barham's mother, who was disabled, and had sold Barham's mother's furniture. Owen inserted himself into the dispute, and as a result, Victim threatened to report Owen's drug use to DSS which could result in Owen losing custody of his children. On the night of September 6, 2015, after doing drugs and drinking, Barham and Owen decided to murder Victim and carried out that plan. (R. 46-112; 114-39; 141-57; 159-73; 243-360; 511-611; 654-700; 702-33; 747-85; 814-29)

ARGUMENT I.

Judge Benjamin correctly held Barham "opened the door" to admission of the testimony of a prior burglary Barham and witness Owen committed together where Barham in questioning a detective specifically accused witness Owen of lying about Barham 10 years earlier when Owen implicated Barham in the prior burglary to police and Barham connected the accusation to Barham's current testimony Owen was doing the same thing in the present case in implicating Barham in this murder; therefore, the Court of Appeals correctly affirmed.

As discussed, Owen was the triggerman and testified at Barham's trial. On direct examination, the State did not bring out Owen's prior conviction for burglary in 2006/2007. On

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of Owen's former girlfriend to Barham's involvement in the murder, another witness' testimony Barham admitted participating in the murder, and Barham's uncle Charles Kusko who spoke to Barham and Owen the night of the murder and saw Barham in possession of a .45 caliber pistol before the murder. The evidence against Barham is more fully set forth in Respondent's Final Brief to the Court of Appeals.

cross-examination of Owen, Barham chose **not to ask** Owen about his prior burglary conviction either, and Barham also **did not** lay an accusation that Owen was lying about Barham now, *like he **[allegedly]** lied about Barham 10 years ago* in the prior burglary case.[2] Owen's testimony was completed, and he was excused as a witness. **(R. 511-611).**

Later in the trial, during the cross-examination of the case detective Investigator Kevin Reese, Barham *specifically alleged* Owen was lying about Barham's involvement in the present murder just like Owen had [allegedly] lied about Barham's involvement in a prior burglary in 2007/2008. **(R. 724, ll. 3-18).** This was a false allegation.[3] Barham specifically alleged on cross-examination of Investigator Reese, that in 2007/2008, Owen committed a burglary and falsely told police Barham was involved to save Owen's own skin, and Barham was in fact innocent of that burglary and Owen was doing the same thing again in this case, trying to implicate Barham in a crime he had no involvement in. (R. 724, ll. 3-18) (See R. 719-23).

> Q: Yes Sir. And **this isn't the first time that Floyd Owen has tried to bring Brandon's [Barham's] name into something is it?**
>
> A: I don't know about his past. I know about what he may have said to me, Floyd Owen, during his interview.

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2 Barham could have asked Owen the same questions he later asked Investigator Reese; but that would have given Owen the opportunity to respond to and rebut the false allegation. Barham made the accusation after Owen testified and to Inv. Reese in hopes no one would be able to respond to or rebut it. (See R. 511-611). Barham did not anticipate the State would recall Owen after the accusation was laid, or simply did not care. (R. 734-45; 785-97; 797-814).

3 Owen was arrested for the prior burglary based on his DNA and gave police a full written statement implicating himself and Barham in the burglary. The apartment and complex that was burglarized was *Barham's former residence*, not Owen's. The property Barham and Owen were trying to recover during the burglary *was Barham's* not Owen's. Owen pled guilty to the burglary but the Solicitor assigned the case chose not to proceed against Barham, for unknown reasons. (R. 724, 734-45; 785-814). The investigator being cross-examined had no knowledge of why the burglary charge against Barham was dismissed. (R. 724, ll. 3-18). The Solicitor who dismissed the case was not called as a witness in this case by Barham. (See Record).

Q: In fact, back in 2007, 2008, Floyd got charged with a burglary charge. Your familiar with that right?

A: I don't know the entire case, or the particulars of it, but I do recall information like that, yes.

Q: And at that point, he tried to bring Brandon's name into it, and **there was no credibility to that case either**?

A: I don't know whether there was credibility or not. It was not my case.

(R. 724, ll. 3-18)(emph. added). Leading up to this exchange, Barham also implied Owen was falsely bringing his name into something he had nothing to do with. (R. 719-23). The State had not brought out the prior burglary, staying away from the issue, and was not going to introduce anything about it, including Barham's involvement. (R. 46-702). However, because of *the accusation* **Barham made** cross-examining Reese, long after Owen had testified, that *Owen was lying now just like he had lied 10 years earlier, bringing Barham into something he did not do*, the State informed the Court it wished to recall Owen to rebut the accusation since Barham "opened the door" to this evidence by creating a false impression with the jury. (R. 733-45). Judge Benjamin heard argument on the matter, reviewed the relevant case law, and a proffer of Owen's testimony relevant to this issue was taken. Judge Benjamin then ruled Barham had "opened the door" to the admission of this evidence and it was admissible pursuant to State v. Young, 378 S.C. 101, 661 S.E.2d 387 (2008) and State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984), *overruled on other grounds*, State v. Davis-Kocsis, 443 S.C. 127, 903 S.E.2d 491(2024). (R. 734-45; 785-97; 797-814). Thereafter, to rebut *the specific accusation* made by Barham of *Owen lying in the past about Barham's involvement in another crime just like he was doing in the present case*, Owen testified

consistent with his proffer. He did not falsely accuse Barham in the past, but told the truth, and explained why the accusation of Barham's counsel was false.[4]

This issue was raised again in a post-trial motion for a new trial. The parties briefed the issue, and Judge Benjamin carefully reviewed the briefs, the relevant case law, and heard argument on October 14, 2015.[5] At the hearing's conclusion, Judge Benjamin ruled Barham had, under our case law, opened the door to the admission of the prior burglary testimony, by his questioning and accusation on cross-examination, accusing Owen of trying to frame Barham in 2006/2007 *and*

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4 Owen explained he and Barham did burglarize an apartment in 2007/2008 where *Barham had previously lived.* Owen had no reason to break into the apartment; they went there solely to get Barham's things Barham had left behind. He and Barham were friends, and one night were out drinking. Barham was driving and explained they were going to his old apartment to pick up some things he had left there. Owen did not expect a burglary to occur. When they arrived, they parked and walked to Barham's former apartment. Barham could not open the door because the lock had been changed. They both decided to break in and did, finding the apartment empty. The property had already been moved. Barham told Owen about a storage room near the complex office. Barham had to show Owen where the room was because Owen had never been there. Owen actually broke the window cutting his hand. Barham's stuff was not there either. Barham stole a computer from this room as they left. Months later Owen was arrested. His DNA led to his arrest. When told of the charges, in a written statement, Owen immediately told police the truth about his and Barham's role in the crimes. Owen pled guilty because he was guilty. Barham was arrested for the burglary but never prosecuted. Owen did not know why that charge was dismissed, but he did not lie about his or Barham's role. He explained he had told the jury the same thing he told police when arrested for the apartment burglary. He was not lying then, and he was not lying now; Barham was involved in both crimes, the burglary and this murder. (R. 814-29; See also R. 734-45; 785-97; 797-814).

5 As at trial, Barham misstated at the post-trial hearing what occurred at trial arguing when Owen testified the 1st time, Barham *merely impeached Owen with his prior burglary conviction,* and for that reason he did not "open the door" to admission of the facts of the prior burglary. But, the record shows Barham never asked Owen about his prior burglary conviction the 1st time he testified nor did the State. Barham also mistakenly argued Judge Benjamin ruled on the admissibility of Owen's testimony about the prior burglary before Owen testified the 1st time. In fact, it was only after Barham opened the door *on cross-examination of Inv. Reese*, accusing Owen of attempting to frame Barham in present case just like he had [allegedly] done in 2006/2007 in the prior burglary, that Judge Benjamin ruled Owen could be re-called to testify a 2nd time, in rebuttal to the accusation by Barham. It was the State who explained what actually occurred at trial. (Oct. 14, 2019, R. 1135-47; See R. 511-612; 724, ll. 3-18; 734-45; 785-97; 797-829).

Owen was allegedly doing the same in the present case. As a result, it was proper for the State to re-call Owen to rebut the allegation made by Barham. As a result, Judge Benjamin held Barham was not entitled to a new trial on this basis. (Oct. 14, 2015, R. 1135-47). The Court of Appeals correctly affirmed Judge Benjamin's ruling Barham opened the door. Barham, *supra.*

Standard of Review

Whether an attorney opens the door to the admission of otherwise inadmissible evidence during the course of a trial is addressed to the sound discretion of the trial judge. State v. Page, 378, S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008). A trial court's decision to admit evidence pursuant to the doctrine of "opening the door" is reviewed for an abuse of discretion. State v. Simmons, 430 S.C. 1, 841 S.E.2d 845 (2020)(citation omitted).

The Law

As a matter of law, a party cannot complain as to matters brought out in response to his questions, where such prejudicial comments were solicited by his questioning, thus "opening the door" for the witness to then answer the question. State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991); State v. Culbreath, 377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008). "It is firmly established, that otherwise inadmissible evidence, may be properly admitted when opposing counsel opens the door to that evidence." Page, 378 S.C. at 482, 663 S.E.2d at 360. This Court has held "[w]hen a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." State v. Jackson, 364 S.C. 329, 336, 613 S.E.2d 374, 377 (2005). "A party may introduce inadmissible evidence in rebuttal, when the opponent places a fact in issue." Simmons, 430 S.C. at 14, 841 S.E.2d at 852. Further, once the defendant opens the door, the solicitor's invited response is appropriate, so long as it is proportional. Simmons, 430 S.C. at 14-

15, 841 S.E.2d at 852, *quoting* Ellenburg v. State, 366 S.C. 66, 69, 635 S.E.2d 224, 226 (2006). *See* Bowman v. State, 422 S.C. 19, 42, 809 S.E.2d 232, 244 (2018)(affirmed in part because the State responded proportionally when defendant "opened the door."). This Court has made clear it will allow introduction of evidence through the "opening the door" doctrine to rebut a false impression conveyed to the jury. State v. Northcutt, 372 S.C. 207, 221, 641 S.E.2d 873 (2007).

Analysis

The Court of Appeals correctly affirmed Judge Benjamin on this issue. Barham clearly opened the door to this evidence. He cannot now complain. Robinson, 305 S.C. 469, 409 S.E.2d 404; Culbreath, 377 S.C. 326, 659 S.E.2d 268. As Judge Benjamin found, this case is strikingly similar to Stroman, 281 S.C. 508, 316 S.E.2d 395. There the defense in seeking to impeach a key state's witness asked him about prior thefts he had committed. He testified he had been involved in several burglaries. The State sought to bring out from the witness that Stroman was involved in several of those burglaries. The trial court held Stroman opened the door to his participation in the prior burglaries by asking the witness about his prior thefts. This Court agreed finding Stroman opened the door to admission of the details of the prior thefts including his participation in the prior burglaries by questioning the witness about his prior thefts. Stroman, 281 S.C. at 512-13, 316 S.E.2d at 398-99. This Court held: "Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially." Id. at 513, 316 S.E.2d at 399. *See also* Culbreath, *supra* (finding where the defense asked witness if drugs he sold before were fronted to him and he replied by defendant. When they further asked him if he had checked the drugs received from defendant, and if not, why, the witness stated he had dealt with defendant before, and never had to check them. The defense "opened the door"

on this issue by its cross-examination of the witness on the subject); Briggs v. State, 421 S.C. 316, 806 S.E.2d 713 (2017)(where defense stated in opening and during cross-examination, victim had been told what to say, it was proper for the State to address the issue of witness-coaching during the forensic interviewer's testimony. When the defense raises coaching of a witness, testimony addressing the absence of witness coaching, although normally deemed to be improperly bolstering of a witness' credibility, is admissible); State v. Bryant, 356 S.C. 485, 589 S.E.2d 775 (Ct. App. 2003), *reversed on other grounds*, 369 S.C. 511, 633 S.E.2d 152 (2006)(where defense attacked a bouncer's credibility he kept a close eye on defendant the night of the murder, it was permissible to elicit on re-direct, in a prior incident, defendant threatened the bouncer, to explain why the bouncer kept a close eye on defendant the night of the murder to rehabilitate witness).

Here, Barham opened the door. On cross-examination of Inv. Reese, Barham specifically *accused* Owen of trying to bring Barham into something he did not do, the present murder, just like Owen had [*allegedly*] done 10 years earlier in a burglary, to save Owen's own skin. The accusation was false. The accusation had to be rebutted by the State. Owen was the key witness in this case and the only witness to the agreement and conspiracy to commit the murder of Victim. The only way the accusation could be rebutted was to recall Owen to the stand to testify to what actually happened before, and to explain to the jury he did not lie in implicating Barham in 2006/2007, because Barham was involved, and Owen had no motive to burglarize Barham's apartment. It was Barham's property they went there to retrieve. Owen did not even know about the storage room near the apartment complex office; Barham had to show him where it was. This response was proportional to the accusation laid by Barham's counsel on cross-examination of the investigator. Simmons, *supra*. There was no abuse of discretion. Simmons.

Barham now claims because he did not elicit prejudicial testimony about Owen he did not open the door. Barham is wrong. Briggs, 421 S.C. 316, 806 S.E.2d 713 (where defense stated in opening and during cross-examination, victim had been told what to say, it was proper for the State to address the issue of witness-coaching during the forensic interviewer's testimony. When the defense raises coaching of a witness, testimony addressing the absence of witness coaching, although normally deemed to be improperly bolstering of a witness' credibility, is admissible); Bryant, 356 S.C. 485, 589 S.E.2d 775 (where defense attacked a bouncer's credibility he kept a close eye on defendant the night of the murder, it was permissible to elicit on re-direct, in a prior incident, defendant threatened the bouncer, to explain why the bouncer kept a close eye on defendant the night of the murder to rehabilitate witness); Northcutt, 372 S.C. 207, 221, 641 S.E.2d 873 (the Court will allow introduction of evidence through the "opening the door" doctrine to rebut a false impression conveyed to the jury.); Simmons, 430 S.C. at 14, 841 S.E.2d at 852 ("A party may introduce inadmissible evidence in rebuttal, when the opponent places a fact in issue."). Again, the Court of Appeals correctly affirmed Judge Benjamin's ruling. Barham, *supra*, citing Stroman, and Northcutt.

Harmless Error

Barham alleges admission of the prior burglary was not harmless because he had to testify to rebut the same and the jury convicted him based on his testimony. (BOA). This argument is false. First, it was Barham who brought up the prior burglary. The State **had not mentioned it** or **tried to admit any evidence about it. Barham brought the burglary into the case intentionally**, *in an attempt to disparage Owen's credibility* when Owen could not respond or rebut the allegation, after Owen testified, on cross-examination of the investigator. And it was Barham who laid *the accusation Owen was lying now just like he lied back in 2007/2008.* Barham

put the prior burglary before the jury, not the State. Second, there is no evidence Barham testified to rebut the prior burglary he brought up. Barham was questioned by the court about his decision to testify. He did not indicate he was testifying because Owen testified about the prior burglary. Barham told the jury he testified for a different reason, not to rebut the prior burglary. His testimony about the prior burglary took up only 1 of 60 pages of testimony, dealing with numerous other issues in the case, and was brief. And, in that 1 page of testimony, he cast further aspersions on Owen. Further, if Barham was convicted on his own testimony, it was because he was not credible and was guilty of the crimes, not because of his denial of the prior burglary. Finally, purported juror interviews after trial cannot be the basis for appellate relief. Regardless, Barham testified he was not involved in the prior burglary and Owen had falsely accused him of being involved in the same, just like the present case. Barham testified he was arrested for that charge, but it was ultimately dismissed because [allegedly] there was no evidence against him. The prior burglary was a swearing contest between Owen and Barham. The jury could determine who they believed. The jury believed Owen that Barham was involved in the murder, which is the relevant issue. The admission of Owen's testimony about the burglary, Barham brought into the case by accusing Owen of lying about him in the past, was harmless. (R. 46-724; (Supp. ROA pgs. 18-21); 830-31; 867; 863-64; 832-92). As the Court of Appeals found, this issue has no merit.

ARGUMENT II.

This issue is not preserved for appellate review with a timely objection to the testimony when offered before the jury and was waived by Barham's introducing similar testimony; and, if preserved, Judge Benjamin did not abuse her discretion in admitting this testimony because it was not offered to prove the truth of the matter asserted or a prior bad act, but to establish an ongoing and long running dispute between the parties, i.e. Victim would not pay Barham money owed for work performed, the *res gestae* of the crime and part of the motive for Victim's murder; and prior difficulties between the parties, to show malice, animus, and origin of the dispute; and even if hearsay,

it fell under recognized hearsay exceptions; regardless, its' admission was harmless beyond any doubt on this record.

In camera, Barham requested argument or proffer on the admissibility of the testimony of Victim's daughter Laurin H. Barnes ("Laurin"). (R. 612-16). The State proffered Laurin's testimony. (R. 615-20). Laurin was asked if she was aware of any disputes between Victim and Barham. She said she was. She testified she had lunch with Victim a few months before his death, in June, at which time Victim was upset, angry, and agitated yelling out loudly in the restaurant Barham had stolen his tools and Barham was going to bring the tools back, and Victim was not going to pay Barham until Barham returned his tools. Victim was so angry and agitated other customers were looking at them and thought Victim was angry at Laurin. Laurin had to calm her father down. (R. 617-21).

Judge Benjamin heard argument *in camera* on the admission of Laurin's testimony. Barham argued the evidence was inadmissible evidence of prior bad acts [the theft of the tools] pursuant to Rule 404(b), SCRE.[6] Specifically, he argued the evidence was irrelevant in proving motive to commit the murder because Victim stated Barham stole Victim's tools not that Victim stole Barham's tools, which would have given Barham a motive to kill Victim. However, the State pointed out it was not offering the evidence pursuant to Rule 404(b) to prove Barham stole Victim's tools but as further evidence and corroboration of the ongoing dispute, which proved malice and was part of the motive for Victim's death, i.e. Victim did in fact owe Barham money for work performed and Victim was refusing to pay Barham and this led to Victim's death. The State pointed out this evidence was connected with and corroborated evidence already admitted

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6 Even though given the opportunity *in camera*, between the proffer and the witness testifying, and when the witness testified, Barham never argued the State failed to prove the prior bad act by clear and convincing evidence, an argument raised in his brief. (R. 612-28; 628-776; 776-84).

through other witnesses, about the dispute over money owed Barham by Victim and Victim's refusal to pay. Those witnesses were Andrew Kusko, Neal Lourie, and Floyd Owen.[7] The State also argued even if it was 404(b) evidence, Rule 404(b) allows such to prove motive. (R. 620-28).

Barham also objected to the admission of the statement *Barham stole my tools* based on hearsay. The State responded the evidence was not hearsay because it was admissible under recognized exceptions of a statement of a then existing mental, emotional, or physical condition, under Rule 803(3), SCRE **and** as an admission against pecuniary interest, Rule 804(3), i.e. Victim admitted he in fact did owe a debt to Barham that he was refusing to pay. (R. 621-28). Finally, Barham objected based on Rule 403, SCRE.[8]

Judge Benjamin ruled the evidence was prior bad act evidence but admissible under Rule 404(b), SCRE, because the evidence was being offered **not as propensity evidence** but to **show motive** as the State contended, one of the permitted exceptions under Rule 404(b) and case law, and it was relevant because similar evidence of the dispute and debt owed by Victim to Barham and Victim's refusal to pay had been offered through other witnesses during trial. She found this evidence corroborated and confirmed those other witnesses that Victim did in fact owe Barham several thousand dollars and was refusing to pay, but this evidence came directly from Victim's mouth and Victim admitted the same. As to Barham's 2nd objection, while Judge Benjamin did

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7 Owen testified part of the motive for the murder was Victim's refusal to pay Barham for work performed. Owen and Barham discussed this before leaving Owen's home to murder Victim.

8 It must be remembered, at this point, the witnesses who had testified to this dispute testified Barham was claiming to them the money was owed to him and Victim would not pay, but Victim had denied to Lourie he owed Barham anything and claimed he had paid Barham for his work. (R. 158-73; 243-360; 511-611). Laurin's testimony proved Victim did in fact owe Barham money and was consciously refusing to pay him and lied to Lourie about the same, on September 4th, which would have further infuriated Barham before the murder. (R. 617-21).

not admit the testimony pursuant to Rule 804(b)(3), SCRE, a statement against pecuniary interest, Judge Benjamin found the evidence was admissible under the recognized hearsay exception of a statement of a then existing physical, emotional, or mental condition, to prove state of mind, Rule 803(3), SCRE, because it proved Victim's intent, plan, motive, design, mental feeling, pain, and bodily health as allowed by that Rule. Judge Benjamin also found the testimony was admissible under Rule 403, SCRE, because its probative value was not substantially outweighed by its' prejudicial effect because the evidence established the prior dispute between Victim and Barham, motive in the case; and, it was tied to other evidence about the dispute; i.e. Victim owed Barham money and he was refusing to pay, and more importantly this evidence was from Victim's own mouth and supported and corroborated the earlier testimony throughout the case of a debt owed Barham for work performed that Victim was refusing to pay. (R. 621-28).

After the Court's ruling

Laurin was not called as a witness after the *in-camera* hearing. Several other witnesses testified during the trial. (R. 628-776). Laurin then testified before the jury. She was asked if she was aware of any problems between her father and Barham prior to her father's death and what she knew about any dispute. She testified to her father's excited and agitated state at the restaurant in June and he blurted out: "Brandon stole my tools and he's going to bring my tools back. I'm not paying him until he brings me my tools." (R. 776-84). Barham did not object to the admission of any of her testimony when it was introduced before the jury. (R. 778-79). Barham also questioned Laurin about the theft of tools and brought out Victim later told Laurin's mother the same thing, i.e. Barham had stolen his tools, Victim wanted them back, and Victim wasn't going to pay Barham until he returned the tools. (R. 780-81). In its closing argument, the State only argued this testimony for the reason it was offered. It corroborated other witnesses there was a

dispute between Victim and Barham over Victim's refusal to pay Barham for work done, that continued for several months, and led up to Victim's death, and was part of the motive and malice for the murder as testified to by Owen. **(R. 918-33; 953-64)).**

Lack of Preservation or Waiver of the Issue

The Court of Appeals correctly found this issue was not preserved for appeal. Barham raised his objections *in limine* and they were ruled on *in limine*. (R. 615-28). Several witnesses testified after the *in limine* motion and *in camera* hearing. (R. 628-776). In fact, there were almost 150 pages of trial transcript before Laurin testified before the jury. When she testified, there was no objection to any of her testimony. (R. 776-84). In fact, **Barham brought out** on cross-examination Victim had told Laurin's mother the same thing he told her: Barham stole his tools, Victim wanted them back, and he wasn't going to pay Barham the money he owed him until Barham returned the tools. (R. 780-81). This issue is not preserved for appellate review *or* was waived based on the failure to make a timely objection when the witness testified before the jury after almost 150 pages of trial transcript *and* testimony by other witnesses (R. 628-776; 776-84) **and** by Barham eliciting similar testimony from the same witness. (R. 780-81). State v. Kromah, 401 S.C. 340, 352-53, 737 S.E.2d 490, 496-97 (2013); State v. Wiles, 383 S.C. 151, 156-57, 679 S.E.2d 172, 175 (2009)("Generally, a motion *in limine* is not a final determination; a contemporaneous objection must be made when the evidence is introduced"); State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d. 837, 840 (2001)("There is an exception to this general rule when a ruling on a motion *in limine* is made immediately prior to the introduction of the evidence in question.'"); State v. Mueller, 319 S.C. 266, 268-69, 460 S.E.2d 409, 410-411 (1995)(noting where

there is no evidence between the motion and the testimony, there is no basis for the trial court to change its ruling, so the decision is a final one).[9]

Finally, Barham only argued on appeal Victim's statement to his daughter *"Brandon stole my tools"* is inadmissible. (BOA, pp. 2-14). He did not argue the remainder of Victim's statement to his daughter was not admissible: i.e. "He's [Brandon's] going to bring me my tools back" "I'm not paying him until he brings me my tools." (R. 778-79) (See BOA, pp. 2-14). Any issue with regard to these statements is not preserved and was waived and abandoned. Rule 208(b)(1)(d), SCACR; Jinks v. Richland County, 355 S.C. 341, 585 S.E.2d 281, 282, n. 3 (2003); First Savings Bank v. Mclean, 314 S.C. 361, 444 S.E.2d 513 (1994)(issues not argued in the brief are deemed abandoned and will not be considered on appeal). Judge Benjamin's ruling admitting this portion of Victim's statement is also the law of the case.

Standard of Review

The admission of exclusion of evidence is within the sound discretion of a trial judge, and an appellate court may disturb a ruling admitting or excluding evidence only upon a showing of a manifest abuse of discretion accompanied by probable prejudice. State v. Douglas, 369 S.C. 424, 632 S.E.2d 845 (2006).

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9 Further, Barham argues the State did not prove the prior bad act by clear and convincing evidence. This argument is not preserved for appellate review; it was not made below in the *in camera* hearing, after the *in camera* hearing, or when the witness testified. (R. 612-28; 628-776; 776-84). State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground"); State v. Patterson 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997)("Appellant is limited to the grounds raised at trial").

Analysis

Regardless of the basis which Judge Benjamin relied upon in admitting the evidence, it was admissible over Barham's hearsay, 404(b), and 403 objections. Barham argued below only the statement *Brandon stole my tools* was hearsay and prior bad act evidence. (IBOR, pp. 2-12). However, Barham does not give this Court the entirety of Victim's statement to Laurin or the context in which it was made, which is why it was admissible. (IBOR, pp. 2-14).

The statement was not hearsay. Hearsay is an out of court statement, other than one made by the declarant while testifying at trial, **offered to prove the truth of the matter asserted in the statement**. Rule 801(c), SCRE; State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006). The rule prohibits admission of hearsay unless an exception to the rule applies. Rule 802, SCRE; Price, 368 S.C. 494, 629 S.E.2d 363. Here, as the record shows, the State did not offer Victim's statement to Laurin to prove Barham stole Victim's tools. The statement was offered to prove the ongoing dispute between Victim and Barham, i.e. Victim had not paid Barham $2,000-$6,000 owed him and Victim was refusing to pay, which was consistent with the texts from May and July of 2015, and what Barham told Andrew, Lourie, and Owen, and which was contrary to what *Victim* told Lourie, and contrary to what **Barham** told police, and established malice and part of the motive for Victim's murder as testified to by the trigger-man Owen, i.e. Victim refused to pay Barham money he had earned and Victim stole $38,000 from Barham's mother and sold her furniture. State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978)(statement implicating defendant in alleged prior crimes, not offered to prove the truth of the matter asserted, that is, that defendant in fact committed the prior crimes, but to establish motive, was not hearsay and its admission was not error); State v. Edwards, 373 S.C. 230, 644 S.E.2d 66 (Ct. App. 2007)(victim's testimony she "heard [defendant] had been hitting [her] mother" was non-hearsay not offered for the truth of the

matter asserted, but to show victim's state of mind that she was fearful of defendant, and did not report defendant's sexual abuse because of such fear; not that defendant had actually ever hit victim's mother); State v. Vick, 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009)(where witness testified to statements she heard deceased victim make during a phone call with defendant's mother, that deceased victim did not have time to fix defendant's hair that particular day, such statement was not offered for the truth of the matter asserted and therefore, by definition, was not hearsay); State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001)(victim's child's statement was not offered to prove the truth of the matter asserted, but to show the impact murder had on victim's child and the rest of her family); State v. Johnson, 324 S.C. 38, 476 S.E.2d 681 (1996)(statement not offered for the truth of the matter asserted was not hearsay); State v. Blurton, 342 S.C. 500, 537 S.E.2d 291 (Ct. App. 2000), *reversed on other grounds*, 352 S.C. 203, 573 S.E.2d 802 (2002)(it was error to exclude a co-conspirator had told defendant and others that he was a former Navy SEAL, where evidence was **not offered to prove that fact**, but to prove defendant was duped into believing co-conspirator was a CIA operative and robbery was part of a CIA plan, thus eliminating criminal intent defendant needed to commit the crimes he was on trial for).[10] This is exactly what the State argued in closing argument. Laurin's testimony, along with Andrew's, Lourie's, and Owen's, proved an *ongoing dispute over money owed to Barham by Victim for work performed that Victim was refusing to pay.* **(R. 918-33; 953-64).**

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10 Victim didn't just say: Brandon stole my tools. Victim told his daughter in an agitated state: Brandon stole my tools and he going to bring my tools back. I'm not paying him until he brings them back. Victim said: "I'm not mad at you, I'm mad at Brandon." (R. 778-79). Each time Laurin was questioned she was asked if she was *aware of any problems or disputes between Victim and Barham* and their nature. She testified to Victim's angry outburst. (R. 618-28; 778-79).

Further, it fell under 2 recognized hearsay exceptions. It was a statement against pecuniary interest of Victim. Rule 804(b)(3) SCRE. Victim admitted he owed a debt to Barham which he was refusing to pay until Barham returned his tools. Rule 804(b)(3), SCRE (an out-of-court statement against *pecuniary* or *property* interest, made by an unavailable declarant is admissible in criminal proceedings). Victim's statement was a statement against pecuniary interest.

And it was a statement of the then existing state of mind of Victim. Rule 803(3), SCRE. Statements of a declarant that go to the then existing mental, emotional, or physical condition of that person, commonly referred to as the person's state of mind are admissible and are deemed trustworthy by virtue of presenting declarant's own unique perception of his feelings at the time in question. State v. Garcia, 334 S.C. 71, 512 S.E.2d 507 (1999). Statements that may directly or indirectly show the declarant's state of mind, emotion, or physical condition are admissible. State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006); Garcia. Barham conceded below (BOA, pp. 2-14): (1) Victim's anger with Barham expressed to his daughter and (2) his statements he was going to make Barham return his tools and he was not going to pay Barham until his tools were returned, were admissible, but the reason for his anger, i.e. "Brandon stole my tools" was not, **under this hearsay exception**. (See BOA, pp. 2-14).[11] *Under Rule 803(3)*, Barham's point is well taken, but the remainder of the statement would have still been before the jury, which is what the State was attempting to prove, i.e. *the dispute* between Victim and Barham over money Victim owed Barham for work performed **and** Victim's state of mind including, *not only* his anger toward Barham, **but also**, his admission he owed Barham money, his *statement of intent to* get his tools back, not pay

11 Barham conceded Victim's anger toward him and the remainder of Victim's statement was admissible by only arguing: "Brandon stole my tools" is inadmissible. (See BOA, pp. 2-14). Rule 208(b)(1)(d), SCACR; Jinks, 355 S.C. 341, 585 S.E.2d 281, 282, n. 3; Mclean, 314 S.C. 361, 444 S.E.2d 513 (issues not argued in the brief are abandoned and not considered on appeal).

Barham for work performed, and not pay Barham until his tools were returned. Rule 803(3), SCRE (A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as *intent, plan, motive, design, mental feeling, pain*, etc.) is admissible); Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004)(fact that defendant stated there was a warrant for his arrest and "before I let an MF, mother fucker cop take me down, police take me down I will shoot and kill one of the SOB's," was admissible under Rule 803(3) because it was a statement of defendant's *intent*); State v. Griffin, 339 S.C. 74, 528 S.E.2d 668 (2000)(testimony deceased murder victim had just completed phone conversation and stated he was going to meet defendant to sell marijuana was admissible as declarant's then existing state of mind to *his intentions or plans*); State v. Edwards, 373 S.C. 230, 644 S.E.2d 66 (Ct. App. 2007)(victim's testimony she "heard [defendant] had been hitting [her] mother" was non-hearsay not offered for the truth of the matter asserted, but rather to show victim's *state of mind* that she was fearful of defendant, and did not report defendant's sexual abuse because of such fear; not that the defendant had actually ever hit victim's mother.).[12]

Barham next argues Laurin's testimony was improper 404(b) prior bad act evidence. The State argued instead it was evidence of the ongoing dispute between Victim and Barham, corroborated by other witnesses, that continued and eventually led to and was part of the malice against Victim and motive for his murder. The State was correct. The evidence was admissible because it was "*res gestae* of the crime" evidence and prior difficulties between the parties which are admissible to prove motive, malice, and animus between the parties. State v. Sweat, 362 S.C.

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12 Barham wants to limit the State to proving only **Victim's anger** and not **Victim's state of mind [intent] he was going to get his tools back and he was not going to pay Barham until Barham returned his tools.** The statement is admissible to prove both, because both were Victim's state of mind. Rule 803(3)(statement of declarant's intent, emotion, etc. is admissible).

117, 606 S.E.2d 508 (Ct. App. 2004)(prior CDV arrest 2 months earlier was admissible evidence of *res gestae* of the crime and prior difficulties between the parties where it was motivation for the attack on the victim 2 months later and provided the jury with the context of the crime); State v. Brooks, 79 S.C. 144, 60 S.E. 518 (1908)(prior difficulties 8 months before murder were admissible); State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000)(4 months between statement or threat and the crime went only to the weight of the evidence not its admissibility); State v. Glenn, 328 S.C. 300, 492 S.E.2d 393 (Ct. App. 1997)(1 year before incident); State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990)(prior disputes admissible to prove motive). The prior ongoing dispute is exactly what the State argued in closing argument **(R. 921, ll. 6-20).**[13]

As the Solicitor stated below, even if this was 404(b) evidence as the defense argued, it was admissible pursuant to 1 of the recognized exceptions of Rule 404(b), SCRE, i.e. to prove and did prove motive; and, it was admissible to prove intent/malice. State v. South, 285 S.C. 529, 331 S.E.2d 775 (1985)(evidence of prior bad act admissible to prove motive to murder victim); State v. Thomas, 248 S.C. 573, 151 S.E.2d 855 (1966)(same). The evidence from Laurin showed Victim *believed* Barham had stolen or taken his tools and as a result, **Victim was refusing to pay Barham the money he owed Barham for work Barham had completed.** This corroborated other witnesses Barham was complaining and angry with Victim for refusing to pay Barham $2,000-$6,000 for work he had performed. This testimony also showed Victim was conscious of the debt owed to Barham, and Victim lied to Lourie when he told him he had paid Barham. This would have further angered Barham. This evidence showed Victim was wrongfully refusing to pay

13 As stated, when Laurin testified, whether *in camera* or before the jury, she was asked if she was aware of **any problems or disputes** between Victim and Barham and the nature of the dispute. She responded by testifying to Victim's angry outburst in June. (R. 618-28; 9-79).

Barham for work performed, thus giving Barham reason to be angry with and murder Victim, as testified to by Owen, i.e. motive and malice. State v. Jennings, 160 S.C. 348, 158 S.E. 687 (1931)(bad act was admissible to show defendant **had a grudge** against victim); State v. Pittman, 137 S.C. 75, 134 S.E. 514 (1926)(evidence of bad act admissible to show grudge against victim).

Barham argues State v. Bell, 430 S.C. 449, 845 S.E.2d 514 (Ct. App. 2020).[14] This case is distinguishable from Bell. This evidence was not offered to prove Barham stole Victim's tools, but that there was a dispute between Barham and Victim over non-payment by Victim of money owed Barham for work performed. Victim admitted to his daughter he owed Barham money and admitted he was refusing to pay Barham and told her the reason he was refusing to pay. Barham repeatedly ignores this, including **the substance of the entire statement of Victim to his daughter**. And, Barham ignores Owen, the trigger man, testified part of Barham's motive for committing the murder **was** Victim's refusal to pay Barham for work performed. Barham also ignores Victim told Lourie he had paid Barham, and Barham told police, **there was no dispute at all** with Victim. Barham also brought out on cross-examination Victim had told Laurin's mother the exact same thing. Finally, in this case, the State did not try to present or prove Barham was a pervert, or a thief, as in Bell, and there was no bag of tools found next to Victim's body, as there was a bag of panties next to the victim in Bell. Here, the State argued 4 different witnesses testified and proved there was an ongoing *dispute* between Victim and Barham over non-payment of money for work performed, part of the motive. **(R. 918-33; 953-64).**

Finally, Barham's Rule 403 objection is without merit. This Court reviews a trial court's

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14 In Bell, the Court found reversible error in admitting a victim's statement to family members before her death that she believed defendant stole her panties. Victim's body was discovered behind an abandoned house with a plastic bag containing her panties next to her brutalized body.

decision under Rule 403 pursuant to an abuse of discretion standard. State v. Holland, 385 S.C. 159, 682 S.E.2d 898 (Ct. App. 2009).[15] The trial court's determination should be reversed only in exceptional circumstances. Hamilton, 344 S.C. at 357, 543 S.E.2d at 593. The determination of whether the danger of unfair prejudice substantially outweighs the probative value of evidence must be based on the entire record and will turn on the facts of each case. State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008). The probative value of bad act evidence may be shown by whether a real connection can be drawn between the 2 incidents, and whether the evidence is relevant to a material issue. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923); State v. Kennedy, 339 S.C. 243, 528 S.E.2d 700 (Ct. App. 2000). Given the entirety of the statement of Victim to his daughter, and its context, the prejudice, if any, was minimal. The jury knew Victim and Barham worked together, and as pointed out by the defense, Barham could simply have picked up Victim's tools by mistake. As the Court correctly found, under Rule 403, SCRE, the probative value outweighed any prejudice because the statement proved the dispute between Victim and Barham, was connected to and corroborated other witnesses' testimony and text messages to the dispute; and, in this statement Victim himself admitted he owed Barham money but was refusing to pay for Victim's own reasons. Owen testified this dispute was part of the reason Victim was murdered. The statement proved both malice and motive. Additionally, Victim told Lourie he had paid Barham, but Barham told others [Andrew, Jenny, and Owen], Victim refused to pay him. Further, Barham denied to police and on direct examination there was any dispute with Victim,

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15 "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." Id., *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).

making the evidence even more probative. Finally, there was extensive un-objected to testimony of Barham's bad character, or bad acts, including that Barham had outstanding warrants against him.[16] Judge Benjamin correctly ruled the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. Holland, 385 S.C. 159, 682 S.E.2d 898. Barham has failed to show an abuse of discretion in admitting this evidence. Id.

Harmless Error

Regardless, this limited testimony was harmless where its' effect was minimal given the entire record and it was cumulative to other testimony of Barham's bad character testified to *over and over* **without objection**. State v. Haselden, 353 S.C. 190, 577 S.E.2d 445, 488 (2003)(erroneous admission of prior bad act evidence is harmless if its' impact is minimal given the entire record.); State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006)(admission of prior bad act is harmless where it was minimal, it is dissimilar to the crime for which defendant is on trial, and other bad acts of defendant were admitted without objection); State v. Broaddus, 331 S.C. 534, 605 S.E.2d 549 (Ct. App. 2004)(any error in admission of prior bad act testimony is harmless where it is cumulative to other testimony properly admitted). Moreover, other evidence established Barham's guilt beyond a reasonable doubt including the testimony of Owen, Jessica James, Jennifer Baker, Barham's uncle Andrew Kusko, Neal Lourie, the security video capturing Barham's truck lurking in the area at the time of the crime, and Barham's statement to police attempting to cast suspicion on anyone but he and Owen and denying any grudge or dispute with Victim. Pagan, 369 S.C. at 212-13, 631 S.E.2d at 268.

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16 (R. 346; 457-64, 497-98; 747-76; 471-75; 504-05; 814-29; 515; 860-64; 875-76; 474-75; 239-40; 354-55; 360; 698, ll. 9-18; State's Ex. 157; Def. Ex. 4).

ARGUMENT III.

This issue is not preserved for appellate review; and, even if it was, South Carolina has not formally recognized the cumulative error doctrine; and Barham has not shown error, much less cumulative errors, or that they denied him a fair trial.

This issue is not preserved. Barham did not raise cumulative error to the trial court. State v. Durant, 430 S.C. 98, n. 3, 844 S.E.2d 49 (2020)(since defendant did not raise cumulative error doctrine below, the issue is unpreserved for appeal); State v. Heyward 432 S.C. 296, 852 S.E.2d 452 (Ct. App. 2020)(same); State v. Beekman, 405 S.C. 225, 746 S.E.2d 483 (Ct. App. 2013).

Also, our courts have not applied the cumulative error doctrine. Beekman, 405 S.C. at 238, 746 S.E.2d at 490; State v. Daise, 421 S.C. 442, 466, 807 S.E.2d 710, 722 (Ct. App. 2017). Even if recognized, Barham must show several errors. Durant, 430 S.C. 98, 111, n. 6, 844 S.E.2d 49, 55 n. 3; State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1998). And Barham must show the errors adversely affected his right to a fair trial. Durant, *supra*, at n. 3; Johnson, *supra*; Daise, *supra*. Barham has not shown error, much less cumulative errors, or that they affected his right to a fair trial. State v. Tillman, 433 S.C. 58, 67, 856 S.E.2d 168 (Ct. App. 2021); State v. Thompson, 420 S.C. 386, 803 S.E.2d 44 (Ct. App. 2017). The Court of Appeals correctly affirmed.

CONCLUSION

For the above stated reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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