STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID OMEGA BEAUFORT,

APPELLANT

APPELLATE CASE NO. 2025-002293

INITIAL BRIEF OF APPELLANT

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II. Whether the trial court erred by allowing the state to ask a burden-shifting question of SLED agent Chad Smith, based on its erroneous conclusion that Appellant had opened the door to the question?

III. Whether the trial court erred by excluding a substantial portion of the defense case-in-chief based on a legally erroneous interpretation of the hearsay rule and prior instances of conduct in a self-defense case?

STATEMENT OF THE CASE

The April 2023 term of the Charleston County grand jury indicted Appellant for the offenses of murder, attempted murder, and possession of a weapon during the commission of a violent crime. R.* (Indictments). The case was tried from November 3 to November 6, 2025, before the Honorable Deadra L. Jefferson and a jury. Tr. 1. Jason T. King and Amanda H. Quiles represented Appellant; Solicitor Scarlett A. Wilson and Sara B. Bozarth represented the state. Tr. 1. The jury convicted Appellant as indicted. Tr. 711-712. Judge Jefferson sentenced Appellant to forty years' imprisonment for murder, fifteen years' imprisonment for attempted murder, and five years' imprisonment for the weapons offense, to run concurrently. Tr. 733, ll. 2-8.

This appeal follows.

STATEMENT OF FACTS

On December 16, 2021, after fighting over control of a firearm, Appellant shot and killed Andrea Reynolds and shot in the general direction of officer Jamie Sylvester, who was unharmed. Appellant raised self-defense at trial.

Facts

Appellant and the decedent were in a tumultuous, on-again-off-again relationship beginning in 2018. Tr. 547, ll. 7-9. The two had a daughter together who was born in 2020. Tr. 547, ll. 13-19. At the time their daughter was born, both Appellant and the decedent were drug users, which resulted in immediate DSS action upon her birth. However, Appellant completed a DSS parenting plan, including parenting classes, drug treatment classes, and anger management classes, which allowed him to obtain sole custody of the child. Tr. 558, ll. 7-21.

In December of 2020, Appellant desired to terminate his romantic relationship with the decedent. Tr. 559, ll. 15-21. Appellant testified that, after an argument, he woke up to Reynolds holding a gun in his face. Tr. 560, ll. 10-23. Appellant also testified that Reynolds threatened to kill him on another occasion five months later, which he reported to law enforcement. Tr. 561, ll. 8-24. The main point of contention between the two, however, was Reynolds's refusal to cease her intravenous drug use. Tr. 562, ll. 20-22; 563, ll. 14-18. Appellant told Reynolds that drugs were not allowed inside of his home due to the presence of his children. Tr. 563, ll. 2-7. When Reynolds failed to uphold "her end of the deal by stop getting high and...taking her life in a different direction," Appellant wanted to end the relationship, in the interest of retaining custody of his children. Tr. 564, ll. 6-13.

Appellant admitted that in the days leading up to the shooting incident, he relapsed on drugs. Tr. 565, ll. 6-8. Appellant and Reynolds were also having problems at the time, due to

Reynolds continuously "coming around." Tr. 564, l. 19. Appellant's older daughter testified that Reynolds "broke in" to Appellant's home several times by coming through her bedroom window. Tr. 511, ll. 1-12. In the days leading up to the shooting incident, Appellant left his home to stay with his mother, and he sent his children to stay with various family members. Tr. 565, l. 15 – 566, l. 12.

On December 15, 2021, when Appellant returned home, Reynolds was there. Tr. 566, ll. 13-18; 510, ll. 15-24. Earlier in the day, Appellant's daughter told Reynolds that she was not welcome at the home, but Reynolds stayed. Tr. 510, ll. 15-24. Appellant and Reynolds had sex. Tr. 567, ll. 3-9. After Appellant and Reynolds finished having sex, Appellant believed that Reynolds had messaged another person to come to the house. Tr. 569, ll. 10-16. Due to the previous incidents of Reynolds' threats of violence against him, Appellant feared that Reynolds would attempt to take his gun. Tr. 569, ll. 10-16. Appellant took his gun with him and laid in the bathtub, where he ultimately fainted. Tr. 569, ll. 14-16. Appellant recalled that he woke up at some point, but his recollection of the events was spotty and mostly came from viewing officer Sylvester's body-worn camera. Tr. 570, ll. 15-22. Appellant did recall that he was extremely paranoid due to his belief that Slyvester had called someone else to the house and that paranoia was heightened when officer Slyvester startled him. Tr. 571-72.

Officer Slyvester went to Appellant's home in response to a 9-1-1 call regarding a potential drug overdose. Tr. 107, ll. 10-21. On his way inside the home, he heard a woman screaming. Tr. 112, ll. 1-4. When he reached the bathroom, he saw Appellant and Reynolds in the bathtub fighting for control of a firearm. Tr. 114, ll. 8-10. DNA from both Appellant and Reynolds was found on the trigger, and blood from both Appellant and Reynolds was found. Tr. 439, ll. 9-20; 441, ll. 18-23. Appellant told Reynolds "You have to go." Tr. 115, l. 7. Slyvester

ordered Appellant to drop the gun but did not identify himself as a police officer. Tr. 115, ll. 18-23, 142, ll. 20-24. Appellant turned the gun in Slyvester's direction and fired three-or-four shots. Tr. 118, l. 22 – 119, l. 10. Appellant presented a substantial amount of evidence that officer Slyvester also fired his gun, despite Slyvester denying having done so. Benjamin Beyler, an off-duty Indiana State Trooper who was present on the night of the shooting, testified that he saw two muzzle flashes come from Slyvester's gun. Tr. 426, ll. 9-14. Benjamin Dye, a firefighter who was there that night, testified that he told law enforcement at the scene that he saw officer Slyvester shoot his gun. Tr. 419, ll. 7-8, 19-22. Drennan Richards, another firefighter who was there that night, testified that he wrote in a contemporaneous report that Slyvester returned fire multiple times. Tr. 404, ll. 11-18. During the ensuing shooting, Appellant shot and killed Reynolds. Tr. 138, ll. 6-8.

Trial

Bedroom Photographs

Prior to the testimony of officer Anita Moore, the state sought to introduce State's Exhibits 22-26. Tr. 220, l. 5. Defense counsel objected to the photographs because they depicted drugs and alcohol and constituted impermissible bad character evidence and were inadmissible under Rule 403, SCRE. Tr. 221, ll. 17-20. The exhibits were several photographs of a night stand. R.* (State's Exhibits 22-26 (photos)) (on file with the Court). State's Exhibit 22 depicted a mostly empty bottle of Crown Royal, two packs of cigarettes, and a plastic bag containing marijuana.[1] State's Exhibit 22 (on file with this Court). State's Exhibit 25 depicted a close-up

[1] The trial court insisted that it could not see marijuana in the bag; however, both Appellant and the solicitor seemed to agree that there appeared to be marijuana in the bag. Tr. 226, ll. 8-11 ("MS. WILSON- I think there is...that little Ziploc bag at the...bottom left."); 226, l. 23 ("MR. KING- Yeah, it's marijuana there."); 226, ll. 24-25 ("THE COURT- Yeah, you better than me. I don't see no marijuana."). Regardless, the Solicitor drew attention to the bag during her direct

shot of "a straw that was on the dresser," and a $5 bill with "some type of white powder residue." Tr. 245, l. 23 – 246, l. 5; State's Exhibit 25 (on file with Court). State's Exhibit 26 depicted another bottle of alcohol, this time Everclear. Tr. 246, ll. 10-13; State's Exhibit 26 (on file with this Court).

The state asserted that the evidence was "part of the *res gestae*." Tr. 227, ll. 15-16. Its position was that it was "important for the jury to see the voluntariness of his intoxication...." Tr. 227, ll. 18-19. The trial court overruled the objections to State's Exhibits 22 and 23, on the grounds that the evidence was relevant, "*its probative value is outweighed by any prejudicial effect*," and it "serves to corroborate testimony that has already been placed in the record." Tr. 228, ll. 6-11 (emphasis added). The trial court went on to overrule the objections to State's Exhibits 24-26 on similar grounds. Tr. 230, ll. 6-11.[2]

Testimony of Agent Chad Smith

The state presented testimony from SLED forensic scientist Chad Smith, who was qualified as an expert in firearms examination without objection. Tr. 306, ll. 14-19. Agent Smith testified that the seven shell casings found in Appellant's bathroom were all fired by Appellant's firearm, but a bullet fragment found in the bathroom was inconclusive. Tr. 313, ll. 2-5, 315, ll. 5-13. During cross-examination, Appellant and Smith engaged in the following colloquy:

> [MR. KING]: Do you have a way to measure your error rate – I mean, how often you might be wrong?
>
> [SMITH]: No, sir. The only way that we measure error rate would be through, like, proficiency testing where we have a known

---

examination, and the state's witness identified the contents of the bag as "possibly green plant material." Tr. 244, ll. 19-23.

[2] Defense counsel did not renew his objections to the photographs when they were presented. However, he was not required to, because the trial court officially admitted State's Exhibits 22-26 into evidence during the *in-camera* hearing. Tr. 228, ll. 14-15; 230, ll. 12-13.

> answer. But other than – in actual casework, we don't have an error rate.
>
> Q. You've done proficiency testing?
>
> A. Yes, sir.
>
> Q. Have there ever been determined any sort of error rate that you had on proficiency testing?
>
> A. My personal error rate? No. I don't know what that would be. However, to my knowledge I've never failed a proficiency test. I'm pretty sure I would have heard about it and taken off casework....
>
> Q. But – because you can't give really error rates, you can't really tell us how often you might be wrong, right?
>
> A. No, sir. Again – but all of our conclusions are peer reviewed by another qualified examiner. So I come up with my conclusions, and then we have another examiner come and look at the evidence under a microscope, try to determine, you know, what they think. So if they agree with my conclusions, then we would – they would sign the paperwork we have saying that they agree with it. And then I could at that point, you know, write a report.

Tr. 318, l. 16 – 319, l. 14. On redirect examination, the Solicitor asked: "if a defense wanted to hire an expert, there are ways that SLED can allow another expert to check your work?" Tr. 320, ll. 11-13. Defense counsel objected to the question, on the grounds it shifted the burden of proof. Tr. 320, l. 14. The trial court overruled the objection, finding that the defense had "opened the door in cross-examination." Tr. 320, ll. 15-19. Agent Smith answered: "Evidence can of course be looked at by a defense expert if they wish. Certainly they can do that." Tr. 320, l. 25 – 321, l. 1.

Screenshots from "Sex Tape"

The state also sought to introduce three screenshots from the "sex tape" that Appellant and the decedent created shortly before the shooting incident. State's Exhibits 65-67 (still

photos)(on file with the Court). State's Exhibits 65 and 66 were blurry photographs which depict Appellant and Reynolds naked and appearing to engage in sexual intercourse. State's Exhibit 67, however, depicted Appellant drinking directly from a bottle of Everclear. Defense counsel objected to the photographs as being substantially more prejudicial than probative and bad character evidence. Tr. 338, ll. 2-13. The trial court asked defense counsel whether drinking alcohol would portray him in a negative light. Tr. 338, ll. 20-21. Defense counsel responded that "chugging from a bottle of Everclear" would often be viewed "in a negative light." Tr. 338, l. 22 – 339, l. 1.

The trial court responded, "That's not what this shows.... It shows somebody with a bottle up to their lips. It doesn't show chugging. It's not in motion.... I think chugging is an inaccurate characterization of Number 67." Tr. 339, ll. 2-10. The state, however, asserted the picture showed Appellant "chugging" the bottle and argued the same in its closing argument. Tr. 227, ll. 24-25; 650, ll. 23-24. For its part, the state asserted that it needed the photographs "to put together the timeline of the victim's death and the defendant having shot at officer Slyvester." Tr. 339, ll. 12-14. The state then proffered the testimony of detective Sam Riedel who identified the time that each photograph was taken. Tr. 343, ll. 3-16.

The state then argued that the photographs were the best evidence that Appellant and Reynolds were having consensual intercourse and that "everything was fine, that if there is any allegation that someone gave him something, we have evidence that he is taking alcohol himself." Tr. 344, ll. 1-3. Further, the state intended "to ask for an instruction that voluntary intoxication is not a defense, but I think it helps explain why he would have done something so foolish, because he was intoxicated." Tr. 344, ll. 7-10. The state further asserted that the photographs were "the *res gestae*." Tr. 344, l. 12.

The trial court overruled the objection, stating:

> The evidence is relevant. It is probative. And any...prejudicial effect it has is outweighed by its probative value. It is an accurate – there's been no argument that these are not self-authenticating images. There's been no argument that they've been hypothecated in some way and that they are not accurate in their representation of what was taking place within minutes of the 911 call. They serve to corroborate exactly what was communicated in the 911 call, as well as corroborating what was taking place on that evening, that being that they were utilizing drugs and alcohol and – not drugs necessarily – well, some people consider alcohol a drug. Some people don't.
>
> But nonetheless, that they were ingesting alcohol, were engaged in sexual activity prior to...Ms. Reynolds becoming alarmed at what she perceived was [Appellant] encountering significant physical distress, that being his throwing up violent, including him throwing up blood. And her then – those activities being a catalyst to her then calling 911 and seeking aid to protect him or to protect his health, to preserve his health.
>
> I do not agree with [trial counsel] that somehow someone ingesting alcohol raises their character. If that's the case, probably 95 percent of our population would be considered bad people. And I don't think ingesting alcohol means that you're a bad person or that somehow is triggered someone questioning your character.
>
> ...
>
> And frankly, *nobody is contesting that they were not drinking*. I've not heard [trial counsel] say that they weren't drinking. I think it's conceded that they were drinking and doing some level of intoxicants other than alcohol preceding [Appellant] becoming ill, which is again reflected in the 911 call.
>
> ...
>
> You see [Appellant] with a bottle to his lips. And again, I do not find any corroboration in those photos consistent with [trial counsel's] representation that somehow someone was chugging alcohol. I just don't see anything in those pictures that would support that.

> So 65, 66, and 67 are marked and admitted. They are subject to the objection which has been overruled.

Tr. 344, l. 21 – 347, l. 16 (emphasis added).

Testimony of Amber Derby

Defense counsel proffered the testimony of Amber Derby, who was his next-door neighbor for a period of six months leading up to the shooting incident. Tr. 458, ll. 1-5, 12-13. Derby described Appellant's demeanor as generally "calm, nice, kind." Tr. 458, l. 25. She saw Reynolds come over to Appellant's apartment frequently, and she described her observations in the following way:

> Normally I tried to just keep my distance because [Reynolds] was generally yelling. In those instances, it looked like she was dropping the baby off and she was usually irate and screaming. [Appellant] usually kept his distance, stayed calm, and just kind of let it pass.

Tr. 459, ll. 21-25. Derby testified that this occurred "at least once or twice a week...every week leading up to the incident, including in November and December." Tr. 465, ll. 14, 18-19.

The state objected to the testimony, asserting that it was irrelevant and "somewhat character evidence under 405(b)." Tr. 461, ll. 19-21. According to the state, the testimony was irrelevant to Appellant's state of mind and was simply offered to paint Reynolds "in a bad light." Tr. 461, ll. 21-25. Relying on *State v. Day*,[3] defense counsel asserted that the testimony was to show "prior instances of conduct" between Appellant and the decedent. Defense counsel asserted that the testimony was relevant to self-defense and to Appellant "having a reasonable apprehension of harm." Tr. 467, ll. 11-12.

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[3] 341 S.C. 410, 535 S.E.2d 431 (2000).

The state responded that the testimony was "character evidence" and was irrelevant. Tr. 468, ll. 2-3. This was because, in the state's words, "the witness said she doesn't know what prompted it," meaning that "she doesn't know whether or not the defendant deserved what he was getting." Tr. 468, ll. 4-6. Further, the state asserted that arguments were not relevant to self-defense. Tr. 468, ll. 6-10.

The trial court held that "contemptuous language is not enough to rise to the level of self-defense. Words that are not accompanied by a hostile act are not relevant." Tr. 468, ll. 20-22. The trial court went on to state:

> And that's where it tap dances on the line of character. Basically, what I'm hearing is that she's just a horrible, volatile person who yelled at him. And again, if that were my barometer, three-quarters of probably the population who exchange children would be put into that category. People get volatile about their kids. They get emotional about their kids.
>
> Again, I think my perception might be different if it were, like, right within the hour of this happening or it happened within the residence or there was some overt act accompanied in the driveway that Ms. Derby heard or witnessed. She's saying that she doesn't know what they said to one another. She just heard –
>
> Some people are just loud. You know? I mean, and I don't think that means they're a bad person. That's just the way they communicate, the way they emote, the way they talk to people. I think if we were to go outside right now and walk down King Street there'd be some people that would be offensive to our ears because they're just loud. That's just their personality. That doesn't mean that they're being aggressive or that they're being…threatening to someone.
>
> I think we've all experienced people – I've been in a store sometimes with people and I think, "My God. Like, you really talk to people like this every day?" That's just how some people are. That does not mean that they – that their behavior has risen to that level.

Tr. 469, l. 3 – 470, l. 4. After a short break, the trial court added that it believed *Day* was inapposite. Tr. 471, l. 17. The trial court also reiterated its concern about the "nexus" of the incident, and stated "if this happened within 24 or 48 hours of this incident and it happened within the context of this house, combined with some overt act, which is what the case law requires, a person -." Tr. 474, ll. 12-15. Ultimately, the trial court sustained the state's objection. Tr. 475, ll. 6-7.

Testimony of Officer Morgan Singletary

Defense counsel also proffered the testimony of officer Morgan Singletary. On May 29, 2021, officer Singletary took a police report from Appellant. Tr. 478, ll. 14-22. In that report, Appellant stated that the Reynolds had stolen the key to his home and threatened to shoot him in the head and burglarize his home. Tr. 479, ll. 5-8. The state objected to the testimony, on the grounds that it constituted "rank hearsay." Tr. 482, l. 5. Defense counsel responded that the evidence went to Appellant's state of mind. Tr. 482, ll. 17-19. The trial court agreed with the state that the contents of the report were hearsay. Tr. 484, ll. 6-7.

Defense counsel then asserted that the witness could testify that he came down to the police station for the purposes of corroborating of Appellant's upcoming testimony about the incident. Tr. 484, ll. 14-15. The trial court responded, "That's activity. That's hearsay." Tr. 484, l. 16. In response to defense counsel challenging this statement, the trial court stated, "Hearsay isn't just words. Hearsay is activity. It's action.... You walking into the police station is an action to assert activity, which is to report something." Tr. 484, ll. 18-19; 22-23. Defense counsel responded, "So when a police officer testified he responded to a residence I can object to hearsay?" Tr. 484, ll. 24-25. The trial court responded, "There is no investigative hearsay. That's different." Tr. 485, ll. 1-2. Further, the trial court stated that the state was not going to contest

that Appellant made the report, so Appellant did not need corroboration for that fact. Tr. 487, ll. 21-23. The trial court went on to review several different hearsay exceptions and concluded that the testimony did not fall into any of them. Tr. 488, ll. 4-21.

Testimony of Montaine Lawton

Defense counsel also proffered the testimony of Montaine Lawton. Lawton testified that Reynolds had broken into her house with two accomplices on February 17, 2021. Tr. 491, l. 12 – 492, l. 11. She also offered an opinion on the decedent's character as a peaceful person. Lawton testified that she sometimes was peaceful, but other times she was "nasty" and "violent," particularly when she used drugs. Tr. 492, l. 24 – 493, l. 4. The state again objected, asserting that the testimony was just an effort to smear Reynolds. Tr. 497, ll. 14-17. Defense counsel responded that this evidence also proved a specific instance of prior violence, that Appellant would testify that he was aware of the incident, and it went to Appellant's "reasonable apprehension of bodily harm from his belief that she can be violent." Tr. 496-97.

The trial court sustained the state's objection. Tr. 498, l. 7. It held that the evidence was remote in time and not directed at Appellant personally. Tr. 499, ll. 2, 4-5. The trial court also held that Appellant "had no clue this happened." Tr. 499, ll. 10-11. Further, the trial court held that the evidence was a prior bad act that was not the subject of a conviction which had to be proven by clear and convincing evidence. Tr. 500, ll. 6-8. Defense counsel responded that the clear and convincing evidence standard applied only to the defendant. Tr. 500, ll. 9-10. The trial court disagreed. Tr. 500, l. 11.[4] Defense counsel stated that he would keep the witness under subpoena until after Appellant's testimony, to which the trial court responded, "That's up to you,

[4] When defense counsel tried to clarify the standard again, the trial court interrupted and stated that, "That's really a side thought. It really doesn't matter. I've already made my ruling regarding what my analysis is regarding it." Tr. 501, ll. 2-6.

but I doubt I'm going to let it in." Tr. 501, ll. 10-11. The trial court then began addressing the witness's testimony that he and Reynolds were in a sexual, "friends with benefits" relationship. Tr. 501, ll. 19-22. Defense counsel informed the trial court that there was going to be testimony that Appellant engaged in similar behavior. Tr. 501, ll. 23-24. In response to that statement, the trial court asserted:

> It seems she had quite a few friends with benefits, but that doesn't make her a bad person. It just makes her a person who knew what she wanted and she pursued her desires. I mean, you know, that's almost like saying – you know, men do it all the time, but somehow when a woman does it it's a problem. It's called free agency; you can do with your body what you want to. She's an unmarried woman. She can do whatever she wants with whoever she wants to do it with. It don't make her a bad person.
>
> [TRIAL COUNSEL]: But kicking in somebody's door does.
>
> THE COURT: I'm talking about sexual activity. She kicked in his door. And his testimony is that she kicked twice. He saw her through the peep hole. The men were doing the kicking, which was directed at him. It wasn't directed at your client.
>
> I'm done with it. I've rule[d].

Tr. 501, l. 25 – 502, l. 15.

Facebook Screenshot

During its cross-examination of Appellant, the state asked Appellant whether on July 1, 2021, he posted a "warning to law enforcement." Tr. 595, ll. 14-15. Appellant responded that he did not remember doing so. Tr. 595, l. 16. The state then offered State's Exhibit 103, which was a screenshot of a Facebook post made by Appellant on July 21, 2021. State's Exhibit 103 (Facebook post) (on file with this Court). Defense counsel objected to the exhibit and the state's line of questioning, asserting it was irrelevant and violated Rule 403, SCRE. Tr. 596, l. 2. The

trial court overruled the objection, stating "Relevance. State of mind." Tr. 596, ll. 7-8. The Facebook post read:

> To all law enforcement, there are six things the Lord hates, seven that are detestable to him: haughty eyes, a lying tongue, hands that shed innocent blood, a heart that devises wicked schemes, feet that are quickly to rush into evil, a false witness who pours out lies, and a person who stirs up conflict in the community.
>
> To the F.O.P. worldwide.

State's Exhibit 103 (Facebook post)(on file with this Court). Appellant then clarified that "F.O.P" was "Fraternal Order of Police." Tr. 597, l. 7.

Ultimately, Appellant was convicted as indicted and sentenced to a cumulative prison term of forty years.

STANDARD OF REVIEW

This Court reviews the trial court's evidentiary rulings for abuse of discretion. *State v. Gibbs*, 431 S.C. 313, 320, 847 S.E.2d 495, 498 (Ct. App. 2020). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

A trial court's determination that a party has opened the door to the introduction of otherwise inadmissible evidence is within the sound discretion of the trial judge and is reviewed for abuse of that discretion. *State v. Page*, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008).

ARGUMENTS

I.

The trial court erred by allowing the state to introduce several pieces of evidence that constituted bad character evidence, were irrelevant, and were substantially more prejudicial than probative.

The trial court erred by allowing the state to introduce State's Exhibits 22-26 (photos), 67 (still), and 103 (Facebook post)(on file with this Court). This Court should reverse and remand for a new trial.

Evidence is not admissible unless it is relevant, which means the evidence has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would have been without the evidence." Rule 401, SCRE. If relevant, evidence is generally admissible. Rule 402, SCRE. However, even relevant evidence must 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. Further, "evidence of a person's character or a trait of character is not admissible for the purposes of proving action in conformity therewith on a particular occasion." Rule 404(a), SCRE.

Probative value is "the measure of the importance of that tendency to the outcome of the case." *State v. Gray*, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014). "It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues." *Id.* Probative value must be examined in context, considering the issues at stake in the trial in an individual case. *Id.* (*citing State v. Lyles*, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App.

2008)). The probative value of a given piece of evidence will necessarily depend on the "scarcity or abundance of other evidence of the same point." *State v. James*, 355 S.C. 25, 35, 583 S.E.2d 745, 750 (2003) (*quoting Old Chief v. United States*, 519 U.S. 172, 185 (1997)). The more evidence there is of a particular fact, the less probative additional pieces of evidence proving that same fact become. *See id.*

Probative value must be weighed against the danger of unfair prejudice. Rule 403, SCRE. "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (*quoting United States v. Bonds*, 12 F.3d 540, 567 (6th Cir. 1993) (internal quotation marks omitted)). Like probative value, prejudice "should be evaluated in the practical context of the issues at stake in the trial of the case." *Gray*, 408 S.C. at 617, 759 S.E.2d at 169. "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." *State v. Cheeseboro*, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001). Unfair prejudice "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*, 519 U.S. at 180.

"In a criminal case, the state cannot attack the character of the defendant unless the defendant himself first places his character in issue." *State v. King*, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999). Evidence of a prior bad act is never admissible "to show criminal propensity or to demonstrate the accused is a bad person." *Id.* When introduced against a criminal defendant specifically, evidence of prior bad acts must never be admitted against a defendant except to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a

common scheme or plan, or (5) the identity of the perpetrator. Rule 404(b), SCRE; *accord, State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). "The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused." *King*, 334 S.C. at 512, 514 S.E.2d at 582.

Evidence of a prior bad act may also be admissible under the *res gestae* theory, but only if that evidence is "an integral part of the crime...or may be needed to aid the fact finder in understanding the context in which the crime occurred." *State v. Preslar*, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005). The prior bad act must be "so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its 'environment' that its proof is appropriate in order 'to complete the story of the crime on trial by proving its immediate context...' or the 'uncharged offense is so linked together in point of time and circumstances with the crime charges that one cannot be fully shown without proving the other....'" *Id.* at 474, 613 S.E.2d at 385 (*quoting State v. Adams*, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996), *itself quoting United States v. Masters*, 622 F.2d 83, 86 (4th Cir. 1980)).

A. State's Exhibits 22 through 26 should not have been admitted.

The trial court found that State's Exhibits 22 through 26 were relevant and not substantially more prejudicial than probative. Because the evidence proved only a fact that was not contested, it possessed very low probative value. Further, because the evidence only existed to paint the jury a picture of a drug user, it was highly prejudicial. This Court should reverse.

"The probative worth of any particular bit of evidence is obviously affected by the scarcity or abundance of other evidence on the same point." *Old Chief*, 519 U.S. at 185. "Photographs calculated to arouse the sympathy or prejudice of the jury should be excluded if

they are...not necessary to substantiate material facts or conditions." *State v. Lee*, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012) (*quoting State v. Torres*, 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010)).

For example, in *Lee*, this Court analyzed a case where a defendant was charged with criminal sexual conduct with a minor, and at his trial, the state introduced graphic photographs of the defendant engaged in sexual conduct with two *adults*. *Id.* at 530, 732 S.E.2d at 229. The state asserted that the photographs showed "an ongoing course of conduct directly related to Victim's testimony of events as alleged in the indictment, which states Lee participated in sexual activity in the presence of Victim." *Id.* at 526, 732 S.E.2d at 227. This Court found that the photographs "may have been relevant to the Victim's testimony about conduct in Lee's home during the time she lived there..." *Id.* at 529, 732 S.E.2d at 229. However, the photographs were of low probative value, since another witness had already described them in detail. *Id.* Further, because there were "no children shown in the photographs," their "primary purpose was to raise the emotions of the jury and to establish that Lee had a general sexually deviant disposition." *Id.* at 530, 732 S.E.2d at 229. Accordingly, this Court reversed Lee's conviction and ordered a new trial. *Id.*

Similarly to *Lee*, State's Exhibits 22-26 are of low probative value. It was already conclusively established that Appellant and the decedent were using drugs that night. *See id.* at 529, 732 S.E.2d at 229 (limited probative value of pictures because another witness had already described them in detail). At the same time, the photographs were highly prejudicial. Most jurors likely possess negative views or harbor stigma against those who use illegal drugs, here, cocaine and marijuana. *See State v. Adams*, 322 S.C. 114, 119, 470 S.E.2d 366, 369 (1996) ("We appreciate the great possibility that unfair prejudice may result from evidence of a criminal

defendant's past use of cocaine."), *overruled on other grounds by State v. Giles*, 407 S.C. 14, 754 S.E.2d 261 (2014). The photographs contain no evidence of whether Appellant killed the decedent in self-defense.[5] Rather, the "primary purpose" of the photographs was simply "to establish that [Appellant] had a general [drug addict] disposition." *Id.* at 530, 732 S.E.2d at 229.

The trial court held that the photographs "serve[] to corroborate testimony that has already been placed in the record." However, that analysis is backwards. The fact that photographs are merely corroborative does not *increase* their probative value, it *decreases* it. *See Old Chief*, 519 U.S. at 185. While "[e]vidence is admissible to corroborate the testimony of a previous witness," *see State v. Stroman*, 281 S.C. 508, 510, 316 S.E.2d 395, 397 (1984), it is still subject to other Rules of Evidence, and it can still be of minimal probative value if there is an abundance of evidence on the same point. *Old Chief*, 519 U.S. at 185. That is especially so when, as here, the testimony that the photos served to corroborate was not contested. *Cf. id.* at 186 (district court abused discretion under Rule 403 when alternative evidence was of "evidentiary value at least equivalent to what the Government's own evidence carried"). For the state to introduce corroboration evidence, the evidence must corroborate some fact that is relevant to the issues presented at trial. *State v. Pagan*, 369 S.C. 201, 210, 631 S.E.2d 262, 266 (2006).

The purpose of Rule 403 is to prevent the jury from being guided by emotion so it can render judgments based on the facts alone. *Johnson v. State*, 433 S.C. 550, 559, 860 S.E.2d 696, 701 (Ct. App. 2021). When those facts are conclusively established, there can be no necessity to introduce additional evidence of the same, which comes in the form of highly prejudicial

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[5] Unlike in other cases where contemporaneous drug use is probative, the evidence here does not establish any "logical relevance between the drug use and the [crime]." *See, e.g., Adams*, 322 S.C. at 121, 470 S.E.2d at 366 ("The evidence tends to show that Adams and Brown robbed [store] *because they had run out of money to buy crack cocaine*." (emphasis added)).

photographs. Therefore, the photographs were substantially more prejudicial than probative, and the trial court abused its discretion in concluding otherwise.

B. State's Exhibit 67 should not have been admitted.

A photograph of Appellant chugging Everclear has no conceivable probative value and is highly prejudicial. The trial court abused its discretion by permitting the evidence.

There is a "great possibility" that a defendant will suffer "unfair prejudice" from evidence of their use of drugs. *Adams*, 322 S.C. at 119, 470 S.E.2d at 369. State's Exhibit 67 (still) (on file with this Court) showed Appellant drinking directly from a bottle of Everclear, which is commonly known to be a hard liquor used primarily to become intoxicated. There was a high likelihood that such a photograph would cause the jury to look at Appellant as a bad person who makes bad choices, causing unfair prejudice to him. *Cf. State v. Dickerson*, 341 S.C. 391, 397, 535 S.E.2d 119, 122 (2000) (because of its significant likelihood for prejudice, evidence of a defendant's drug use is *never* admissible unless there is some relevant connection between the drug use and the crime charged); *cf. also, State v. Williams*, 412 S.E.2d 359, 364 (N.C. 1992) ("[E]vidence of drug use alone is not admissible under Rule 608(b).").

By contrast, the photograph was of very limited probative value. It was not in controversy that both Appellant and the decedent had been drinking and using drugs. *Old Chief*, 519 U.S. at 185 (cumulative effect of evidence diminishes its probative value). The only reason the state wanted to introduce the photograph was to paint a picture for the jury of a heavy drinking, bad decision making delinquent who frequently abuses alcohol to the point of extreme intoxication. "Chugging" directly from a bottle of hard liquor is not the sort of behavior that most people find acceptable. Thus, a photograph depicting the same was highly likely to cause the jury to reach a

decision on an improper basis. Accordingly, State's Exhibit 67 was substantially more prejudicial than probative and should have been excluded.

C. State's Exhibit 103 should not have been admitted.

Finally, contrary to the trial court's finding, State's Exhibit 103 (Facebook post) (on file with this Court), a screenshot of an anti-police Facebook post made by Appellant, is in no way relevant to his "state of mind." Rather, the state's goal in introducing the screenshot was simply to depict Appellant as a bad person who dislikes law enforcement. Because the likely prejudicial effect of the screenshot substantially outweighed its non-existent probative value, the trial court abused its discretion in permitting the state to enter the screenshot as evidence.

State's Exhibit 103 was a screenshot of a Facebook post made about Appellant, criticizing the Fraternal Order of Police in general terms *five months before the shooting*. The post lacked the temporal proximity or specificity found in other cases to make such evidence relevant to a defendant's "state of mind." *See generally, e.g., State v. Wangstad*, 917 N.W.2d 515, 519 (N.D. 2018) (anti-police social media post relevant when it was made ten days prior to a crime against law enforcement, and spoke of "ending it all and aggressive action toward law enforcement"). Rather, it was an opinion post which contained no specific threats against law enforcement at all. *Contra, e.g., State v. Cox*, 221 S.C. 1, 68 S.E.2d 624 (1951) (holding defendant's statement, "someone [will] pay for this," made to another person after being sentenced to chain gang for assault on wife was admissible to show express malice in prosecution for wife's murder). In fact, the post was not a threat or expression of intent at all, it was a paraphrasing of a Bible verse which, if not for Appellant's statement that the post was "to

all law enforcement" would not be connected to the police at all.[6] There is no probative link between the Facebook post and Appellant's alleged criminal acts.

At the same time, the Facebook screenshot was likely to unfairly prejudice Appellant. *See State v. Gilchrist*, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App. 1998) ("Unfair prejudice means an undue tendency to suggest decision on an improper basis."). A statement by the defendant may be unduly prejudicial under Rule 403, "depending upon what is said and the circumstances under which it is said;" "the trial court must consider the nature of the statement, as well as the context in which it was made." *Id.* at 629, 496 S.E.2d at 428. "[A] statement imputed to a defendant which contains graphic language distasteful to normal sensibilities, or epithets or slurs against others, may be excludable under Rule 403, SCRE, where it has little relevance." *Id.* (*citing United States v. Kallin*, 50 F.3d 689 (9th Cir. 1995) (holding any probative value of defendant's prior statement, that he disliked Mexicans, was far outweighed by its prejudicial effect in tax evasion prosecution) (parenthetical in *Gilchrist*)).[7] Most people approve of law enforcement. There is a high probability that at least one juror would look negatively upon someone who expressed generally negative views of law enforcement. Therefore, "[t]he only purpose this evidence could serve would be to prejudice the jury against [Appellant]." *Kallin*, 50 F.3d at 696 n.7. Accordingly, the danger of unfair prejudice of State's Exhibit 103

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[6] *Compare* State's Exhibit 103 *with* PROVERBS 6:16-19 (KJV) ("These six things doth the Lord hate: yea seven are an abomination unto him: A proud look, a lying tongue, and hands that shed innocent blood, An heart that deviseth wicked imaginations, feet that be swift in running to mischief, A false witness that speaketh lies, and he that soweth discord among brethren.").

[7] In fact, in some contexts, introduction of a defendant's controversial opinion at a criminal trial may implicate the First Amendment when that opinion bears no relevance to the issues in the case. *See Dawson v. Delaware*, 503 U.S. 159 (1992) (introduction of evidence that defendant had "Aryan Brotherhood" tattoo violated his First Amendment rights when such evidence had no relevance to the issues being decided in the proceeding).

substantially outweighed its non-existent probative value. The trial court should have excluded the evidence.

II.

The trial court erred by permitting the state to ask a burden-shifting question of SLED agent Chad Smith based on its erroneous conclusion that Appellant had opened the door to the question.

The trial court erred in allowing the state to ask agent Smith whether the defense could have hired an expert and tested the firearm themselves. Because of the burden-shifting nature of this question, this error requires reversal.

In a criminal prosecution, the state bears the burden to prove the defendant guilty beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 362 (1970). "The obvious rationale behind the principle that the burden of proof is on the state is the safeguard of the presumption of innocence." *State v. Attardo*, 263 S.C. 546, 551, 211 S.E.2d 868, 870 (1975). While burden-shifting is most commonly raised as a challenge to jury instructions by the trial court, the solicitor is also confined in his own behavior, lest he make a comment to the jury that shifts the burden of proof onto the defendant. *See Douglas v. State*, 332 S.C. 67, 71, 504 S.E.2d 307, 309 (1998) ("it is never permissible for the prosecutor to suggest to the jury that it draw an adverse inference when the defendant fails to present any evidence at trial, since the defendant may let the case go to the jury on the basis that the prosecution did not meet its burden of proof"); *cf. Lenz v. State*, 245 So.3d 795, 798 (Fla. Ct. App. 2018) ("an argument emphasizing a defendant's failure to proclaim his innocence is the equivalent of a burden-shifting argument"); *and cf. Doyle v. Ohio*, 426 U.S. 610, 619 (1976) (cross-examination about a defendant's post-*Miranda* silence is impermissible).

Otherwise inadmissible evidence can become admissible if the other party "opens the door" to such evidence, meaning that they "introduce evidence as to a particular fact or

transaction." *State v. Heyward*, 426 S.C. 630, 636, 828 S.E.2d 592, 595 (2019); *State v. Foster*, 354 S.C. 614, 623 582 S.E.2d 426, 431 (2003) (when one party introduces evidence about a matter, the other party may explain or rebut that evidence, even if the explanatory evidence would have been inadmissible if offered initially). This is because generally, a "party cannot complain of an error which his own conduct created." *State v. Curtis*, 356 S.C. 622, 632, 591 S.E.2d 600, 605 (2004). However, testimony in response to an opened door "must be proportional and confined to the topics to which counsel had opened the door." *Id.*; *Bowman v. State*, 422 S.C. 19, 42, 809 S.E.2d 232, 244 (2018).

Here, defense counsel questioned agent Smith only about the potential error rate of the processes he used during his investigation. This questioning would have been entirely proper, if not routine, during *voir dire* examination of agent Smith prior to his qualification as an expert. *Cf. Watson v. Ford Motor Co.*, 389 S.C. 434, 447, 699 S.E.2d 169, 176 (2010) ("In determining a witness's qualifications as an expert, the trial court should not have a solitary focus, but rather, should make an inquiry broad in scope."); *cf. also, Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594 (1993) ("the court ordinarily should consider the known or potential rate of error"). Yet, in response to this mundane questioning, the trial court permitted the state to elicit testimony that the defense could have hired his own expert and tested the conclusions of agent Smith. Appellant, however, has no obligation to prove his innocence. *Attardo*, 263 S.C. at 551, 211 S.E.2d at 870.

Further, defense counsel's questioning regarding the error rate of agent Smith's process did not "open the door" to the burden-shifting testimony. Testimony in response to an opened door "must be proportional and confined to the topics to which counsel had opened the door." *Curtis*, 356 S.C. at 632, 591 S.E.2d at 605. The state's questioning regarding the defense's ability

to perform additional testing on a firearm is not confined to defense counsel's questioning regarding the error rate of agent Smith's processes. *See Foster*, 354 S.C. at 431, 582 S.E.2d at 623-24 (defendant did not open the door to state introducing a prior consistent statement of its witness when defendant merely questioned the witness about the existence of the statement). Testimony that the defense could have hired their own expert does not *directly* contradict defense counsel's questioning regarding the sufficiency of agent Smith's investigation which is typically required for a finding that a defendant opened the door to otherwise improper testimony. *See, e.g., State v. Dunlap*, 353 S.C. 539, 579 S.E.2d 318 (2003) (finding that defendant opened the door to evidence of prior convictions for possession with intent to distribute when, in opening statement, defense counsel stated defendant "never sold" crack, but was merely an addict); *Curtis*, 356 S.C. at 632, 591 S.E.2d at 605 ("Given that [defendants] maintained that [the company] did not allow pornographic materials or links on the website, it is patent that they opened the door to this line of inquiry"); *United States v. Robinson*, 485 U.S. 25 (1988) (finding defendant opened the door to prosecutorial comments about defendant's post-arrest silence when defense counsel asserted several times in closing argument that defendant was never given the chance to tell his side of the story).

Agent Smith's testimony that the defense could have hired their own expert was burden-shifting. Further, the testimony did nothing to rebut defense counsel's questioning about the error rate of agent Smith's processes. Accordingly, the trial court erred in finding that Appellant opened the door to agent Smith's burden shifting testimony. Appellant is entitled to a new trial.

III.

The trial court erred by excluding a substantial portion of the defense case-in-chief based on a legally erroneous interpretation of the hearsay rule and prior instances of conduct in a self-defense case.

Because of the trial court's misunderstanding of the hearsay rule and the specific instances of violence rule, it excluded a substantial amount of Appellant's trial evidence which would have tended to prove that the decedent was a generally violent person who had threatened Appellant and others before. The jury heard an incomplete picture of Appellant's self-defense theory without this evidence, and this Court should reverse.

A. The trial court erred by excluding the testimony of Amber Derby

Amber Derby would have provided crucial testimony regarding prior instances between Appellant and the decedent that would have supported Appellant's assertion that he had a reasonable apprehension of harm supporting his self-defense case. The trial court erred by excluding the evidence, and this Court should reverse.

Evidence of specific instances of violence by the deceased are admissible in a self-defense case if they are either directed at the defendant personally, or if directed against others, "were so closely connected at point of time or occasion with the homicide as reasonably to indicate the state of mind of the deceased at the time of the homicide, or to produce reasonable apprehension of great bodily harm." *State v. Day*, 341 S.C. 410, 419-20, 535 S.E.2d 431, 436 (2000); *see also*, *State v. Brown*, 321 S.C. 184, 467 S.E.2d 922 (1996); *State v. Amburgey*, 206 S.C. 426, 34 S.E.2d 779 (1945). Evidence of prior difficulties between a defendant and decedent is often extremely relevant to a self-defense case, as prior difficulties between a defendant and

decedent gives the defendant "the right to judge the conduct of his adversary more harshly than otherwise." *State v. Hendrix*, 270 S.C. 653, 661, 244 S.E.2d 503, 507 (1978).

Here, Derby would have testified that Reynolds during child custody exchanges, very frequently became "irate" and screamed at Appellant, who, for his part, remained calm and waited for the incident to pass. Derby testified that this occurred at least once-or-twice per week every single week leading up to the incident. This testimony is relevant to Appellant's self-defense case, as it tends to establish aggressiveness towards him by the decedent which is relevant to his state of mind and reasonable apprehension of harm. In excluding the evidence, the trial court made several findings that do not withstand scrutiny.

First, the trial court excluded the testimony based on its belief that there was no temporal connection between the decedent's previous aggression toward Appellant and the shooting incident. However, this is a misapprehension of the rule. The rule is that "evidence of other specific instances of violence on the part of the deceased are not admissible unless they were directed against the defendant, *or if directed against others*, were so closely connected in point of time or occasion with the homicide as reasonably to indict the state of mind of the deceased at the time of the homicide, or to produce reasonable apprehension of great bodily harm." *Brown*, 321 S.C. at 187, 467 S.E.2d at 923-24 (*quoting Amburgey*, 206 S.C. at 429, 34 S.E.2d at 780) (emphasis added). Neither *Day* nor *Brown* nor *Amburgey* stand for the proposition that specific instances of conduct by the decedent, directed *at the defendant*, have to meet any temporal proximity standard.[8]

[8] Further, the trial court held that the instances were not sufficiently close in time because they did not occur "within 24 or 48 hours" of the shooting. Tr. 474, ll. 12-15. A rule requiring instances of violence to occur within 24 or 48 hours finds *no* support in the case law, even if the decedent's aggression had not been directed at Appellant. *See Day*, 341 S.C. at 421, 535 S.E.2d

Second, the trial court held that the decedent's aggression was irrelevant because: "Words not accompanied by a hostile act are not relevant." Tr. 468, ll. 20-22. At the outset, it is not clear where the trial court got its purported rule that words must be accompanied by a hostile act to possess any relevance. There does exist a rule that states: "words accompanied by hostile acts, may, depending on the circumstances, establish a plea of self-defense." *State v. Fuller*, 297 S.C. 440, 444, 377 S.E.2d 328, 331 (1989). However, the existence of a rule does not require that the inverse is true, and there is no logical argument supporting the proposition that words alone are *irrelevant. See* Rule 401, SCRE (evidence is relevant if it possesses "*any tendency* to make the existence of any fact...more probable or less probable than it would be without the evidence." (emphasis added)); Richard D. Friedman, *Irrelevance, Minimal Relevance, and Meta-Relevance*, 34 HOUSTON L. REV. 55, 56 (1997) ("That tendency might be very slight; even if there are many alternatives to the proposition at issue...."). For example, if a decedent made a direct death threat against a defendant, the trial court's purported rule would bar introduction of that crucial fact. That is not and cannot be the law of South Carolina.

Third, the trial court held that Derby's testimony constituted improper character evidence.[9] "In cases in which character or a trait of character of a person is an essential element

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at 437 (holding that prior act of violence against a third party which occurred "*only four months*" prior to the incident was admissible (emphasis added)).

[9] In support of its bad character evidence holding, the trial court asserted that "three-quarters of probably the population who exchange children would be put into that category. People get volatile about their kids. They get emotional about their kids." This is the exact inverse of its reasoning when permitting the state to introduce State's Exhibit 67, where it said: "I do not agree with [trial counsel] that somehow someone ingesting alcohol raises their character. If that's the case, probably 95 percent of our population would be considered bad people." Therefore, according to the trial court, evidence of the decedent committing an act that in the trial court's opinion 75% of people also do means that evidence is prejudicial bad character evidence. However, evidence of Appellant performing an act that "95%" of people do is not prejudicial bad character evidence because so many other people also do that act. It is not clear where this

of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct." Rule 405(b), SCRE. Evidence of a decedent's general character for violence is often relevant evidence in a self-defense case. *See Day*, 341 S.C. at 421, 535 S.E.2d at 437 (specific instances of decedent's violence admissible in self-defense case provided certain conditions met); *Commonwealth v. Amos*, 284 A.2d 748, 750-51 (Pa. 1971) (evidence of decedent's character for violence admissible either "(1) to corroborate defendant's alleged knowledge of the victim's quarrelsome and violent character in an effort to show that defendant reasonable believed that his life was in danger; (2) to prove the allegedly violent propensities of the victim to show that the victim was in fact the aggressor."); *Espinoza v. State*, 951 S.W.2d 100, 101 (Tex. Ct. App. 1997) ("In a murder case, the victim's reputation for violence and specific acts of aggressive misconduct in keeping with the victim's character are admissible in two respects to support a claim of self-defense: (1) to show that the victim was the first aggressor and/or (2) to show that the defendant reasonably apprehended danger."); 3 JONES ON EVIDENCE § 16:55 (7th ed.) (Nov. 2025 update) ("A number of states...permit a defendant to offer [evidence of "unrelated violent acts by the victim"] to prove the victim's violent character."). An essential element of self-defense is that Appellant "believed he was in [imminent danger] and a reasonably prudent man of ordinary firmness and courage would have entertained the same belief." *Fuller*, 297 S.C. at 444, 377 S.E.2d at 331 (*quoting State v. Jackson*, 277 S.C. 271, 87 S.E.2d 681 (1955)). Therefore, the decedent's character for violence was an "essential element" of the

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disconnect in the trial court's reasoning lies. And, if there is some metaphysical line between 75% and 95% of the population performing an act, it is not clear where that line lies, or where the trial court derived its statistics. The more rational conclusion, of course, is that the trial court was not applying any of the Rules of Evidence and was rather making evidentiary rulings based on its own perceptions and standards of morality. The Rules of Evidence exist to eliminate exactly that.

defense. Rule 405(b), SCRE. The trial court erred in excluding Derby's testimony on this ground.

For these reasons, Derby's testimony about the decedent's specific instances of conduct should have been admitted. The trial court's rulings to the contrary either lack evidentiary support or are grounded in errors of law. Accordingly, the trial court abused its discretion in disallowing Derby's testimony. This Court should reverse and remand for a new trial.

B. The trial court erred in excluding the testimony of officer Singletary

After a separate evidentiary ruling, defense counsel sought to introduce the testimony of officer Morgan Singletary to corroborate his testimony that he had made a police report against Reynolds. The trial court excluded the evidence based on an unreasonable and legally erroneous application of the hearsay rule. Appellant is entitled to a new trial.

"Hearsay" is "a *statement*, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE (emphasis added). A "statement" is "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Rule 801(a), SCRE. For example, "a nod of the head or pointed finger may be hearsay if it is intended as a communication." *State v. Williams*, 285 S.C. 544, 548, 331 S.E.2d 354, 356 (Ct. App. 1985). Necessarily, therefore, the classes of non-verbal conduct that will qualify as a "statement" will be narrow, as the rule is only intended to "eliminate questions of sincerity," or in other words, to prevent a witness from guessing as to a party's *intention* behind an act such as a finger point or head nod. FED. R. EVID. 801, Adv. Comm. notes.

Here, defense counsel sought to have officer Singletary testify that Appellant came into the police station and made a report. The trial court ruled that this testimony was hearsay,

because: "Hearsay isn't just words. Hearsay is activity. It's action.... You walking into the police station is an action to assert activity, which is to report something." Tr. 484, ll. 18-19, 22-23. When defense counsel challenged this ruling, stating, "so when a police officer testified he responded to a residence I can object to hearsay," the trial court responded, "there is no investigative hearsay. That's different." Tr. 484, l. 24 – 485, l. 2.[10] The trial court misapprehends the hearsay rule. By walking into the police station and making a report, Appellant did not perform any action that was "intended...as an assertion." Rule 801(a), SCRE. The *substance* of the report was, of course, an assertion. However, the mere fact of Appellant walking into a police station and making a report is not an assertion. If that were the case, it would not be possible for any witness in any case to testify that they witnessed another person doing something. Under such a rule, testimony such as "I saw John turn right at the stop light" or "I saw Jane walk into PNC Bank in Columbia" would be inadmissible hearsay. That is not the hearsay rule. The purpose of the hearsay rule is to prevent a non-declarant from providing speculative testimony about what another person meant by a statement. A "nod of the head or pointed finger," *Williams*, 285 S.C. at 548, 331 S.E.2d at 356, could raise such concerns. Appellant walking into a building does not. Accordingly, the trial court erred by excluding Officer Singletary's testimony.

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[10] This statement by the trial court is fundamentally incorrect. *State v. King*, 422 S.C. 47, 67, 810 S.E.2d 18, 29 (2017) ("So-called 'investigative hearsay' is still, fundamentally, hearsay. There is no special kind of evidence known as 'investigative hearsay,' we have no rule of evidence called the 'investigative hearsay rule.'"). But even if the trial court was correct, the witness sought to be introduced by Appellant was a police officer, gathering evidence, in the course of their employment. If there was an "investigative hearsay rule," Officer Singletary's testimony would constitute the same. Accordingly, the trial court's ruling fails on its own, albeit misguided, terms.

C. The trial court erred by excluding the testimony of Montaine Lawton

Defense counsel sought to have Montaine Lawton testify that the decedent, with two accomplices, had broken into his house eleven months prior to the shooting incident. The trial court excluded the testimony based on a misapplication of the *Day* rule and a misapplication of Rule 404(b), SCRE. This Court should reverse.

Specific instances of violence by the decedent may be admitted in a self-defense trial if they "were so closely connected at point of time or occasion with the homicide as reasonably to indicate the state of mind of the deceased at the time of the homicide, or to produce reasonable apprehension of great bodily harm." *Day*, 341 S.C. at 419-20, 535 S.E.2d at 436.

In *Day*, the defendant sought to trick the decedent into believing he had committed a murder that the decedent hired him to commit, in order to prevent the decedent from hiring someone else to do it. *Id.* at 414, 535 S.E.2d at 433. Day's perhaps ill-advised plan was to have the intended murder victim hide under blankets in the backseat of his truck while he picked up the decedent. *Id.* at 415, 535 S.E.2d at 433. However, Day became scared that the decedent had seen the intended victim move in the backseat, thus knowing he had been duped. *Id.* When the decedent reached for what Day believed was a gun, Day shot and killed him. *Id.* At trial, Day sought to introduce evidence that decedent had, four months prior, held a shotgun to another person's head "as he drove around Aiken County and accused her of being involved with others in a drug trafficking scheme in his residence." *Id.* at 420, 535 S.E.2d at 436. The trial court disallowed the evidence under Rule 405, SCRE. *Id.*

The Supreme Court reversed. *Id.* It held that the prior act of violence "occurred only four months prior to [decedent's] death and was admissible to prove Day had a reasonable apprehension of violence from [decedent], an essential element of his self-defense claim." *Id.* at

421, 535 S.E.2d at 437. The evidence was also relevant to establish "the continuous and consistent pattern of [decedent's] drug-induced, violent paranoia." *Id.*

This case is similar to *Day*. Appellant testified that he believed the decedent had called someone else to the house and that the decedent had previously burglarized his home and threatened his life. Evidence that the decedent violently burglarized another person's home not even a year earlier would have supported this fear and Appellant's fear of bodily injury.[11] Therefore, under *Day*, the trial court erred in excluding Lawton's testimony of this prior instance of violent conduct by the decedent

The trial court's reasoning to the contrary is unpersuasive. First, the trial court held that the Lawton burglary was remote in time to the shooting incident at the center of this case. However, eleven months is not as remote in time as the trial court seemed to believe. In *Day*, the Supreme Court held that a period of four months was not too remote to require exclusion of the evidence. 341 S.C. at 421, 535 S.E.2d at 437. Other cases where appellate courts have held specific instances of conduct were too remote to be admissible involve significantly longer periods than eleven months. *See Brown*, 321 S.C. at 187, 467 S.E.2d at 922 (twenty-three years).

Further, the trial court held that the specific instance of conduct had not been proven by "clear and convincing evidence."[12] The "clear and convincing evidence" standard of proving specific instances of conduct that were not the subject of a conviction applies only when the state attempts to introduce such conduct against the *defendant* at a criminal trial. *State v. Smith*, 300

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[11] Appellant asserted to the trial court that he would testify that he was aware of this event, but the trial court held that the evidence was inadmissible despite his knowledge.

[12] When challenged, the trial court stated that this was a side thought that was not germane to its analysis. Appellant disagrees. The trial court made this assertion during its ruling, and it should be addressed if there is any possibility it affected the trial court's decision.

S.C. 216, 218, 387 S.E.2d 245, 247 (1989). The trial court erred by holding Appellant to this higher standard.

For these reasons, the trial court erred by excluding a substantial portion of the defense case-in-chief. Appellant is entitled to a new trial where he may fully present his defense.

CONCLUSION

For the foregoing reasons, this Court should reverse Appellant's convictions and sentences and remand for a new trial.

W. Chandler Norville
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day May, 2026.