STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chesterfield County

J. Michael Baxley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

THOMAS STEWART,

APPELLANT

Appellate Case No. 2012-213655

INITIAL REPLY BRIEF OF APPELLANT

JARRETT O. COCO

Nelson Mullins Riley & Scarborough LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

ROBERT M. DUDEK

South Carolina Commission on Indigent Defense
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29201-1589
(803) 734-1330

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 2

I. THE STATE"S USE OF PEREMPTORY STRIKES VIOLATED BATSON. 2

A. Appellant timely raised his Batson objection at trial; thus, it is properly preserved and before this Court. 2

B. Appellant's request for a new trial is the proper remedy 4

C. Appellant carried his burden to prove that the State's proffered reasons were pretextual 5

II. THE STATE RELIES ON FOOTNOTE NINE OF BELCHER FOR THE PROPOSITION THAT THE STATE IS ENTITLED TO ARGUE IMPLIED MALICE FROM USE OF A DEADLY WEAPON TO THE JURY; HOWEVER, FOOTNOTE NINE ALSO ENTITLES DEFENDANT THE OPPORTUNITY to PRESENT HIS ARGUMENT TO THE JURY. THEREFORE, APPELLANT WAS ENTITLED TO BUT DENIED THE OPPORTUNITY TO REBUT THE STATE'S ARGUMENT REGARDING IMPLIED MALICE TO THE JURY 10

III. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO ENTER UNFAIRLY PREJUDICIAL CHARACTER EVIDENCE 12

A. The disputed portion of the video tape interview is not evidence of the victim's state of mind, but rather improper character evidence and evidence relating to a prior bad act under Rule 404. 12

B. The disputed portion of the tape and the arrest warrant for trespassing and the restraining order were not part of the res gestae of the case. 14

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Barnes v. Anderson, 202 F.3d 150 (2d Cir. 1999) 4, 5

Gary v. State, 760 So. 2d 743 (Miss. 2000) 10

Miller-El v. Dretke, 545 U.S. 231 (2005) 6, 9

Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989) 14

Pruitt v. State, 986 So. 2d 940 (Miss. 2008) 10

Snyder v. Louisiana, 552 U.S. 472 (2008) 9

Startzell v. City of Philadelphia, 533 F.3d 183 (3d Cir.2008) 6

State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) 14, 15

State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) 11

State v. Cochran, 369 S.C. 308, 631 S.E.2d 294 (Ct. App. 2006) 2

State v. Donaghy, 769 A.2d 10 (Vt. 2013) 4

State v. Dunbar, 356 S.C. 138, 587 S.E.2d 691 (2003) 3, 4

State v. Edwards, 384 S.C. 504, 682 S.E.2d 820 (2009) 5

State v. Ford, 334 S.C. 59, 512 S.E.2d 500 (1999) 2, 3

State v. Garcia, 334 S.C. 71, 512 S.E.2d 507 (1999) 13, 14

State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424 (Ct.App.1998) 15

State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014) 14

State v. Inman, __ S.C. __, 760 S.E.2d 105 (2014) 7, 8, 9

State v. Johnson, 333 S.C. 62, 508 S.E.2d 29 (1998) 2

State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999) 14, 15

State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) 15

State v. Scott, 406 S.C. 108 749 S.E.2d 160 (Ct. App. 2013) 6

State v. Scott, 829 N.W.2d 458 (S.D. 2013) 4, 6

State v. Smalls, 336 S.C. 301, 519 S.E.2d 793 (Ct. App. 1999) 2

State v. Smith, 309 S.C. 442, 424 S.E.2d 496 (1992) 15

State v. Weston, 367 S.C. 279, 625 S.E.2d 641 (2006) 13

State v. Williams, 379 S.C. 399, 665 S.E.2d 228 (Ct. App. 2008) 5

United States v. Barnette, 644 F.3d 192 (4th Cir. 2011) 7

Yancey v. State, 813 So. 2d 1 (Ala. Crim. App. 2001) 8

Rules

Rule 403, SCRE 15

Rule 404, SCRE 12, 13, 14

INTRODUCTION

The State responds that the trial court fully complied with its obligations under Batson and that Appellant failed to demonstrate pretext. The State further argues that should this Court find that the trial court failed to apply the third step in Batson, the proper remedy would be remand for a hearing, not new trial. Plainly put, the State used four of its five peremptory strikes to remove African American jurors and the Appellant offered three similarly situated white jurors who were not struck by the State. The trial court then summarily concluded that there was no pretext instead of conducting a careful analysis of whether the State's proffered reasons were applied neutrally. In its Initial Brief, the State spills pages of ink speculating as to possible reasons why the State might have not struck the similarly situated white jurors offered by the Appellant; however, this just goes to prove Appellant's point: such speculation would not be necessary had the trial court properly performed step three of the analysis because it would have been contained in the record. It will not suffice for the State to conjure up possible reasons now nearly two years after the fact. Therefore, as explained more fully below, because the trial record is devoid of specific findings, this Court should not afford deference to the trial court.

The State also argues that footnote nine in Belcher expressly permits the State to argue to the jury that malice can be inferred from use of a deadly weapon. If that is true, then footnote nine would also expressly permit a defendant to rebut that argument; however, the Appellant was denied the opportunity to respond to the State's implied malice argument.

Finally, the State argues that the three disputed pieces evidence were properly admitted because they go to the mental state of the Appellant and victim and they are part of the res gestae. However, the challenged portion of the taped interview is not evidence of the victim's state of mind; it is unfair character evidence and evidence of a prior act. The disputed evidence is not part of the res gestae because the evidence is not so intimately connected with or integral

to the events in the case such that admission would be necessary to provide a full presentation of the case. In addition, the probative value of the evidence is substantially outweighed by the unfair prejudice to the Appellant.

ARGUMENT

I. THE STATE"S USE OF PEREMPTORY STRIKES VIOLATED BATSON.

A. Appellant timely raised his Batson objection at trial; thus, it is properly preserved and before this Court.

The State argues in its Initial Brief that Appellant should be procedurally barred from arguing that the trial court failed to comply with the third step in the Batson analysis because Appellant "did not raise that same claim before Judge Baxley." State's Initial Brief at 11. However, as the record reflects, Appellant timely raised the issue.

"In order to raise and preserve a Batson issue, the opposing party must move for the hearing after the jury is selected but before it is sworn." State v. Cochran, 369 S.C. 308, 328, 631 S.E.2d 294, 305 (Ct. App. 2006). A Batson issue is properly preserved when "appellant clearly stated his position and the trial judge ruled on the issue, [and] [f]urther objection would have been useless and unnecessary . . . ." State v. Ford, 334 S.C. 59, 64, 512 S.E.2d 500, 503 (1999). See also State v. Smalls, 336 S.C. 301, 307, 519 S.E.2d 793, 796 (Ct. App. 1999) (citing Ford and finding the Batson issue preserved where the defendant failed to object to the composition of a second jury drawn immediately after the first was quashed on Batson grounds); State v. Johnson, 333 S.C. 62, 64, 508 S.E.2d 29, 30, n.1 (1998) (issue is preserved for review where a party's request to charge was denied on-the-record after an opportunity for discussion, and the party is not required to renew his request at the conclusion of the charge).

As the record reflects, the Appellant timely raised this issue to the trial court. First, there is no question that the Appellant properly raised the Batson issue. See R. at 96 lines13-15 (objecting on the grounds that "[t]he State exercised four [out of five] of it's [sic] peremptory strikes against African American jurors"). Appellant then addressed each of the four jurors struck by the State and presented similarly situated white jurors. Appellant clearly stated his position and the trial judge ruled on the issue, so further objections would have been useless and unnecessary. Ford, 334 S.C. at 64, 512 S.E.2d at 503.

The State claims that after the trial court ruled, "Appellant's only inquiry concerned an expansion of his claim that he learned another potential juror (#105) had evidence of a dismissed charge of ad checks and simple assault." State's Initial Brief at 11. However, the State's misconstrues the testimony. A fair reading of the transcript reveals that Appellant was trying to ensure that the record was complete and preserved with regard to his Batson motion by clarifying details regarding the prior arrests of the similarly situated jurors. (R. at 106-107). Mr. Young, counsel for Appellant, stated "I understand the Court's ruling and I just want to make sure that my records are complete." Tr. at 106:14-15. Mr. Young then went on to clarify the prior arrests of Jurors 131 and 105, who were the jurors that were offered as similarly situated to Juror 101. Mr. Young then clarified information relating to Juror 33; specifically that Juror 33 had a "contentious relationship with his wife." Tr. at 107:9-13. Mr. Young was clearly trying to preserve the Batson objection and ensure the record was clear relating to the similarly-situated jurors.

To support its claim, the State cites State v. Dunbar for the proposition that "a party may not argue one ground at trial and an alternate ground on appeal." 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). This does not apply here—no party is making inconsistent arguments.

However, Dunbar is instructional not for the proposition cited by the State, but for the proposition that "a party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." Id. There is no question that Appellant timely presented his Batson challenge, and it was ruled upon by the trial court; therefore, the issue is preserved for appellate review. Id.

B. Appellant's request for a new trial is the proper remedy

The State also argues that if this Court finds that trial judge failed to complete its Batson-mandated analysis, the appropriate remedy would be to remand to the trial court for a special finding and not grant a new trial. The State acknowledges that this case cannot be remanded back to Judge Baxley because he has since left the bench. However, the State nevertheless urges this Court to remand the case to another judge for a hearing, and a new trial should be ordered only if that judge finds that there is insufficient evidence. State's Initial Brief at 12, n. 5.

However, this is not a practical remedy. Even the State acknowledges the "practical difficulties" that this remedy would present and cites case law from foreign jurisdictions. However, the case law cited by the State recognizes that this remedy is not appropriate if Appellant has shown a prima facie case of discrimination or if the passage of time is such that it would make remand for a hearing impossible. See State v. Donaghy, 769 A.2d 10 (Vt. 2013); State v. Scott, 829 N.W.2d 458, 467 (S.D. 2013). Here, Appellant has made out a prima facie case for discrimination, see supra, § I.C., nearly two years have passed since the trial,[1] and the presiding judge is no longer available. See Barnes v. Anderson, 202 F.3d 150, 157 (2d Cir. 1999) (ordering a new trial where the trial judge was unavailable). Charging the lower court

[1] It is likely that by the time this Court issues its decision, over two years will have passed since the trial.

with the task of determining the mind set and thought processes of the prosecution and the trial judge from years earlier and in the absence of the presiding trial judge is not likely a practical solution.

In addition, the case law in South Carolina weighs in favor of a new trial and not remand for a Batson hearing. For example, in State v. Edwards, , the South Carolina Supreme Court ordered a new trial after determining that the reasons proffered by the defendant were in fact race neutral and the record did not contain evidence that the prosecution demonstrated that the proffered reasons were pretextual. 384 S.C. 504, 510-11, 682 S.E.2d 820, 823 (2009). See also State v. Williams, 379 S.C. 399, 403, 665 S.E.2d 228, 230 (Ct. App. 2008) (finding that the proper remedy is a new trial where the defendant's proffered reason was in fact race-neutral and the record did not show that the prosecution established pretext). If one follows the State's reasoning, the proper remedy for these cases should have been remand for a hearing, not a new trial. In fact, the State does not cite any South Carolina case law to support its argument that the proper remedy under the facts of this case is to remand for a Batson hearing, particularly where the trial judge is now unavailable. Under the facts of this case, it is unlikely that "further proceedings would . . . shed reliable light upon the voir dire" because, practically speaking, there would be significant difficulty recalling the circumstances of the jury selection due to the passage of time and the unavailability of the trial judge. Anderson, 202 F.3d at 157. Therefore, the proper remedy is to grant Appellant a new trial.

C. Appellant carried his burden to prove that the State's proffered reasons were pretextual.

The State argues that Appellant failed to carry his burden to show pretext because the white jurors offered by Appellant were not "similar." State's Initial Brief at 23. The State goes through great pains to speculate as to why the prosecution may not have struck the similarly

situated white jurors offered by the Appellant. For example, the prosecution struck juror 101 because he had a prior arrest. Appellant then offered Juror 131 as a white juror who also had a prior arrest. The State argues for the first time in its Initial Brief that Juror 131 had a son in law who was in law enforcement, so perhaps that is why the prosecution did not strike Juror 131. However, as held by the Supreme Court of the United States, a similarly situated juror does not have to be identical. Miller-El v. Dretke, 545 U.S. 231, 247, n.6 (2005) ("None of our cases announces a rule that no comparison is probative unless the situation of the individuals compared is identical in all respects, and there is no reason to accept one. . . . A per se rule that a defendant cannot win a Batson claim unless there is an exactly identical white juror would leave Batson inoperable; potential jurors are not products of a set of cookie cutters.") (emphasis added). See also State v. Scott, 406 S.C. 108, 115, 749 S.E.2d 160, 164 (Ct. App. 2013), reh'g denied (June 16, 2014) (quoting Miller-El, and noting that potential jurors are not required to be "identical in all respects."). After all, they are called similarly-situated jurors, not identically-situated jurors. Thus, to succeed in his Batson motion under Miller-El, Appellant is not required to present a white juror exactly identical in every respect except for race. "Rather, the potential jurors need only be alike 'in all relevant aspects.'" Id. (quoting Startzell v. City of Philadelphia, 533 F.3d 183, 203 (3d Cir.2008). "All relevant aspects" means those facially neutral reasons given by the State for striking; or, in the case of Jurors 101 and 131, the fact that they both had prior arrests.

"All relevant aspects" does not mean speculation. There is nothing in the record to support the supposition that the occupation of Juror 131's son-in-law was in the contemplation of either the prosecution or the trial judge. Miller-El, 545 U.S. at 252 ("A Batson challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can

imagine a reason that might not have been shown up as false."). See also United States v. Barnette, 644 F.3d 192, 205 (4th Cir. 2011) (quoting Miller-El and finding that a Batson challenge must stand on the prosecution's stated reasons). This is exactly the type of information that could have been borne out on the record and weighed by the trial court if it had properly conducted the third step of the Batson analysis. After having the luxury of time to research and reflect, the State cannot now profit from the trial court's failure to conduct a proper step three inquiry by "thinking up" possible reasons that the prosecutor may not have struck a similarly situated juror almost two years after the fact.

The State also argues that Appellant has abandoned any argument relating to the strike of Juror 126 because "it was not argued in his brief." State's Initial Brief at 21. However, Appellant does not abandon any argument regarding Juror 126 and although Appellant did not offer a white juror similarly situated to Juror 126, Appellant's brief does in fact contain argument that relies on Juror 126. See Initial Brief of Appellant at 4-5 (noting that four out of five of the State's peremptory strikes were used against African American jurors, discussing the composition of the impaneled jury, and discussing proffered reasons for each of the struck jurors). Therefore, this Court is entitled to consider whether the State struck Juror 126 because of her "disinterested demeanor," or if that reason proffered by the State was contrived in light of the totality of the circumstances. The State's strike of Juror 126 is significant because Juror 126 was one of the four African American jurors struck by the State and this Court can look to circumstantial evidence of racial discrimination. State v. Inman, __ S.C. __, 760 S.E.2d 105, 109, n.6 (2014), reh'g denied (July 24, 2014) ("The party asserting the Batson challenge may also point to circumstantial evidence of racial discrimination, such as a 'pattern' of strikes against jurors of a particular race, particularly when the number of strikes exercised against that race is

disproportionate to the race's representation among the jury pool.").[2] In this case, the jury pool was 31% African American. See Jury Rollcall List for Panel (showing that 47 out of 150 panel members were African American). Yet, the State used four out of five of its strikes (or 80% of its strikes) against African Americans who, as a group, comprised only 31% of the jury pool. Therefore, the number of strikes used by the State against African American jurors is heavily disproportionate to the representation of African Americans in the jury pool. Again, this is significant when one considers that only two members of the twelve member jury (16%) were African American (Jurors 95 and 59), and were presented by the State only after the State had already used four of its five peremptory strikes, and the State used its final strike on an African American. See Initial Brief of Appellant at 4; R. 88 lines 19-25. Therefore, the composition of the jury was also disproportionate to the jury pool and under Inman can be considered by this Court as circumstantial evidence of discrimination.

The State may argue that the South Carolina Supreme Court in Inman states that such "statistical evidence, standing alone, is not sufficient to establish purposeful discrimination. Rather, the statistical evidence must be paired with some other evidence of discrimination, such as direct evidence of other jurors being struck for pretextual reasons." Inman, __ S.C. __, 760 S.E.2d 105, 109, n.6 (citations omitted). However, Appellant has offered evidence of pretext as argued above, in his Initial Brief, and at trial, in the form of similarly situated white jurors. Moreover, the Inman Court cited a case called Yancey v. State for the proposition that "the State's use of twelve of its fifteen strikes to strike black jurors, when paired with other direct evidence of discrimination, demonstrated that the trial court's rejection of a Batson challenge was clear error." Id. (citing Yancey v. State, 813 So. 2d 1, 8 (Ala. Crim. App. 2001). The

[2] State v. Inman decided June 18, 2014, which was after Appellant filed his Initial Brief on February 3, 2014.

"direct evidence of discrimination" in Yancey was demonstrated by the defendant in the form of similarly situated white jurors, just as was done here. Also, in Yancey, the prosecution used twelve out of fifteen strikes to eliminate African American jurors, which, when reduced to its common denominator, equals four out of five (or 80%)—the same amount in this case. Id.

Inman also reinforces the importance of the third step in Batson and requires (not encourages) the trial court undertake a careful analysis in step three to evaluate whether the facially race-neutral reasons were actually applied neutrally. Inman, __ S.C. __, 760 S.E.2d at 109. (noting that "step three of the [Batson] analysis requires the court to carefully evaluate whether the party asserting the Batson challenge has proven racial discrimination," and the party asserting the Batson challenge should show "that the opponent struck a juror for a facially neutral reason but did not strike a similarly-situated juror of another race.") (emphasis added). As discussed more fully in Appellant's Initial Brief at 7, the trial court failed to undertake such an analysis, and instead summarily concluded that each of the facially-neutral reasons proffered by the State had been found to be "permissible" in previous cases. R. 104 line 9 – R. 105 line 16. In so doing, the trial court fulfilled its duty under step 2 of Batson by finding that the reasons were facially neutral; however, the court still had an obligation to evaluate how those reasons were applied by the prosecution.

Appellant agrees that a trial court does not "need [to] make detailed findings addressing all the evidence before it," Miller-El, 537 U.S. at 347; however, contrary to the assertions of the State, a trial court does need to make some factual findings regarding the race-neutral reasons given for each strike. The United States Supreme Court has stated that an appellate court should not defer to the trial court if it did not make "specific finding[s] on the record" regarding each of the prosecutor's explanations for its strikes. See Snyder v. Louisiana, 552 U.S. 472, 479 (2008)

("[D]eference is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike. Here, however, the record does not show that the trial judge actually made a determination concerning Mr. Brooks' demeanor. The trial judge was given two explanations for the strike. Rather than making a specific finding on the record concerning Mr. Brooks' demeanor, the trial judge simply allowed the challenge without explanation."); see also Gary v. State, 760 So. 2d 743, 748 (Miss. 2000) ("Mere broad conclusions at the end of the Batson process will not suffice."); Pruitt v. State, 986 So. 2d 940, 949 (Miss. 2008) (dissenting, J. Diaz) (quoting Snyder for proposition that an appellate court should not defer to the trial court if it did not make specific findings on the record).

In this case, the trial court simply did not make any findings of fact. The State looks to the following conclusory sentence in the record as evidence that the trial court fulfilled its obligations under step three: "Also, I do not find that there is a pattern here of jurors being treated distinctly and separately among the races, one decision for one and another decision for another." State's Initial Brief at 14, citing R. 105 lines 10-14. This is simply ipse dixit. Therefore, this Court should not afford the trial court deference in this case because the record is devoid of specific findings regarding the State's explanations for its strikes. Accordingly, Appellant respectfully requests this Court to reverse the decision of the lower court and remand for a new trial.

II. THE STATE RELIES ON FOOTNOTE NINE OF BELCHER FOR THE PROPOSITION THAT THE STATE IS ENTITLED TO ARGUE IMPLIED MALICE FROM USE OF A DEADLY WEAPON TO THE JURY; HOWEVER, FOOTNOTE NINE ALSO ENTITLES DEFENDANT THE OPPORTUNITY TO PRESENT HIS ARGUMENT TO THE JURY. THEREFORE, APPELLANT WAS ENTITLED TO BUT DENIED THE OPPORTUNITY TO REBUT THE STATE'S ARGUMENT REGARDING IMPLIED MALICE TO THE JURY.

The State argues that Belcher expressly allows the prosecution to argue that malice can be inferred from use of a deadly weapon. The State looks to footnote nine in Belcher which states that "we neither restrict the State from arguing to the jury for a finding of malice from the use of a deadly weapon, nor restrict a defendant from arguing the absence of malice or the presence of reasonable doubt in this regard." State v. Belcher, 385 S.C. 597, 612, 685 S.E.2d 802, 810, n. 9 (2009) (emphasis added). However, Appellant was in fact restricted from "argu[ing] the absence of malice or the presence of reasonable doubt" because Appellant was required to make his closing remarks first which denied Appellant the opportunity address the State's remarks to the jury. R. 625 line 22 – R. 626 line 1; Initial Brief of Appellant at 16 (item (5)).

At the time of Appellant's closing remarks, he could not have known that the State would argue inferred malice from use of a deadly weapon and therefore could not preempt the State's argument. Appellant timely objected when the State argued for the first time in its closing argument that malice could be inferred from use of a deadly weapon, and the trial court overruled. R. 658 lines 3-4. Out of the presence of the jury, the court acknowledged Appellant's objection but noted that the court did not instruct the jury on implied malice by use of a deadly weapon, "but that doesn't change the factual inference that I believe the State is entitled to argue. Your objection, of course, is preserved, but the Court determine [sic] not to stop the arguments and consider it further or discuss it on the record." R. 673 lines 2-7. Thus, there was little more that Appellant could have done to preserve this argument or to address the jury with his side of the implied malice argument because the trial court assured Appellant that his objection was preserved, and that the court was not inclined to "consider it further or discuss it on the record."

In addition, and as Appellant argued more fully in his Initial Brief at 16, the prejudice to the Appellant is particularly acute because of the context in which the State presented its argument. The State was quoting from the trial court's instructions and then immediately followed with the implied malice argument, which likely suggested to the jury that it was quoting from or endorsed by the trial court. In addition, the trial court failed to provide a curative instruction which likely suggested affirmation of the State's closing remarks by the trial court.[3] The State's response was that "learned defense counsel" would have "not made an objection." State's Initial Brief at 31. However, Appellant stands by his objection and his argument that footnote nine in Belcher is based on parity; thus, if one party argues implied malice, then the other should have an opportunity to be heard.[4] Therefore, Appellant was entitled to but denied the opportunity to present his side of the implied malice argument to the jury.

III. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO ENTER UNFAIRLY PREJUDICIAL CHARACTER EVIDENCE

A. The disputed portion of the video tape interview is not evidence of the victim's state of mind, but rather improper character evidence and evidence relating to a prior bad act under Rule 404.

Despite the State's assertions to the contrary, evidence the Appellant "used to beat [the victim] up" is not evidence of the victim's state of mind, it is character evidence and evidence of a prior act under Rule 404, SCRE. This is not hearsay evidence that revealed that the victim was afraid of Appellant and thus would clearly be probative of the victim's state of mind. The cases

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[3] The trial court did, however, provide what it deemed to be a curative instruction with regard to the State's remark that "Thomas Stewart doesn't deserve anything," R. 668 line 11 – R. 669 line 4; R. 672 lines 16-18, but declined to provide any curative instruction on the State's implied malice remark.

[4] For example, once the State made the argument that malice could be implied by use of a deadly weapon, Appellant, if given the opportunity, would have argued that the victim was also armed with a knife and if malice can be inferred from the defendant's use of the knife, then it can also be inferred from the victim's use of a deadly weapon.

that the State relies on (again, all from foreign jurisdictions), all relate to the hearsay exception for state of mind. Hearsay is different from this situation because in hearsay cases, the evidence in question involves a witness repeating something the victim said, typically a statement that indicates that the victim feared the defendant. There is no hearsay issue here and the State does not know the victim's state of mind but speculates that Appellant's statement that he "used to beat [the victim] up" meant that the victim feared Appellant. Under such logic, any character evidence or prior bad act under Rule 404 would be admissible if a party could come up with a plausible reason that it might affect the victim's state of mind.

The law in South Carolina weighs in favor of excluding this from evidence. In State v. Garcia, the South Carolina Supreme Court found that although a victim's state of mind was relevant where it was used to disprove the appellant's contention that the shooting was an accident, the exception does not permit evidence that "reveals the reason for [the victim's] state of mind (i.e., evidence that [the defendant] "had kicked and threatened to kill her)." 334 S.C. 71, 76, 512 S.E.2d 507, 509 (1999) (emphasis added). The Supreme Court discussed at length that the hearsay state of mind exception does not permit the witness to relate any of the declarant's statements as to why he held the particular state of mind. "If the reservation in the text of the rule is to have any effect, it must be understood to narrowly limit those admissible statements to declarations of condition—'I'm scared'—and not belief—'I'm scared because [someone] threatened me'.") Id. quoting United States v. Cohen, 631 F.2d 1223, 1225 (5th Cir.1980). See also State v. Weston, 367 S.C. 279, 287, 625 S.E.2d 641, 646 (2006) (finding that the testimony was properly admitted under Garcia because it did not give the reason for the victim's fear, rather the testimony only reflected that the victim was afraid of the defendant.).

Understanding that there are no hearsay issues here, Garcia is applicable nevertheless because it demonstrates that evidence of a victim's state of mind should not include the "why" or the "reason" for the purported state of mind. Here, the State intends to introduce Appellant's statement that he "used to beat [the victim] up" as the "why" or the "reason" for the victim's purported state of mind.

B. The disputed portion of the tape and the arrest warrant for trespassing and the restraining order were not part of the res gestae of the case.

The State also argues that the disputed portion of the tape as well as the arrest warrant for trespassing and the restraining order were admissible as part of the res gestae of the case. Under the res gestae doctrine, evidence of other crimes is admissible

> when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae' " or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ...' [and is thus] part of the res gestae of the crime charged." And where evidence is admissible to provide this "full presentation" of the offense, "[t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "res gestae."

State v. King, 334 S.C. 504, 512-13, 514 S.E.2d 578, 582-83 (1999) (quoting State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 371 (1996) overruled on other grounds by State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014). In a criminal case, the State cannot attack the character of the defendant unless the defendant himself first places his character in issue. Rule 404(a), SCRE. Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989). Further, evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad person. King, 334 S.C. at 512, 514 S.E.2d at 582. South Carolina law precludes evidence of a defendant's

prior crimes or other bad acts to prove the defendant's guilt for the crime charged except to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator. Rule 404(b), SCRE; Adams, 322 S.C. 114, 470 S.E.2d 366; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). The evidence of the prior bad acts must be clear and convincing to be admissible. The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused. Adams, 322 S.C. 114, 470 S.E.2d 366; State v. Smith, 309 S.C. 442, 424 S.E.2d 496 (1992); State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424 (Ct.App.1998). Further, even though the evidence is clear and convincing and 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. Rule 403, SCRE; King, 334 S.C. at 512, 514 S.E.2d at 582.

The State argues that the "evidence supported the bigger and more accurate picture" because it was probative of the Appellant and victim's state of mind. State's Initial Brief at 49. While it is true that the disputed portion of the tape, the arrest warrant, and the restraining order are related to the charges and may provide context, contrary to the assertions of the State, the evidence is not so intimately connected with or integral to the events in the case such that admission would be necessary to provide a full presentation of the case. In addition, the probative value of the evidence is substantially outweighed by the unfair prejudice to the Appellant. Appellant does not dispute that there is some probative value to the evidence; however, the arrest warrant and restraining order were circumstantial evidence of bad acts of the Appellant, and it is noteworthy that these were not convictions. Admittedly, the arrest warrant and restraining order may be probative for the victim's state of mind; however, as discussed above, the disputed portion of the taped interview does not reveal the state of mind of the victim

without also revealing the "why" or the "reason" for the victim's state of mind and is therefore not properly admissible. However, all the evidence is extremely prejudicial to the Appellant because it allows the jury judge the Appellant based on extrapolation and violates the policies that underpin the rule against character evidence and prior acts. See Initial Brief of Appellant at 21-22. Therefore, the probative value of the evidence is outweighed by its prejudice to the Appellant.

CONCLUSION

Consistent with the foregoing, Appellant respectfully requests this Court to reverse the decision of the lower court and remand for a new trial.

Respectfully Submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

Jarrett O. Coco
SC Bar No. 100577
E-Mail: jarrett.coco@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE
Robert M. Dudek
E-Mail: RDudek@sccid.sc.gov
1330 Lady Street, Suite 401
PO Box 11589
Columbia, SC 29201-1589
(803) 734-1330

Attorneys for Appellant Thomas Stewart

This 12th day of September, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chesterfield County

J. Michael Baxley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

THOMAS STEWART,

APPELLANT

Appellate Case No. 2012-213655

CERTIFICATE OF SERVICE

The undersigned attorney hereby certified that a true copy of the Initial Reply Brief of Appellant in the above referenced case have been served upon Donald J. Zelenka, Esquire, State of South Carolina, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, South Carolina 29201, this 12th day of September, 2014.

By: _____
Jarrett O. Coco
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of September, 2014.

_____ (L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.