THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

TONYA MCALHANEY,

APPELLANT

APPELLATE CASE NO. 2014-000255

Appeal from Hampton County

Brooks P. Goldsmith, Circuit Court Judge

Opinion No. 2015-UP-564

PETITION FOR REHEARING

On December 23, 2015, this Court affirmed Appellant's conviction and sentence in an unpublished opinion. State v. McAlhaney, Op. No. 2015-UP-564 (S.C. Ct. App. filed Dec. 23, 2015). Pursuant to Rules 221(a) and 240, SCACR, Appellant respectfully requests this Court to rehear the matter based upon the following points that may have been overlooked or misapprehended in the summary opinion.

This Court affirmed the trial court's ruling that the evidence of Appellant's November 24, 2013 burglary was admissible in her trial for the November 23, 2013 burglary and based its holding on the *res gestae* theory. This Court also concluded that the November 24, 2013 burglary was a

subsequent bad act which "was admissible to show the defendant's intent" during commission of the charged crime."

The November 24, 2013 burglary was not "so intimately connected with" the November 23, 2013 burglary that its "admission [was] necessary for a full presentation of the case" against Appellant under *res gestae*. Anderson v. State, 354 S.C. 431, 435, 581 S.E.2d 834, 836 (2003). This Court may have overlooked the fact that Appellant's codefendant, Ricky Sauls, testified against Appellant on behalf of the State. Sauls testified that on November 23, 2014, he and Appellant called Larry Crosby to take them to the CVS in the town of Varnville, South Carolina. R. 156, lines 17 – 23. On the way back, Crosby stopped by 108 Plywood Street to look at a truck that he was supposed to buy from Amanda Brown who resided there. R. 157, lines 1 – 5. Crosby told Sauls and Appellant that he had helped Brown move out of the house and that there were pills inside. R. 157, lines 6 – 9.

Sauls stated that he had been drinking that night but remembered that he, Appellant, and Hair all went inside of the house. R. 158, line 3. He admitted to taking knives and liquor but could not remember whether Appellant took anything. R. 159 – 161. They had been inside the house for ten minutes. R. 165, lines 5 – 7. When they were ready to leave, Sauls called Crosby to come pick them up. R. 165, lines 13 – 23. Sauls explained that it was Crosby's idea for them to go into the house because pills were in there. R. 166, lines 2 – 23. Sauls did not see Appellant come out with pills, however. R. 166, line 25.

Because of this detailed testimony from Appellant's codefendant, the November 23, 2013 burglary could be fully shown **without admitting any evidence of the November 24, 2013 burglary**. Nor is the November 24, 2013 burglary so intimately connected with and explanatory of the November 23, 2013 burglary, for which Appellant was on trial." See State v. McGee, 408 S.C.

278, 287, 758 S.E.2d 730, 735 (Ct. App. 2014) ("One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence furnished **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.")(emphasis added).

"Nonetheless, evidence considered for admission under the *res gestae* theory must satisfy the requirements of Rule 403 of the South Carolina Rules of Evidence." State v. Dennis, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013). Under Rule 403, SCRE, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time or needless presentation of cumulative evidence. Hearing that Appellant was arrested inside of the same house for which she was on trial for burglarizing, **without a limiting instruction from the judge**, allowed the jury to make the impermissible inference that because Appellant committed the burglary on November 24th, she committed the burglary on November 23rd. Because this evidence was admitted, Appellant was unfairly prejudiced.

Citing State v. Benjamin, 345 S.C. 470, 479-80, 549 S.E.2d 258, 263 (2001), this Court wrote that "evidence of a defendant's subsequent bad act was admissible to show the defendant's intent during the commission of the charged crime." The subsequent bad act in Benjamin was the armed robbery of a convenience store. Id. The weapon recovered from the convenience store was the same weapon used in a robbery and murder which occurred "several hours" earlier at another convenience store. Id.

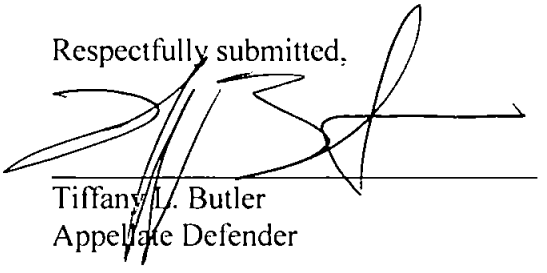
At trial, Benjamin asserted the defense of duress, arguing that he feared his codefendant would harm him if he did not participate in the robberies. Id. at 479, 549 S.E.2d at 263. The State presented testimony of the store clerk from the subsequent robbery. The clerk identified Benjamin

as one of the robbers who screamed at her when she tried to run away. Id. The Supreme Court found that testimony concerning the subsequent robbery was properly admitted to demonstrate Benjamin's intent to commit the earlier robbery, which was inconsistent with his defense of duress. Id. at 479-80, 549 S.E.2d at 263.

Appellant's case is readily distinguishable from Benjamin as she did not assert the defense of duress. Further, Appellant held the State to its burden of proof and did not testify.

For the reasons argued above, Appellant respectfully requests this Court to rehear this matter based upon the points that may have been overlooked or misapprehended concerning the admissibility of the November 24, 2013 burglary under the *res gestae* theory and as a subsequent bad act to show Appellant's intent to commit the burglary on November 23, 2013.

Respectfully submitted,



Tiffany L. Butler
Appellate Defender

This 7th day of January, 2016.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Ms. Tonya Mcalhaney #358721, at Leath Correctional Institution, 2809 Airport Road, Greenwood, SC 29649, this 7th day of January, 2016.

Tiffany L. Butler
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 7th day
of January, 2016.

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