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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTONIO VASHON BARNES, JR.

APPELLANT

APPELLATE CASE NO. 2023-001390

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err by denying Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act, when Appellant proved by a preponderance of the evidence that he was entitled to immunity pursuant to the Act?

2. Did the trial court err by failing to correctly instruct the jury on the defense of habitation as requested by Appellant when there was evidence to support the charge, particularly where the instruction given incorrectly told the jury the defense only applied if Appellant or a member of his household was attacked in Appellant's home and the life or safety of Appellant or a member of his household was jeopardized, which is an incorrect statement of law?

3. Did the trial court abuse its discretion by admitting evidence of Appellant's marijuana possession and prior marijuana distribution as well as evidence of Appellant's possession of unrelated firearms and ammunition since the evidence was not relevant pursuant to Rule 402, SCRE, any probative value of the evidence was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE, and the evidence was improper bad character evidence merely used to establish propensity in violation of Rule 404(b), SCRE?

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5. Did the trial court abuse its discretion by refusing to admit Defendant's Exhibit No. 108, Appellant's prior consistent statement, pursuant to Rule 801(d)(1)(B), SCRE, to rebut the state's argument that Appellant had fabricated his account of events, and to counter the state's suggestion Appellant manufactured remorse on the stand, particularly where the exclusion violated Appellant's constitutional right to present a complete defense?

6. Did the trial court err by refusing to grant a new trial based on the cumulative effect of the trial errors?

STATEMENT OF THE CASE

A Richland County grand jury indicted Appellant on April 13, 2021 for two counts of murder, for the killings of Antonio Dash and Eric Griffin, and possession of a weapon during the commission of a violent crime. R. 1260-1263. A pretrial hearing on Appellant's motion for immunity pursuant to the Protection of Persons and Property Act was held on March 30-31, 2022 before the Honorable DeAndrea Benjamin. R. 1. Assistant Solicitors Dale Scott, Paul Walton, and Nick Fowler represented the state. Laura Young, Luke Shealy, Brian Shealy, and Caroline Latimer represented Appellant. R. 1. By order filed June 14, 2022, Judge Benjamin denied Appellant's motion for immunity. R. 469-483.

Appellant's case was called for trial on December 5, 2022 before the Honorable Clifton Newman, and a jury. R. 484. Assistant Solicitors Dale Scott, Paul Walton, and Nick Fowler represented the state. Laura Young, Luke Shealy, Brian Shealy, and Carolina Latimer represented Appellant. R. 484. On December 8, 2022, the jury acquitted Appellant of one count of murder related to the killing of Antonio Dash, but found him guilty of the second count of murder for the death of Eric Griffin as well as the weapons offense. R. 1215, l. 18 – 1216, l. 10.

On December 13, 2022, Judge Newman sentenced Appellant to thirty-five years for murder and five years concurrent for the weapons offense. R. 1220, ll. 15-17. On December 22, 2022, Appellant filed a motion for a new trial. R. 1248-1258. By order filed September 7, 2023, Judge Newman denied Appellant's motion for a new trial. R. 1259.

This appeal follows.

STATEMENT OF FACTS

In February 2019, Appellant lived in Apartment 14G at the Willow Run Apartments with Samuel Thomas and Antonio Dash, one of the decedents. It was a two bedroom apartment located in a "dangerous neighborhood" in Columbia. R. 908, ll. 12-15. Appellant and Thomas, who were listed on the lease, allowed Dash to live with them because he had nowhere else to stay. The three,

who had been good friends for more than a decade, had been living together for at least a year. Thomas used the front bedroom, which was the first door on the right off the hallway. Appellant slept in the back bedroom, which was the second door on the right off the hallway. Dash, who did not have his own bedroom, slept on an air mattress in a large walk in closet at the very end of the hallway. Dash kept his belongings in this closet as well. R. 659, l. 20 – 660, l. 25. The apartment also had a bathroom, a kitchen, and a living room. The living room had little to no furniture. There was a table with a TV on top, "two church foldup chairs" and a second table with a "missing leg" in the corner that people would sit on. R. 916, ll. 14-18.

Thomas was the only roommate with a car. He routinely gave his roommates and other friends a ride to work or wherever else they needed to be. Thomas drove Dash to Wendy's where he worked every morning. Appellant quit his job a week before the shooting and had not gained new employment. However, he regularly worked and was working at AutoZone at the time of trial. Appellant also sold marijuana. Though, he was not "a big drug dealer" and did not make a lot of money selling weed. He only sold marijuana to support his own smoking habit. R. 975, l. 9 – 976, l. 9; R. 1048, ll. 12-23.

Appellant, Dash, and Thomas all routinely carried a firearm because they lived in a high crime neighborhood. About two weeks before the shooting in this case, Thomas and Dash were robbed at gunpoint at The Corner Store, a convenience store located just down the road from their apartment. Both Thomas and Dash had a gun stolen from them during this robbery. Dash was able to obtain another gun from his brother after the robbery. However, Thomas had not acquired another gun. R. 668, l. 20 – 670, l. 17; R. 905, l. 21 – 908, l. 17.

Eric Griffin, the other decedent, had been Appellant's friend for seven years. R. 891, l. 20 – 892, l. 6. Griffin had recently been released from jail. Appellant had helped Griffin post bond. After Griffin was released from jail, he "started coming back over" to Appellant's apartment. R. 898, l. 23 – 899, l. 16.

On February 5, 2019, two days before the shooting, Griffin visited Appellant's apartment. Samuel Thomas and a woman named Katerra Harper were also at the apartment. The group was "chilling" and playing videogames. Antonio Dash was at work and was not present. For whatever reason, Thomas had the gun Dash had recently obtained from his brother. Initially, Thomas had the gun on his person. However, as the group was hanging out in the living room, Thomas placed the gun on the table in the corner. At some point, Appellant's brother called and asked for a ride to work. Thomas agreed to take Appellant's brother to work and the group dispersed. Griffin and Katerra left the apartment. Appellant also left and went to a friend's apartment nearby. R. 671, l. 1 – 673, l. 13; R. 899, l. 17 – 904, l. 20.

A few minutes after Appellant left, Thomas called Appellant and said Dash's gun, which he had placed on the table in the living room, was missing. Thomas "said the only thing he could think of" was that Griffin had taken the gun. Appellant immediately called Griffin and asked Griffin if he had taken the gun. Griffin denied taking the gun and Appellant believed him since Griffin was his friend. R. 904, l. 23 – 905, l. 12.

The following morning, February 6, 2019, Appellant woke up to the sounds of arguing. He walked into the living room and discovered Dash and Griffin arguing about the missing gun. Thomas and Katerra were also present. The argument between Dash and Griffin was "heated." Dash was holding Appellant's gun, which he had borrowed the night before to go to the store. Because the men were being aggressive, Appellant "snatched" his gun out of Dash's hand and attempted to deescalate the argument. He tried to be a mediator between the two. Griffin again denied taking Dash's gun. Eventually, Griffin left the apartment. R. 908, l. 18 – 910, l. 19.

Later that night, Appellant stayed up late playing videogames with Dash. Appellant learned while hanging out with Dash that Dash planned to go to work the following morning as usual. Appellant also talked on Facetime with his girlfriend into the early morning hours. The call with

his girlfriend ended at 2:59 am. R. 865, ll. 1-6. Appellant then went to sleep. R. 912, l. 21 – 913, l. 9.

Appellant was awoken the following morning by a "loud boom." He thought the noise was the front door of his apartment being "kicked in." Appellant laid in bed for a minute or two and listened. He heard what sounded like "feet moving" and someone in the house "running." He also heard furniture "turning over" and then a loud crash, which he suspected was his TV falling to the floor. Appellant listened for the voices of his roommates, Samuel Thomas and Antonio Dash. However, he did not hear any voices he recognized. Based on their daily routine, Appellant did not believe Thomas or Dash were home. Thomas usually drove Dash to work around that time every morning and Dash told Appellant the night before that he had to work that day. R. 913, l. 15 – 915, l. 18.

On edge because he lived in a dangerous neighborhood, Appellant was scared. He believed his apartment was being "home invaded." He was afraid that if he remained in bed, the intruders would find and kill him. Appellant grabbed his gun, which he always kept on the box spring under his mattress while he slept.[1] R. 917, ll. 1-19. He ran out into the hallway. His heart was "racing." Appellant quickly moved down the hallway hugging the wall as he did so. As soon as he reached the corner, Appellant began firing in the area where he heard the sounds. He started shooting while he was still moving forward. Once he made it around the corner, Appellant saw two men on the ground. They were on top of each other. At first, Appellant did not recognize the men. Then he realized the man on the bottom who was facing upward was Antonio Dash. The man on top of Dash was Eric Griffin. The men were so close together, it looked like they were kissing. R. 915, l. 19 – 921, l. 10.

[1] Appellant legally owned and carried this firearm. He had purchased it and a prior gun he owned from Academy Sports and Outdoors. R. 977, ll. 8-15.

Appellant began to panic. Dash was his best friend and like a brother to him. Appellant was also close with Griffin. After accessing the scene, Appellant suspected Dash and Griffin had been in a physical altercation causing the commotion he had heard prior to the shooting. R. 921, l. 11 – 922, l. 22. The physical evidence supported this conclusion. Dash suffered blunt force trauma to the right side of his head and his left eyebrow. R. 841, l. 16 – 843, l. 9. One of Griffin's earrings had been ripped out of his ear lobe and was found on the floor next to his body. R. 731, l. 10 – 732, l. 10. Both Griffin and Dash had each other's DNA under their fingernails. R. 1065, l. 6 – 1071, l. 24. Ultimately, they both suffered multiple gunshot wounds and were pronounced dead at the scene. R. 804, l. 13 – 820, l. 12.

After the shooting, Appellant walked to the front door and opened it. He saw Griffin's mother and girlfriend walking up the stairs. Appellant held the door open for them. The women began screaming and crying at the sight of the bodies. R. 922, l. 4 – 923, l. 7. Appellant went to his bedroom, grabbed his phone, and called 911 at 8:55 a.m., within a minute or so of the shooting. Other people also began to approach the apartment to find out what happened. Shakila Smalls, who lived two apartment buildings over, walked into the apartment, saw the bodies, and "snatched" the gun out of Appellant's hand.[2] Appellant then walked downstairs and gave his name and contact information to the police. R. 923, l. 8 – 925, l. 24.

Samuel Thomas testified that he "always" took Dash to work. R. 657, l. 22 – 658, l. 9. However, on the morning of February 7, 2019, Dash told Thomas that he had another ride. Because Dash did not need a ride, Thomas chose to go to the doctor. He left the apartment around 8:15 a.m. When he left, Dash was sitting in the living room. He had his work uniform on. Appellant was

[2] Law enforcement found the firearm in Smalls's apartment while executing a search warrant later that day. R. 652, l. 3 – 653, l. 4; R. 743, l. 5 – 748, l. 7. There is no evidence in the record as to why Smalls took the gun from Appellant. The state presumably did not call Smalls as a witness during trial because she had significant and obvious credibility problems as shown by the evidence presented during the immunity hearing.

asleep. Based on their usual daily routine, Dash and Thomas would not have been home at the time of the shooting. R. 658, l. 10 – 659, l. 1; R. 661, l. 25 – 662, l. 16; R. 678, l. 13 – 680, l. 13. When Thomas returned to the apartment after visiting the doctor, he learned about the shooting. He spoke to investigators outside around 9:30 a.m. and told them that when he left one of his roommates was asleep and the other was about to leave for work. R. 680, l. 14 – 682, l. 21.

Griffin's mother, Wanda Griffin, and his girlfriend, Ieasha Washington, both testified that Griffin suddenly asked to stop by Appellant's apartment on their way to take Wanda to work that morning. Griffin did not say why he wanted to stop by. Washington, who was driving, parked the car directly in front of Appellant's apartment. Washington and Wanda both testified that no one else came or went from Appellant's apartment after Griffin entered. R. 573, ll. 14-17. After waiting for about five minutes, the women heard gunshots. Washington immediately called Griffin. This call was placed at 8:54 a.m. The women then ran up the stairs to Appellant's apartment. Wanda knocked on the door and Appellant walked outside. Appellant walked straight to Washington and exclaimed, "What are they doing here? Why [were they] fighting? Who let him in? How did he get here?" R. 521, l. 16 – 535, l. 24; R. 550, l. 10 – 551, l. 1; R. 562, l. 12 – 569, l. 10. Washington testified that Appellant was "spazzing." He was pacing back and forth and pulling his hair. He told Washington that he had been asleep. Numerous people then started approaching the apartment. Washington saw Appellant walk down the hallway to his bedroom and then back outside. The next time Washington saw Appellant he was downstairs talking to the police. R. 575, l. 6 – 577, l. 5.

Kevin Archie, who performed maintenance for the apartments, testified that Appellant told him while they were downstairs minutes after the shooting that he was "back there" asleep, that he thought "they were trying to rob him," that Dash and Griffin were "in there fighting," and that Appellant "came out the back" and "started blasting." R. 592, l. 21 – 595, l. 25.

Appellant gave numerous statements to law enforcement that day. He was always consistent in his account of what occurred. R. 635, l. 22 – 637, l. 7.

ARGUMENT

1.

The trial court erred by denying Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act, when Appellant proved by a preponderance of the evidence he was entitled to immunity pursuant to the Act.

Relevant Facts

Appellant filed a motion pretrial seeking immunity from prosecution pursuant to S.C. Code Ann. § 16-11-450 (otherwise known as the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410 *et seq*.). A pretrial hearing was held on Appellant's motion eight months before trial. Appellant presented ten witnesses during the hearing: Emmitt Gilliam, Kevin Archie, Samuel Thomas, Steven Harper, Christopher Watkins, Castro, Daren Monroe, Sara Goodman, Paul Greer, and Ralph Tressel. At the conclusion of the hearing, the court requested the parties submit proposed orders. Appellant filed a proposed order granting immunity on April 18, 2022. R. 439-454. The state likewise submitted a proposed order. R. 455-468. By order filed June 14, 2022, the trial court denied Appellant immunity from prosecution.[3] R. 469-483.

Standard of Review

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which [the appellate court] reviews under an abuse of discretion standard of review." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual

[3] The state's proposed order and the trial court's order denying immunity are nearly identical.

conclusions, is without evidentiary support." State v. Jones, 416 S.C. 283, 289, 786 S.E.2d 132, 136 (2016).

Discussion

The trial judge erred by denying Appellant immunity from prosecution pursuant to the Protection of Persons and Property Act, when Appellant proved by a preponderance of the evidence he was entitled to immunity pursuant to the Act.

In 2006, the South Carolina General Assembly adopted the Protection of Persons and Property Act. S.C. Code Ann. § 16-11-410, et seq. The General Assembly explained its intent was to "codify the common law Castle Doctrine which recognizes that a person's home is his castle and to extend the doctrine to include an occupied vehicle and the person's place of business." S.C. Code Ann. § 16-11-420(A). The Act expresses the General Assembly's finding "that it is proper for law-abiding citizens to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others." S.C. Code Ann. § 16-11-420(B). The General Assembly recognized "that persons residing in or visiting this State have a right to expect to remain unmolested and safe within their homes, businesses, and vehicles." S.C. Code Ann. § 16-11-420(D). Finally, the General Assembly explained "that no person or victim of crime should be required to surrender his personal safety to a criminal, nor should a person or victim be required to needlessly retreat in the face of intrusion or attack." S.C. Code Ann. § 16-11-420(E).

To effectuate its intent, the General Assembly created a statute providing for immunity from prosecution to "a person who uses deadly force as permitted by the provisions of this article or another applicable provision of law." S.C. Code Ann. § 16-11-450(A). The phrase "another applicable provision of law" includes the common law of self-defense. State v. Glenn, 429 S.C. 108, 118 838 S.E.2d 491, 496 (2019). "Another applicable provision of law" would include the analogous common law defense of defense of habitation.

Section 16-11-440 sets forth the circumstances under which the Act allows the use of deadly force. Id. The statute states in relevant part:

> (A) A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
>
> > (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and
> >
> > (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.
>
> …
>
> (C) A person who is not engaged in an unlawful activity and who is attacked in another place where he has the right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

According to our Supreme Court, "a trial court should first consider whether the defendant has proved the elements of self-defense by a preponderance of the evidence." State v. Glenn, 429 S.C. 108, 118, 838 S.E.2d 491, 496 (2019). "If the defendant has failed to meet the elements of reasonable fear or the duty to retreat, the court should then determine whether section 16-11-440(A) or (C) is applicable." Id. Thus, "in cases where the defendant has not proved the duty to retreat element by a preponderance of the evidence, the court should then consider whether section 16-11-440(C) is applicable because the provision was enacted to extend the protections of the Castle Doctrine to other places where he had a right to be." Id. at 118-19, 838 S.E.2d at 496. Where section 16-11-440(C) is applicable, "it replaces the duty to retreat element required to establish self-defense." Id. at 119, 838 S.E.2d at 497. "In determining whether a defendant satisfies section 16-

11-440(C), the circuit court must analyze whether, at the time of the incident, he was engaged in an unlawful activity and was attacked in another place where he had a right to be." Id.

Furthermore, when considering whether the defendant was in a place where he had a right to be as required by the Act, the trial court must consider proximate cause or a causal connection to the incident. Id. at 119-120, 838 S.E.2d at 497. "To bar a victim of crime from claiming immunity based on a hyper-technical reading of the statute would lead to absurd results when his presence in the place he was attacked had no relation to the incident itself." Id. at 120, 838 S.E.2d at 497. Additionally, "a proximate cause analysis must also be applied to the unlawful activity element of subsection (C)." Id.

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard." Curry, 406 S.C. at 370, 752 S.E.2d at 266. Thus, a person who proves by a preponderance of the evidence that he satisfied (1) the elements of common law self-defense or defense of habitation *or* (2) the elements of the Act is entitled to immunity from prosecution. The trial court must "sit as fact-finder at [the pretrial] hearing, weigh the evidence presented, and reach a conclusion under the Act." State v. Cervantes-Pavon, 426 S.C. 442, 451, 827 S.E.2d 564, 569 (2019).

A. Appellant is Immune From Prosecution Under Common Law Defense of Habitation

Appellant proved by a preponderance of the evidence that he is immune from prosecution under the common law defense of habitation.

"For the defense of habitation to apply, a defendant need only establish that a trespass has occurred and that his chosen means of ejectment were reasonable under the circumstances." State v. Rye, 375 S.C. 119, 124, 651 S.E.2d 321, 323 (2007) (citing Bradley, 126 S.C. 528, 533, 120 S.E. 240, 242 (1923)); See State v. Bryant, 391 S.C. 225, 233, 705 S.E.2d 465, 470 (Ct. App. 2010). "Stated differently, unlike the defense of self-defense, the defense of habitation does not require that a defendant reasonably believe that he (or his property) was in imminent danger sustaining serious injury or damage." Id. "Instead, the defense of habitation provides that where one attempts to force

himself into another's dwelling, the law permits an owner to use reasonable force to expel the trespasser." Id. Although South Carolina precedent properly recognizes that self-defense and habitation are analogous, the defenses are not identical. Id. (citing State v. Sullivan, 345 S.C. 169, 173, 547 S.E.2d 183, 185 (2001)).

"When one becomes a trespasser, the law permits the owner of the home to employ such force, even to the taking of the life of the trespasser, as may be reasonably necessary to accomplish the expulsion." Bryant, 391 S.C. at 234, 705 S.E.2d at 470 (citing State v. Sparks, 179 S.C. 135, 137, 183 S.E. 719, 720 (1936)). "A man who attempts to force himself into another's dwelling, or who, being in the dwelling by invitation or license refuses to leave when the owner makes that demand, is a trespasser, and the law permits the owner to use as much force, even to the taking of his life, as may be reasonably necessary to prevent the obtrusion or to accomplish the expulsion.) Id. (citing State v. Bradley, 126 S.C. 528, 533, 120 S.E. 240, 242 (1923)).

The evidence presented during the immunity hearing showed Appellant was awakened the day of the shooting to a loud boom followed by sounds of commotion and fighting. Appellant distinctly heard his television crash to the floor. It was Appellant's firm belief that he was being home invaded and would be killed in his bed if the intruders made it to his bedroom. Although Griffin was Appellant's friend and had been welcomed in the home recently, there was no evidence to suggest Griffin was invited or expected to come over that morning. Based on Appellant's statement to law enforcement and Ieasha Washington's testimony, there was an ongoing dispute between Griffin and Dash regarding a gun Griffin allegedly stole from Dash. It is unclear whether Griffin used force at the door to gain entry or whether he was initially permitted entry by Dash prior to Dash's violent confrontation with Griffin. Either scenario is plausible given the loud boom Appellant heard, and both would justify defensive action. Because Dash suspected Griffin of stealing his firearm, it is unlikely Dash would have welcomed Griffin into the apartment. Based on the evidence of the violent struggle in the living room, it is axiomatic that Dash was in the process of trying to forcibly eject Griffin from

the home and viewed him as an unwelcomed intruder. Under the common law defense of habitation, Appellant was justified in using deadly force to end the unwarranted intrusion and expel the trespasser, Griffin. Although, Griffin's and Dash's identities were unknown to Appellant at the time he sought to end the intrusion into his home, he is immune from prosecution under the common law defense of habitation as it relates to Griffin, as it is clear Griffin was engaged in a violent attack against the home and one of its occupants, Dash.

B. Appellant is Immune From Prosecution Under Common Law Self-Defense

Our Supreme Court emphasized in State v. Curry, 406 S.C. 364, 752 S.E.2d 263 (2013) "that immunity under the Act 'is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by a preponderance of the evidence,' save the duty to retreat." State v. Douglas, 411 S.C. 307, 318, 768 S.E.2d 232, 238 (Ct. App. 2014) (quoting Curry, 406 S.C. at 371-372, 752 S.E.2d at 266-267). "A valid case of self-defense must exist, and the trial court must necessarily consider the elements of self-defense in determining a defendant's entitlement to the Act's immunity." Id. at 318, 768 S.E.2d at 238 (quoting Curry, 406 S.C. at 371, 752 S.E.2d at 266) (alternation in original).

"There are four elements required by law to establish a case of self-defense: First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness, and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance." Id. at 318, 768 S.E.2d at 238-239 (internal citation omitted). As

mentioned, the last element, the duty to retreat, need not be shown when seeking immunity under the Act. Id. at 318, 768 S.E.2d at 239 (citing Curry, 406 S.C. at 371, 752 S.E.2d at 266.

An individual has a right to act on appearances. State v. Starnes, 340 S.C. 312, 531 S.E.2d 907 (2000); State v. Jackson, 277 S.C. 271, 87 S.E.2d 681 (1955). Furthermore, "when a person is justified in firing the first shot, he is justified in continuing to shoot until it is apparent that the danger to his life and body has ceased." State v. Hendrix, 270 S.C. 653, 244 S.E.2d 503 (1978).

This case is similar to the factual and legal finding from State v. Scott, 424 S.C. 463, 819 S.E.2d 116 (2018), where a homeowner was granted immunity while defending his property under the common law of self-defense, which resulted in him killing an uninvolved party mistakenly.

Appellant, like Scott, was acting lawfully at the time of the shooting and cannot be said to have brought about the difficulty. He was asleep in his bed when he heard a loud "boom" that was followed by further commotion and his television crashing. His is corroborated by Appellant's statements, the physical evidence, and Appellant's cell phone activity. Like Scott, Appellant had a reasonable belief that he was under threat of imminent death or great bodily injury based on the sounds coming from his living room, combined with his belief that he was home alone with his roommates at work. Appellant laid in bed for a couple of minutes and listened for his roommates and heard no familiar voices. He reasonable believed, based on the nature of his neighborhood, that he was being home invaded and if he allowed the intruders to get back to his room he would be "smoked" or killed. Appellant was entitled to arm himself with his lawfully owned handgun and take action to defend himself against what he reasonably believed to be a threat to his person and home. He traveled the short distance from his bedroom to the hall and shot at the threat until the threat was extinguished. Like Scott, pursuant to the common law, Appellant had no duty to retreat on his own premises. Like Scott, Appellant was ultimately mistaken. It is unclear what Griffin's intentions were that day toward Appellant, if any. The evidence showed Appellant called 911 for help, and throughout the day gave consistently shocked and remorseful statements concerning the

shooting of his friends. Appellant was permitted to take action to preserved his own life against what he reasonably perceived to be a serious threat by unknown intruders.

C. Appellant is Immune From Prosecution Pursuant to § 16-11-440(A)

The above analysis shows Appellant is entitled to immunity pursuant to the common law principles of self-defense and defense of habitation. However, for purposes of argument, even if Appellant's common law claim failed in one or more respects, he is still entitled to immunity pursuant to § 16-11-440(A) and § 16-11-440(C). Section 16-11-440(A) is applicable in this case and provides the Act's strongest protections:

> A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:
>
> (1) against whom the deadly force is used **is in the process of unlawfully and forcefully entering**, or has unlawfully and forcibly entered a dwelling, residence, or **occupied vehicle**, or if he removes **or is attempting to remove another person against his will from** the dwelling, residence, or **occupied vehicle**; and
>
> (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

(emphasis added).

The evidence showed Griffin had unlawfully and forcefully entered Appellant's apartment. Appellant was awoken by a loud "bang." The living room was discovered in a damaged state. Based on the physical evidence presented, Griffin and Dash were undisputedly engaged in a violent fight. Dash suffered blunt force trauma to the right side of his head and his left eyebrow. One of Griffin's earrings had been ripped out of his ear lobe and was found on the floor next to his body. Both Griffin and Dash had each other's DNA under their fingernails. There was a hole in the living room wall likely caused by a body striking the wall. There was also forensic and ballistic evidence that suggested Griffin was armed and shot Dash during the struggle. This unlawful and forceful entry into Appellant's apartment entitled him to the presumption of reasonable fear of imminent

peril of death or great bodily injury. Accordingly, Appellant has established he is entitled to immunity pursuant to § 16-11-440(A) by a preponderance of the evidence as to Griffin.

D. Appellant is Immune From Prosecution Pursuant to § 16-11-440(C)

Although immunity has been established by a preponderance of the evidence under common law principals of self-defense and defense of habitation, as well as pursuant to the Act under § 16-11-440(A) regarding Griffin, if the Court finds § 16-11-440(A) is not applicable then Appellant has proven he is entitled to immunity pursuant to § 16-11-440(C). This section states:

> A person who is not engaged in an unlawful activity and who is attacked in another place where he has the right to be, including, but not limited to, his place of business, has no duty to retreat and has the right to stand his ground and meet force with force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person or to prevent the commission of a violent crime as defined in Section 16-1-60.

This portion of the Act specifically removes any common law duty to retreat so long as an individual can prove he was attacked while acting lawfully and in a place where he had a right to be. The evidence showed Appellant was sleeping in his own bed in his lawfully rented apartment when he heard a loud bang and commotion he reasonably believed was caused by home invaders. The evidence revealed through Appellant's statements to police as well as his phone records that he was not awake that morning and he believed, as was the custom, that his roommates were at work as usual that day. After laying in bed for a couple of minutes listening for any familiar voices, once he heard his television crash, Appellant made the decision to meet force with force and confront his would be assailants. He met what he reasonably believed to be home invaders and used deadly force as permitted pursuant to the Act. Only after did Appellant realize who he had shot, at which time Appellant called 911 as shown by his phone records.

There was evidence based on Appellant's statement to police and a search of Appellant's apartment, that he was in possession of a quantity of marijuana and sold marijuana. As required by State v. Glenn, a "proximate cause analysis must be applied to the unlawful activity element of

subsection (C)." 429 S.C. at 120, 838 S.E.2d at 497. The evidence presented during the pretrial hearing showed Appellant's possession or prior distributions of marijuana had nothing to do with the killings. Accordingly, although Appellant could be said to be acting unlawfully because of his possession of marijuana, there was no evidence to suggest that unlawfulness had played any part in the shooting of Griffin and Dash or why Griffin and Dash were fighting that day. Consequently, as in Glenn, the possession or prior sale of marijuana was not the proximate cause of the killings and does not preclude Appellant from otherwise establishing immunity pursuant to the Act.

Appellant has proven by a preponderance of the evidence that he entitled to immunity from prosecution for the killing of Eric Griffin pursuant to the common law principals of defense of habitation and self-defense as well as both § 16-11-440(A) and § 16-11-440(C) of the Act. Respectfully, this Court should hold the trial court abused its discretion by denying Appellant immunity from prosecution and dismiss Appellant's charges.

2.

The trial court erred by failing to correctly instruct the jury on the defense of habitation as requested by Appellant when there was evidence to support the charge, particularly where the instruction given incorrectly told the jury the defense only applied if Appellant or a member of his household was attacked in Appellant's home and the life or safety of Appellant or a member of his household was jeopardized, which is an incorrect statement of law.

Relevant Facts

During the charge conference, Appellant requested the following charge on the defense of habitation:

> The defense of habitation is the defense of one's dwelling house. Our common law has long recognized the defense of habitation as analogous, yet distinct to self-defense, and that for the defense of habitation to apply, a defendant need only establish that a trespass has occurred and that his chosen means of ejectment were reasonable under the circumstances. Stated differently, unlike the defense of self-defense, the defense of habitation does not require that a defendant reasonably believe that he (or his property) was in imminent danger [of] sustaining serious

> injury or damage. Instead, the defense of habitation provides that where one attempts to force himself into another's dwelling, the law permits an owner to use reasonable force to expel the trespasser. For defense of habitation to apply it is also not necessary to show that the trespasser entered by force: A man who attempts to force himself into another's dwelling, or who, ***being in the dwelling by invitation or license refuses to leave when the owner makes that demand, is a trespasser, and the law permits the owner to use as much force, even to the taking of his life, as may be reasonably necessary to prevent the obtrusion or to accomplish the expulsion.*** State v. Bradley, 126 S.C. 528 (1923).

R. 1227-1228 (emphasis in original).

In support of the request, defense counsel argued the charge is "analogous yet distinct from self-defense" because it does not require an attack. Rather, it only requires an intrusion or a trespass. Counsel argued the charge dates back to State v. Bradley, 126 S.C. 528, 120 S.E. 240 (1923), the case cited in Appellant's written request to charge. The defense of habitation allows a man to take reasonable means to expel the intrusion or end the obstruction, including the use of deadly force. Counsel asserted the charge was warranted because there was evidence Appellant was "defending his habitation and reasonably believed that he was being home invaded." R. 1097, l. 14 – 1098, l. 2.

The assistant solicitor argued the charge was "inapplicable" because there was no evidence of any kind of trespass or forceful entry. He maintained that Eric Griffin was a frequent guest of the apartment and there testimony from witnesses that they heard Griffin knock on the apartment door. The solicitor also asserted that Antonio Dash was an occupant of the apartment. R. 1098, ll. 8-19.

Defense counsel countered that the defense of habitation does not necessarily require a trespass, any intrusion into the home is sufficient to support the charge. He argued that the charge is important because the defense does not require an attack. He stated, "When you're in your own home and you feel reasonably that there's an intrusion and attack on your home, you don't have to first show you were lunged at or someone pulled a gun on you. You have every right in your home to end that intrusion, including to the point of deadly force." Counsel concluded that habitation should be charged as a distinct defense from self-defense. R. 1098, l. 20 – 1100, l. 19.

Lastly, defense counsel asserted Appellant "viewed this as being an attack on his habitation, an intrusion to the safety of his home, which does not require for you to first show that you were attacked. That's the main difference between defense of habitation [and self-defense]. So, he [Appellant] was using his powers as a citizen of South Carolina to end that intrusion, eject the problem, which you're allowed to use with deadly force." R. 1102, l. 13 – 1103, l. 7.

The trial court initially ruled that the self-defense instruction, including the right to act on appearances, adequately covered what Appellant "testified to" and that the defense of habitation "is not a separate charge that he's entitled to." R. 1103, ll. 8-13. Defense counsel respectfully disagreed. R. 1103, l. 14.

The following morning, after the parties had reviewed the instructions the trial court intended to charge the jury, defense counsel objected to the absence of an instruction on the defense of habitation. In support of his objection, counsel cited State v. Bryant, 391 S.C. 225, 705 S.E.2d 465 (Ct. App. 2010), which held it was "reversible error to not give the defense of habitation charge as well as a self-defense charge." He also cited to State v. Rye, 375 S.C. 119, 651 S.E.2d 321 (2007), where an incorrect defense of habitation instruction was given. R. 1107, l. 17 – 1109, l. 4.

After the trial court read the opinion in Bryant, the assistant solicitor continued to argue the instruction was "inapplicable" to Appellant's case because there was no evidence of trespass or any effort to eject a trespasser. R. 1113, ll. 17-24. He contended that "any concern as far as using deadly force to meet a threat is covered in the self-defense instructions." R. 1115, ll. 2-13.

Defense counsel again asserted that the "benefit" of the defense of habitation "as distinguished from self-defense" is the defendant does not have to show he or she was under attack. The defense "encompasses the idea that deadly force can be used to end the trespass upon someone's property, as our client [Appellant] reasonably believed he was being home invaded." R. 1114, ll. 1-17. Counsel continued, "He [Appellant] believed that he had a right to end the intrusion and eject whoever was in there. He was mistaken about both [of the decedents]. So, under the law

of defense of habitation, as along as he's acting reasonably, it should be a question for the jury." R. 1116, ll. 2-9.

After "weighing everything," the trial court agreed to charge defense of habitation. He reasoned, "All these cases all say that the charge should be based, uniquely based on [the] circumstances of every case[.] [I]f the jury, they [the jurors] could possibly believe the defense's theory. So, I'm going to charge it." When defense counsel asked for clarification, the court stated it was "charging the standard habitation charge" and the parties could "argue it back and forth to the jury." R. 1116, ll. 10-23.

The trial court instructed the jury on defense of habitation as follows:

> **If the defendant or a member of the defendant's household is *attacked* in the defendant's own home**, the defense may use the force which appears to be needed **to protect himself or his household from death or serious bodily injury.** If a trespasser refuses to leave the home when asked to leave, the defendant may use the necessary force to eject the trespasser. **If in the effort to eject the trespasser, the life or safety of the defendant or member of the defendant's household is jeopardized, the defendant may take the life of the trespasser.** The kind and degree of force which are justified depend on the conduct of the trespasser. If a person entered the dwelling at the invitation of a member of the household, the person becomes a trespasser if the person refuses to leave when asked.
>
> If while legitimately exercising in good faith the right to eject a trespasser, **the defendant is assaulted by the trespasser and fears death or serious bodily harm, the defendant . . . would be without fault in bringing on the difficulty.** Whether the defendant was acting in good faith in attempting to eject the victim or victims and was assaulted in the process is a question for you to determine.

R. 1204, l. 16 – 1205, l. 14 (emphasis added).

After the court instructed the jury, it asked if there were any exceptions to the charge. Appellant objected to the defense of habitation instruction given. Defense counsel argued the court omitted a critical part of the instruction. He asserted, "Unlike the defense of self-defense, **the defense of habitation does not require that a defendant reasonably believe that he or his property was in imminent danger of sustaining serious injury or damage**. Rather, the defense of habitation provides [that] when one attempts to force himself into a dwelling, the law permits an

owner to use reasonable force to expel the trespasser. I did hear the language about invitees being transformed into trespasser and what it means, but **I did not hear that critical distinction about not requiring an attack or imminent threat**." R. 1212, l. 13 – 1213, l. 7 (emphasis added).

The trial court stated it was satisfied the instruction on the defense of habitation was the proper instruction and refused to further instruct the jury. R. 1213, ll. 8-10.

Standard of Review

"A trial court's decision regarding jury charges will not be reversed where the charges, as a whole, properly charged the law to be applied." State v. Rye, 375 S.C. 119, 123, 651 S.E.2d 321, 323 (2007) (citing State v. Burkhart, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002)). "Conversely, where a defendant requests a charge on a defense that is supported by the evidence presented at trial, the trial court is required to charge the jury on that defense, and the failure to do so is reversible error." Id. (citing State v. Day, 341 S.C. 410, 416-17, 535 S.E.2d 431, 434 (2000)).

Discussion

The trial court erred by incorrectly instructing the jury on the defense of habitation where the instruction was warranted by the evidence presented. The instruction the trial court gave failed to inform the jury that the defense of habitation does not require that a defendant reasonably believe he or his property was in imminent danger of sustaining serious injury or damage. Rather, the instruction given incorrectly told the jury that Appellant had to show he or a member of his household was attacked in Appellant's home and that the "life and safety" of Appellant or a member of his household was "jeopardized."

"For the defense of habitation to apply, a defendant need only establish that a trespass has occurred and that his chosen means of ejectment were reasonable under the circumstances." State v. Rye, 375 S.C. 119, 124, 651 S.E.2d 321, 323 (2007) (citing Bradley, 126 S.C. 528, 533, 120 S.E. 240, 242 (1923)); See State v. Bryant, 391 S.C. 225, 233, 705 S.E.2d 465, 470 (Ct. App. 2010). "Stated differently, unlike the defense of self-defense, the defense of habitation does not require that

a defendant reasonably believe that he (or his property) was in imminent danger sustaining serious injury or damage." Id. "Instead, the defense of habitation provides that where one attempts to force himself into another's dwelling, the law permits an owner to use reasonable force to expel the trespasser." Id. Although South Carolina precedent properly recognizes that self-defense and habitation are analogous, the defenses are not identical. Id. (citing State v. Sullivan, 345 S.C. 169, 173, 547 S.E.2d 183, 185 (2001)). "It is insufficient to charge only self-defense when a charge on defense of habitation is warranted." Bryant, 391 S.C. at 236, 705 S.E.2d at 471.

"When one becomes a trespasser, the law permits the owner of the home to employ such force, even to the taking of the life of the trespasser, as may be reasonably necessary to accomplish the expulsion." Bryant, 391 S.C. at 234, 705 S.E.2d at 470 (citing State v. Sparks, 179 S.C. 135, 137, 183 S.E. 719, 720 (1936)). "A man who attempts to force himself into another's dwelling, or who, being in the dwelling by invitation or license refuses to leave when the owner makes that demand, is a trespasser, and the law permits the owner to use as much force, even to the taking of his life, as may be reasonably necessary to prevent the obtrusion or to accomplish the expulsion.) Id. (citing State v. Bradley, 126 S.C. 528, 533, 120 S.E. 240, 242 (1923)).

There was ample evidence presented during Appellant's trial to support both a self-defense and a defense of habitation instruction. There was extensive testimony describing the condition of the apartment, which objectively showed the decedents were engaged in a violent physical altercation immediately prior to the shooting. For example, there was evidence of damaged walls and an overturned table and television. Additionally, Dash suffered blunt force trauma to the right side of his head and his left eyebrow and one of Griffin's earrings had been violently ripped out of his ear lobe. Samuel Thomas and Appellant both testified that it was the regular schedule and routine for Thomas and Dash to be gone from the apartment and at work during the time of the shooting. Appellant testified extensively that given his reasonable belief that he was the sole occupant of the apartment that morning, coupled with the violent noises he heard coming from his

living room, that he believed there were unwanted intruders in his apartment. The trial court correctly agreed there was evidence to support a defense of habitation instruction and the jury "could possibly believe the defense's theory." See R. 1116, ll. 10-14.

Despite correctly deciding to instruct the jury on defense of habitation because there was evidence to support the charge, the instruction the trial court ultimately gave was inadequate and incorrect. The charge incorrectly implied that habitation requires a defendant to establish that his person or property was in some danger of injury or harm. It also incorrectly informed the jury that in order for the defense to apply, the defendant or a member of his household had to be attacked or assaulted. Such error requires this Court to reverse Appellant's convictions.

In State v. Rye, our Supreme Court reversed the appellant's murder conviction holding the trial court incorrectly instructed the jury on the defense of habitation since the instruction given erroneously implied the defense of habitation required the defendant to establish that his person or property was in some danger of injury or harm. 375 S.C. at 121, 651 S.E.2d at 322. Rye owned a piece of property on which he stored tools and equipment he used for his business. Id. Although the property was not Rye's primary residence, he occasionally slept in a house located on the property and visited the property at least once a day to feed several pet cats he kept there. Id. For several months, Rye experienced a continuous problem with trespassers who not only damaged the premises and stole Rye's equipment, they also "made a sport of shooting (and killing) [his] pet cats." Id.

On the day of the shooting, Rye went onto his property, saw a dead cat by the front steps of his house, and observed footprints around the house. Id. at 122, 651 S.E.2d at 322. Rye called the police, reported the trespassing, and went back to his driveway to await the police's arrival. Id. While waiting, Rye said he heard a gunshot on his property, grabbed his rifle, and ran toward his house. Id. As Rye approached the house, he heard additional gunshots, and then saw the decedent "charging at him in a slouching position with his rifle." Id. The men immediately exchanged

gunfire and Rye shot and killed the trespasser. Id. Rye's neighbor, on the other hand, who was with the decedent that day, claimed that upon being confronted by Rye, the decedent held his gun by the handle and, as he knelt to put the gun down, Rye shot him multiple times. Id.

Rye argued on appeal that the trial court erred by incorrectly instructing the jury on the defense of habitation. Id. at 123, 651 S.E.2d at 323. Our Supreme Court agreed. The Court noted, "While charging the jury on the law of habitation, the trial court properly stated that the law recognizes the right of every person to defend his or her premises, but differentiated habitation from self-defense with the sole caveat that a 'person defending his or her home or premises . . . has no duty to retreat.'" Id. The Court emphasized that the trial court failed to instruct the jury on exactly what "defending one's home or premises meant." Id. Defending one's home or premises "means ending an unwarranted intrusion through the use of reasonably necessary means of ejection." Id. The Supreme Court also held that by instructing the jury that the same elements required by law to establish self-defense apply to the defense of habitation, with the exception of the duty to retreat, the charge "incorrectly implied that habitation requires a defendant to establish that his person or property was in some danger of injury or harm." Id. at 123-24, 651 S.E.2d at 323. Consequently, the Court reversed Rye's conviction. Id. at 125, 651 S.E.2d at 324.

While the defense of habitation instruction given in Rye incorrectly implied that habitation requires a defendant to establish that his person or property was in some danger of injury or harm, the more egregious instruction given in Appellant's case directly stated the defense requires the defendant to show he or a member of his household was attacked in the defendant's home. It further stated that if "the life or safety of the defendant or a member of the defendant's household is jeopardized, the defendant may take the life of the trespasser." This was blatantly incorrect, as we know from Rye, which cited by counsel at trial, that "unlike the defense of self-defense, the defense of habitation does not require that a defendant reasonably believe that he (or his property) was in imminent danger sustaining serious injury or damage." Rye, 375 S.C. at 124, 651 S.E.2d at 323.

In State v. Bryant, this Court held Bryant was entitled to a defense of habitation charge in addition to a self-defense charge where the evidence showed Bryant was confined to a wheelchair, he argued with and was assaulted by the decedent before entering his (Bryant's) hotel room, that he tried to prevent the decedent from entering his room, that the decedent managed to enter his room after Bryant entered but before Bryant was able to close the door, and that Bryant shot the decedent in the hotel room as the decedent advanced toward him. 391 S.C. at 234-235, 705 S.E.2d at 470. This Court concluded the trial court's instruction on self-defense "was clearly insufficient to cover the law on the defense of habitation." Id. at 236, 705 S.E.2d at 471. The Court further determined the error in failing to charge defense of habitation could not be harmless as the trial court "effectively deprived Bryant of an entire defense." Id. at 237, 705 S.E.2d at 471-72.

Likewise, here, even though the trial court correctly instructed the jury on self-defense, the jury instructions as a whole were insufficient where an instruction of the defense of habitation was also warranted. The court's incorrect charge on habitation deprived Appellant of an entire defense. See Id. It was important for the jury to understand both the concept of self-defense and the defense of habitation. Respectfully, this Court should hold the trial court erred by failing to correctly instruct the jury on the defense of habitation and Appellant should be granted a new trial.

3.

The trial court abused its discretion by admitting evidence of Appellant's marijuana possession and prior marijuana distribution as well as evidence of Appellant's possession of unrelated firearms and ammunition since the evidence was not relevant pursuant to Rule 402, SCRE, any probative value of the evidence was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE, and the evidence was improper bad character evidence merely used to establish propensity in violation of Rule 404(b), SCRE.

Relevant Facts

Appellant filed a written motion pretrial to exclude any evidence of marijuana possession or distribution and photographs of guns and Appellant holding a gun recovered from Appellant's phone extraction. R. 1229-1234. Appellant argued such evidence was inadmissible pursuant to Rule 402, SCRE, because the evidence was not relevant; Rule 403, SCRE, because any probative value of the evidence was substantially outweighed by the danger of unfair prejudice; and Rule 404(b), because the evidence constituted improper character evidence. R. 1229-1234.

At the beginning of Appellant's trial, defense counsel explained the grounds for the motion and the evidence that supported the motion. However, the trial court refused to rule on the motion pretrial. R. 486, l. 12 – 493, l. 5.

Ryan McIntyre, an investigator with the Columbia Police Department, spoke to Appellant briefly at the Willow Run Apartments, within a couple of hours of the shooting. The state called McIntyre as a witness to testify about the statements Appellant made to McIntyre in the management office at the apartment complex. Appellant objected to any testimony from McIntyre about Appellant's admission that he sold marijuana from his apartment and that he suspected the commotion he heard that morning was caused by intruders attempting to steal marijuana. Appellant's objection was again based on Rules 402, 403, and 404, SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

Defense counsel argued the evidence was not relevant or probative because there was no evidence Appellant was participating in a drug deal immediately before or at the time of the shooting. Additionally, there was no evidence that Eric Griffin arrived at the apartment to purchase marijuana. Consequently, counsel contended the evidence would only serve as improper character evidence that the state would use to assert Appellant acted as a bad person because he sold drugs. She asserted, "So, it's not like a drug deal gone bad. This is just going to be improper character evidence." R. 637, l. 11 – 639, l. 25.

The assistant solicitor maintained the evidence was relevant and probative because it was part of Appellant's explanation for why he acted the way he did. R. 640, l. 2 – 641, l. 12.

The trial court found the evidence was relevant and "not inadmissible." R. 642, ll. 12-14.

Over objection, McIntyre told the jury that Appellant admitted he sold marijuana and that he thought someone was breaking into his apartment to "steal his weed." R. 643, ll. 11-20.

The state subsequently called Investigator George Potash to testify about the execution of a search warrant at Appellant's apartment the day of the shooting. Appellant objected to any evidence, specifically Potash's testimony and State's Exhibit Nos. 20, 25, 27, and 28, which were photographs taken during the search, indicating that marijuana, drug paraphernalia, firearms, or ammunition were found in the apartment. The state proffered Potash's testimony in response to Appellant's objection. Potash testified *in camera* that in the first bedroom, he found "green plant residue from atop of a footlocker, a sleeve of small plastic bags, and then an identification card. Moved to the second bedroom and we located a plastic container containing a quantity of green plant material from the top drawer of a dresser in the second bedroom." Also in the second bedroom, Potash testified officers found "a black rifle scope" and Appellant's driver's license. In the walk-in closet, Potash testified they found "nine small clear plastic bags containing green plant material, unused small clear plastic bags, and ammunition to include one round of .40 caliber Smith & Wesson, one .380 auto round, a small silver colored grinder, more unused plastic bags, and . . . six rounds of .380 auto in a bag, eleven rounds of Speer .40 S&W in a foil cigar pack." In the kitchen, Potash testified they located "a copy of a firearms purchase receipt for a Smith & Wesson SD40 VE pistol, a digital scale, and a partial box of CCI .22 long rifle ammunition." Lastly, Potash testified that in the dining room, there was a .22 rifle leaning in the corner. R. 713, l. 8 – 715, l. 12.

Defense counsel explained that only .9 millimeter shell casings were collected from the apartment and the recovered gun used in the shooting was a .9 millimeter. He argued that "unrelated evidence of firearm ownership" and ammunition was not relevant under Rule 402,

SCRE, and should be properly excluded. He further argued that Appellant was not charged with drug possession and any evidence of drug possession is not relevant. Lastly, defense counsel asserted the evidence should be excluded pursuant to Rule 403, SCRE, and Rule 404(b), SCRE, because the state is only seeking to admit the evidence "to say that this is a gun-toting thug who has guns, likes guns, shoots people. It has nothing to do with this case." Counsel also cited to Appellant's written motion on the matter. R. 715, l. 13 – 716, l. 23.

The assistant solicitor argued the evidence was relevant simply because "this is what's in this man's apartment." The solicitor contended that anything a crime scene investigator collects pursuant to a search warrant is relevant. R. 718, l. 1 – 719, l. 2.

Defense counsel reiterated that the evidence is "simply to show" that Appellant is "a guy who has a lot of guns because he's bad and violent." R. 720, ll. 1-6.

The trial court overruled the objection. It reasoned, "The state has to prove motive. The state has to prove malice. The state has to prove criminal intent. I find that all of this is more probative than prejudicial, given the nature of the scene, the nature of the killings, and what was in the mind of the defendant at the time he killed these people. So I'm allowing it all in." R. 720, ll. 13-19.

Appellant contemporaneously objected to State's Exhibit Nos. 20, 25, 27, and 28, photographs of the challenged evidence found during the execution of the search warrant, when the state sought to admit them before the jury. Potash explained to the jury what law enforcement found in the apartment, including marijuana, ammunition, and the unrelated firearm. R. 721, l. 4 – 723, l. 6.

Later, during the testimony of Christopher Watkins, the digital forensic examiner who extracted Appellant's phone, the assistant solicitor sought to admit evidence that Appellant had photographs of unrelated firearms, as well as photographs of Appellant holding firearms, on his

phone. Defense counsel objected to this evidence arguing it was not relevant "to anything that happened in this case." R. 877, l. 4 – 879, l. 11.

The solicitor indicated that there were a series of photographs of Appellant "posed with a number of different guns. Any one of them could have been the gun that he's worried about that people took from his apartment." The solicitor stated that he would not seek to admit the actual photographs, but he would question Watkins about what the photographs showed. The solicitor asserted that he would seek to admit a series of text messages from Appellant's phone in which Appellant discussed the firearm Antonio Dash suspecting Eric Griffin of stealing. R. 879, l. 13 – 881, l. 20.

Defense counsel argued none of the evidence was admissible because it was not relevant pursuant to Rule 402, SCRE, and "it just makes him [Appellant] look like a bad guy" in violation of Rule 403, SCRE, and Rule 404, SCRE. R. 880, ll. 12-15.

The trial court ruled the evidence was admissible simply stating, "I overrule the objection." R. 881, l. 20.

Defense counsel contemporaneously objected when the state sought to admit State's Exhibit No. 83, which showed Appellant's text messages concerning the stolen gun. R. 881, l. 24 – 882, l. 10. The state had Watkins read the content of the text messages to the jury. R. 882, l. 11 – 883, l. 21. The solicitor also elicited testimony from Watkins that there were photographs on Appellant's phone showing "a number of different types of guns" and photographs showing Appellant "posing with several different types of guns." R. 884, l. 5 – 885, l. 22.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." State v. Collins, 409 S.C. 524, 529-530, 763 S.E.2d 22, 25 (2014) (quoting State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)) (internal quotation marks omitted). "This Court is bound by the trial court's factual findings unless they are clearly erroneous." Id. at 530, 763 S.E.2d at 25 (quoting

Baccus, 367 S.C. at 48, 625 S.E.2d at 220) (internal quotation marks omitted). "The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." Id. (quoting State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004)) (internal quotation marks omitted). "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. (quoting Wise, 359 S.C. at 21, 596 S.E.2d at 478) (internal quotation marks omitted).

Discussion

The trial court abused its discretion by admitting evidence of Appellant's marijuana possession and prior distribution as well as evidence of Appellant's possession of unrelated firearms and ammunition since the evidence was not relevant pursuant to Rule 402, SCRE, any probative value of the evidence was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE, and the evidence constituted improper bad character evidence merely used to establish propensity in violation of Rule 404(b), SCRE.

"Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." State v. Cartwright, 425 S.C. 81, 90, 819 S.E.2d 756, 760 (2018) (quoting Rule 401, SCRE) (internal quotation marks omitted); See State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991). "All relevant evidence is admissible, except as otherwise provided . . ." Id. (quoting Rule 402, SCRE) (internal quotation marks omitted); See State v. Langley, 334 S.C. 643, 515 S.E.2d 98 (1999). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Id. at 90, 819 S.E.2d at 761 (quoting Rule 403, SCRE) (internal quotation marks omitted). "The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case." Id. (quoting State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007)) (internal quotation marks omitted). "Evidence is unfairly prejudicial if it has an undue

tendency to suggest a decision on an improper basis, such as an emotional one." Id. at 91, 819 S.E.2d at 761 (quoting State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001)) (internal quotation marks omitted).

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." SCRE Rule 404(b); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, the record must support a logical relevance between the prior bad act and the crime for which the defendant is accused. State v. Brooks, 341 S.C. 57, 61, 533 S.E.2d 325, 327 (2000). "Further, even though the evidence falls within a Lyle exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." SCRE Rule 403; See State v. Garner, 304 S.C. 220, 221-222, 403 S.E.2d 631, 632 (1991).

Evidence of Appellant's prior marijuana distribution and his possession of marijuana was not relevant because there was no evidence, direct or circumstantial, that Appellant was attempting to sell marijuana on the morning of the shooting. The evidence had no "direct bearing upon" nor tended "to establish or make more or less probable" any "matter in controversy" given that all the circumstantial evidence presented supported Appellant's consistent account to both law enforcement and other witnesses as well as his testimony before the jury that he was asleep in his bedroom prior to hearing the commotion in the living room. For the same reasons, the evidence had no probative value. However, evidence of Appellant's prior marijuana distribution and his possession of marijuana was unfairly prejudicial because it had an undue tendency to suggest a decision on an improper basis, namely an emotional one. Specifically, this unfairly prejudicial evidence likely incited strong emotions in the jury surrounding illegal drug use, possession, and dealing, and prejudiced the jury against Appellant.

Similarly, the evidence that Appellant previously sold marijuana and possessed marijuana had no relevance or logical connection to Appellant's motive, intent, or absence of mistake, the only potentially relevant exceptions found in Rule 404(b). The state only admitted such evidence to suggest that because Appellant was previously engaged in criminal activity, he was engaged in criminal activity on the morning of the shooting and acted with malice.

In State v. Coleman, 301 S.C. 57, 60, 389 S.E.2d 659, 660 (1990), our Supreme Court held prejudice to Coleman from the admission of evidence that he was a social user of cocaine outweighed any probative value to show Coleman's motive or state of mind at the time of the murder. Despite evidence Coleman was "wired" on the morning of the murder, the Court concluded there was no evidence Coleman's condition was the result of cocaine use nor was there any evidence in the record to support the inference that the victim and Coleman were involved in a drug transaction. Instead, the Court held the only function of this evidence was to demonstrate Coleman's bad character and thus it granted him a new trial.

In State v. Bolden, 303 S.C. 41, 398 S.E.2d 494 (1990), our Supreme Court held evidence of Bolden's alleged crack cocaine use in a hotel shortly before the hotel was robbed was prejudicial error when its only function was to demonstrate Bolden's bad character. The Court stated, "[T]here is nothing in the record to indicate a logical relevance between use of crack cocaine during the night before the robbery and the robbery which occurred at 6:10 am the following day." 303 S.C. at 43, 398 S.E.2d at 494-95. The Court further held that even if the testimony was relevant, its probative value was clearly outweighed by its unfair prejudice and thus remanded Bolden's case for a new trial. 303 S.C. at 43-44, 398 S.E.2d at 495.

In State v. Smith, 309 S.C. 442, 424 S.E.2d 496 (1992), our Supreme Court held evidence of Smith's prior drug use, unrelated to the murder and armed robbery, should have been excluded. Despite considerable evidence of cocaine use during the actual murder and armed robbery, the Court held Smith's *prior* cocaine use was highly prejudicial and "so destructive to [Smith's]

character, hence her credibility, that it cannot be held harmless error or cumulative." The Court reversed Smith's convictions and death sentence and remanded the case for a new trial. 309 S.C. at 446-47, 424 S.E.2d at 498-99.

The facts of Appellant's case are similar to the facts of the above cited cases. Evidence of Appellant's possession of marijuana and *prior* marijuana distribution was highly prejudicial, failed to establish any logical motive or intent based on the evidence presented, and was extremely destructive to his character and credibility. Moreover, it was not necessary for "a full presentation of the case." The trial court abused its discretion in admitting this evidence.

Furthermore, the unrelated ammunition and rifle found in Appellant's apartment during the execution of the search warrant as well as the photographs of Appellant holding firearms and other various unrelated firearms found on Appellant's phone were not relevant or probative, were unfairly prejudicial, and constituted bad character evidence. The evidence was not relevant or probative because Appellant admitted to possessing a gun at the time of the shooting and this gun was recovered by law enforcement and found to have fired the shell casings discovered at the scene. The evidence of other firearms and ammunition had absolutely no connection to the case. However, this evidence likely caused the jury to emotionally dislike Appellant and convict him on an improper basis. The imagery of Appellant being around a large number of guns likely incited an emotional reaction by the jury where Appellant was accused of unlawfully killing Griffin and Dash with a gun. Additionally, being devoid of any real probative value or relevance, the evidence was merely used by the state to show Appellant is a bad person and had the propensity to murder Griffin and Dash. The evidence was not relevant to any of the exceptions found in Rule 404(b) and no logical connection was shown nor can be shown by the state. Consequently, the trial court abused its discretion by admitting this evidence.

4.

The trial court abused its discretion by admitting lyrics from a song Appellant rapped and posted on YouTube when the state failed to disclose the evidence to the defense in violation of Rule 5, SCRCrimP, and where the rap lyrics should have been excluded because the evidence was not relevant pursuant to Rule 402, SCRE, any probative value of the evidence was outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE, and the evidence constituted bad character evidence in violation of Rule 404(b), SCRE.

Relevant Facts

During the pretrial immunity hearing, the assistant solicitor questioned Christopher Watkins, the digital forensic analyst who extracted Appellant's phone and analyzed the data, about a "rap video" that was uploaded to Instagram on Appellant's phone and discovered as part of the extraction. Defense counsel objected to the admission of the rap video, which was marked as State's Exhibit No. 17, pursuant to Rule 402, SCRE, Rule 403, SCRE, and Rule 404, SCRE. She argued the video was not relevant and that the state only sought to admit the video to make Appellant "look like a bad guy." R. 259, l. 15 – 261, l. 21.

The assistant solicitor argued the video was relevant because "it clearly goes to his [Appellant's] state of mind, clearly shows motive, and it clearly shows intent." He asserted that Appellant's defense was self-defense and "mistake of fact." However, the video "shows what he [Appellant] has warned others he would do if anybody stole from him" and there are allegations of a stolen gun. R. 261, l. 24 – 262, l. 15.

Defense counsel emphasized that there was no evidence as to when the rap video was made. She also argued the video had nothing to do with Appellant's state of mind: "That's like saying when an author writes a book about murder, then they have murder on their mind. That's completely absurd. He wrote a song and he rapped about it. It doesn't have anything to do with

what happened in his apartment that day. Just because someone creates art does not mean that's always their state of mind or it's somehow always in their mind." R. 262, l. 16 – 263, l. 2.

The trial court recognized that "things are said in rap music that is not necessarily true. A lot of times, it's a whole lot of bluffing." The court expressed concern with the lack of foundation given it had not heard any evidence as to when the video was made or posted on social media. R. 263, ll. 3-23.

Watkins testified that the meta data showed the video originated from Instagram on January 18, 2019, which means it was not recorded by Appellant's phone. Rather it was recorded by another device and then downloaded onto Appellant's phone on the specified date. R. 266, l. 17 – 269, l. 4.

The trial court sustained Appellant's objection. The court found the state did not properly authenticate the video as there was no evidence as to when the video was created. All that was presented was that the video originated from Instagram on January 18, 2019. The court further found the video was not relevant since it was downloaded nearly twenty days before the shooting in this case and the allegations concerning the stolen gun arose only a day or two prior to the shooting. Consequently, the lyrics were not relevant to Appellant's state of mind. For the same reasons, the court found the video was not admissible pursuant to Rule 404 as it did not establish motive or intent. R. 270, ll. 3-22.

Anticipating that the state may seek to admit the rap music video downloaded from Instagram on January 18, 2019 during Appellant's jury trial, Appellant filed a motion pretrial to exclude the rap lyrics. R. 1235-1242. Appellant argued the state cannot properly authenticate the video, the video is not relevant, any probative value of the video is outweighed by the danger of unfair prejudice, and the video would be improper character evidence. R. 1235-1242.

At the beginning of Appellant's trial, defense counsel raised the motion before the trial court. Counsel argued the rap video downloaded from Instagram on January 18, 2019 should be

excluded, as it was during the pretrial immunity hearing, because the state cannot authenticate it. She also argued the rap video was not relevant because it was downloaded before Appellant was ever "perceived to be a victim of any kind of theft." Lastly, counsel again asserted any probative value of the video is outweighed by its prejudicial effect and it is inadmissible "bad character evidence." R. 494, l. 1 – 496, l. 10.

The assistant solicitor maintained the lyrics "would be fodder for cross-examination should he [Appellant] take the stand." He claimed, "Some of these lyrics are going to his [Appellant's] state of mind. At least one of his rap songs specifically references him killing his two - - the victims in this case." R. 496, ll. 12-22.

The trial court indicated it would address the objection later in the trial. R. 496, ll. 23-24.

At the beginning of the state's cross-examination of Appellant, the assistant solicitor asked Appellant who is "Big Hood Lyfe?" Appellant stated it was his "rap name." The solicitor then asked Appellant whether he had made a rap song about killing the decedents. After Appellant answered no, defense counsel objected pursuant to Rule 5, SCRCrimP, Rules 402, 403, and 404, SCRE, and the First Amendment.

The solicitor told the court that the state had twenty-two rap videos Appellant posted on YouTube between December 16, 2018 and August 31, 2022. Despite initially stating the videos were discovered on Appellant's phone, the solicitor later clarified that only one song was obtained from the extraction of Appellant's phone. The others the state found on YouTube. The solicitor stated "as early as last week, we typed in Big Hood Lyfe in Google" and discovered Appellant's rap videos.

The solicitor further argued the rap lyrics were relevant. He explained that in one song Appellant said, "T.O. was like my brother. When the time comes, everybody freeze but I'm cold with that cut." The solicitor contended that this song seemed to be "celebrating the killing of these people" since T.O. is what Appellant called Antonio Dash. In a song from December 21, 2018,

almost eight weeks before the shooting, Appellant rapped, "I heard you trying to jack. I heard you trying to rob me. I'm scared to take a loss. I'm a business thread your cross." Then in a song posted on January 20, 2019, the solicitor said Appellant rapped, "I'll kill you. I'll kill you if you steal from me." The solicitor claimed Appellant "has telegraphed what [he] was thinking." He claimed the following lyrics were evidence of malice, a critical element of murder, "My heart is as black as a kettle. No, I'm not a grave digger. Grave filler, that's my name." R. 944, l. 24 – 947, l. 3.

Defense counsel asserted that only one rap video came from Appellant's phone extraction. She argued that if the state intended to use any other rap videos or lyrics as impeachment, the state was required to provide the evidence to Appellant pursuant to Rule 5, SCRCrimP. In support of her argument, counsel cited to State v. Lawton, 382 S.C. 122, 675 S.E.2d 454 (Ct. App. 2009), which held that "everything that is material to the defense has to be turned over even if it's just for impeachment." Counsel clarified that she was not claiming a Rule 5 violation" as to the video discovered on Appellant's phone. However, any additional rap videos the state "found somewhere on the internet that they intend to impeach him [Appellant] with" should have been provided to the defense pursuant to Rule 5. R. 947, l. 5 – 950, l. 2. She contended that the lyrics were "material to the defense" because the evidence "goes to whether Mr. Barnes [Appellant] will take the stand and testify. . . . This isn't trial by ambush." R. 956, ll. 5-10.

Defense counsel argued that rap musicians are artists and their music is art. Rap artists and other types of artists are not always autobiographical. Rap artists often rap about robbing and killing people. However, such lyrics are not representative of their mental state. She asserted, "When someone makes music, there is no . . . way to determine whether . . . it's something they're pulling out of the air, completely made up, something they'd never do." Counsel maintained that in this case, the lyrics from Appellant's songs are not relevant pursuant to Rule 402, SCRE. She also cited to State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001) where our Supreme Court held

the admission of Cheeseboro's rap lyrics was error because any probative value of the lyrics was outweighed by the danger of unfair prejudice. R. 950, l. 4 – 953, l. 17. Counsel contended that the lyrics in this case are likewise "overly prejudicial" and should be excluded pursuant to Rule 403, SCRE. Lastly, counsel argued the lyrics were inadmissible bad character evidence that the state only sought to admit to "make him [Appellant] look bad because he raps." R. 956, l. 15 – 958, l. 4.

The assistant solicitor maintained that he had "songs were he [Appellant] is singing about the murder." R. 954, ll. 5-9.

After summarizing Appellant's argument, the court ruled that the lyrics that were disclosed to the defense were admissible. It reasoned, "The defense saw fit to explore the defendant's mind and thinking before, during, and after, including his . . . nightmares. . . . So I believe that particular lyrics/song involving the - - one of the victims in the case is relevant for impeachment purposes, and I'll allow that one at this stage of this case." R. 960, l. 19 – 962, l. 3.

After the court ruled, defense counsel asked to clarify what the lyrics were since the evidence still had not been turned over to the defense. The solicitor disagreed stating the lyrics were discussed during the pretrial immunity hearing. However, defense counsel stated that she understood the court's ruling to be that the state could impeach Appellant with the lyrics that referenced "T.O." The assistant solicitor finally provided defense counsel with a copy of these lyrics. Counsel again clarified that the parties did not discuss those lyrics at the immunity hearing, the lyrics did not come from the rap video on Appellant's phone, and the state failed to turn over the evidence to Appellant. R. 962, ll. 6-23.

The solicitor offered to tell the court the specific lyrics he sought to admit that referenced "T.O." The title of the song is *Let Me Explain* and the lyrics, according to the solicitor, were:

> Nobody know what happened. But everybody got something to say. But if the shoe was on the other foot, would you feel the same way? An N word talking about robbing me. An N word run into my house and try to harm me. You know I fuck with both of y'all. But T.O. is like a brother to me. Everybody say what they going to do but they freeze. I'm cold with that cutter. Watch him fall. It don't matter if it's T.O. I'm going to stand on business forever and always. That gangster shit be making me shoot these N words. I swear to God I'll beat the trial. I'm a soldier. I don't mean no truces. It's me against the rest of y'all. I'm a barber with a cutter. Watch me burn like alcohol.

Defense counsel again argued that the state's failure to turn over the lyrics was a Rule 5 violation. The assistant solicitor asked, "which one of the Shealeys [defense counsel] asked me which rap song we were going to be talking about?" Luke Shealey answered, "That was me. I was trying to get you to disclose some evidence and you were generally pretty vague about it." The solicitor stated, "I told you it was on Google, right?" Luke Shealey responded, "You just said something about the Google machine. But you refused to answer my direct question - - on the matter." The trial court interpreted and simply stated, "The court has ruled." R. 962, l. 24 – 965, l. 2.

Once the jury returned to the courtroom, the solicitor questioned Appellant about the lyrics contained in his song, *Let Me Explain*. Appellant denied writing the song about killing Griffin and Dash. He also testified that the solicitor incorrectly recited the lyrics. The solicitor then went through the lyrics line by line with Appellant. Appellant corrected the solicitor wherever he inaccurately stated the lyrics. The solicitor repeatedly suggested the lyrics were written about the shooting in this case, which Appellant denied. Appellant testified that his brother wrote the song and then Appellant recorded himself rapping it. R. 965, l. 7 – 975, l. 5.

Standard of Review

"The admission or exclusion of evidence is an action within the sound discretion of the [trial] court and will not be disturbed on appeal absent an abuse of discretion." State v. Tapp, 398 S.C. 376, 385, 728 S.E.2d 468, 473 (2012) (citing State v. Williams, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010)). "An abuse of discretion occurs when the conclusions of the [trial] court are either

controlled by an error of law or are based on unsupported factual conclusions." Id. (citing State v. Douglas, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006)).

Discussion

The trial court abused its discretion by admitting lyrics from a song Appellant rapped and posted on YouTube when the state failed to disclose the evidence to the defense in violation of Rule 5, SCRCrimP, and where the rap lyrics should have been excluded because the evidence was not relevant pursuant to Rule 402, SCRE, any probative value of the evidence was outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE, and the evidence constituted bad character evidence in violation of Rule 404(b), SCRE.

Rule 5, SCRCrimP

Rule 5(a)(1)(A) provides:

> (A) Statement of Defendant. Upon request by a defendant, the prosecution shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution; the substance of any oral statement which the prosecution intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a prosecution agent.

Rule 5(a)(1)(C) provides:

> (C) Documents and Tangible Objects. Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

In State v. Lawton, 382 S.C. 122, 675 S.E.2d 454 (Ct. App. 2009), this Court held there is no distinction between the state's obligation to provide materials it uses for impeachment purposes versus materials it uses in its case in chief under Rule 5(a)(1)(A). Lawton was convicted of first degree burglary and possession of a weapon during the commission of a violent crime. Lawton

testified that he would frequently visit his ex-girlfriend's trailer at night even after they ended their relationship. One night, Lawton entered the trailer through the doggy-door, which he claimed was not uncommon. Lawton's ex-girlfriend, awakened by her dogs barking, went to her living room and saw an intruder coming through the doggy-door. After she retrieved her handgun, a struggle ensured and Lawton, who was also armed, was shot in the leg. Id. at 124-25, 675 S.E.2d at 455-56.

During cross-examination, the state produced a letter Lawton had written to his ex-wife that stated in part, "I know that my story is full of lies, but no more than hers, mine just have to be better than hers." Lawton immediately objected to the use of the letter based on the state's failure to disclose it prior to trial pursuant to Rule 5, SCRCrimP. Specifically, Lawton argued the state was required to produce the letter in response to his Rule 5 motion under subsection (a)(1)(A) because it qualified as a relevant written statement made by Lawton that was within the state's control. The trial court ruled the letter was admissible because it was only being used for impeachment. Id. at 125, 675 S.E.2d at 456.

Lawton later argued the letter also should have been produced in response to his Rule 5 motion pursuant to subsection (a)(1)(C), asserting the letter was material to Lawton's defense. The trial court found the letter was not relevant under subsection (a)(1)(A) but was a collateral matter having to do with the credibility of the witness and therefore allowed the state to impeach Lawton pursuant to Rule 608, SCRE. Id. at 126, 675 S.E.2d at 456.

This Court held the trial court erred in failing to suppress the letter because of the state's failure to comply with subsection (a)(1)(A). The Court determined the letter was "clearly relevant" and should have been provided by the state in response to Lawton's Rule 5 motion. This Court further held Lawton was prejudiced by the state's failure to turn over the letter before trial since disclosure of the letter was "clearly material" to the preparation of Lawton's defense because it likely would have affected his decision to testify, a fundamental right. The Court concluded that there was "a reasonable probability Lawton would not have testified had he known the state

processed such strong impeachment evidence." "The state's strategy in failing to disclose the letter and instead surprising Lawton with it during cross-examination clearly prejudiced Lawton." Consequently, this Court reversed Lawton's conviction and remanded for a new trial. Id. at 126-27, 675 S.E.2d at 456-57.

In this case, the trial court erred by failing to suppress the rap lyrics based on the state's failure to comply with Rule 5, SCRCrimP. The lyrics should have been disclosed to Appellant under both subsection (a)(1)(A) and (a)(1)(C). Defense counsel specifically requested the assistant solicitor disclose which lyrics the state intended to use during trial, but the solicitor refused. The defense was only aware of the rap song Appellant posted to Instagram that was found on Appellant's phone extraction and turned over to the state.

The lyrics should have been disclosed to Appellant pursuant to subsection (a)(1)(A) because the evidence consisted of a "relevant written or recorded statement made by the defendant . . . within the possession, custody, or control of the prosecution, the existence of which is known . . . to the attorney for the prosecution." The assistant solicitor knew of the lyrics, had possession of the lyrics, and failed to disclose them to Appellant despite a specific request by defense counsel. Moreover, it is clear that the solicitor intended to use the lyrics for impeachment purposes if Appellant testified, which in fact occurred. Additionally, the lyrics should have been disclosed pursuant to subsection (a)(1)(C) because the evidence was indisputably material to the preparation of Appellant's defense.

Rule 403, SCRE

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ." Rule 403, SCRE. In State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001), our Supreme Court considered whether the following rap lyrics were properly admitted by the trial court:

> Ruckus, I believe you''e a perpetrator, gold and platinum hater, cause me and J.D. is a force like Dark Vador. Who do you despise a strong enterprise? Do the greed in your eyes lead you to tell lies? Victimize me and Jermain Dupri, don't let me see or else there'll be death in this industry. Want let go, set it fo' sho', I get hype like Mike put yo' blood on the dance flo'. Blow fo' blow, toe to toe, with that no mo'. Like the 4th of July, I spray fire in the sky. If I hear your voice, better run like horses or like metamorphis, turn all y'all to corpses. No fingerprints or evidence at your residence. Fools leave clues, all I leave is a blood pool. Ten murder cases, why the sad faces? Cause when I skipped town, I left a trail [of] bodies on the ground. Your whole click ain't nothing but tricks, bitch pulling sticks, grown men sucking dicks. No one bring ruckus like King Justice, but toughest the So So Def most corruptest.

Id. at 549-50, 552 S.E.2d at 313. The trial court admitted the rap lyrics as an admission against interest due to their reference to leaving no prints and bodies left in a pool of blood where the defendant was being accused of an armed robbery and the murder of three individuals in an execution style shooting. The Supreme Court held the admission was error because the minimal probative value of the lyrics was far outweighed by the danger of unfair prejudice. Id. at 550, 552 S.E.2d at 313.

Much like in Cheeseboro, the rap lyrics in this case were vague in context and the "minimal probative value" was "far outweighed by its unfair prejudicial impact as evidence of Appellant's bad character, *i.e.* his propensity for violence in general." Id. The state improperly used the evidence to unfairly attack Appellant's credibility and make him appear to be a bad person.

Rule 404, SCRE

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE. In this case, there is no logical connection between the rap lyrics the state used to impeach Appellant and any of the exceptions found in Rule 404(b). Rather, the state merely used the evidence to make Appellant appear to be a bad person and suggest that he had the propensity to murder Griffin and Dash.

Respectfully, this Court should hold the trial court abused its discretion by admitting the rap lyrics, reverse Appellant's conviction, and remand for a new trial.

5.

The trial court abused its discretion by refusing to admit Defendant's Exhibit No. 108, Appellant's prior consistent statement, pursuant to Rule 801(d)(1)(B), SCRE, to rebut the state's argument that Appellant had fabricated his account of events, and to counter the state's suggestion Appellant manufactured remorse on the stand, particularly where the exclusion violated Appellant's constitutional right to present a complete defense.

Relevant Facts

During defense counsel's redirect examination of Appellant, counsel sought to admit Defendant's Exhibit No. 108, which is the recorded video of Appellant in an interview room at the Columbia Police Department headquarters on the day of his arrest. Counsel sought to admit the portion of the video in which there is a break in questioning and Appellant is alone in the interview room. During this period, Appellant called his mother and a friend and recounted what occurred that morning. Appellant was very emotional during these discussions. See Defendant's Exhibit No. 108

The assistant solicitor objected to the admission of Defendant's Exhibit No. 108 based on relevance. He argued, "My prediction is that they are going to show an excerpt of him getting emotional. They can ask him about the thing. I do the same thing. But it's already in evidence. That's fine. But it's opening the door for recross on this if they want to keep talking about his emotional reaction to this." R. 1051, ll. 2-8.

Defense counsel countered that the video was admissible pursuant to Rule 801(d)(1)(B), SCRE, as a prior consistent statement offered to rebut an express or implied charge against the declarant of recent fabrication. She argued that during cross-examination, the assistant solicitor "attacked his [Appellant's] consistency about what he told people" and "brought his remorse into

play." Counsel specifically mentioned the solicitor's questioning of Kevin Archie, a state witness, in which the solicitor suggested Appellant told Archie "three different things" about what happened that morning. R. 1051, ll. 10-19.

The solicitor maintained that he "briefly" crossed Appellant on his remorsefulness in response to Appellant's direct examination. He asserted the defense was "treading over ground they covered during the direct." R. 1051, ll. 21-25.

Without any further argument, the trial court sustained the state's objection and refused to admit Defendant's Exhibit No. 108. R. 1052, l. 1.

During the state's recross examination, the assistant solicitor repeatedly questioned Appellant about his remorse suggesting Appellant was not remorseful. R. 1054, l. 23 – 1060, l. 18. At the conclusion of Appellant's testimony, defense counsel told the court she had a matter of law and the court asked counsel to approach. Defense counsel requested to play the proffered video, Defendant's Exhibit No. 108, which shows Appellant in the interview room speaking with his mother and a friend on the phone about what occurred earlier that day. Defense counsel asserted the solicitor "directly attacked his [Appellant's] remorse again" during his recross examination and the proffered video "goes directly to that issue." The trial court again immediately denied the request reasoning "you have direct, cross, redirect, recross . . . That's it for the witness. You can't put up evidence during the end of testimony of the witness. . . . That's the way the process works." The court told defense counsel she could not "get a third bite at the apple." R. 1060, l. 21 – 1062, l. 111.

In his written motion for a new trial, Appellant argued the trial court erred by refusing to admit portions of Appellant's recorded statement to law enforcement a few hours after the shooting as a prior consistent statement pursuant to Rule 801(d)(1)(B), SCRE, to rebut the state's charge that Appellant had fabricated his account of events and was remorseful. Appellant also argued that the refusal to admit Defendant's Exhibit No. 108, Appellant's recorded statement, violated Appellant's

constitutional right to present a complete and full defense. R. 1248 – 1258. In support of his argument, Appellant asserted, "The State seized upon the [trial court's] error allowing Mr. Barnes [Appellant] to be questioned about rap lyrics, and accused Mr. Barnes of fabricating his account of what happened on the morning of the shooting. He [the assistant solicitor] also accused Mr. Barnes of faking the remorse he expressed on the stand while testifying, by referencing the rap lyrics. In addition to the use of the rap lyrics, the State used a lay witness, Kevin Archie, to argue that Mr. Barnes gave three different accounts of what occurred in his apartment on the morning of the shooting." R. 1248 – 1258.

Lastly, Appellant argued the prejudice of the trial court's error in refusing to admit Defendant's Exhibit No. 108 was demonstrated during sentencing when the trial court "mistakenly stated Mr. Barnes did not show remorse for the killing of Mr. Griffin. In fact, the prior consistent statements reflected a great deal of remorse for the killings of both Mr. Dash and Mr. Griffin." R. 1248 – 1258.

Standard of Review

"The admission or exclusion of evidence is an action within the sound discretion of the circuit court and will not be disturbed on appeal absent an abuse of discretion." State v. Tapp, 398 S.C. 376, 385, 728 S.E.2d 468, 473 (2012) (citing State v. Williams, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010)). "An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions." Id. (citing State v. Douglas, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006)).

Discussion

The trial court abused its discretion by refusing to admit Defendant's Exhibit No. 108, Appellant's prior consistent statement, pursuant to Rule 801(d)(1)(B), SCRE, to rebut the state's argument that Appellant had fabricated his account of events, and to counter the state's suggestion

Appellant manufactured remorse on the stand, particularly where the exclusion violated Appellant's constitutional right to present a complete defense.

Rule 801(d)(1)(B), SCRE, states: "(d) Statements Which Are Not Hearsay. A statement is not hearsay if (1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive; provided, however, the statement must have been made before the alleged fabrication, or before the alleged improper influence or motive arose."

"In order for a prior consistent statement to be admissible pursuant to Rule 801(d)(1)(B), the following elements must be present: (1) the declarant must testify and be subject to cross-examination, (2) the opposing party must have explicitly or implicitly accused the declarant of recently fabricating the statement or of acting under an improper influence or motive, (3) the statement must be consistent with the declarant's testimony, and (4) the statement must have been made prior to the alleged fabrication, or prior to the existence of the alleged improper influence or motive." State v. Winkler, 388 S.C. 574, 583, 698 S.E.2d 596, 601 (2010) (citing State v. Saltz, 346 S.C. 114, 121-22, 551 S.E.2d 240, 244 (2001)).

The video of Appellant in the interview room at the Columbia Police Department in which he emotionally recounts to his mother and a friend on the phone what occurred that morning, which was marked for identification as Defendant's Exhibit No. 108, should have been admitted pursuant to Rule 801(d)(1)(B) as a prior consistent statement "offered to rebut an express or implied charge against the declarant of recent fabrication" given that all four factors listed above were satisfied. During the assistant solicitor's cross-examination of Appellant, the solicitor repeatedly attacked Appellant's consistency about what he maintained occurred, his credibility, and his remorse for the killings. The solicitor also elicited testimony from other witnesses, such as Kevin Archie,

suggesting Appellant gave different accounts of what happened that morning. Accordingly, the trial court erred by failing to admit Defendant's Exhibit No. 108 as a prior consistent statement.

Moreover, the trial court's failure to admit Defendant's Exhibit No. 108 violated Appellant's constitutional right to present a complete defense. "The United States Constitution guarantees a criminal defendant the right 'to present a complete defense.'" State v. Burgess, 391 S.C. 15, 21, 703 S.E.2d 512, 515 (Ct. App. 2010) (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)). "This right is also guaranteed by our State constitution: 'Any person charged with an offense shall enjoy the right ... to be fully heard in his defense....'" Burgess, 391 S.C. at 21-22, 703 S.E.2d 512, 515-516 (quoting S.C. Const. art. I, § 14 (2009)); See S.C. Code Ann. § 17-2-60 (2003) ("Every person accused shall, at his trial, be allowed ... to produce witnesses and proofs in his favor...."); State v. Lyles, 379 S.C. 328, 341, 665 S.E.2d 201, 208 (Ct. App. 2008); See Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

Appellant's statements and emotional reaction recorded while he was in the interview room at the Columbia Police Department on the day of the killings was powerful evidence in support of his defense. The evidence established Appellant was remorseful for his actions that day and strengthened his credibility, which had been repeatedly attacked by the state throughout the trial. The trial court's arbitrary exclusion of this evidence violated Appellant's constitutional and statutory right to present a complete and full defense.

6.

The trial court erred by refusing to grant a new trial based on the cumulative effect of the trial errors.

Relevant Facts

In his written motion for a new trial, Appellant argued, "All issues raised pretrial, during trial, and in this motion, upon which the [trial court] did not rule for the defense or provide an adequate remedy have resulted in cumulative error and prejudice, the result of which requires a new

trial as the only remedy." R. 1248 – 1258. Appellant cited to the Sixth Amendment and Article 1, Section 14 of the South Carolina Constitution in support of his motion. R. 1248 – 1258. He asserted his right to a fair and impartial trial was violated due to the cumulative effect of the trial court's errors. R. 1248 – 1258. By order filed September 7, 2023, the trial court denied Appellant's motion for a new trial. The court stated it "fully considered the motion and the argument made therein." R. 1259.

Discussion

Each of the errors discussed above require reversal on their own. Alternatively, the cumulative effect of all of these errors deprived Appellant of a fair and impartial trial under the United States Constitution and the South Carolina Constitution and requires reversal of Appellant's convictions. U.S. Const. amend. VI; S.C. Const. art. 1, § 14.

"The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial." State v. Beekman, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013) (citing State v. Johnson, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999)); See State v. Gleaton, 444 S.C. 394, 429, 906 S.C.2d. 603, 648 (Ct. App. 2024). "An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground." Id. (citing Johnson, 334 S.C. at 93, 512 S.E.2d at 803).

The combination of errors in this case involving the admission of photographs of ammunition found in Appellant's apartment and evidence of Appellant's prior possession of unrelated firearms, the admission of Appellant's statements about selling marijuana, the admission of unfairly prejudicial rap lyrics, the exclusion of Appellant's prior consistent statement to rebut the charge of fabrication and demonstrate Appellant's remorse, and the incorrect and inadequate

instruction on the defense of habitation adversely affected Appellant's right to a fair trial qualifying for reversal.

In State v. Freeman, 319 S.C. 110, 123-24, 459 S.E.2d 867, 875 (Ct. App. 1995), this Court wrote:

> We are aware that every instance of trial error does not entitle an appellant to prevail on appeal. However, *the aggregation of errors may produce a cumulative effect of prejudice, where individually, the prejudice is insufficient to justify reversal.* In their totality, the cumulative effect of the lack of latitude allowed the defense in cross-examining the State's investigating officers along with the court's comments, unfairly prejudiced the defense and necessitates the convictions be set aside.

(emphasis added).

The aggregation of errors in the present case resulted in prejudice requiring reversal of Appellant's convictions.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court grant him immunity from prosecution pursuant to the Protection of Persons and Property Act. In the alternative, Appellant requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

Lara M. Caudy

Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR APPELLANT

This 29th day of April, 2025.

RECEIVED
Apr 29 2025
SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

April 29, 2025.

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANTONIO VASHON BARNES, JR.

APPELLANT

APPELLATE CASE NO. 2023-001390

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above referenced case has been served upon W. Joseph Maye, Esquire, at his primary email address listed in the Attorney Information System (AIS), this 29th day of April, 2025.

Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR APPELLANT

From: Mcinnis, Sara
To: jmaye@scag.gov
Cc: Donna D"Alessio; Caudy, Lara
Subject: 2023-001390 The State v. Antonio V. Barnes Jr. Final Brief of Appellant
Date: Tuesday, April 29, 2025 1:16:00 PM
Attachments: 2023-001390 The State v. Antonio V. Barnes Jr. Final Brief of Appellant.pdf

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Good Afternoon Mr. Maye,

Attached for service in the above-referenced case is the final brief of appellant, which will be filed with the Court of Appeals today, April 29, 2025, via email filing.

Respectfully,

Sara McInnis
Administrative Assistant
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