STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County
R. Knox McMahon, Circuit Court Judge

THE STATE,

Respondent,

vs.

MARVIN BROCK JOHNSON,

Appellant.

Appellate Case No. 2014-002435

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 2

ARGUMENTS

I. The trial court did not abuse its discretion in refusing to accept a plea with no negotiations or recommendations under North Carolina v. Alford, and the issue is not preserved for review. Further, Appellant was not prejudiced by the trial court's ruling because Appellant was not punished for going to trial 7

II. The trial court did not err in declining to require the State to disclose the identity of the confidential informant because the confidential informant was a mere tipster and not a participant in the crime 15

CONCLUSION 26

TABLE OF AUTHORITIES

Cases:

Davis v. State, 336 S.C. 329, 520 S.E.2d 801 (1999) 13

Jackson v. Speed, 326 S.C. 289, 306 S.E.2d 750 (1997) 9

Lindsay v. Lindsay, 328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997) 9

North Carolina v. Alford, 400 U.S. 25 (1970) ..... passim

Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999) 7

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State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) 21

State v. Aiken, 322 S.C. 177, 470 S.E.2d 404(1996) 19, 20

State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991) 23

State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000) 16, 23

State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990) 24

State v. Fletcher, 379 S.C. 17, 664 S.E.2d. 480 (2008) 16

State v. Ford, 334 S.C. 444, 513 S.E.2d 385 (Ct. App. 1999) 17, 19, 21, 22

State v. Gore, 299 S.C. 368, 384 S.E.2d 750 (1989) 21

State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999) 16, 23

State v. King, 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002) 15, 16

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State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985) 25

State v. Morris, 307 S.C. 480, 415 S.E.2d 819 (Ct. App. 1992) 9

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State v. Rosier, 312 S.C. 145, 439 S.E.2d 307 (Ct. App. 1993).....7

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State v. Sosebee, 284 S.C. 411, 326 S.E.2d 654 (1985).....8

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Rule 403, SCRE 23

Rule 404, SCRE 15, 18

STATEMENT OF ISSUES ON APPEAL

I.

The trial court did not abuse its discretion in refusing to accept a plea with no negotiations or recommendations under North Carolina v. Alford, and the issue is not preserved for review. Further, Appellant was not prejudiced by the trial court's ruling because Appellant was not punished for going to trial.

II.

The trial court did not err in admitting Appellant's prior bad acts because the bad acts are sufficiently similar to show a common scheme or plan and are also probative of Appellant's intent. The probative value of the evidence did not outweigh the danger of unfair prejudice. Further, the trial court did not err in finding evidence of these prior bad acts was clear and convincing (Appellant's Issues II and III).

STATEMENT OF THE CASE

The Aiken County Grand Jury indicted Appellant Marvin Brock Johnson for shoplifting, third offense. A jury found Johnson guilty of the charge at the conclusion of trial on November 4, 2014. The presiding judge, the Honorable R. Knox McMahon, sentenced Johnson to six years imprisonment.

STATEMENT OF FACTS

Patsy Singletary is employed with Belk as the Department Manager for Loss Prevention at Belk's North Augusta store. She has law enforcement experience as a police officer in Georgia and as a deputy at the Richland County Sheriff's Office. At the time of trial, she worked for Belk in loss prevention for eighteen months. ROA. pp. 62-63. Singletary underwent the company's six week loss prevention training. Under company policy, there is a five-step process for determining if a Loss Prevention Officer will intervene in a suspected shoplifting, described by Singletary as follows:

> The first step is you have to see the subject enter. The second is you have to see them select the merchandise. The third is conceal the merchandise. The fourth is pass all points of sales without rendering payment for the merchandise. And the fifth step is to exit.[1]

ROA. p. 64, lines 6-11.

On May 24, 2014, Singletary was in the Loss Prevention Office and observed Johnson in the store on closed circuit television. Johnson removed items of clothing from the rack in the Chaps/Polo area of the store and stuffed the clothes into an army duffel bag.

[1] Johnson further elaborated on redirect examination that the fifth step term exit includes "the exit door where there's no cash registers that's around, which means you pass all points of sales and you're exiting

Singletary contacted law enforcement and left the office for the sales floor as Johnson was headed for an exit. Johnson's back was on the door when Singletary intercepted him. ROA. p. 68-69. Johnson removed the clothes from the bag and left them in a pile on the floor; still holding the bag, Johnson proclaimed, "I'm not caught yet." ROA. p. 69, line 16 – p. 70, line 3.

Johnson was in the store the two previous Saturdays: on May 10 and May 17, each time around the same time of day, Singletary, watching on closed circuit television, observed Johnson in the same area of the store concealing merchandise. Each time, Johnson made it out of the store before Singletary could reach the exit.[2] ROA. p. 70. On May 10, Johnson used a purple laundry bag to conceal the clothes. On May 17, Rebecca Powell, an off-duty store employee, notified Singletary about Johnson. ROA. p. 71. All three times, Johnson parked a green van, backed into the parking space, with the driver side door facing the store entrance. ROA. p. 71-72. Johnson admitted to Singletary, "he did it the first two times and this time he dumped the stuff . . ." ROA. p. 95, lines 6-9.

Johnson's conduct was captured on closed circuit television, and Singletary watched it with North Augusta Police Officer Terry. ROA. p. 101. Unfortunately, when Singletary attempted to record Johnson's activity on a compact disc for Officer Terry, he accidently recorded a later period of time. Law enforcement did not realize their copy of the video did not capture Johnson's conduct until just prior to trial, and the store's video surveillance was erased long before then. ROA. pp. 80-81.

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out of the building." ROA. p. 101, lines 9-11.

[2] Singletary explained, "Mr. Johnson is fast. He doesn't play. He comes in, he conceals, he leaves quickly.

Powell testified she was a seven-year employee at Belk. She previously was a Loss Prevention Officer at the Aiken store, but was working in Human Resources at the North Augusta store at the time of Johnson's shoplifting spree. ROA. pp. 104-105. On May 17, she finished work and was doing some shopping with her husband while she was off duty. She saw a man she identified in court as Johnson acting suspiciously in the men's department. She texted Singletary about what she observed. She described what she meant by suspicious activity: "We're trained to look for behaviors, selecting merchandise with disregard for color, for size, for price, just random selections, multiple selections without even paying any, there's total disregard for what you're selecting." ROA. p. 106, lines 11-15. That was what she saw that day in Belk. ROA. p. 106, lines 16-19.

Maura Castens is also trained in loss prevention. On May 24, Singletary called Castens and told her she had a "fish." That is a code name for a shoplifter. Castens observed Singletary and Johnson, with Officer Terry approaching from behind. ROA. pp. 108-1110. She followed them to the Loss Prevention Office. After taking Johnson's basic information, Singletary asked Johnson and Castens to leave the room while Officer Terry and Singletary watched the store video. ROA. p. 110, lines 10-21.

Castens escorted Johnson to the Human Resources Office. While sitting in the office they started talking. Castens testified as follows about the conversation:

> [W]e're just . . . talking about making bad decisions and I said, you know, Don't you see the video cameras and stuff when you walk in department stores; you don't think someone might be watching you; Yeah; and I'm like well, why did you do it; You got to do what you got to do sometimes, he said, to

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I wasn't able to catch him the first two times." ROA. p. 87, lines 8-10.

make ends meet.

ROA. p. 111, lines 1-8. Castens talked with Johnson some more:

> And we talked about his truck and I asked him why he backed in all the time and he said where he could just pull out and go. And typically our policy is to immediately have the vehicle towed. I was feeling compassionate because I wasn't sure if he shared that car with somebody so we didn't immediately have it impounded. We let it stay in case he needed to have somebody come over and pick it up.

ROA. p. 111, lines 18-25.

Officer Terry was notified Belk apprehended a shoplifter, and he responded to the store. Officer Terry went to the Loss Prevention Office where Johnson and the Loss Prevention people were present. Officer Terry watched the surveillance after Johnson was escorted out of the room. Officer Terry took the copy Singletary made him and took Johnson in custody. Unfortunately, prior to trial, he reviewed the CD copy of the store video and saw it was not what he saw at the store. ROA. pp. 116-118. On cross-examination, Officer Terry described what he saw when he reviewed the surveillance at the store:

> I watched the in-store video surveillance footage, observed subject Johnson to kneel down on the floor, take clothing items from the shelves and conceal them inside of a camouflage bag, head towards the front of the store where he was stopped by complainant Singletary after he had removed the clothing items and attempted to leave the store.

ROA. p. 125, line 20 – p. 126, line 2.

Johnson testified on his own behalf. Johnson admitting backing up his van at Belk, and he admitted he went into Belk with a tote bag. Johnson said he had his checkbook, some underwear, and a "rack" of air fresheners in the tote bag. ROA. pp. 129-130. Johnson

testified he picked up some clothes, put them back down, and went to the store exit where he was met by Singletary. He went with Singletary to an office because she wanted him to sign something promising to not come back to the store for five years. ROA. pp. 130-131. Instead, he was arrested for shoplifting. ROA. p. 133. Johnson, several times, confirmed he went into Belk and picked up clothes with the intention of stealing them, but claimed he changed his mind and put them back. ROA. p. 133, lines 1-5; pp. 134-135. Specifically, Johnson explained on cross-examination: "When I went into the store, my plan was I'm going to try to get me a couple of shirts and make me a couple of dollars so I can get me some gas, a little food or whatever." ROA. p. 133, lines 16-19. He confirmed he was planning to steal the shirts, but he "had a change of mind, a change of heart, and [he] left the shirts there." ROA. p. 135, line 20 – p. 136, line 2. Johnson denied being in the store on the prior two occasions. ROA. p. 136, lines 6-20.

Johnson was impeached with his six prior shoplifting convictions. ROA. pp. 138-139.

ARGUMENT

I.

The trial court did not abuse its discretion in refusing to accept a plea with no negotiations or recommendations under North Carolina v. Alford, and the issue is not preserved for review. Further, Appellant was not prejudiced by the trial court's ruling because Appellant was not punished for going to trial.

Prior to trial, the trial court enquired about whether the shoplifting charge would be a third or more property crime for purposes of enhancement and inquired as to the exposure for the charge. SUPP. ROA. p. 1, lines 8-24. The trial court also inquired as to the last plea offer from the State, which was an offer of four years imprisonment suspended to one year imprisonment and probation. ROA. p. 4. [3] Johnson asked to speak and advised the trial court he was not guilty and was hoping the jury would not find him guilty. He indicated he wanted a jury trial. ROA. p. 6.

After opening arguments from the parties and an in camera hearing on the admission of prior bad acts, the court recessed for lunch. Following the lunch break, Johnson attempted to plead guilty. ROA. pp. 56-57. When the trial court asked if he wanted to give up his right to a jury trial, Johnson replied, "I guess so." ROA. p. 60, lines 17. The trial court then asked Johnson if he was guilty and Johnson replied, "I'm not guilty, but I'm pleading guilty. I'm not guilty." ROA. p. 61, lines 2-4. The trial court informed Johnson he was not going to

[3] Johnson claims in his brief the offer was for a negotiated sentence (App. Br. p. 15), but the record is silent as to whether the offer was for a recommended sentence or a negotiated sentence. Nonetheless, the trial court was not required to accept the plea. State v. Rosier, 312 S.C. 145, 439 S.E.2d 307 (Ct. App. 1993); see also Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999) (discussing contract principals implicated in a guilty plea and noting a trial judge is not required to accept a guilty plea).

accept the plea. ROA. p. 61, lines 5-7. Then Johnson's counsel asked if he would accept an Alford plea. The trial court explained: "No, sir. I don't . . . typically take – I very rarely take Alford pleas unless there is a showing of factual foundation that there is no memory of – of the offense." ROA. p. 61, lines 10-13.[4] **Johnson's counsel accepted the ruling.** ROA. p. 61, line 15. Note the record fails to show whether the State was still offering its last plea offer or any plea offer at all when the trial court began colloquy concerning the aborted plea. Note the record is also silent as to whether the State was willing to offer a plea bargain premised on an Alford plea.

Johnson claims the trial court abused its discretion by not exercising its discretion in refusing to consider an Alford plea. The issue is not preserved for review because Johnson and his counsel never argued to the trial court that it was abusing its discretion, or not exercising its discretion, in refusing to consider an Alford plea. Johnson made no argument to the trial court as to why the trial court's rationale for not considering an Alford plea was wrong. Therefore, the issue is simply not reviewable. Stephens v. CSX Transportation, Inc., 400 S.C. 503, 735 S.E.2d 505 (Ct. App. 2012) (finding "[b]ecause Stephens did not present this argument to the trial court, the court was not given the opportunity to exercise its discretion as to that argument, and the argument is not preserved for appeal.") *rev'd on other grounds by* Stephens v. CSX Transportation, Inc., ___ S.C. ___, 781 S.E.2d 534 (2015); State v. Sosebee, 284 S.C. 411, 413, 326 S.E.2d 654, 655 (1985) (finding "[n]o objection

[4] Johnson only quotes the "unless" clause, which distorts the trial court's meaning – "rare" and "typically" does not constitute never, as Johnson implies. See App. Br. p. 13. A fair reading of the comment was the trial court was explaining the court only takes Alford pleas in extraordinary circumstances, **such as** when the defendant cannot remember the offense.

was made to either of these alleged errors nor was a motion for a new trial made such that the judge might have an opportunity to correct a mistake if there be such."). When a party accepts a trial court's ruling without objection, the issue is not preserved for review. State v. Morris, 307 S.C. 480, 486, 415 S.E.2d 819, 823 (Ct. App. 1992); see Lindsay v. Lindsay, 328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997) (holding an appellate court will affirm a ruling by a trial judge if offended party does not challenge that ruling; failure to challenge ruling is abandonment of the issue and precludes consideration on appeal). "[I]t is the responsibility of trial counsel to preserve issues for appellate review." Jackson v. Speed, 326 S.C. 289, 306 S.E.2d 750, 759 (1997). In the instant case, Johnson simply did not challenge the trial court's reasoning for not accepting an Alford plea, so the issue is not preserved for review.

Additionally, the trial court did not abuse its discretion. In North Carolina v. Alford, 400 U.S. 25 (1970), the United States Supreme Court found the plea judge did not commit constitutional error in accepting a guilty plea from the appellant, even though the appellant contended he was innocent, because of the strong evidence establishing his guilt and his desire to gain the benefit of a plea bargain to avoid the death penalty. The Supreme Court concluded a trial court is not prohibited from accepting a guilty plea despite a defendant's protestation of innocence where the defendant nonetheless determines pleading guilty is in the defendant's best interests. Id. at 37.

However, as noted by this Court in State v. Paris, 354 S.C. 1, 578 S.E.2d 751 (Ct. App. 2003),[5] Alford only speaks to whether the trial court errs in accepting a plea despite a defendant's claim of innocence. It does not speak as to under what circumstances, if any, a

trial court might be required to accept such a plea.

Johnson attempts to distinguish, or rather avoid, Paris by reference to State v. Smith, 276 S.C. 494, 280 S.E.2d 200 (1981). However, Smith has no application to the present case. In Smith, the defendant was tried in his absence and the trial judge sealed his sentence. Once apprehended, the defendant's sentence was published; however, the trial judge stated he was without jurisdiction to alter the sealed sentence, which was an error of law. The Supreme Court reversed the sentence and remanded for a hearing on the motion to alter or amend the sentence because it was "apparent here the sentencing judge did not exercise any discretion but [instead] based his ruling on an erroneous view of the law." Id. at 497, 276 S.C. at 202. In the instant case, the trial court was well aware he could accept an Alford plea, but chose not to, for good reason.

Courts are understandably reluctant to accept pleas without an admission of guilt. A federal district judge opined, "Although the general policy of this Court is hostile to the acceptance of [a nolo contendere] plea, circumstances surrounding the event and the condition of the defendant frequently make a strong appeal to the exercise of the Court's discretion." United States v. Bagliore, 182 F.Supp. 714, 716 (E.D. N.Y. 1960). Citing Bagliore, another district court judge wrote, "It has been said that courts are 'hostile' to [a nolo contendere] plea. . . . Whether this be so or not, they are at least reluctant to accept it unless the circumstances of the case are so exceptional as to appeal to a favorable exercise of (the court's) discretion. . . ." United States v. Faucette, 223 F.Supp. 199, 200 (S.D. N.Y. 1963). The First Circuit noted, "Acceptance of a nolo plea is solely a matter of grace."

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[5] Johnson predicted in his brief that Respondent would cite this case. Johnson was right.

United States v. David E. Thompson, Inc., 621 F.2d 1147, 1150 (1st Cir. 1980) (citation and quotation marks omitted). The First Circuit observed it was unaware of any case in which an appeals court reversed a district court's refusal to accept a plea of nolo contendere unsupported by the prosecution. Id.

United States Attorney General Herbert Brownell, Jr., issued a directive in 1953 remonstrating on the routine use of nolo contendere pleas:

> One of the factors which has tended to breed contempt for the Federal law enforcement in recent times has been the practice of permitting as a matter of course in many criminal indictments the plea of nolo contendere. . . . [A] person permitted to plead nolo contendere admits his guilt for the purpose of imposing punishment for his acts and yet, for all other purposes, and as far as the public is concerned, persists in its denial of wrongdoing. It is no wonder that the public regards consent to such a plea by the Government as an admission that is has only a technical case at most and that the whole proceeding was just a fiasco.

Gurevich, Mark, Justice Department's Policy of Opposing Nolo Contendere Pleas: a Justification 6 Cal. Crim. L. Rev. 2, p. 22 (January, 2004) (quoting reproduction of the directive in the United States Attorney's Manual § 9-16.010).

This Court likewise quoted favorably the First Circuit's observation that "a conviction affects more than the court and the defendant; the public is involved. . . . [T]he public might well not understand or accept the fact that a defendant who denied his guilt was nonetheless placed in a position of pleading guilty and going to jail. . . ." Paris, 354 S.C. at 3, 578 S.E.2d at 752 (quoting United States v. Bednarski, 445 F.2d 364, 366 (1st Cir. 1971)).

Shoplifting is a crime with significant hidden costs beyond the obvious value of the

stolen items. Of course the costs are staggering. The National Association for Shoplifting Prevention (NASP) estimates more than $13 billion worth of goods are stolen from retailers each year. National Association for Shoplifting Prevention, The Shoplifting Problem in the Nation. www.shpliftingprevention.org/what-we-do/learing-resource-center (last visited March 1, 2016).[6] The NASP website further notes shoplifting hurts communities due to the burden placed on police and courts, the corruption of youth, the loss of local and state sales tax revenue, and "the inconvenience and invasiveness of security measures to consumers when shopping in stores." Id.

The last issue is particularly troublesome, as noted by an online article from the Houston Chronicle's Small Business webpage: "Heightened security measures can serve as a deterrent to ideal customers who may feel a level of guilt by association." Kokemuller, Neil, The Effects Shoplifting Has on a Business, smallbusiness.chron.com/effects-shoplifting-business-59560.html (last visited March 1, 2016). The same article further explains, "The negative measures taken to deter shoplifting can impede employee instincts toward a positive and welcoming attitude with customers. Employees also may become overly suspicious of customers and get overzealous in their efforts to protect the store's inventory." Id.

Retailers are subject to a multiplier effect from the value of stolen merchandise because retail establishments operate on profit margins. A Rutgers University article notes the following:

> [I]f you have a 10% profit margin, and someone steals a $2.00

[6] The North Augusta Belk store certainly experienced its share in these figures. Singletary testified she apprehended sixty-five shoplifters and testified in court sixty times in the mere fourteen month span she was employed at Belk. ROA. p. 65, lines 1-11.

> item, you will have to sell $20.00 in merchandise to make up for that loss. Some stores have very low profit margins, and suffer greatly because of shoplifting. Grocery stores often have profit margins of around 1%. If someone shoplifts steaks worth $7.00, the store must sell goods worth $700.00 to recover the loss. It's easy to see how out-of-control shoplifting can quickly threaten the viability of your business.

School of Criminal Justice at Rutger's University, How much does shoplifting cost me? http://crimeprevention.rutgers.edu/crime/shoplifting/costs.htm (last accessed February 19, 2016). An online CNN article from 2009 reported on the spike in shoplifting in the United States resulting from the economic downturn. The article reported the spike in shoplifting cost consumers $435 per family that year. Kavilanz, Parija B., Store theft cost to your family: $435 http://money.cnn.com/2009/11/10/news/economy/retail_recession_theft/ CNN Money (last accessed February 19, 2016). Considering these statistics, it is hardly surprising that Belk would be willing to incur the cost of recruiting from law enforcement agencies to hire loss prevention employees to combat this epidemic.

People like Johnson cause Belk to necessarily incur these costs and pass them on to South Carolina's consumers. Allowing Johnson to plead but yet protest his innocence would demean the trial court's role to the end stage of a cat and mouse game rather than provide the forum for a proper recognition of the societal impact of his crime or the platform for Johnson to express moral atonement for his crime.

Of course, the record does not suggest that Johnson, who attempted to plead guilty without negotiations or recommendations, was punished for going to trial. See Davis v. State, 336 S.C. 329, 333, 520 S.E.2d 801, 803 (1999) (it is impermissible for the sentencing

court to consider the exercise of the right to trial in pronouncing a sentence). Johnson fails to show he was prejudiced by the trial court's decision to not consider an Alford plea.

In the instant case, Johnson, fifty-five years old, certainly must have long ago learned it is wrong to shoplift from stores, but unfortunately he lacks the will to conform his conduct appropriately. The trial court's sentence certainly was reasonable considering this was his seventh shoplifting conviction and his fifteenth property offense. The trial court also was reasonable to believe no extraordinary circumstance existed to agree to accept an Alford plea in the instant case. Admission of the crime the evidence so clearly shows Johnson committed is likely a predicate for a future change in his behavior. The trial court justly refused to consider an Alford plea in this case and did not abuse his discretion.

II.

The trial court did not err in admitting Appellant's prior bad acts because the bad acts are sufficiently similar to show a common scheme or plan and are also probative of Appellant's intent. The probative value of the evidence did not outweigh the danger of unfair prejudice. Further, the trial court did not err in finding evidence of these prior bad acts was clear and convincing (Appellant's Issues II and III).

Johnson argues the trial court erred in allowing testimony about Johnson's two prior shoplifting incidents at the same Belk store in North Augusta. However, the evidence of these uncharged prior bad acts was admissible because the incidents fall under both the intent and common scheme or plan exceptions of Rule 404(b), SCRE. Further, the trial court did not abuse its discretion when it found the evidence met the clear and convincing standard, and the probative value of the evidence outweighed the potential for unfair prejudice. Thus, it was proper for the trial court to admit the evidence of the prior bad acts.

Evidence of prior crimes, wrongs, or acts by a defendant is generally inadmissible to prove the defendant's propensity to commit the charge for which he has been charged. Rule 404(b), SCRE. However, such evidence may be admissible to prove motive, intent, common scheme or plan, identity of the perpetrator, or lack of accident or mistake. See Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). To fall under one of these exceptions, there must be a logical connection between the prior criminal acts and the current crime charged. Lyle, 125 S.C. at 417, 118 S.E. at 807.

In State v. King, 349 S.C. 142, 153, 561 S.E.2d 640, 645 (Ct. App. 2002), this Court paved a foundation for admitting prior bad acts in cases involving drug dealing:

> To admit prior bad acts regarding drugs under the Lyle exception, there must be a logical relevance between the acts in question and the purpose for introduction. See State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) ("The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused."). "Under Rule 401, 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."

Id. at 153, 561 S.E.2d at 645 (Ct. App. 2002) (concluding citations omitted).

In the instant case, not only did the two prior incidents establish Johnson's intent when he put clothes in his tote bag, but they were prior manifestations of his scheme to commit weekly thefts in the men's department and get away in his strategically parked vehicle. The prior bad acts were logically relevant and more than mere propensity evidence.

The Evidence Presented at Trial was Clear and Convincing.

Johnson argues the trial court erred in finding evidence of the prior bad act was clear and convincing based on what are more properly jury arguments. A prior bad act, which is not the subject of conviction, must be established by clear and convincing evidence. State v. Tutton, 354 S.C. 319, 325, 580 S.E.2d 186, 189 (Ct. App. 2003) (citing State v. Beck, 342 S.C. 129, 135, 536 S.E.2d 679, 683 (2000)). "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established." State v. Fletcher, 379 S.C. 17, 24, 664 S.E.2d. 480, 483 (2008). The clear and convincing standard is more than a preponderance of evidence, but less than

the standard of beyond a reasonable doubt. Id. However, clear and convincing "does not mean clear and unequivocal." Id.

Appellate courts do not review the ruling of a trial judge "on the admissibility of other bad acts by determining *de novo* whether the evidence rises to the level of clear and convincing. If there is any evidence to support the admission of the bad act evidence, the trial judge's ruling will not be disturbed on appeal." State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001).

Johnson admits the proper standard for this Court's review is any evidence, but asks this Court to ignore it. Johnson suggests this Court should reverse the trial court because: (1) of the mistake in not preserving the video,[7] (2) the failure to get the license plate number of the green van **he admits he drove**, and amazingly (3) he escaped the previous two times. Simply because Johnson was a successful thief the previous times or potentially more evidence of the prior bad acts could have been gathered does not mean there was not sufficient evidence to meet the clear and convincing standard. The trial court was in the position to judge the credibility of the employee witnesses who had direct knowledge of Johnson's prior thefts. State v. Ford, 334 S.C. 444, 453, 513 S.E.2d 385, 389 (Ct. App. 1999) (finding the clear and convincing standard was met because the victim testified from direct knowledge that the defendants robbed and attempted to rob him and his testimony was

[7] This is a particularly troubling argument. The NASP notes, "Shoplifting has traditionally been treated as a retail industry specific problem to be prevented exclusively by the retail victims themselves." The Shoplifting Problem in the Nation. www.shpliftingprevention.org/what-we-do/learing-resource-center (last visited February 18, 2016). However, it is absurd to suggest Belk should be taxed for developing, out of economic necessity, a sophisticated security apparatus with occasional human-error glitches, or any victim should be required to provide a video recording of their victimization.

partially corroborated by a detective).

The three employees each had first-hand experience and knowledge concerning the shoplifting incidents by Johnson. Singletary, Belk's loss prevention manager, was the first person to respond and apprehend Johnson on May 24. She observed Johnson shoplift and attempted to apprehend him the two prior consecutive Saturdays before Johnson was caught. She testified that on May 24, Johnson admitted he shoplifted the first two times, but not the third time.

Moreover, Rebecca Powell witnessed Johnson acting suspiciously in the men's department on May 17, when she was shopping after her shift was over. Since she was trained in loss prevention and Johnson's actions raised suspicions, Powell texted Singletary about what she had observed. Maura Castens, also trained in loss prevention, was informed by Singletary on May 24 that there was a shoplifter in the store. Thereafter, she spoke with Johnson and testified as to her conversation with him.

The trial court's finding that evidence of the prior acts met the clear and convincing standard is amply supported by evidence, regardless of Johnson's remonstrations about the standard of review.

Evidence of the Prior Shoplifting Incidents are Admissible to Show a Common Scheme or Plan.

Under 404(b), SCRE, the law allows evidence of prior bad acts to be admissible to show the existence of a common scheme or plan. Under Rule 404(b), evidence of common scheme or plan may be found admissible. "Such evidence is relevant because proof of one is strong proof of the other. When determining whether evidence is admissible as common

scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine if there is a close degree of similarity." State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277-278 (2009) (citation omitted). "When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b)." Id., 384 S.C. at 433, 683 S.E.2d at 278.

"In other words, the law permits proof of a plan or scheme to commit a series of crimes including the one for which the accused is being tried, and, as tending to show the existence of such plan or scheme, it allows testimony of the commission of crimes other than the one charged, but so related in character, time, and place of commission as to tend to support the conclusion that there was a plan or system which embraced both them and the crime which is charged." Webster v. State, 425 S.W.2d 799, 811 (Tenn. Crim. App.1967) (quoting 20 Am.Jur., Evidence, sec. 314, page 296).

For example, this Court held evidence of prior bad acts admissible under the common scheme or plan where an attempted robbery and prior robbery were so similar to the incident for which the defendant was charged. State v. Ford, 334 S.C. 444, 452, 513 S.E.2d 385, 389 (Ct. App. 1999). In Ford, the victim of the robbery testified that Ford and his accomplice robbed him once before at gunpoint, telling him they would shoot him if he did not give them $200 everytime they saw him. They attempted to rob him again two months later. Id. at 451, 513 S.E.2d at 388. This Court found the prior robbery and attempted robbery "was a necessary element in understanding their motive and intent when they accosted" the victim in the charged incident two months after the attempted robbery. Id. at 452, 513 S.E.2d at 389.

This Court concluded, "The previous robbery and attempted robbery . . . were so similar to the incident for which Ford and [accomplice] were charged that they tend to establish both the existence of a common plan and the fact that the plan was being carried out." Id.

In State v. Aiken, 322 S.C. 177, 470 S.E.2d 404 (1996), this Court found multiple prior robberies his accomplice testified they committed together admissible because like the charged case, they all took place in the same part of Orangeburg, on or near the Highway 21 bypass. Additionally, they were all committed by a black man with his face partially concealed. Id. at 181, 470 S.E.2d at 406. Notably, this Court found the chance of unfair prejudice was small because if the jury found the accomplice credible, the jury would have no reason to consider the other robberies. Id.

In the instant case, the trial court did not err in allowing testimony of Johnson's two prior, consecutive shoplifting crimes because of all three incidents' similarities in character, time, and place of commission. Numerous factors common between the crime charged and the prior bad act were present: (1) all three incidents occurred at the Belk in North Augusta; (2) all three incidents occurred in the men's department; (3) the three incidents occurred on consecutive Saturdays; (4) all three incidents involved Johnson concealing merchandise in a large bag; (5) Johnson left through the same exit during the prior thefts where he was apprehended on the third occasion; and (6) Johnson parked a green van, backed into a space for quick exit, during all of the incidents and used it as his getaway vehicle the first two times.

The two prior incidents establish Johnson was carrying out a shoplifting in the same

manner he had the previous two times: Johnson was stuffing clothes from the men's department into a bag, exiting through the same door, and would have drove away in his conveniently parked getaway van, just like the previous two Saturdays. Thus, evidence of Johnson's prior bad acts was properly admitted under the common scheme or plan exception.

Evidence of the Prior Shoplifting Incidents are Admissible to Show Intent.

The two prior bad acts were also admissible to establish Johnson's intent. See Rule 404(b), SCRE; Ford, 334 S.C. at 452 (finding evidence that defendants twice robbed or attempted to rob the victim helped to prove motive and intent of charged robbery against the same victim); State v. Adams, 322 S.C. 114, 118, 470 S.E.2d 366, 369 (1996) (holding defendant's involvement in armed robbery a half hour before charged armed robbery was admissible to prove defendant's intent to rob second store) *overruled on other grounds by* State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014); State v. Simmons, 310 S.C. 439, 427 S.E.2d 175 (1993) ("The evidence of appellant's violence against elderly women, each of whom was alone in her home at the time of the attack, makes more probable appellant's criminal intent when he entered [victim's] house since he already knew her to be an elderly woman.") *reversed on other grounds by* Simmons v. South Carolina, 512 U.S. 154 (1994).

The South Carolina Supreme Court explained application of the intent exception from Lyle in two drug cases. The Supreme Court noted, "We have held that evidence of a prior drug transaction is relevant on the issue of intent when the defendant has been charged with possession of a controlled substance with intent to distribute." State v. Wilson, 345 S.C. 1,

7, 545 S.E.2d 827, 830 (2001) (citing State v. Gore, 299 S.C. 368, 384 S.E.2d 750 (1989)). In Gore, the Court held that evidence of prior sales by defendant was admissible on the issue of intent where the prior sale occurred one month before the charged offense. Gore, 299 S.C. at 370, 384 S.E.2d at 751 ("The evidence that appellant sold cocaine from the trailer on two occasions only one month earlier tends to establish his intent regarding the cocaine in his possession at the time in question.").

Similarly, in Wilson, the Court held evidence of a prior drug transaction was relevant on the issue of intent when the prior sales occurred only a few days earlier. Wilson, 345 S.C. at 7, 545 S.E.2d at 830. The Court also relied on circumstantial evidence to prove intent. Id. (finding the amount of baggies and cash found in hotel room, evidence of flushing before police entered the room, and testimony that defendant himself did not smoke crack was properly admitted by the trial judge to prove intent of prior bad acts exceptions).

The instant case is most similar to Ford, 334 S.C. 444. In Ford, the defendants appealed their convictions of robbery and criminal conspiracy for a robbery that took place against a victim in December 1995. Id. at 447. On appeal, the defendants argued the trial judge erred in allowing the same victim's testimony that the defendants robbed or attempted to rob him in August 1995 and October 1995. Id. at 451. This Court held the victim's testimony regarding these prior bad acts was admissible to prove motive and intent by the defendants to target the victim. Id. at 453.

In the instant case, the State introduced testimony from employees at Belk who witnessed Johnson shoplift from the store, but unsuccessfully apprehended him, on the two

prior, consecutive Saturdays. As in Ford, there was evidence of two prior incidents that were similar in nature. Further, in Ford and the instant case, all three incidents involved the same victims.

Johnson's prior bad acts were admissible to prove his intent. The evidence of Johnson's two prior shoplifting incidents two weeks prior tends to establish his intent regarding the clothing he removed from his bag at the exit door. Thus the trial court did not err in admitting the evidence of the prior bad acts to prove Johnson's intent to target the same Belk in North Augusta once again.

The Probative Value of the Prior Shoplifting Incidents Outweighs the Threat of Unfair Prejudice.

Evidence of prior bad acts, even if relevant and clear and convincing, must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. See Rule 403, SCRE; State v. King, 334 S.C. 504, 513, 514 S.E.2d 578, 583 (1999). Prejudicial evidence is still proper unless it amounts to unduly or unfair prejudice. See State v. Beck, 342 S.C. 129, 136-37, 536 S.E.2d 679, 683 (2000) ("We find that evidence of the [prior bad act], although certainly prejudicial to Appellant, is not unduly so under our previous decisions."). "'Unfair prejudice' within its context means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991).

"When a court is assessing whether the probative value of extrinsic evidence outweighs the threat of unfair prejudice, the court should consider factors such as the differences between the charged and extrinsic offenses, their temporal remoteness, and the

government's need for the evidence to prove intent." United States v. Pessefall, 27 F.3d 511, 516 (11th Cir. 1994) (citing United States v. Diaz–Lizaraza, 981 F.2d 1216 (11th Cir.1993)). Similarities between prior acts and the current act are important to establish whether the probative value outweighs the potential prejudice. United States v. Dennis, 625 F.2d 782, 800 (8th Cir. 1980); United States v. Wilson, 31 F.3d 510, 515 (7th Cir. 1994) (holding that evidence of prior drug transaction was probative and not unduly prejudicial because of strong similarity and close temporal proximity to charged crime).

This Court's observation in Aiken applies in the instant case as well. As mentioned before, this Court noted that if the jury found Aiken's accomplice credible when he testified as to Aiken's involvement in the robbery, the jury would not need to consider the earlier robberies. In the instant case, if the jury for some reason found Singletary's testimony about the May 24 shoplifting to not be credible, the jury would likewise found Singletary's testimony about the prior bad acts to not be credible. There was little danger of unfair prejudice from the prior bad acts.

In the instant case, it is apparent that the evidence of Johnson's two prior shoplifting thefts at Belk is highly probative of his guilt for the charged crime because of the extensive similarities and close temporal proximity between all three incidents. The testimony regarding the two prior shoplifting incidents at Belk is deeply connected to the facts of the current charge. Testimony provided under oath by a loss prevention officer of Belk regarding eyewitness account of Johnson shoplifting two weeks in a row is clearly meant to prove intent and common scheme or plan, rather than to unfairly prejudice Johnson.

Further, Johnson was not prejudiced by the admission of the prior bad acts and any error is harmless beyond a reasonable doubt. First, Johnson was impeached with his six prior convictions for shoplifting; the jury is already aware of his history of shoplifting so these two instances hardly offer any improper propensity effect. State v. Bell, 302 S.C. 18, 27, 393 S.E.2d 364, 369 (1990) (noting exclusion of evidence is reversible only where error and prejudice are shown). Additionally, evidence was simply overwhelming since he confessed and also since Singletary's testimony was corroborated by Officer Perry, who saw the incident on the store's close circuit television. Finally, Johnson admitted at trial that he intended to steal merchandise even though he claimed to abandon this attempt. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (holding whether an error is harmless depends on the circumstances of the case, but it is harmless where it could not reasonably have changed the outcome of the trial).

Accordingly, this Court should affirm the trial court's ruling that the evidence of Johnson's prior, similar acts in Belk is highly probative and not unfairly prejudicial.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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May 31, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Aiken County
R. Knox McMahon, Circuit Court Judge

THE STATE,

Respondent,

vs.

MARVIN BROCK JOHNSON,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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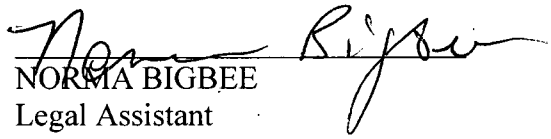
PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Laura R. Baer, Esquire, Appellate Defender, SC Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 31ST day of May, 2016.



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May 31, 2016

VIA HAND DELIVERY
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, S. C. 29211

Re: **State of South Carolina v. Marvin Brock Johnson**
Appellate Case No: 2045-002435

Dear Ms. Kitchings:

Enclosed please find the original and nine (9) copies of the **Final Brief of Respondent** along with **proof of service**, in the above-referenced matter for filing in your office. By copy of this letter, we are serving opposing counsel with this brief today.

Sincerely,

David Spencer
Senior Assistant Attorney General
Bar No: 68571

DS/nb
Enclosures

cc: Laura R. Baer, Esquire (2 copies)
Victim Services (with enclosure)