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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Horry County

Honorable B. Alex Hyman, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

STEPHEN D. O'HARA,

APPELLANT

APPELLATE CASE NO. 2024-000097

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# INITIAL BRIEF OF APPELLANT

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ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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2.

Whether appellant's conviction for pointing and presenting a firearm should be vacated since the indictment returned by the grand jury erroneously named the decedent, Paul Mishoe as the victim of that crime, where in fact the pointing and presenting a firearm charge involved a separate incident involving Ryan Woodard, and this indictment consequently should have been quashed?

## STATEMENT OF THE CASE

Appellant was indicted at the February 17, 2021 term of the Horry County grandy jury for the offenses of murder, possession of a weapon during the commission of a violent crime, and pointing and presenting a firearm. R. p. *. Appellant's case was called to trial on January 8, 2024, before the Honorable B. Alex Hyman and a jury. Martin Spratlin represented appellant. The assistant solicitors were Mary Ellen Walter and Elizabeth Farmer. Tr. 1.

On January 12, 2024, the jury found appellant guilty on all three counts. Tr. 557, l. 18 – 558, l. 3. Judge Hyman sentenced appellant to thirty-five-years' imprisonment for murder, five years consecutive for possession of a firearm during the commission of a violent crime, and five years concurrent for pointing and presenting a firearm. Tr. 581, ll. 1-15.

This appeal follows.

## STANDARDS OF REVIEW

**Admission of evidence:** In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Whitner, 399 S.C. at 557, 732 S.E.2d at 866.

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

**Quashing of indictment:** If a defendant raises a timely challenge to the sufficiency of an indictment, the reviewing court is charged with:

> determining whether (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or

> conviction thereon; and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged.

State v. Gentry, 363 S.C. 93, 102–03, 610 S.E.2d 494, 500 (2005).

"In determining whether an indictment meets the sufficiency standard, the trial court must look at the indictment with a practical eye in view of all the surrounding circumstances." State v. Tumbleston, 376 S.C. 90, 97, 654 S.E.2d 849, 853 (Ct.App.2007). In doing so, "one is to look at the 'surrounding circumstances' that existed pre-trial, in order to determine whether a given defendant has been 'prejudiced,' i.e., taken by surprise and hence unable to combat the charges against him." State v. Wade, 306 S.C. 79, 86, 409 S.E.2d 780, 784 (1991).

## ARGUMENT

1.

The court erred by admitting evidence about appellant being dressed in a "motorcycle vest" or motorcycle clothing since motorcycle gang or motorcycle club affiliation evidence was bad character evidence implying a criminal propensity on appellant's part pursuant to *State v. Robinson*, 438 S.C. 421, 882 S.E.2d 883 (Ct. App. 2023) which was highly prejudicial given appellant's defense of self-defense.

**Relevant facts**

Prior to trial, defense counsel Spratlin filed a motion to exclude any reference to the Red Devils Motorcycle Club. The motion noted "a large amount of evidence provided to counsel through the discovery process, including witness statements, 911 phone calls, videos, etc. references the Defendant's affiliation with the 'Red Devils' motorcycle club." R. p. *. Defense counsel cited State v. Robinson, 438 S.C. 421, 882 S.E.2d 883 (Ct. App. 2023) (bad act evidence relating to the defendant's purported gang affiliation was not logically relevant to the defendant's involvement in the charged crimes), and Johnson v. State, 433 S.C. 550, 860 S.E.2d 696 (Ct. App. 2021) (defendant's gang affiliation was logically relevant to prove planning an agreement).

Counsel argued: "The Defense, believes and contends that the defendant's involvement/affiliation with this motorcycle club has no relevance to the case at hand . . . it has no relevance to any alleged motive or intent at issue in this case . . . the defense contends that introduction of any evidence purporting to show the Defendant was a member of any organization that the State considers a 'gang' is improper and thus should be barred from being introduced in this case." R. p. *. Counsel verbally argued these points to the trial judge as well. Tr. 53, l. 18 – 63, l. 12.

Counsel also argued that affiliation with a gang in and of itself was bad character evidence. Further, local law enforcement had classified the Red Devils Motorcycle Club as a gang, and any mention of the "Red Devils" would be improper. Tr. 54, l. 3 – 63, l. 13; Tr. 96, l. 24 – 97, l. 14.

Counsel noted that identity was not an issue in this case since it was undisputed that appellant was the shooter. In addition, the probative value of this Red Devils Motorcycle Club evidence was substantially outweighed by its unduly prejudicial effect. Tr. 54, l. 14 – 56, l. 5.

The solicitor argued that "the defendant chose to wear that gear that night. The gear is how, in large part, he was identified…it's not, he's a gangbanger. He's a Red Devils. It's a gang. It's a gang." Tr. 56, ll. 6-23. The solicitor contended that as long as the state did not use the word "gang" there should be no prohibition on the "Red Devils" evidence being admitted. The solicitor also claimed that its probative value was not substantially outweighed by its unduly prejudicial effect. Tr. 57, l. 3 – 58, l. 11.

The solicitor added although there was evidence that appellant was arrested while wearing his Red Devils Motorcycle attire, the prosecution would not argue "gang affiliation." Tr. 59, l. 13 – 60, l. 6.

The judge stated he agreed with the defense as far as "the gang stuff" but he noted that appellant was asking to remove every mention of him being dressed in Red Devils Motorcycle Club attire. Defense counsel answered that the state had the ability to do that, and they, in fact, had done that in prior cases. Tr. 60, l. 7 – 61, l. 8. The following occurred between the trial judge and the attorneys:

> THE COURT: All right. What I'm going to do, I'm going to grant your motion in part. Any wording as far as "Red Devils motorcycle/biker gang," I'm not going to allow it. If someone

> wants to address it as he was wearing *a motorcycle club vest, I'm okay with that. As far as the pictures, I'm going to allow them.*
>
> MR. SPRATLIN: You're going to allow the pictures?
>
> THE COURT: The pictures, but I won't allow any testimony of Red Devils motorcycle gang.
>
> MS. WALTER: I want to clarify, because, again, for the 911 call -- we can listen -- I took out any reference to "gang." But is Your Honor saying that no one can say he was wearing a Red Devils vest? I've instructed all of my witnesses not to use the word "gang."
>
> THE COURT: I would prefer they don't even say "Red Devils." If they want to say *"motorcycle club vest."* Just like you said, there is law enforcement in motorcycle clubs, but I don't want the jury making an unfair or prejudicial assertion that just because he may or may not be in Red Devils, that he's doing something illegal just by its nature. So, again, *I'm going to allow the photos in.* The jury can draw from that what they want. But as far as testimony that he's a member of the Red Devils Motorcycle Club, I won't allow that.
>
> MS. WALTER: Right. I want to be clear. There was not going to be any testimony that he was a member, because, quite frankly, I don't have a member of the Red Devils to say he was. It was just simply that he was wearing that. *Is Your Honor going to allow the State to introduce the actual vest and hoody?*
>
> *THE COURT: Yes.*
>
> MS. WALTER: I'm making sure because I'll reinstruct all the witnesses.

Tr. 61, l. 9 – 62, l. 23; Tr. 96, l. 24 – 97, l. 14.

Defense counsel would reiterate that as to his motion to exclude this evidence was not satisfied with the Court's partial ruling in his favor: "I understand the Court's ruling on my motion in *limine*, I understand the Court's ruling that no mention of the Red Devils or any sort of mention of a gang; however, the State can mention `motorcycle club' and is allowed to show

pictures of my client's clothing that reflected he was a member of the Red Devils. I just want to make it clear for the record that I do not believe it is sufficient to protect my client's rights under the motion in *limine*." Tr. 96, l. 24 – 97, l. 14. The trial judge confirmed he understood the continuing objection of the defense to this evidence. Tr. 97, ll. 15-17.

After hearing the redactions to the 911 tape, the judge then allowed it over the defense's objection that "its way more prejudicial than probative. And, in addition, I take exception to those two redactions and the way they are framed. I think it draws attention to the clothing, which again, is, I believe, objectionable." Tr. 97, l. 17 – 100, l. 7. The objectionable 911 tape, State's Exhibit 1, is on file for this Court to review. Ashley Flowers states on the 911 call that Dennis, the shooter, had a motorcycle in the parking lot and she gives the 911 operator the license number. When twice asked what Dennis was wearing the redactions are extremely obvious and call attention to the fact that what appellant was wearing has been redacted. Defense counsel was correct that the redactions called extra attention to the clothing appellant was wearing that night given the redactions.

Ryan Woodard went to the CW's Wings in Conway on the night of November 22, 2020. Tr. 130, ll. 5-18. It was Sunday night, and Woodard went to "catch the end of a football game." He was drinking rum and coke, and he talked to the decedent, Paul Mishoe, that night although they had not met previously. Mishoe seemed to be getting along with everyone in the bar that night according to Woodard. Tr. 131, ll. 10-25.

Woodard knew appellant from the bar, and he remembered appellant was with his wife or girlfriend, Kim.[1] Nothing unusual seemed to be happening as the bar was closing down around

[1] Appellant would testify in his own defense. He said that he had lived with Kim for twenty-three years, but they never married. Tr. 433.

eleven p.m. during that COVID period. Tr. 132, l. 4 – 133, l. 16. See State's Exhibits 47 and 49 (videos of CW's at closing time on file with this Court).

The decedent went outside into the parking lot after closing, and Kim did also. At some point thereafter, appellant also went outside. Tr. 134, ll. 2-24. Woodard remembered "Mr. O'Hara's wife had come in screaming that there was a fight [outside], saying, 'help, there's a fight there's a fight.'" Tr. 138, ll. 5-12. Woodard then walked outside in the parking lot with the bartender, Ashley, and another patron, Keith. Tr. 138, ll. 9-21.

Woodard remembered when he got outside into the parking lot, appellant and the decedent "were tangled up amongst each other." Woodard testified, "I went and grabbed Paul and pulled him back, and as soon as I did, Paul said, 'no. No. No. We're good. Everything is fine.' They [appellant and Paul] both sort of shook each other's hands, gave each other like a hug, and everything seemed to be fine in that moment." Tr. 138, l. 15 – 139, l. 8.

Woodard did not witness any physical altercation or punches being thrown. Tr. 139, ll. 9-12. Woodard thought everything was resolved, and Ashley and Keith went back into the bar. Tr. 139, l. 20 -140, l. 8. The following occurred on direct examination of Woodard:

> Q So what happened -- did something happen after they went back inside?
>
> A No, nothing else happened.
>
> Q What happened between the defendant and Paul?
>
> A They talked for a minute, and then Paul walked away and he came towards me. He was about, I don't know, maybe 6, 10 feet away. We were having a quick chat while he was about to leave, and that's when Mr. O'Hara came over, walked over nonchalant, pulled out a gun, and shot him right in the back of the neck.
>
> Q Had Paul said anything or made any movement towards the defendant prior to that?

A No, he did not.

Q What happened after the defendant shot Paul in the neck?

A He just stood there.

Q What did you do?

A I turned around, and I walked back in the bar.

Q What did you do once you got back in the bar?

A I walked towards the bar, told Ashley to call the cops, "he shot him."

Q Where did you go after that?

A I went into the kitchen.

Tr. 140, l. 6 – 141, l. 5.

Woodard said he went into the kitchen because he did not know what appellant was going to do next. Tr. 141, ll. 18-22. Defense counsel objected to State's Exhibits 47 and 48 insofar as they depicted appellant in his Red Devils motorcycle club outfit. Tr. 142, l. 2 – 143, l. 24.

Woodard described State's Exhibit 48 where appellant came into the kitchen with his gun in hand and the two men struggled over the gun. Tr. 143, l. 5 – 144, l. 4. Woodward said after he disarmed appellant, he told appellant he was a good person and that he was not going to hurt him. "I was also trying to deescalate the situation verbally." Tr. 144, ll. 5-23. Woodard threw the gun into the trashcan next to the back door and put his hands in the air to identify he was not a threat to the police when he saw them arrive in their police cruiser. Tr. 144, l. 24 – 145, l. 17.

Keith Hester was the cook at Carolina Wings in Conway. He had worked there for sixteen years, and he remembered the events of the night November 22, 2020, and the early

morning hours of November 23, 2020. He recalled decedent, Paul Mishoe, coming into CW's that night. Hester said he did not know appellant at the time. Tr. 159, l. 14 – 160, l. 15.

Hester was cleaning the bar with Ashley, the bartender, when the decedent went outside, and appellant at some point also went outside. Hester said that appellant's "girlfriend" came back inside, and she said the two men were fighting. Hester and Ashley then both walked outside into the parking lot. "Ashley said everything was alright, so we walked back in CW's. By the time we got back to the bar, Ryan [Woodard] was coming in and said Paul was shot. So he walked—while we was walking back outside, Dennis [appellant] was walking in, and Paul was outside on the ground." Tr. 160, l. 16 – 161, l. 6. Hester did not see the fight outside, but after the decedent was shot Hester tried to hold the decedent's neck to control the bleeding from his neck. Tr. 160, l. 14 – 162, l. 11.

The following occurred on direct examination of Keith Hester:

> Q Before this happened, did you see any interaction between Paul and the defendant that night?
>
> A When I walked in to come clean up, I seen Paul's hands on this girl's ass -- excuse me, the girl's butt, and the dude said -- I guess he was being sarcastic saying, Hey, my name is Dennis, and that's my girl. That's the only interaction I seen out of the two. But they weren't -- they wasn't fighting or nothing. It wasn't like -- he was just being sarcastic, I guess.
>
> Q You didn't see anybody throwing punches or anything like that?
>
> A No. No.
>
> Q And, earlier, you said you talked to a person named Draper in the parking lot. Who is that?
>
> A He was a cook at CW's.
>
> Q And then you also said that after you went outside that you saw Dennis [appellant] come back inside. Do you know what his demeanor was like at that point?

> A He was calm, like he didn't do nothing. He was just calm. I think he was looking for a ride.

Tr. 162, l. 15 – 163, l. 11.

Lauren "Ashley" Flowers was the general manager and head bartender at CW's Wings and Ribs of Conway. She remembered the night of November 22, 2020. Tr. 171, l. 7 – 173, l. 19. Ashley knew both the decedent, from having gone to school with him, and she also knew appellant as "a customer every now and again. He would pop in every couple of weeks" with his girlfriend/wife, Kim. Tr. 174, l. 1 – 175, l. 25.

Ashley said the men were watching the football game, and at one point the decedent and Kim walked outside. Tr. 178, l. 14 – 179, l. 5. Appellant paid his tab as the bar was closing, and he also went outside into the parking lot. Ashley remembered Kim back inside the bar and said, "they're out there fighting." Ashley testified that appellant was on the ground when she got outside. Appellant told Ashley: "He [the decedent] pushed me, so I pushed him back, but Dennis said, he didn't push me, I tripped. Let him help me up." Ashley confirmed that the decedent said he pushed appellant down. However, appellant and the decedent then shook hands, and patted each other on the back. Tr. 179, l. 3 – 180, l. 12.

Ashley opined on cross-examination that Kim was very flirtatious with other people inside the bar. Tr. 201, ll. 3-21. Ashley recalled Ryan Woodard coming back in the bar telling her to call 911 because the decedent had been shot outside. She remembered Woodard saying, "he shot him in the neck. Call the law. He shot him in the neck. He didn't say who or how, he just said, 'he shot him in the neck, call the law.'" Ashley did not witness the shooting. Tr. 206, l. 22 – 207, l. 20.

As seen, the trial judge ruled that appellant's clothing could be referred to as a "motorcycle vest." Defense counsel continued to object to the "motorcycle vest" ruling, arguing it did not solve the problem of being perceived as a person of bad character because he was associated with a motorcycle club or motorcycle gang.

Corporal Glen Guyett testified that on November 22, 2020, he was called to the scene of the shooting at CW's wings. He remembered the suspect was said to be "somebody named Dennis that came on a motorcycle, was wearing a motorcycle vest, and was blind in one eye." Tr. 225, l. 7 – 226, l. 13; 245, ll. 7-14.

Appellant objected to the introduction of State's Exhibit 26, State's Exhibit 27, and State's Exhibit 28, which were photographs of appellant's Red Devils Motorcycle Club clothing. Tr. 255, l. 7 – 256, l. 14; 289, l. 24 – 291, l. 1. State's Exhibit 26, 27, and 28 are on file with this Court for review. Counsel also objected to the introduction of the actual motorcycle club clothing, State's Exhibits 45 and 51, including on the additional ground that it was cumulatively prejudicial. Tr. 321, l. 7 – 323, l. 18.

Appellant testified in his own defense. Tr. 432, ll. 2-5. Appellant was fifty-eight-years-old at the time of trial. He had lived in Horry County for twenty-eight years prior to the incident in this case. Tr. 432, l. 8 434, l. 7.

Appellant had worked for "almost twenty-eight years at the Myrtle Beach International Airport" for the TSA. Tr. 434, l. 19 – 435, l. 12. Appellant lived with his long-time girlfriend, Kim. Tr. 435, l. 15 – 436, l. 2.

Appellant owned a motorcycle, and he testified that he had a concealed weapons permit to carry his .380 LCP Ruger. The state would later contest whether appellant had a concealed weapons permit, and it argued that even if appellant did have a permit, he could not have legally

been drinking in a bar while carrying a firearm. Tr. 436, ll. 11-20. Appellant noted that he was blind in his right eye as the result of an accident when he was nine-years-old. Tr. 437, l. 17 – 438, l. 3.

Appellant remembered on November 22, 2020, which was a Sunday, he and Kim had gone to another bar and then they played in a cornhole tournament that afternoon. Tr. 440, l .6 – 443, l. 11. Appellant and Kim then went to CW's Wings which closed at eleven p.m. because of COVID restrictions. Appellant remembered there was a football game on, and they were talking to people and friends in the bar. Tr. 443, l. 8 – 444, l. 4.

Appellant testified that he had never seen the decedent, Paul Mishoe, before that night at CW's. "The initial interaction I had was Paul had stopped me and I was heading to the restroom and [he] said that my wife had a fat, juicy ass." Tr. 445, ll. 16-21. Appellant said he told him "I didn't appreciate it and it was very rude and disrespectful." Tr. 445, ll. 21-23.

When appellant returned from the restroom, the decedent grabbed his arms and told him that he should take his remark about Kim as a compliment. Appellant said that he responded that if the decedent said, "my wife was pretty, I – I would not have been so upset, but that, to me, was disrespectful, but neither one of us were antagonistic at all." Tr. 446, ll. 2-10.

Appellant said at the end of the night, the decedent hugged him and he in return hugged the decedent. Everything seemed to end well. Tr. 446, ll. 11-24.

After the decedent left the bar, appellant said that Kim went outside to say goodnight to the decedent. Tr. 448, ll. 7-25. Appellant said about ten minutes after Kim left the bar, he went outside to tell Kim to start the car so he could get on his motorcycle and follow her home. However, appellant remembered that the decedent waved him over, and appellant walked towards the decedent to see what he wanted. Tr. 449, l. 10 – 450, l. 17. The decedent told him

that appellant had embarrassed him inside the bar and that he did not care "who I was." The decedent then pushed appellant down. Appellant started to get up off of the pavement when he saw Ashley the bartender come outside. He told Ashley that he had fallen down because he did not want her to call the police or cause trouble for her bar because of what the decedent had done. Tr. 450, l. 9 – 451, l. 18.

Appellant reiterated that things calmed down, and he told Kim he would warm his "bike up. At that time, she was warming her car up." Appellant thought the difficulties with the decedent were over, but the decedent called him over again. Again, appellant walked over to see what the decedent wanted. Appellant said the decedent repeated that appellant had embarrassed him inside the bar "and he called me a bitch. At that point, I just said (indicates), [I] turned and walked away. I turned to the right side to walk away...I was hit in the back of the head as I was turning to the right side...I thought he was going to hit me again, and I didn't know what I got hit with, and I was very scared." Tr. 452, l. 12 – 454, l. 8. Appellant said he grabbed his gun "I shot backwards." Appellant turned around and "I saw Paul holding his neck." Tr. 454, ll. 4-25.

Appellant said when he shot the decedent, Ryan Woodard walked back into the bar. Appellant followed Ryan back into the bar to talk to him about what had just happened. Tr. 454, l. 9 – 456, l. 1. Appellant described how he opened the freezer inside the kitchen and struggled with Ryan Woodard after he opened the freezer door and Ryan grabbed his gun. Appellant said he was not thinking straight at that time. "I was pretty messed up." Tr. 456, ll. 1-21. State's Exhibit 48 is on file with this Court for viewing.

On cross-examination, appellant said that he knew it was illegal to drink alcohol inside of a bar while carrying a gun, even with a concealed weapons permit, if he had a valid one. Tr. 466, ll. 16-25. However appellant repeated that he was hit in the back of the head by the

decedent immediately before appellant shot him, in fear for his own life. Appellant said that he thought he was going to get hit again when he shot the decedent. Tr. 476, l. 25 – 479, l. 11.

The judge charged the jury the law of murder, voluntary manslaughter, and self-defense. Tr. 541, l. 17 – 549, l. 16.

**Discussion**

Defense counsel correctly argued that appellant being in a motorcycle group, club or gang was not probative of anything at issue in this case. It did not any way provide a motive or explain some intent for the shooting in this case.

This Court has held that "evidence of gang affiliation demands careful handling because of its power to distract the fact finder from its rational task of deciding the facts from objective evidence, luring their attention to the lurid, raising the risk that they will decide the case on an improper or subjective (often an unduly emotional) basis." Johnson v. State, 433 S.C 550, 559, 860 S.E.2d 696, 699 (2021). The mention of gangs summons a stigma of lawlessness, and as this Court noted in Johnson, it is extremely dangerous and prejudicial evidence in a criminal case.

While the gang evidence was found necessary in State v. Johnson, this Court found such gang evidence was reversible error in State v. Robinson. The Court noted in Robinson, that without a doubt, testimony and evidence regarding Robinson's gang affiliation constituted prior bad act evidence. The question was whether or not the evidence was logically relevant to Robinson's involvement in the crimes for which he was charged and did they prove a motive or intent to commit the crime. See State v. Robinson, 438 S.C. 421, 437, 882 S.E.2d 883, 891-92 (2023).

As in this case, any motorcycle gang or motorcycle club related evidence was not logically relevant to prove any material fact at issue, as defense counsel correctly argued here. The evidence that appellant was in a motorcycle club or gang, that he wore a "motorcycle vest," and the admission of his "Red Devils" motorcycle clothes were all unnecessary and gratuitous. In addition, as seen, appellant objected to the redactions in the 911 tape, which is on file with this Court since they called great attention to the clothing appellant was wearing that night given the manner of the redactions. The 911 was unnecessary, especially given these prejudicial "clothing" redactions. The jury learned from the other objected to evidence that appellant was wearing the Red Devils motorcycle vest that night. Appellant being dressed in motorcycle clothes and being known as a member of a motorcycle club did nothing to explain what happened at CW's Wings on the night of November 22, 2020. It was not in dispute that appellant shot the decedent.

The motorcycle club evidence only tended to show that appellant was a person of bad character, a criminal, who enjoyed engaging in criminal activity and antisocial activity with other people in the motorcycle gang or club. See State v. Robinson, supra. This motorcycle evidence in no way tended to show a motive, a common scheme or plan, identity or any other State v. Lyle exception under Rule 404(b), SCRE in this case.

The motorcycle vest, motorcycle clothing, and the other references to the motorcycle club affiliation by appellant in this case was totally irrelevant. It did not tend to prove any material issue in this case, its admission was gratuitous. and it was highly prejudicial to appellant. Defense counsel also correctly argued that the trial judge's partial sanitizing of this evidence by trying to limit its mention to a "motorcycle vest" was ineffectual and did not cure the problem with such evidence.

Further, the state cannot attack the character of the defendant unless the defendant himself first places his character at issue. See State v. King, 334 S.C. 504, 512, 514 S.E.2d 578 (1999). Bad character evidence can arise in many ways. In this case, it arose from the fact that appellant was gratuitously made known to the jury as a member of a motorcycle club or gang, the Red Devils.

In State v. Mitchell, 298 S.C. 186, 379 S.E.2d 123 (1989), our Supreme Court found that the failure to object to impermissible evidence that Ms. Mitchell was involved in "devil worship" and had a "mafia membership" constituted ineffective assistance of counsel. She had not put her character in issue before being attacked in this manner.

In State v. King, the state presented evidence of King's numerous prior thefts from his ex-wife which began in 1994 and which were remote. The state also offered evidence of a theft on the night before the murder. These thefts were not admissible under any theory against King, our Supreme Court found, and they only showed his bad character and his propensity to commit crimes. The evidence was not harmless beyond a reasonable doubt. See State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990); State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992).

Appellant's defense in this case was self-defense. The jury was tainted in its analysis of self-defense in this case by the bad character and propensity evidence of appellant being in a motorcycle gang or club. Defense counsel argued that the state in other cases had removed or redacted such bad character or bad act evidence and that it easily could have done the same in this case. Given the gratuitous, unnecessary, and highly prejudicial motorcycle gang or motorcycle club evidence in this case, which was inadmissible bad character evidence implying a propensity to crimes on appellant's part, appellant should be granted a new trial. State v. Robinson.

2.

Appellant's conviction for pointing and presenting a firearm should be vacated since the indictment returned by the grand jury erroneously named the decedent, Paul Mishoe, as the victim of that crime, where in fact the pointing and presenting a firearm charge involved a separate incident involving Ryan Woodard, and this indictment consequently should have been quashed.

**Relevant facts**

The arrest warrant for pointing and presenting a firearm alleged that appellant "did present a handgun and did point it at the victim and make threats causing him to fear for his safety, that the acts of the accused constitute the offense of pointing and presenting a firearm at a person..." R. p. *. (Arrest Warrant for Pointing and Presenting a Firearm).

The indictment of the Horry County grand jury for pointing and presenting a firearm stated that "Stephen D. O'Hara did, in Horry County on or about November 22, 2020, point or present a loaded or unloaded firearm, to wit: handgun, at one Paul Anthony Mishoe, in violation of § 16-23-0410..." R.*.

Thus, the arrest warrant for pointing and presenting a firearm did not name the victim and the indictment returned by the Horry County grand jury erroneously stated that the victim was the decedent, Paul Anthony Mishoe who was shot outside CW's Wings in the parking lot. As will be seen infra, the pointing and presenting a firearm involved a separate incident inside CW's involving a separate victim, Ryan Woodard after Mishoe was shot outside.

On November 15, 2023, a pretrial hearing was held before the Honorable Benjamin Culbertson. The assistant solicitor was Mary-Ellen Walter. Martin Spratlin represented appellant. Supp. Tr. 1.

The solicitor stated: "I accidentally put the murder victim, Paul Mishoe's, name on the murder indictment and on the pointing and presenting. In fact, the pointing and presenting should have Ryan Woodard as the victim." Supp. Tr. 3, ll. 10-16. The judge asked if this involved "one incident at the same time?" Supp. Tr. 4, ll. 20-21.

The solicitor answered that the facts would show that Mr. Woodard, Mr. Mishoe, and Mr. O'Hara, and his girlfriend, I guess she would be, were outside. Mr. Woodard will testify that at some point Mr. O'Hara shot Mr. Mishoe in the neck killing Mr. Mishoe. Mr. Woodard then went into the bar and hid in the kitchen. The defendant followed him in, had a gun on him, and there was a struggle for the gun. So it was all within that same time, within minutes of each other." Supp. Tr. 4, l. 20 – 5, l. 6.

Defense counsel Spratlin objected to the amendment, citing State v. Bryson, 357 S.C. 106, 591 S.E.2d 637 (Ct. App. 2004) and State v. Gentry, 363 S.C 93, 610 S.E.2d 494 (2005). Defense counsel argued that in Bryson, the state sought to amend an indictment before trial for pointing and presenting a firearm and resisting arrest with assault on a police officer by substituting the name of one officer that was a victim for another officer that was a victim. The Court of Appeals held this was improper. Supp. Tr. 5, l. 9 – 7, l. 13.

Spratlin said that the same essential situation was present in this case. The state alleged that appellant pointed and presented a firearm at Ryan Woodard who was a separate victim. Yet, the grand jury returned an indictment stating appellant pointed and presented a firearm at Paul Anthony Mishoe. The right to be indicted by the grand jury is an important right in South Carolina, defense counsel argued, and the state could not go to trial on the pointing and presenting indictment unless the grand jury returned an indictment against appellant for pointing and presenting a firearm at Ryan Woodard. Supp. Tr. 5, l. 9 – 7, l. 13.

The solicitor argued that the indictment was only a notice document and that defense counsel should not be surprised by the requested amendment changing the name of the victim. Defense counsel repeated the problem in this case was the grand jury indictment where the grand jury apparently indicted based on erroneous information given to it by state pertaining to someone who was not the victim of the alleged crime: Paul Mishoe. The judge ruled he would grant the state's motion to amend the indictment, reasoning it was only a notice document. Supp. Tr. 8, l. 7 – 9, l. 1. The trial judge ruled he would not overrule Judge Culbertson's granting the state's motion to amend and refusing to quash the indictment thereby forcing the solicitor to seek to reindict appellant on this charge with accurate information if she could. Tr. 11, l. 19 – 13, l. 6.

**Discussion**

"A defendant has a constitutional and statutory right to demand that a properly constituted grand jury consider his case and decide whether to issue a sufficient indictment.' The primary purposes of an indictment are to put the defendant on notice of what he's called upon to answer, *i.e.*, to apprise him of the elements of the offense and allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgement to pronounce if the defendant is convicted." State v. Means, 367 S.C. 374, 383, 626 S.E.2d 348, 353 (2006) *citing* Evans v. State, 363 S.C. 495, 508-13, 611 S.E.2d 510, 517-19 *citing* State v. Gentry, 363 S.C. at 102-103, 610 S.E.2d at 500 (2005).

In South Carolina, a defendant cannot be tried unless upon indictment by the grand jury in the county in which the offense occurred pursuant Article I, § 11 and Article V, § 22 of the South Carolina Constitution. Here, the grand jury in Horry County indicted appellant for killing Paul Mishoe with malice aforethought, murder. The grand jury also indicted appellant for

pointing and presenting a firearm at Paul Mishoe. The state sought to go to trial on a different theory, that appellant and presented a firearm at Ryan Woodard inside CW's Wings after the decedent, Paul Mishoe, had been shot and killed in the parking lot outside of CW's Wings.

In State v. Jones, 211 S.C. 319, 45 S.E.2d 29 (1947), this Court held it was permissible to amend the name of the victim in the indictment. However, the Jones Court, relying on State v. McGill, 191 S.C. 1, 3 S.E.2d 257 (1939), noted there is no error so long as the nature or grade of the offense was not changed. State v. Jones, 211 S.C. at 322, 45 S.E.2d at 30. Here, the pointing and presenting a firearm offense involving Ryan Woodard was different in nature. It was a separate incident from the murder offense where the state alleged appellant shot and killed Paul Mishoe. Paul Mishoe was not the victim of the pointing and presenting offense.

The pointing and presenting a firearm offense against Ryan Woodard was alleged to have occurred after the murder inside the kitchen of CW's Wings. Since appellant had the right to be indicted by the grand jury in the county where the crime was allegedly committed, the solicitor in this case should have been forced to present an accurate indictment to the Horry County grand jury for pointing and presenting a firearm at one Ryan Woodard if the state sought to proceed with that indictment. To hold that naming the actual victim of the crime is merely a superfluous afterthought when presenting an indictment to a county grand jury would make the state constitutional right mandate that a person be indicted by the county grand jury before a criminal charge can proceed to trial a hollow or meaningless right or process. See Article I, § 11 and Article V, § 22 of the South Carolina Constitution.

Appellant's present conviction for pointing and presenting a firearm should therefore be vacated.

## CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed, and this case remanded to the Horry County Court of General Sessions for a new trial. In addition, appellant's conviction for pointing and presenting a firearm should be vacated.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of November, 2024.