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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Darlington County

Honorable R. Kirk Griffin, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DARIUS GRANT DICKEY,

APPELLANT

APPELLATE CASE NO. 2024-000145

INITIAL BRIEF OF APPELLANT

JOANNA K. DELANY
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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STATEMENT OF THE CASE

On June 11, 2020, a Darlington County Grand Jury indicted Darius Dickey, Appellant, for murder, unlawful carrying of a pistol, and possession of a weapon during the commission of a violent crime. On September 7, 2023, a Darlington County Grand Jury indicted Appellant for attempted murder and two counts of assault and battery of a high and aggravated nature (ABHAN). R. *(indictments). The State served notice of intent to seek life without parole based on Appellant's prior conviction for attempted armed robbery. Tr. 668, l. 13 – 670, l. 16. Appellant was tried before the Honorable R. Kirk Griffin and a jury, from January 22 – 25, 2024. Appellant was represented by Marianna White, Jamie Scruggs, and Nathan Scales. Kernard Redmond and Monty Bell prosecuted the case. Tr. 1.

Appellant was convicted as indicted, and he was sentenced to serve concurrent terms of imprisonment of life without parole for murder, life without parole for attempted murder, twenty years for each count of ABHAN, and one year for unlawful carrying of a pistol. No sentence was imposed for possession of a weapon during the commission of a violent crime. Tr. 646, l. 14 – 648, l. 20; Tr. 676, l. 3 – 677, l. 6.

This appeal follows.

STATEMENT OF FACTS

On January 26, 2020, shooting broke out at approximately 1:45 a.m. inside a crowded Mac's Lounge in Hartsville. Tr. 337, l. 8 – 339, l. 5; Tr. 158, l. 16 – 159, l. 9; Tr. 275, ll. 12-13. The State alleged that Appellant and one Davijon McCall shot at each other, but their gunfire hit others in the club. Garrett Bakhsh, DiCaprio Collins, and Bryant Robinson were shot and killed.[1] Ivan Grandados and Leonard Sweetenburg were hit by gunfire but survived.[2] Davijon McCall was charged with the murders of Collins and Robinson. Tr. 132, l. 9 – 138, l. 3; Tr. 162, l. 23 – 164, l. 2; Tr. 259, ll. 8-12; Tr. 481, ll. 3-19. Appellant was charged with the murder of Bakhsh, with the attempted murder of McCall, and with ABHAN as to Grandados and Sweetenburg. R. *(indictments). Appellant was tried separately from McCall. Tr. 1.

A woman named Angelena Deason[3] pointed out Appellant's car to a state trooper, the first officer on the scene, but the trooper was unable to stop the car due to traffic from people fleeing the shooting. Tr. 528, l. 20 – 531, l. 8. Around the same time, Appellant called his mother to say the car he was driving had been stolen. Tr. 442, ll. 3-23. When Investigator Hause subsequently met with Appellant's mother, they got Appellant on the phone and Appellant admitted being at the club but denied shooting and he stated the car was stolen. Tr. 468, l. 3 – 470, l. 22.

Officer Curtis, the second officer on scene, had a body-worn camera which recorded the immediate aftermath of the shooting. Curtis got there "[m]oments after" the shooting. Tr. 158, ll. 16-21. Curtis spoke to a crying and hysterical Deason outside the club. Tr. 160, l. 2 – 161, l. 6.

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[1] Bakhsh survived for several days in the hospital before succumbing to his injuries. Tr. 267, l. 16 – 269, l. 4.

[2] A sixth man, Michael Grider, was also shot and injured. Tr. 163, l. 18- 164, l. 7.

[3] Deason was a military police officer in the Army. This fact would become relevant to the *Batson* discussion, *infra*.

Deason claimed that prior to the shooting she saw Appellant pull a gun out of his waistband and cock it, then put it back in his waistband. According to Deason, she heard the gunshots break out shortly thereafter. Because of what she had seen, she assumed Appellant fired shots. However, she did not see Appellant pull the gun out after he put it back in his pants, and she did not see Appellant shoot. Tr. 315, l. 5 – 317, l. 21; Tr. 186, l. 16 – 189, l. 4; Tr. 160, ll. 6-24.

The only person who claimed Appellant fired shots that night was Appellant's cousin, Zyrig Thomas, who denied remembering that he made such a statement when called to testify at trial. Tr. 450, l. 3 – 453, l. 14. However, Investigator Hause claimed Thomas told him DiCaprio Collins and Davijon McCall were fighting, and Appellant grabbed McCall, then Appellant and McCall shot at each other: Appellant while backing away towards the patio and McCall while backing away towards the main entrance. Tr. 473, l. 5 – 476, l. 18.

Club owner Jeremy Grantham testified he heard gunshots and saw muzzle flash coming from over by the pool table near the patio door directed towards the front door. Tr. 339, ll. 3-25. Patron Ivan Grandados testified he was shot near the pool table on his way out to the patio. He stated it sounded like shots were coming from the direction of the patio. Tr. 277, l. 7 – 279, l. 10. Patron "A.J." Wright testified he saw Appellant, DiCaprio Collins, and another man walking towards the stage. According to Wright, Appellant had his hands in his pants. Wright testified he heard "commotion" and "holler[ing]" and then gunshots. Wright did not see who started the fight. Wright claimed he saw Appellant afterwards, "jumping up and down asking who did it with the gun in his hand." Tr. 408, l. 7 – 411, l. 17.

The state trooper located Appellant's car shortly after the shooting. It was parked outside a residence in the area. Tr. 531, ll. 11-17. A friend of Appellant's would testify that Appellant had pulled up to the residence driving the car. Tr. 511, l. 18 – 514, l. 1. No one was in the car

when the trooper got there but the trooper saw shell casings inside the car. The shell casings were forty-caliber. A person identified as Appellant, who claimed to be a resident of the home, came out and asked the trooper to leave but the trooper stayed with the car until other officers arrived. Tr. 195, l. 20 – 197, l. 7; Tr. 531, l. 21 – 534, l. 20; Tr. 501, l. 24 – 504, l. 8.

Forty-caliber shell casings and nine-millimeter shell casings were found inside the club. Fired projectiles were also recovered, and possible bullet strikes seen on the walls. Tr. 231, l. 4 – 239, l. 24. The shell casings from Appellant's car were compared to shell casings at the scene of the shooting, and an expert in firearms and toolmark identification opined that the same gun that fired the casings found in Appellant's car also fired some of the casings found at the shooting scene. Tr. 368, l. 18 – 369, l. 11; Tr. 387, l. 12 – 393, l. 6.

The State proceeded on the theory that McCall shot at Appellant, but struck Collins and likely also struck Robinson; and Appellant shot at McCall, but likely struck Bakhsh, as well as likely striking Grandados and Sweetenburg. Its theory of the case was based on testimony from people in the club, the locations of the people who were shot, and firearms evidence. Tr. 586, l. 1 – 594, l. 15; Tr. 132, ll. 13-22; Tr. 162, l. 23 – 163, l. 16; Tr. 267, l. 16 – 271, l. 16; Tr. 277, l. 3 – 279, l. 2; Tr. 288, l. 2 – 289, l. 16; Tr. 296, l. 18 – 297, l. 18; Tr. 315, l. 17 – 323, l. 17; Tr. 338, l. 19 – 342, l. 24; Tr. 361, l. 2 – 364, l. 4; Tr. 376, l. 3 – 393, l. 6.

However, as counsel argued in closing, the evidence did not conclusively establish that Appellant was a shooter. Nor did it establish that if he were a shooter, his bullets hit Bakhsh, Grandados, and Sweetenburg. Tr. 597, l. 17 – 610, l. 4. For instance, the State's firearms expert opined that Davijon McCall's gun fired a bullet recovered from the autopsy of Brian Robinson, and that McCall's gun may have fired a bullet recovered from DiCaprio Collins's autopsy. However, the expert could *not* say that the gun which fired the shell casings from Appellant's car

also fired the bullet fragments recovered from Garrett Bakhsh's autopsy. The expert also admitted that *McCall's* gun may have fired the shot which struck Bakhsh. Tr. 380, l. 5 – 384, l. 11; Tr. 384, l. 19 – 385, l. 23; Tr. 396, l. 15 – 399, l. 20.

The jury was charged on self-defense and defense of others. Tr. 625, l. 13 – 629, l. 24. It was charged on accomplice liability over objection. Tr. 623, l. 21 – 625, l. 6. It was not charged on mutual combat. The jury deliberated for approximately three hours and forty-five minutes. It asked two questions. Tr. 634, l. 20 – 645, l. 6. As seen, Appellant was convicted as indicted.

ARGUMENT

I. The trial court erred by instructing the jury on accomplice liability, where there was no evidence that if Appellant was not the shooter that he was aiding and abetting another person who was the shooter, since the improper instruction was hopelessly confusing.

The State asked the jury to convict Appellant because the victims were "caught in the crossfire" between Appellant and Davijon McCall. It obtained an instruction on accomplice liability. Davijon McCall was not Appellant's accomplice: the State alleged the men were shooting at each other. The accomplice liability instruction was unsupported by the facts and hopelessly confusing.

Standard of review

"In criminal cases an appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "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." *Id.* "In reviewing jury charges for error, this [c]ourt must consider the [trial] court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Simmons*, 384 S.C. 145, 178, 682 S.E.2d 19, 36 (Ct. App. 2009). "If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error." *Id.* "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *Id.* "To warrant reversal, a [trial] court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *Id.*

Relevant facts

No one alleged Appellant intended to shoot Bakhsh, Grandados, or Sweetenburg. The evidence did not conclusively establish which gun fired the shots that struck Bakhsh, Grandados, and Sweetenburg. It could have been McCall's gun. Pretrial, the defense attempted to clarify upon what theory the State was going forward—defense counsel stated the prosecution had previously informed the defense it was proceeding on a mutual combat theory, but now it appeared the State was not. The defense also sought to confirm Appellant only faced one count of murder at this trial. Tr. 91, l. 6 – 92, l. 7. Although the solicitor noted that Appellant had been indicted for the additional murders of Brian Robinson and DiCaprio Collins under a mutual combat theory, the solicitor stated the State was "backing off" of that. The solicitor stated the prosecution was going forward on a theory of transferred intent as to Bakhsh, Grandados, and Sweetenburg, and specific intent as to McCall. Tr. 92, l. 11 – 93, l. 8; Tr. 98, l. 9 – 99, l. 8.

At the conclusion of the case, the State did not seek a jury instruction on mutual combat.[4] Nevertheless, quasi-mutual combat was the State's theory of the case as presented to the jury. The State alleged that Bakhsh, Grandados, and Sweetenburg were shot, likely by Appellant but possibly by Davijon McCall, while the two men were shooting at each other. In closing argument, the solicitor summed up the State's position by stating that Bakhsh, Grandados, and Sweetenburg were like "fish in a barrel caught in the crossfire" between Appellant and McCall, when the two men shot at each other. Tr. 586, l. 1 – 587, l. 17. As seen, the State's firearms expert opined that

[4] Likely the State did not seek a mutual combat instruction because it had not proven that Appellant and McCall were "rival combatants [who] were armed for the mutual combat with deadly weapons and each combatant knew the others were armed." *State v. Young*, 429 S.C. 155, 160, 838 S.E.2d 516, 519 (2020). The mutual combat doctrine "has most often been applied in situations where the defendant and decedent bear a grudge against each other before the fight in which one of them is killed occurs." *State v. Taylor*, 356 S.C. 227, 232, 589 S.E.2d 1, 4 (2003).

Davijon McCall's gun fired a bullet recovered from the autopsy of Brian Robinson, and that McCall's gun may have fired a bullet recovered from DiCaprio Collins's autopsy. However, the expert could not say that the gun which fired the shell casings from Appellant's car also fired the bullet fragments recovered from Garrett Bakhsh's autopsy. The expert also admitted that McCall's gun may have fired the shot which struck Bakhsh. Tr. 380, l. 5 – 384, l. 11; Tr. 384, l. 19 – 385, l. 23; Tr. 396, l. 15 – 399, l. 20.

The State sought an accomplice liability instruction. The defense objected to the request, and argued there was no evidence to support the charge, since Appellant was not alleged to have been acting in concert with anyone. Tr. 571, ll. 6-19; Tr. 572, ll. 6-10. The State responded that Appellant and McCall aided and abetted each other by shooting at each other in a crowded bar. Tr. 576, l. 7 – 577, l. 15. "[I]t's just hard for me to fathom the fact that just because we may not be able to definitely say who fired the fatal shot in a shootout in a bar that anyone should be able to benefit . . . since we don't know who shot whom, hey, tough luck." Tr. 578, l. 122 – 579, l. 10. The defense replied that "*Young* said that there has to be a pre-existing dispute and that the State is required to []prove the [rival] combatants were armed for the mutual combat with deadly weapons and each combatant knew the others were armed. And that's our, the basis of our objection." Tr. 581, ll. 13-18.

The court took the matter under advisement. Tr. 582, l. 24 – 583, l. 2. The court charged the jury on accomplice liability but not on mutual combat. Tr. 623, l. 21 – 625, l. 6. At the conclusion of the charge, Appellant renewed his objection to the charge on accomplice liability. The State was silent. Tr. 632, ll. 9-17.

Discussion

The State's alternative theories of Appellant's criminal liability were that Appellant shot at McCall with the intent to kill him but missed, striking Bakhsh, Grandados, and Sweetenburg; or that McCall shot at Appellant and missed, striking Bakhsh, Grandados, and Sweetenburg. Thus, the State sought to convict Appellant under the doctrine of transferred intent or the doctrine of mutual combat. To avail itself of the mutual combat doctrine, the "State is required to prove the rival combatants were armed for the mutual combat with deadly weapons and each combatant knew the others were armed." *State v. Young*, 429 S.C. at 160, 838 S.E.2d at 519. "[M]utual combat can properly serve as the basis for a murder charge for the death of a non-combatant under the 'hand of one is the hand of all' theory of accomplice liability. When two or more individuals engage in combat via a reckless shootout, they collectively trigger an escalating chain reaction that creates a high risk to any human life falling within the field of fire." *Young*, 429 S.C. at 157, 838 S.E.2d at 517. "[M]utual combat acts as a bar to self-defense because it requires mutual agreement to fight on equal terms for purposes other than protection." *State v. Taylor*, 356 S.C. at 234, 589 S.E.2d at 4. The State did not make the showing necessary to receive a mutual combat instruction—that the men were rival combatants armed for the mutual combat and each knew the other was armed. The State did not seek a mutual combat instruction. Instead, it sought and received an instruction on accomplice liability.

It was error to charge the jury on accomplice liability where there was no evidence Appellant and McCall were accomplices. "Under the hand of one is the hand of all theory of accomplice liability, one who joins with another to accomplish an illegal purpose is liable criminally for everything done by his confederate incidental to the execution of the common design and purpose." *State v. Harry*, 420 S.C. 290, 299, 803 S.E.2d 272, 276 (2017) (cleaned up). "Under

the doctrine we refer to in South Carolina as 'the hand of one is the hand of all,' the State proves the defendant guilty by proving he had a mutual plan or agreement with another person to commit one crime, and during the course of committing that initial crime, the other person committed a second crime they had not agreed to commit." *State v. Sellers*, 442 S.C. 140, 148, 898 S.E.2d 116, 120 (2024). In a typical case where the State attempts to convict the defendant of murder under the hand of one doctrine, two or more people agree to commit an initial crime, and during the course of that crime a person who is not the defendant shot and killed a victim. *Id.* "[I]n a murder case involving a gunshot, the trial court should charge the law of accomplice liability when there is any evidence (1) the defendant had a mutual plan or agreement with another person to commit the murder, and (2) the other person in the mutual plan or agreement fired the fatal shot." *State v. Johnson*, 444 S.C. 442, 449–50, 908 S.E.2d 102, 106 (2024). In this case, there was no evidence that Appellant had a mutual plan or agreement with another person to commit an initial crime. There was also no evidence McCall was part of a mutual plan or agreement to commit an initial crime. There was no evidence Appellant or McCall had a plan to shoot Bakhsh, Grandados, and Sweetenburg. Appellant and McCall were not alleged to have been accomplices—they were alleged to have been shooting at each other rather than aiding and abetting each other in committing some initial crime when the shots broke out.

"The law to be charged must be determined from the evidence presented at trial." *State v. Knoten*, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003). "If there is any evidence to support a jury charge, the trial judge should grant the request." *State v. Brown*, 362 S.C 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004).

"[I]t is reversible error to charge a correct principle of law as governing a case when such principle is inapplicable to the issues on trial." *Dunsil v. E. M. Jones Chevrolet Co.*, 268 S.C. 291, 295, 233 S.E.2d 101, 103 (1977). "The purpose of instructions is to enlighten the jury and to aid it in arriving at a correct verdict. It is error to give instructions which are calculated to confuse or mislead the jury." *State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987) (citing *State v. Hewitt,* 205 S.C. 207, 31 S.E.2d 257 (1944)). *See also State v. Rothell*, 301 S.C. 168, 169–70, 391 S.E.2d 228, 229 (1990) (same). "Instructions that do not fit the facts of the case may serve only to confuse the jury." *State v. Blurton*, 352 S.C. 203, 208, 573 S.E.2d 802, 804 (2002). "Only law applicable to the case should be charged to the jury." *Id*. *See also State v. Fair*, 209 S.C. 439, 445, 40 S.E.2d 634, 637 (1946) (same).

There was no evidence Appellant was part of a mutual plan to commit a crime and there was no evidence McCall was part of a mutual plan to commit a crime. There was no evidence Appellant and McCall were coconspirators. The charge was erroneous. *Cf. State v. Sellers*, 442 S.C. at 153, 898 S.E.2d at 123 (because the State presented evidence the defendant agreed with a codefendant to commit the burglary and robbery and evidence both the defendant and the codefendant beat the victim during the course of the two initial crimes, the hand of one jury instruction was supported by the evidence); *Barber v. State*, 393 S.C. 232, 237, 712 S.E.2d 436, 439 (2011) (accomplice liability charge was proper where there was evidence the defendant shot the victims and there was evidence that supported a finding the defendant's accomplice shot the victims). The instruction was confusing and misleading—the court should not have instructed the jury on a principle of law inapplicable to the case. *E.g.*, *State v. Blurton*, 352 S.C. at 208, 573 S.E.2d at 804.

The error was not harmless. "In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered." *State v. Burdette*, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019) (quoting *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014)). "If we have any reasonable doubt as to whether the erroneous charge contributed to the verdict, we must affirm the reversal of the conviction." *State v. Bowers*, 436 S.C. 640, 647, 875 S.E.2d 608, 611 (2022). The jury was not charged on mutual combat. It was charged on transferred intent. It was charged on self-defense.[5] The accomplice liability instruction was lengthy. The jury could have convicted Appellant even if it had found Appellant did not fire the shots which struck Bakhsh, Grandados, and Sweetenburg, by applying the improper instruction. The instruction was hopelessly confusing on the facts of this case, and when viewed in relation to the charge in its entirety.

Jury questions may be relevant to a harmless error analysis regarding improper instructions. *E.g.*, *State v. Blassingame*, 271 S.C. 44, 47, 244 S.E.2d 528, 530 (1978) (jury's request for additional instructions on the definitions of murder and manslaughter demonstrated jury was focusing its critical attention on the meaning of the offenses, illustrating prejudice caused by erroneous manslaughter instruction). The jury asked a question during deliberations which illustrated the prejudice here. One of Appellant's charges was possession of a weapon during the commission of a violent crime. During deliberations, the jury sent a note and then verbally asked the court to define the word "commission" as regards the weapons offense and how it related to the Appellant. The note stated, "Commission meaning him as in Mr. Dickey"? R. *(Court's

[5] *See Taylor*, 356 S.C. at 235, 589 S.E.2d at 5 (trial court's unwarranted charge on mutual combat was prejudicial as it acted as a limitation on the Petitioner's ability to claim self-defense).

Exhibit #2). The jury asked if it was supposed to determine whether Appellant was guilty of the commission of the violent crime or whether it was just supposed to determine if he possessed a weapon when the incident occurred. The foreperson asked, "[D]oes 'commission' mean just in general it happened, like the act happened? Or does it—is it stating that the defendant actually did this?" The court recharged the jury on the offense rather than directly answering the question. Tr. 635, l. 23 – 640, l. 9. Although Appellant is not raising this matter as an issue on appeal (Appellant was not sentenced for this charge), this fact shows that the jury was struggling with whether Appellant's presence at the scene with a weapon was enough to support criminal liability.

This Court should reverse. *Cf. State v. Washington*, 431 S.C. 394, 411, 848 S.E.2d 779, 788 (2020) (accomplice liability instruction prejudiced Petitioner where the evidence that Petitioner shot Manigault was not overwhelming, and the insertion of the accomplice liability charge into the case invited the jury to speculate whether Kinloch—the only possible accomplice of Petitioner—shot Manigault, when there was no evidence Kinloch was the shooter).

II. The trial court erred by quashing the jury panel, where defense counsel struck two jurors who both had conservative demeanors and one declined an age exemption from jury service, since these were race-neutral and gender-neutral reasons.

The defense's reasons for exercising its peremptory strikes—failure to avail oneself of an exemption and possessing a conservative demeanor—were race-neutral explanations under *Batson v. Kentucky*, 476 U.S. 79 (1986). Once the explanations were provided, the burden should have gone back to the State to demonstrate the proffered reasons were pretext for racial discrimination. The court did not require the State to do so and instead improperly granted the motion. A juror struck from the first panel was seated on the second. This error requires reversal.

Standard of review

"'In criminal cases, the appellate court sits to review errors of law only.'" *State v. Inman*, 409 S.C. 19, 25, 760 S.E.2d 105, 108 (2014) (quoting *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). "A court is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* (internal quotation omitted). "On review, this Court is limited to determining whether the trial court abused its discretion." *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). "This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence." *Id.*

"In the typical appeal from the granting or denial of a *Batson* motion, the appellate courts give deference to the findings of the trial court and apply a clearly erroneous standard." *State v. Cochran*, 369 S.C. 308, 312, 631 S.E.2d 294, 297 (Ct. App. 2006). "This standard of review, however, is premised on the trial court following the mandated procedure for a *Batson* hearing." *Id.* "[W]here the assignment of error is the failure to follow the *Batson* hearing procedure, we

must answer a question of law. When a question of law is presented, our standard of review is plenary." *Id.*

Relevant facts

The solicitor successfully challenged the first jury panel pursuant to *Batson*. Tr. 65, l. 20 – 73, l. 20. At the conclusion of jury selection, the solicitor challenged five of Appellant's strikes under *Batson*: those against Juror #179, #109, #128, #20, and #152. It appears that four of the strikes had been used on white jurors. Tr. 67, l. 8 – 68, l. 17; *see* R. *(Random Strike Sheet, First Jury). It is unclear whether the fifth challenged strike was used against a black or white juror. The solicitor stated that Juror #179 was black, but the jury strike sheet reflects Juror #179 was white. Tr. 67, ll. 20-22; *see* R. *(Random Strike Sheet, First Jury). So, Juror #179 was either a black male or white male. Juror #20 was a white female. Juror #152 was a white female. Juror #109 was a white male. Juror #128 was a white male. R. *(Random Strike Sheet, First Jury).

As to Juror #179, the defense stated it struck the juror because the juror was a former employee of the South Carolina Department of Corrections. Tr. 69, ll. 1-3. The State withdrew its objection to the strike against Juror #179. Tr. 70, ll. 11-14. The court noted the State withdrew this challenge. Tr. 73, ll. 12-14.

As to Juror #128, the defense stated it struck the juror because the juror was a veteran, and a key State's witness (Deason) was in the military, so the defense was concerned about bias. R. 70, l. 22 – 71, l. 2. The solicitor incorrectly responded that military service was not a permissible reason to exercise a strike. Tr. 71, ll. 4-16. The judge stated this was a permissible, race-neutral reason. Tr. 73, ll. 16-19.

As to Juror #109, the defense stated it struck the juror because the juror "glared" at Appellant. The solicitor did not respond. The court stated this was a "valid" reason. Tr. 73, ll. 14-16.

As to Juror #20, the defense stated it struck the juror because the juror was eligible for an age exemption to jury service, but chose not to take the exemption, and because the juror had a conservative demeanor. "Your Honor, regarding juror number 20, she had an age exemption. She chose to stay and I believe she had quite a conservative demeanor and, therefore, chose to exercise the strike."[6] Tr. 69, ll. 6-9. The solicitor responded that *Batson* mandates the strike must be age-neutral, although he provided no authority for this assertion. Tr. 69, ll. 13-18. The defense again stated the strike was because the juror chose to stay despite having an exemption and had a conservative demeanor. "We viewed the fact that she did have an exemption yet chose to stay, um, as just a factor along with her demeanor." Tr. 71, l. 23 – 72, l. 2.

Similarly, as to Juror #152, the defense stated it struck the juror because the juror had a conservative demeanor. "Your Honor, it appeared that juror number 152 displayed conservative demeanor, we therefore, chose to exercise the strike." Tr. 69, l. 23 – 70, l. 1. The solicitor responded that conservative demeanor was not a race-neutral reason, and thus the strike was pretext. "Your Honor, the State respectfully argue that is not a race neutral reason because for one, what is the definition of conservative demeanor." Tr. 70, ll. 2-5. "I think that goes right to heart of pretext." Tr. 70, ll. 7-8.

Rather than recognizing that the proffered reasons were race-neutral and requiring the State to show they were not, the court ruled the reasons given for using strikes on Juror #20 and Juror

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6 S.C. Code Ann. § 14-7-480 provides in relevant part that, "No person is exempt from service as a juror in any court of this State except men and women sixty-five years of age or over."

#152 were not race-neutral. The court ruled that while a party could strike a potential juror based on demeanor if the juror "g[a]ve off the impression that they did not want to serve as a juror or had some sort of bias one way or the other, but a conservative demeanor, I don't know what that means and I don't know what, um, that there's been anything offered to me to display why that conclusion was made by the defense. It just seems like a pretextual reason for strikes." "I don't know how one exhibits a conservative demeanor." Tr. 72, ll. 5-17. "[T]here's been no specifics offered as to why these folks were considered to be conservative and the Court can only conclude they were excluded based upon their rate, based upon their race and, you know, even though it was with, the argument was withdrawn by the defense, just because somebody chooses not to make themselves available of an exemption because of age that certainly is by no means any reason for them to be stricken." "Certainly, our folks that are aged 65 years of age or older, I've heard judges my whole career say we'd love to have your wisdom experience on this jury and I just, I believe 20 and 152, um, those reasons were pretextual." Tr. 72, l. 25 – 73, l. 12. A second jury panel was then selected. Tr. 88, ll. 9-19.

Discussion

The Equal Protection Clause of the Fourteenth Amendment prohibits the prosecution from striking a juror on the basis of race. *Batson v. Kentucky*, 476 U.S. 79, (1986). This prohibition also applies to criminal defendants as well as the State. *Georgia v. McCollum*, 505 U.S. 42, 59 (1992). The Fourteenth Amendment further prohibits striking a juror on the basis of gender. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994). *Batson* protects the right of every juror to serve and every defendant to have a trial free of racial discrimination. *See Batson*, 476 U.S. at 87; *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. at 128 ("potential jurors, as well as litigants, have an equal protection right to jury selection procedures that are free from state-sponsored group stereotypes

rooted in, and reflective of, historical prejudice"). "Age is not a protected category under *Batson*." *Sanchez v. Roden*, 808 F.3d 85, 90 (1st Cir. 2015).

"The United States Supreme Court has set forth a three-step inquiry for evaluating whether a party executed a peremptory challenge in a manner which violated the Equal Protection Clause." *State v. Inman*, 409 S.C. 19, 26, 760 S.E.2d 105, 108 (2014) (citing *Purkett v. Elem*, 514 U.S. 765, 767–68 (1995)). The South Carolina Supreme Court adopted these procedures in *State v. Adams*, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996). The first step simply requires the moving party to request a *Batson* hearing.[7] In the second step, the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation. *Purkett v. Elem*, 514 U.S. at 767. If a race-neutral explanation is tendered, the third step requires the trial court to decide whether the opponent of the strike has proven purposeful racial discrimination. *Id.*

In the second step of the *Batson* inquiry, the "proponent of the strike must offer a race or gender neutral explanation." *State v. Edwards*, 384 S.C. 504, 508, 682 S.E.2d 820, 822 (2009). "[T]he proponent of the strike must give a clear and reasonably specific explanation of legitimate reasons for exercising the challenge." *State v. Giles*, 407 S.C. 14, 19, 754 S.E.2d 261, 263 (2014) (citing *Batson*, 476 U.S. at 98 n. 20). The explanation must be "an articulable reason that would

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[7] In South Carolina, making a motion for a *Batson* hearing satisfies the first step of the *Batson* inquiry. "When one party strikes a member of a cognizable racial group or gender, the trial court must hold a *Batson* hearing if the opposing party requests one." *State v. Shuler*, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001). "We require that trial courts hold *Batson* hearings whenever one is requested. In our opinion, requesting a *Batson* hearing in effect sets out a prima facie case of discrimination." *State v. Chapman*, 317 S.C. 302, 305–06, 454 S.E.2d 317, 319–20 (1995) (*overruled on other grounds by State v. Hicks*, 330 S.C. 207, 499 S.E.2d 209 (1998)). "[D]uring jury selection, either the defendant or the State may oppose the peremptory challenge of a juror who is a member of a cognizable racial group. Once a peremptory challenge is opposed, the trial court must, upon request, conduct a *Batson* hearing and adhere to the procedures set forth in *Purkett v. Elem*, 514 U.S. 765, 767 (1995), and adopted by our supreme court in *State v. Adams*, 322 S.C. 114, 124, 470 S.E.2d 366, 372 (1996)." *State v. Cochran*, 369 S.C. 308, 314, 631 S.E.2d 294, 297–98 (Ct. App. 2006) (footnote omitted).

enable the trial court, in the third step of the *Batson* process, to assess the plausibility of the proffered reason for striking the potential jurors." *Id.*, 407 S.C. at 23, 754 S.E.2d at 266. "Unless a discriminatory intent is inherent in the proponent's explanation, the reason offered will be deemed race-neutral." *State v. Tucker*, 334 S.C. 1, 8, 512 S.E.2d 99, 102 (1999). Justifications which are not facially neutral include the following. *State v. Giles*, 407 S.C. at 17, 754 S.E.2d at 262 (pro se defendant's explanation that he struck ten whites from jury venire because he "did not feel the jurors were right for the jury" was not a racially neutral explanation); *State v. Tomlin*, 299 S.C. 294, 299, 384 S.E.2d 707, 710 (1989) (*holding modified by State v. Adams*, *supra*) (explanation that juror was struck because he "shucked and jived" was racially discriminatory); *Payton v. Kearse*, 329 S.C. 51, 56, 495 S.E.2d 205, 208 (1998) (striking a juror because she was a "redneck" was not facially race-neutral).

However, demeanor is a facially neutral justification. "A [party] may strike veniremen based on their demeanor and disposition." *State v. Wilder*, 306 S.C. 535, 538, 413 S.E.2d 323, 325 (1991). "[C]ounsel may strike venire persons based on their demeanor and disposition." *State v. Tucker*, 334 S.C. at 8, 512 S.E.2d at 102. "The demeanor of a prospective juror is generally a race-neutral reason for employing a peremptory challenge." *State v. Cochran*, 369 S.C. at 317, 631 S.E.2d at 299. *See State v. Blake*, 442 S.C. 295, 307, 898 S.E.2d 184, 190 (Ct. App. 2024) (solicitor's explanation that she struck two jurors because she found college students to be "liberal" was permissible under *Batson*); *State v. Flynn*, 368 S.C. 83, 86, 627 S.E.2d 763, 765 (Ct. App. 2006) (no *Batson* violation where State struck black juror and asserted it believed she was "liberal" due to her employment).

Step three of the *Batson* inquiry "requires the court to carefully evaluate whether the party asserting the *Batson* challenge has proven racial discrimination by demonstrating that the proffered

race-neutral reasons are mere pretext for a discriminatory intent." *State v. Inman*, 409 S.C. at 27, 760 S.E.2d at 108. "Once the proponent states a reason that is race-neutral, the burden is on the party challenging the strike to show the explanation is mere pretext, either by showing similarly situated members of another race were seated on the jury or that the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment." *State v. Evins*, 373 S.C. 404, 415, 645 S.E.2d 904, 909 (2007). "The opponent of the strike carries 'the ultimate burden of showing purposeful discrimination' and must demonstrate the pretextual nature of the stated reason for the strike." *Cochran*, 369 S.C. at 315, 631 S.E.2d at 298 (citing *State v. Adams*, 322 S.C. at 124, 470 S.E.2d at 372). A "conclusory statement" that the proffered reasons are pretextual is insufficient to meet the step three burden of persuasion. *See State v. Inman*, 409 S.C. at 28, 760 S.E.2d at 109 (State's response to the proffered race-neutral explanation merely that it was "pretext" failed to carry its step three burden of persuasion).

"An express finding by the trial court will, unless clearly erroneous, trump counsel's stated perception of a prospective juror's demeanor and disposition. In this situation, the trial court determines counsel's credibility." *State v. Cochran*, 369 S.C. at 317, 631 S.E.2d at 299. "The rule-extending considerable deference to a trial judge's credibility determinations could not be otherwise without undermining the remaining remnants of *Batson*. For example, if a party were able to overcome every *Batson* challenge by merely claiming that a prospective juror's demeanor and disposition were somehow inappropriate, the equal protection principles underlying *Batson* would be weakened. The trial court serves an important gatekeeping role in this regard." *Id.*, 369 S.C. at 318, 631 S.E.2d at 300. "In the absence of an express and contrary finding by the trial court, a party's striking of a juror based on demeanor and disposition should be upheld by the trial court." *Id.*, 369 S.C. at 318, 631 S.E.2d at 300.

In this case, the State met the first step of the *Batson* process by requesting a hearing. Then, Appellant overcame the second step by providing race-neutral reasons for striking the jurors. As to Juror #20, counsel stated she exercised a strike because the juror had an age exemption yet chose to stay. *E.g.*, *State v. Tucker*, 334 S.C. at 8, 512 S.E.2d at 102 ("Unless a discriminatory intent is inherent in the proponent's explanation, the reason offered will be deemed race-neutral."). Therefore, the burden should have moved to the State in step three to demonstrate pretext. The State did not do so. The State did not show defense counsel seated a juror of a different race who had an age exemption. Instead, it incorrectly argued age was a protected category under *Batson*. The court ruled the explanation was pretext for a strike based on age. Tr. 73, ll. 5-8. It was not based on age. It was based on failure to use an exemption; any exemption. This was a race-neutral explanation the State was required to overcome, and it did not.[8]

Defense counsel's explanations that she struck Juror #20 and Juror #152 based on their conservative demeanors were also legitimate, race-neutral reasons. *E.g.*, *State v. Cochran*, 369 S.C. at 317, 631 S.E.2d at 299 ("The demeanor of a prospective juror is generally a race-neutral reason for employing a peremptory challenge."). Once counsel provided these race-neutral reasons, it was on the State to demonstrate pretext, but the court did not require it to do so—instead the court found the explanations were pretextual. The court failed to follow the proper *Batson* procedure once counsel provided race-neutral explanations. The State did not show defense counsel seated a juror of a different race with a conservative demeanor. It did not show the challenged jurors looked liberal. The court did not find that defense counsel was not credible. Nor

[8] Even if the strike were based on age, age would have been a race-neutral reason and the court erred by ruling that age was an impermissible reason to strike. "Age is not a protected category under *Batson*." *Sanchez v. Roden*, 808 F.3d at 90.

did the court find the jurors did *not* have a conservative demeanor. Rather, the court's ruling reflects that because counsel could not articulate why the jurors appeared conservative, the strikes were discriminatory: "I don't know how one exhibits a conservative demeanor."[9] Tr. 72, ll. 6-9.

These rulings were erroneous. Once Appellant provided facially neutral explanations, the trial court should have moved on to step three of the *Batson* inquiry, and shifted the ultimate burden back to the State to show the proffered reasons were pretextual. The solicitor merely made a conclusory statement that the explanations were pretext. This was insufficient to meet the State's step three burden. *State v. Cochran*, 369 S.C. at 321, 631 S.E.2d at 302 (after counsel offered seemingly valid reasons for striking juror, court erred by not requiring State to prove racial discrimination and instead required Appellant's counsel to disprove pretext); *State v. Inman*, 409 S.C. at 28, 760 S.E.2d at 109 (in finding defense counsel's proffered rationale was insufficient, circuit court inappropriately left burden of persuasion on defense counsel to prove her explanation was not pretextual instead of shifting burden to State to prove why the explanation was pretextual).

"In *State v. Short*, 333 S.C. 473, 511 S.E.2d 358 (1999), our supreme court held that no actual prejudice need be shown to establish reversible error for the deprivation of a peremptory strike where properly struck jurors are seated on the second jury." *State v. Cochran*, 369 S.C. at 324, 631 S.E.2d at 303. When "an appellate court finds that the circuit court improperly granted a *Batson* motion, and one of the disputed jurors is seated on the jury, then the erroneous *Batson* ruling has tainted the jury and prejudice is presumed in such cases because there is no way to

[9] Moreover, defense counsel's inability to state why the jurors appeared conservative did not render the strikes facially discriminatory. Voir dire in non-death penalty cases in this state is judicially-conducted and brief. A party's peremptory strikes must therefore largely be based on first impressions. This was not a bug in defense counsel's explanation, but a feature of the voir dire process in South Carolina.

determine with any degree of certainty whether a defendant's right to a fair trial by an impartial jury was abridged." *State v. Inman*, 409 S.C. at 29, 760 S.E.2d at 110 (cleaned up).

In contrast, if "a trial court improperly grants the State's *Batson* motion, but none of the disputed jurors serve on the jury, any error in improperly quashing the jury is harmless because a defendant is not entitled to the jury of her choice." *State v. Edwards*, 384 S.C. at 509, 682 S.E.2d at 823. In *State v. Adams*, 322 S.C. at 125-26, 470 S.E.2d at 373, the South Carolina Supreme Court explained that where "the trial judge improperly quashes a jury panel, no juror's equal protection rights have been violated. An appellate determination that a judge erred in finding a *Batson* violation means the obvious: No *Batson* violation occurred, and there was, therefore, no denial of anyone's equal protection rights." "Our opinion on this matter might be different were there evidence that the jury ultimately selected for the case had on it any of the persons that defense counsel struck from the first jury panel." *Id.*, 322 S.C. at 126 n. 2, 470 S.E.2d at 373 n. 2. *See State v. Cochran*, 369 S.C. at 325, 631 S.E.2d at 304 ("Because jurors properly struck were seated on the second jury, which found Appellants guilty, the error is reversible."); *State v. Rayfield*, 369 S.C. 106, 114, 631 S.E.2d 244, 248 (2006) (*overruled on other grounds by State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (2016)) (although trial judge erroneously granted State's *Batson* motion, error was harmless because no juror whom Petitioner challenged in the initial drawing was selected to serve on the trial jury).

In this case, the error was reversible. Although the jurors seated on the second jury did not include those jurors who were challenged by the State, a juror Appellant struck during the first selection (Juror #62) was seated on the second jury. R*(Random Strike Sheet, Second Jury). Juror #62 stated during voir dire that she had knowledge about the case from the family of the victims. She initially said this would impact her ability to be fair and impartial, but then agreed she could

base her verdict on the evidence. Tr. 27, l. 16 – 28, l. 17. The inclusion of Juror #62 on the second panel demonstrated prejudice: the improper quashing of the first panel resulted in the selection of the second panel which contained a person whom defense counsel had struck from the first panel. *E.g.*, *Adams*, 322 S.C. at 126 n. 2, 470 S.E.2d at 373 n. 2; *Cochran*, 369 S.C. at 325, 631 S.E.2d at 304.

III. The trial court erred in admitting a body-camera recording which captured the immediate aftermath of the shooting,

A. Where any probative value of the evidence was substantially outweighed by the danger of unfair prejudice, since the evidence should have been excluded pursuant to Rule 403, SCRE.

Officer Curtis's body-camera footage captured the horrific scene just moments after six people were shot in a packed nightclub. The recording should have been excluded—it had no probative value. It was cumulative to other evidence, but it had a high potential for unfair prejudice.

Standard of review

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

Relevant facts

Officer Curtis had a body-worn camera which recorded the immediate aftermath of the shooting. Curtis spoke to a crying and hysterical Angelena Deason outside the club. Tr. 160, l. 2 – 161, l. 6. Deason claimed that prior to the shooting she saw Appellant pull a gun out and cock it, then put it back on his hip. According to Deason, she heard the gunshots break out shortly thereafter. Because of what she had seen, she assumed Appellant fired shots. Tr. 316, l. 2 – 317, l. 18. Although both Deason and Curtis testified at trial, the State wanted Curtis's body-camera

footage, which captured Deason's remarks, in evidence. A proffer was made during an *in camera* hearing on the admissibility of the footage. Tr. 139, l. 18 – 155, l. 4.

In addition to containing Deason's remarks, the recording captured video and audio of the following. Officer Curtis runs up to the nightclub. Patrons and employees are wailing and cursing. Blood-curdling screams ring out over and over. People clutch the bodies of their dead and dying loved ones, screaming: "Oh, God!" "No, no!" "Oh, no!" Officers open a bathroom door and find panicked and crying people hiding inside. An angry patron yells at officers and threatens to kill people. Bodies of multiple victims—some living and some dead—are strewn around. People put pressure on a man's chest wound. A man is given oxygen and loaded onto a stretcher. A medic asks Officer Curtis for a police escort to the ambulance due to the violence and chaos. The camera returns to the people wailing and clutching their dead loved ones repeatedly as Officer Curtis walks around trying to secure the scene. *See* State's Exhibit #1.

This footage was incredibly emotional. It was also unnecessary, since other witnesses, including Angelena Deason, Officer Curtis, Officer Goodman, Officer Pauli, Officer Hause, Officer Cottingham, Ivan Grandados, Jeremy Grantham, Angelina Garcia, and A.J. Wright testified about these circumstances—they were all present during the shooting or responded to the scene. E.g., Tr. 159, l. 2 – 164, l. 7; Tr. 320, l. 25 – 321, l. 13.

Appellant objected to the admission of the recording based on Rule 403, SCRE. Defense counsel argued that the footage was cumulative since Deason was available to testify and any other persons on the footage could be called to testify if the State chose. The defense also argued the footage was unfairly prejudicial.[10] Appellant objected wholesale to the admission of the footage,

[10] The transcript states defense counsel said the footage was "more prejudicial or primitive," but it was clear the parties and the court referred to the unfair prejudice portion of Rule 403, SCRE. Tr. 151, ll. 17-24; e.g., Tr. 154, ll. 20-24.

and he additionally argued that if the footage were admitted, the court should order the recording be muted and order that images of the bodies be redacted. Tr. 150, l. 21 – 151, l. 25. The prosecutor responded that the footage was probative of the placement of the bodies and said the State had partially redacted the footage. The prosecutor also stated, "We'd ask that you don't mute the sound on that body cam." Tr. 152, ll. 1-20.

The court found the recording was admissible. Tr. 153, l. 23 – 154, l. 24. The court ruled, "I think the orientation of the individuals who were involved in this, in this event at the nightclub I think their location within the bar is certainly more probative than prejudicial . . . the jury can certainly will need to be oriented as to where these people were with, within the bar when this event happened. So I don't think the showing of these, of these bodies or the injured individuals is more prejudicial than probative. So I would allow those portions of the tape who played in front of the jury and I'm not going to require the tape be muted or the video to be muted." Tr. 153, l. 23 – 154, l. 13. "[U]nder the totality of the circumstances under Rules 803(2) and 403, I'm gonna allow [the footage]." The footage was admitted over objection.[11] Tr. 162, ll. 3-10.

Discussion

"Although relevant, evidence may be excluded if 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. "The determination of whether the danger of unfair prejudice outweighs the probative value of evidence must be based on the entire record and will turn on the facts of each

[11] State's Exhibit #1 is a flash drive which contained multiple exhibits including this footage. This footage was labeled "#226 Curtis Body Cam From Mac's_~09". Court's Exhibit #1 is a list of the redactions which were made to the footage by the solicitor. Tr. 155, ll. 2-4; Tr. 157, ll. 8-13. The footage as admitted showed the jury approximately fifteen minutes of the recording. Court's Exhibit #1 is located at pp. * of the Record on Appeal. State's Exhibit #1 is on file with this Court.

case." *State v. Holland*, 385 S.C. 159, 171, 682 S.E.2d 898, 904 (Ct. App. 2009) (quoting *State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008)).

Due to the relatively recent advent of body-cameras, relevant case law deals with photographs rather than footage. "The trial judge must balance the prejudicial effect of graphic photographs against their probative value." *State v. Martucci*, 380 S.C. 232, 249, 669 S.E.2d 598, 607 (Ct. App. 2008). "Although photographs may be used to corroborate other evidence, it 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. Middleton*, 288 S.C. 21, 24, 339 S.E.2d 692, 693 (1986) (cleaned up). "In the *guilt* phase of a trial, photographs of the murder victims should be excluded where the facts they are intended to show have been fully established by competent testimony." *State v. Kornahrens*, 290 S.C. 281, 288-289, 350 S.E.2d 180, 185 (1986) (emphasis in original). "Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are irrelevant or not necessary to substantiate material facts or conditions." *State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010) (citing *State v. Brazell*, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997)). *See State v. Nelson*, 440 S.C. 413, 426–27, 891 S.E.2d 508, 515 (2023) ("Other convincing evidence established malice and how Victim was killed, thereby eliminating the photos' probative value. Thus, we believe the danger of unfair prejudice substantially outweighed any minimal probative value of the autopsy photos in this case.").

"The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997). "To constitute unfair prejudice, the photographs must create a 'tendency to suggest a decision on an

improper basis, commonly, though not necessarily, an emotional one.'" *Martucci*, 380 S.C. at 250, 669 S.E.2d at 607 (quoting *State v. Kelley*, 319 S.C. 173, 178, 460 S.E.2d 368, 370-71 (1995)). "[P]otential for an emotional reaction is the essence of the danger of unfair prejudice." *State v. Heyward*, 441 S.C. 484, 501, 895 S.E.2d 658, 667 (2023). *See also State v. Saltz*, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001) (same); *State v. Phillips*, 430 S.C. 319, 328, 844 S.E.2d 651, 656 (2020) ("Unfair prejudice is the tendency of the evidence to suggest a decision based on something other than the legitimate probative force of the evidence.").

In this case, the footage had no probative value since the State had a plethora of evidence to establish the same things that were depicted in the recording. The State had witness testimony, photographs, diagrams, and physical evidence. However, the footage carried a high potential for unfair prejudice. The emotional content of this video cannot be overstated. The screams are bone-chilling. It is next to impossible to watch and listen to this footage without imagining this happening to you or your loved ones. That is the essence of unfair prejudice. The evidence should have been excluded pursuant to Rule 403, SCRE. The court's failure to require the footage be muted or images of the bodies redacted brings its abuse of discretion into sharp relief.

The error in admitting the evidence was not harmless. "The harmless error rule generally provides that an error is harmless beyond a reasonable doubt if it did not contribute to the verdict obtained." *State v. Collins*, 409 S.C. 524, 537, 763 S.E.2d 22, 29 (2014). "In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt." *Id.*, 409 S.C. at 538, 763 S.E.2d at 29 (cleaned up). While there was evidence Appellant was at the scene and had a weapon, only one witness claimed he fired the weapon, and that witness recanted. It was unclear whose shots hit these victims. The jury was charged on self-defense and

defense of others. It deliberated for more than three-and-a-half hours. The error was not harmless beyond a reasonable doubt. *Cf. State v. Jones*, 440 S.C. at 264, 891 S.E.2d at 373 (horrific autopsy photographs were harmless because they did not contribute to the jury's sentence of death, instead the horrific facts of the case did); *State v. Nelson*, 440 S.C. at 426, 891 S.E.2d at 514 (admission of excessively gruesome autopsy photos unnecessarily created the potential for the jury to convict defendant of the murder based on inflamed emotions); *State v. Robinson*, 201 S.C. 230, 22 S.E.2d 587, 589 (1942) (photographs were harmless as they "were not inflammable fuel to be consumed by the minds of the jurors").

III. The trial court erred in admitting a body-camera recording which captured the immediate aftermath of the shooting,

B. Where any probative value of the evidence was substantially outweighed by considerations of needless presentation of cumulative evidence, since the recording should have been excluded pursuant to Rule 403, SCRE.[12]

Discussion

The cumulative nature of this evidence provided another basis for its exclusion. In addition to unfair prejudice, evidence should be excluded pursuant to Rule 403 if its probative value is substantially outweighed by considerations of needless presentation of cumulative evidence. *See* Rule 403, SCRE ("Although relevant, evidence may be excluded if 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."). *See also State v. Hess*, 279 S.C. 14, 18, 301 S.E.2d 547, 550 (1983) (upholding exclusion of evidence based on inadmissibility of cumulative testimony); *State v. Gault*, 375 S.C. 570, 574, 654 S.E.2d 98, 100 (Ct. App. 2007) (no error in excluding photographs of tinted windows where witness already testified windows were tinted; evidence was properly excluded as cumulative pursuant to Rule 403, SCRE).

Several witnesses who were in the club at the time of the shooting testified, as did several law enforcement officers who arrived moments later. This included Officer Curtis and Ms. Deason. In addition to testimony, the State had diagrams and photographs of the scene. The

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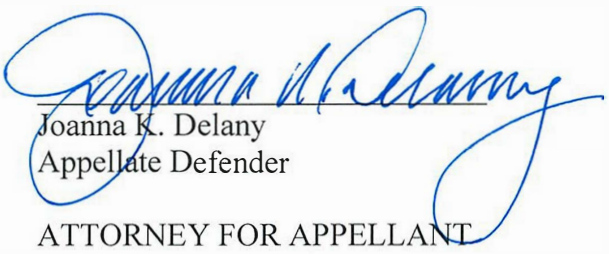
[12] The same standard of review applies to Issue III., A., and Issue III., B. Appellant hereby incorporates the standard of review section from Issue III., A. Similarly, the same facts are relevant to both Issue III., A., and Issue III., B. Appellant hereby incorporates the relevant facts section from Issue III., A.

footage had no probative value since the State had a plethora of evidence to establish the same things that were depicted in the footage. The cumulative evidence should have been excluded pursuant to Rule 403, SCRE.

The error in admitting the evidence was not harmless. "The harmless error rule generally provides that an error is harmless beyond a reasonable doubt if it did not contribute to the verdict obtained." *State v. Collins*, 409 S.C. 524, 537, 763 S.E.2d 22, 29 (2014). "In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt." *Id.*, 409 S.C. at 538, 763 S.E.2d at 29 (cleaned up). While there was evidence Appellant was at the scene and had a weapon, only one witness claimed he fired the weapon, and that witness recanted. It was unclear whose shots hit these victims. The jury was charged on self-defense and defense of others. It deliberated for more than three-and-a-half hours. The error was not harmless beyond a reasonable doubt.

CONCLUSION

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



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of January, 2025.