STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County
Brian M. Gibbons, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

v.

QUANELL MARQUAN McILWAIN,

Appellant

Appellate Case No. 2014-002539

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in allowing a witness to testify that appellant confronted him with a pistol fifteen minutes before a shooting that was completely unrelated to the confrontation?

RESPONDENT'S STATEMENT OF THE ISSUE

When the defense was asserting an issue concerning who possessed the weapon at the time of the shooting and the role of Timothy Nelson who claimed he received the weapon after the Appellant shot the victim and hid the weapon, the trial judge did not abuse his discretion in admitting relevant and probative *res gestae* evidence that 15 minutes before the decedent was shot that Petitioner displayed a similar weapon to the murder weapon as part of evidence that Appellant and not Nelson possessed the gun at the time of the shooting as part of the *res gestae*.

RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Quanell Marquan McIlwain, is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Clerk of Court for Lancaster County. On October 13, 2011, the Appellant was indicted by the Court of General Sessions of Lancaster County for murder involving the May 29, 2011 death of Terrance Antonio Jones. (2011-GS-29-1138). ROA 586-87. He was also indicted the same date for possession or display of a firearm (a handgun) during the commission of a violent crime (2011-GS-29-1139). ROA 589-90. He was subsequently indicted on an amended indictment on November 29, 2012 for possession of firearm or ammunition by a person convicted of a felony violent crime. 2011-GS-29-1140. ROA 592-93.

On November 10, 2014, his cases were called to trial before the Honorable Brian M. Gibbons, presiding judge. The appellant was present and represented by Brandon Steen and Justin Jones of Sixth Circuit Public Defenders Office. The prosecution was represented by Sixth Circuit Solicitor Doug Barfield. The Appellant entered a not guilty plea and the case proceeded to trial from November 10, 12-13, 2014.

At the conclusion of the trial on November 13, 2014, the Appellant was convicted of each indictment. R. 577, Tr.p. 646, ll. 2-24. Judge Gibbons sentenced the Appellant to life imprisonment on murder (2011-GS-29-1138) and five years concurrent on possession or display of a firearm (a handgun) during the commission of a violent crime (2011-GS-29-1139), and five years concurrent on possession of firearm or ammunition by a person convicted of a felony violent crime. 2011-GS-29-1140. R. 584-85, Tr.p. 653-654.

The Appellant served a notice of appeal timely on the Solicitor on November 17, 2014. This appeal follows.

RESPONDENT'S STATEMENT OF THE FACTS

On May 29, 2011, Terrance Antonio "Tonio" Jones was shot to death at around 4 AM near Pardue Street. Jones had left around 3 AM to get cigarettes. R. 37-39, Tr. 66-68. He arrives near the Pardue Street Apartments carrying some bologna and walks past Tanisha Nelson who is holding her baby. R. 363-64, Tr.p. 432-433. She is on Appellant Quanell McIlwain's telephone talking to her boyfriend Qua Stevens. At that point, Tanisha sees gunfire from McIlwain's gun while she is standing on the porch of 1705. Tanisha then runs back to her home. R. 365-66, Tr.p. 434-435. Jones is shot twice and dies as a result.

Appellant begins his flight from the scene. Timothy Nelson, hearing the gunfire, leaves an apartment thinking someone is shooting in the air and screams "this is b—s---." He sees Appellant climbing over a fence wearing a white shirt and states to him to give him the "junk." R. 242-44, Tr. 311-313. Appellant then goes in flight to York where he admits to a longtime friend Mauricio Richardson that he had shot somebody earlier. R. 337-38, Tr. 406-407. Appellant is located weeks later in Lawton, Oklahoma. R. 428, 433, 439, Tr.p. 497, 502, 508.

Timothy Nelson, after being tossed the weapon carries it into an apartment. They he disposes of the six spent shell cartridges from the gun into a diaper into a trashcan. R. 248, Tr.p. 317. Eventually, he disposes of the gun by throwing it into a lake. R. 247-48, Tr.p. 316-317. Timothy later tell law enforcement about the gun's location. R. 249, Tr. 318. The gun that was tossed to Nelson by Appellant is found to be the murder weapon. R. 507-08, Tr. 576-77.

ARGUMENT

I. When the defense is asserting a issues concerning who possessed the weapon at the time of the shooting and the role of Timothy Nelson who claimed he received the weapon from the Appellant after he shot the victim and hid the weapon, the trial judge did not abuse his discretion in admitting relevant and probative *res gestae* evidence that around 15 minutes before the decedent was shot that Petitioner displayed a weapon to Qua Stevens during a verbal confrontation as probative evidence that Appellant and not Nelson possessed the gun at the time of the shooting as part of the *res gestae*.

The issue before the jury was who possessed the gun at the time that Antonio Jones was shot. Any doubt about the defense theory was that someone other than Quanell McIlwain, particularly Timothy Nelson, possessed the weapon is revealed by defense counsel Steen closing statement:

> Mr. Barfield admits he's the one that had possession of the gun. **There has been no reliable evidence during this whole trial that Mr. McIlwain had this gun.** Que Black (Timothy Nelson) admits to having the gun. Numerous witnesses say Que Black had a gun. The only witness that says Mr. McIlwain had a gun, Keith Benson who also said yeah I had it too so did Que Black. So did every other guy out there. It was Pardue on Saturday night we were playing around. That does not make Mr. McIlwain the guilty party here because a bunch of guys are playing with a gun on a Saturday night. (Solicitor Barfield) said Mr. Que Black had nothing to hide so he can't be guilty. He testified that no one saw him clean those bullets out. He did that in secret. Then the ladies came and said they heard the clicking. They actually heard the clicking of him taking out the bullets and that's how they figured out he had the gun. He didn't openly show everybody, he (Timothy Nelson) was keeping it a secret. Who keeps secrets? Who destroys evidence? Guilty people.

R. 548, Tr.p. 617, ll. 12-21 (emphasis added).

The defense's goal at trial was to keep out any evidence that Appellant possessed a weapon and to suggest the actual guilty party was Timothy Nelson who was last seen with the weapon after the shooting. The Appellant attempts to use a smokescreen that it was the state's real purpose to show "propensity" or that Appellant was a violent person when the stated purpose was simply to show that Appellant possessed the gun used in the shooting within 15 minutes before Tonio Jones was shot. The Appellant's red herring argument ignores the

probative value of the challenged evidence by suggesting it was unnecessary for the state to show this close in time possession of the gun by Appellant because there was some evidence of Appellant's possession many hours earlier when it was getting dark (through Keith Benson's testimony) and an eyewitness to the event (Tanisha Nelson). It is additionally unclear what so-called "propensity" Appellant claims that the 15 minute prior confrontation between Appellant and Qua Stevens over Tanisha Nelson was supposed to show other where that confrontation lacked actual violence, compared to the spontaneous shooting of Jones.[1] Rather, the challenged evidence revealing the possession of the weapon within 15 minutes of the shooting was highly probative to the state's case against Appellant. Had this evidence of Appellant's possession of the weapon been suppressed there would have been a probative void in the state's complete story because that last possession of the weapon would have rested with an earlier disclosure of the gun earlier that night when it was getting dark with evidence that not only Appellant, but also Timothy Nelson and others were passing it around through the testimony of Keith Benson. R. 199, 207-08, Tr.p. 268, 276-77.[2] It is particularly probative evidence because after the shooting the gun is seen in the possession of Timothy Nelson by others. Simply put the entirety of the state's case would have rested on Tanisha Nelson's identification of Quanell McIlwain, which Appellant sought to impeach because she is family to Timothy Nelson.[3] The judge reasonably recognized that possession of the weapon by Appellant 15 minutes prior to the shooting (rather than hours before) was highly probative and proper *res gestae*. As the State consistently argued, it was not seeking to introduce the evidence to show propensity or under Rule 404 (b), but to

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[1] In the Initial Brief of Appellant, p. 13, Appellant contends the showing of the gun evidence to Stevens was introduced by the state solely to show that Appellant "was a violent person in a case where there is no motive."

[2] Respondent notes that Justine Gladden testified that after the shooting she saw someone in a white shirt toss a gun near a fence to Timothy Nelson. R. 170-71, Tr.p. 239-240.

[3] The Appellant asserts in his brief that "the State's witnesses were related to each other" suggesting their testimony was not reliable. Initial Brief of Appellant, p. 5.

show the possession of the weapon in close time and space proximity to the crime. This was appropriate and not an abuse of discretion in its admission. This evidence aids the fact-finder and presents a complete, whole and unfragmented story temporally related with the shooting.

STANDARD OF REVIEW

Significantly, "[a] trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). Decisions to admit or exclude evidence rest in the sound discretion of the trial judge and will only be reversed on appeal for a prejudicial abuse of discretion. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

Only evidence that is relevant should be admitted during trial. Rule 402, SCRE. "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). Evidence which could assist the jury in arriving at the truth of an issue is relevant and should be admitted during trial. State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986).

Evidence of Bad Acts

However, pursuant to Rule 404(a), SCRE, "[e]vidence of other crimes, wrongs, or acts is

not admissible to prove the character of a person in order to show action in conformity therewith." "This is so because under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than upon prior criminal or immoral acts." State v. Hough, 319 S.C. 104, 107, 459 S.E.2d 863, 865 (Ct. App. 1995). Evidence of a defendant's prior crimes or bad acts is limited to establish motive, intent, and the absence of mistake or accident, the existence of a common scheme or plan, or the identity of the perpetrator. State v. Martucci, 380 S.C. 232, 251-252, 669 S.E.2d 598, 608 (Ct. App. 2008). See Rule 404(b), SCRE.

Admissibility of Res Gestae Evidence

Furthermore, evidence of a defendant's prior crimes or bad acts may also properly be admitted if those acts form part of the res gestae of the charged offense. Anderson v. State, 354 S.C. 431, 435, 581 S.E.2d 834, 836 (2003). The res gestae theory recognizes that evidence of other bad acts may be an integral part of a charged crime or may be necessary to aid the fact finder in understanding the context in which the crime occurred. State v. Preslar, 364 S.C. 466, 473, 613 S.E.2d 381, 385 (Ct. App. 2005). To constitute part of the res gestae of an offense, it is important that the prior bad acts have a close temporal proximity to the charged crime. Martucci, 380 S.C. at 258, 669 S.E.2d at 612.

In State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-371 (1996), the Supreme Court explained the res gestae theory:

> One of the accepted bases for the admissibility of evidence of other crimes arises 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."

(citations omitted and alteration in original). Thus, where a prior bad act is "inextricably intertwined" with a charged offense, the evidence of the prior bad act is admissible as part of the res gestae of the crime. Id. at 122, 470 S.E.2d at 371. See United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980) (internal citations, some quotation marks, and footnotes omitted).

Nonetheless, evidence considered for admission under the res gestae theory must satisfy the requirements of Rule 403 of the South Carolina Rules of Evidence. See Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct.App.1998) (quotation marks and citations omitted). "All evidence is meant to be prejudicial; it is only unfair prejudice which must be [scrutinized under Rule 403]." State v. Lee, 399 S.C. 521, at 529, 732 S.E.2d 225, at 229 (2012) (alteration and emphasis in original; quotation marks and citations omitted).

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). After an error is found, the appellate court must then review the other evidence considered at trial besides

the erroneously admitted evidence. State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). Thus, when overwhelming evidence of guilt has been presented or when erroneously admitted evidence is merely cumulative to other properly admitted evidence, any trial error may be harmless. See State v. Gathers, 295 S.C. 476, 480-481, 369 S.E.2d 140, 143 (1988) ("[I]n view of the overwhelming evidence of appellant's guilt, we hold any error harmless beyond a reasonable doubt."); State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence.").

HOW THE RES GESTAE ISSUE WAS RAISED

A. Pre-trial

During the pre-trial hearings, Appellant initially raised a motion to exclude evidence under Rule 404 and other bad acts. R. 5, Tr.p. 34. He asserted that the pertinent issue arose from an incident involving Quay Stevens and Tanisha Nelson. R. 6, Tr.p. 35. Appellant prior to the current incident, the appellant was alleged to have pulled a gun on one of the State's witnesses and he was separately charged in an incident report. The appellant requested that the evidence of the prior incident be excluded as evidence of a prior bad act.

The solicitor asserted that the challenged evidence arose from an argument between Quay Stevens and Tanisha Nelson. The State contended at some point McIlwain saw the boyfriend and girlfriend arguing and according to Stevens, the appellant approached him in foster him for

arguing and after some back-and-forth Quay Stevens stated "who's going to stop me?" and McIlwain pulled a pistol out of his pocket, presented it, and said to Stevens "I'll stop you". R. 7-8, Tr.p. 36-37. The State contends that within minutes McIlwain shot and killed the victim in this case. "I certainly intend to offer testimony from Stevens the minutes before the victim in this case was shot and killed we alleged by McIlwain, that McIlwain had in his possession a pistol which matches a general description of what we found in later learn was in fact the murder weapon." R. 8, Tr.p. 37. The solicitor declared that he thought it was certainly a bad act and it certainly occurred before the killing, "but I think more importantly is not a prior bad act under the rule nearly as much as its part of the raise just of the crime." One of the elements of this offense is an allegation that he shot him with a pistol and "I intend to offer evidence of minutes before the shooting Quanell McIlwain was armed with a pistol, *res gestae*." R. 8-9, Tr.p. 37-38. See also Tr.p. 161 ("I do intend to call Quay Stevens to say minutes before the shooting he saw him with a gun.").

The defense asserted, relying upon State v. Smith, 322 S.C. 107, 470 S.E.2d 364 (1996), that before it can be presented to the jury, the state must prove by clear and convincing evidence that the defendant committed this act, logically connect this to one of the five Lyle[4] reasons why it can come in and then show that its more probative than prejudicial. R. 9, Tr.p. 38, ll. 4-12.

The trial court held it in abeyance pending the presentation of the witness. R. 9, Tr.p. 38.

DURING TRIAL

In Camera Hearing

Prior to the testimony of Edrickis ["Qua" or "Quay"] Stevens, an *in camera* hearing was held related to the presentment of the gun issue. In establishing an understanding of the prosecution's purpose of the testimony, Solicitor Barfield stated:

[4] State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)

> Mr. Stevens is the boyfriend of Tanisha Nelson. These are the two who were arguing outside before the shooting occurred. Mr. Stevens' expected to testify in a minute that after he argued with Ms. Nelson his girlfriend he and Mr. McIlwain had a confrontation at which point Mr. McIlwain pulled out a pistol and threatened him not directly pointing the pistol at him but simply threatened him while holding a pistol. And that is what is objectionable I believe. And again my argument we'll get into arguments later but my argument is **it's not really prior bad acts; it's part of the ongoing series of events that ended up in a shooting a short time later.**

R. 284-85, Tr.p. 353, l. 16- p. 354, l. 3.

Stevens testified *in camera* that he was with Tanisha Nelson on May 29, 2011 in Pardue. He stated that he and Tanisha initially had an argument inside her apartment. He stated that they went outside at some point she went outside and they were about to fight and she went off running and Stevens chased Tanisha and Appellant was chasing him until Stevens stopped running. R. 287, Tr.p. 356, ll. 10-20. Stevens stated that Appellant confronted him and told him that he could not sit there and watch Stevens jump on Steven's baby's mama when he had seen his own mother get jumped on and that he did not like it. R. 287-88, Tr.p. 356-57. Stevens stated that he responded to Appellant by stating "well who's going to stop me?" Stevens said that Appellant stated he would stop him now and appellant pulled out a chrome .357 gun. R. 288, Tr.p. 357, ll. 8-11. Stevens stated that Appellant never pointed it at him. Stevens stated he told appellant to go ahead and after appellant put it back, Stevens got in Tanisha's car and left. R. 288-89, Tr.p. 357-358.

Stevens stated that he subsequently called appellant's telephone and asked him to let him talk to Tanisha (because Tanisha did not have a cellphone) and appellant gave her the phone. Stevens stated that this was about 15-20 minutes after he had left in Tanisha's car. R. 289, Tr.p. 358, l. 24-25. Stevens stated he was not present when anyone got shot. R. 290, Tr.p. 359.

On cross-examination during the in camera portion, Stevens stated that Tanisha was not

present when appellant ("SK") pulled out the gun. R. 291, Tr.p. 360.[5]

After Stevens in camera testimony, counsel Steen asserted that it was "clear and convincing evidence that McIlwain did it, but asserted that the Solicitor must show the Lyle factors with intent, common scheme, and identity and then under Rule 403 that it is not outweighed by prejudicial effect. The defense alternately asserted the 403 connection and that the State is going to use appellant's statement Stevens shouldn't be treating a woman that way as a motive for the murder when these incidents had nothing combined. Different victims, different incidents, different motives; that's going to confuse the jury to have him testify that Quanell pulled a gun because of this then from the statement use that he pulled a gun on the victim. R. 292-93, Tr.p. 361-362.

In response, Solicitor Barfield disputed the characterization of his intent to introduce the evidence. He stated he was not offering the evidence of the event as a prior act, but as evidence that Appellant had the gun immediately prior to the shooting.

> My understanding is Tanisha Nelson will testify that as she is on the phone with Mr. Stevens, the phone that Quanell McIlwain gave her, that's when the shooting occurs. So Steven's testifies a gun gets produced, fifteen minutes later he's on the phone with Tanisha Nelson and so fifteen minutes later is when the shooting occurred. So the time frame is fifteen minutes. I'm not offering the evidence of this gun incident fifteen minutes earlier as a prior bad act. I'm simply offering it to show as evidence of Quanell McIlwain being armed with a gun showing it before somebody got shot and killed in a party. , , ,
> ... It is - It is no different than testimony that came in without objection earlier today by Keith Benson that he saw Quanell McIlwain with a gun moving it from one side of his waist to the other behind 1701. It's simply – It's illegal because possession of a gun but I'm not offering it as a prior bad act. I'm offering it to show the man was armed.

R. 293-94, Tr.p. 362, l. 10- p. 363, l. 7.

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[5] During the in camera proceeding Tanisha Nelson testified that she was not present with Stevens when Quanell McIlwain pulled out a gun and threatened him. R. 311-12, Tr.p. 380, l. 22- p. 381, l. 4. She stated that she learned about it from Stevens ("baby daddy told me") when he took her to the police station after the shooting. R. 312, Tr. p. 381, ll. 10-14.

Counsel Steen responded that the cases on res gestae always deal with the same victim over the same time with the same crime. R. 294, Tr.p. 363.

Judge Gibbons inquired of Counsel Steen whether he would agree that if the defendant showing the weapon which identification matches the other identification would show a propensity to do the act. Counsel Steen agreed asserting that this is what Rule 404 excludes. Judge Gibbons posited that it was why it should come in as a gatekeeper doing a balancing test. R. 295, Tr.p. 364.

The Trial Court's Ruling on Admissibility

Judge Gibbons allowed the testimony to be introduced. He did not base his ruling on the Rule 404 (b) analysis, but found it was part of the res gestae. R. 295-96, Tr.p. 364-365. In Particular, he concluded:

> Let me put my basis ...for allowing that testimony to come in the record. *Assuming arguendo* again just like I did in your Biggers analysis that this is a prior bad act, that was not subject of a conviction, I do find that the State has met a clear and convincing evidence standard. I find that the testimony is logically relevant and as far as to take it to its conclusion for the trier of fact. And lastly I find that the (probative) value of the testimonies substantially outweighs the prejudicial effect under the 403 analysis.
>
> But I tend to agree with the State so if I weren't gonna take it that far under the 404 (b) analysis that would be my finding. But I'm not basing my ruling on that. **I'm basing my ruling on the State's contention that it's not offering it as a prior bad act; it's just part of the whole situation that was happening that night considering the fact that it only happened fifteen minutes or so or right before the actual act of violence occurred.**

R. 294-96, Tr.p. 363, l. 4 – p. 365, l. 5.

How the Challenged Evidence Was Presented to the Jury

Prior to the in camera proceeding, Dawnetta "Dora" Montgomery testified[6] that she saw

[6] The headings of the transcript pages are in error and may be confusing to the reader. Dawnetta "Dora" Montgomery's testimony is from trial transcript pages 191 through 218. However the pages during her direct examination from pages 191 through 214 (ROA pp 122-146) have "Jatoya Wright" on the heading of the transcript pages rather than "Dawnetta Montgomery."

Tanisha Nelson and Stevens arguing. R. 136, Tr.p. 205. She stated that she observed Tanisha running from him and "everything got crazy." R. 136-07, Tr.p. 205-206. Montgomery testified that she got Tanisha's baby and brought it to 1701. She stated that Qua Stevens took Tanisha's car and left. R. 139, Tr.p. 208. She stated that Tanisha came back to 1701 and got her baby. She saw Tanisha then go back to her address with the baby. R. 137, Tr.p. 206. Shortly after Tanisha left, Montgomery heard gunshots. R. 137-08, Tr.p. 206-207. She stated Stevens was gone when the gunshots occurred. R. 139, Tr.p. 208.

Justine Gladden also described hearing Tanisha ("Little One") screaming after she let her use the telephone and then saw her running toward the 1600 block being chased by Qua Stevens. R. 162-63, Tr.p. 231-232. She testified that Tanisha returned back to the apartment about 15 minutes after she saw her running from Stevens. R. 163, Tr.p. 232. Gladden however, did not recall seeing Tanisha's baby at the apartment that day. R. 164, Tr.p. 233. After she returned to the apartment, Gladden thought Tanisha left and went home. R. 164, Tr.p. 233. This was before the shooting.

Edrickis "Qua" Stevens Trial Testimony.

Stevens testified similar to his in camera testimony. He described having an argument that night at her apartment in the early morning around four. R. 321, Tr.p. 390. He stated that they were about to fight and Tanisha took off running to her cousin's house and that he started chasing her. R. 322, Tr.p. 391. He stated that he looked back and saw the Appellant was chasing him so he stopped chasing her and asked Quanell why he was chasing him. Stevens asked him why he was chasing him and Appellant stated:

> "he couldn't sit out there and let me do my baby momma like that. So I was like who gonna stop me. And he pulled out the gun and was like well I'll stop you right now. So I was like man go ahead with that. And I turned around and I left he put the gun up."

R. 323, Tr.p. 392, ll. 20-25. Stevens stated the Appellant pulled a .357 gun off his waist. R. 324, Tr.p. 393. Stevens stated that he had seen the gun one time before when they were "chillin." Stevens stated at that time he left in Tanisha's car.

Stevens stated that he learned that a shooting took place when he was on the phone with Tanisha after he left in the car. R. 324-25, Tr.p. 393-394. Stevens stated that he called Quanell's ("SK"'s) phone to see if he would give her his phone to talk with him. R. 325, Tr.p. 394. When he asked Appellant if he could talk with "Little One" Quanell handed the phone to Tanisha. R. 326, Tr.p. 395. He stated that this was about 15–20 minutes after he left. He stated during the call he found out that shots were fired. R. 327, Tr.p. 396. He thought it was about 10 minutes after he got on the phone that he learned about the shooting. R. 327, Tr.p. 396.

Stevens confirmed that the only basis he called Appellant was to talk to Tanisha. R. 329, Tr.p. 398. He stated that he stated he was on the phone when the shooting happened. R. 333, Tr.p. 402. He stated he went with Tanisha to the police department. He stated that she knew Appellant as SK and not as Quanell. R. 333, Tr.p. 402.

Mauricio Richardson's Testimony about the Inculpatory Statement

Mauricio Richardson testified that about 10 am on May 29, 2011 Appellant came to his home in York County. R. 336, Tr.p. 405. Appellant was wearing black shots and a white tee shirt. R. 337-38, Tr.p. 406-407. Appellant told Richardson that "he was defending somebody and they got into an argument with their friend, a boyfriend I guess and he shot somebody." R. 338, Tr.p. 407, ll. 6-8. Richardson stated that he guessed that Appellant thought the person was coming back and retaliate against him. R. 338, Tr.p. 407, ll. 16-17. Richardson stated that he told the Appellant to leave. He stated Appellant did after about 20 minutes. R. 341, Tr.p. 410.

Tanisha Nelson's Testimony

Tanisha Nelson testified that she knew Appellant as "SK" or "Marq" and had known him from school when they rode the bus. R. 351, Tr.p. 420. She stated that she is a relative of Timothy Nelson (cousin). R. 352, 353, 380, Tr.p. 421, 422, 449. She stated that she saw Quanell on May 29, 2011. R. 351-52, Tr.p. 420-421. She had seen him in Pardue about two weeks earlier. R. 352, Tr.p. 421.

Tanisha stated that she had been with Qua Stevens, her boyfriend, that day after she had picked him up in her car about 2 or 3 am. R. 353, Tr.p. 422. She had her 8 month old baby with her. She stated that they were arguing about something that had happened in the past. She stated that she did not see Stevens with a gun that night. R. 356, Tr.p. 425. Tanisha described going out the back door and that Stevens came after her. R. 357, 370, Tr.p. 426, 439. She stated she ended up at 1701. R. 357, Tr.p. 426. She stated there were about 10 people there and Dawnetta had gone over and gotten her baby from her house. She stated that Qua Stevens had left in her car before that. R. 358, Tr.p. 427. She did not see Stevens back in Pardue between when he left in her car and the shooting. R. 359, Tr.p. 428. She stated that when she was in 1701, she saw Dawnetta, Justine, cousin Chavis, Terrance Nelson and Timothy Nelson. R. 359, Tr.p. 428. She stated that she started to go home with her baby after everything had died down after Qua Stevens had left. R. 360, Tr.p. 429. She stated that Quanell was walking behind her and brought her the telephone and stated that Qua wanted to talk to her so she grabbed the flip-up phone. R. 361-62, Tr.p. 430-31. She stated that she did not have a working phone at that time. R. 362, Tr.p. 431. Appellant walked off after giving her the telephone. R. 363, Tr.p. 432. While talking to Stevens, Tanisha stated she saw fire coming from a gun that Quanell had. R. 363-64, Tr.p. 432-33. She stated that she had seen somebody walk past her before but it was too dark and it appeared like a shadow. R. 364, Tr.p. 433. She stated that she did not hear anyone say anything.

She described that all she heard was like 5 gunshots while she was on the phone with Stevens. She saw bullets come from the gun as she was standing on the porch of 1705. R. 365, Tr.p. 434. Tanisha stated at that time she ran to her front door but it was locked. R. 365-66, Tr.p. 434-435.

Tanisha stated that she was sure it was Quanell who shot the gun. R. 367, Tr.p. 436. She stated this happened about 10 minutes after Stevens had left in her car. Id. She stated that when she had gotten her baby after Timothy Nelson was in the kitchen in 1701 and he was there when she left. She stated that she gave the police the telephone the next day. R. 366, 371, Tr.p. 435, 440. [7]

On cross-examination, Tanisha stated that she did not see anything going on at the fence. R. 375, Tr.p. 444. She stated that Stevens returned to her apartment about 10 minutes after the shooting with his mother. R. 376, Tr.p. 445.

Solicitor's Closing Argument

During the solicitor's argument, he discusses the significance of the altercation between Appellant and Qua Stevens not as propensity, but only to show Appellant's recent possession of the weapon prior to the shooting:

> What have we got? We got Tanisha Nelson and Qua Stevens who get into an argument and at some point I submit to you Quanell McIlwain knows that those two are going at it out there. And Quanell McIlwain minutes before the shooting has a confrontation with Qua Stevens and basically tells him you ought not to be talking to that girl like that. And of course Qua Stevens being the smart guy he is smarts back off at him and says "Who's gonna stop me?" And Quanell McIlwain has a gun and pulls it out and shows it and the gun is described by Qua Stevens as a chrome or silver .357 magnum I believe. This gun right here in this box. State's Exhibit Number Forty-seven.
>
> So minutes before the shooting we've got Quanell McIlwain being in possession of a gun that is consistent with what we know is the gun that killed Tonio Jones.

[7] Tanisha testified about identifying Appellant at the police station in a photo-lineup. R. 372-74, 377-79, Tr.p. 441-443, 446-448. Testimony about the photographic identification of Appellant by Tanisha Nelson on May 29, 2011 was presented in testimony by Lancaster Police Lt. Phillip Hall. R. 451-58, Tr.p. 520-527.

R. 533-34, Tr.p. 602, l. 14 - p. 603, l. 3.

Defense Closing Argument

In addition to the earlier portion set out, the defense firmly focused on Timothy Nelson as the true perpetrator of the crime based upon his possession of the gun after the incident. In conclusion, counsel Steen stated:

> I don't know what happened in Pardue three and a half years ago on that Saturday night. I'm not alleging that Mr. McIlwain wasn't there. He just didn't shoot Mr. Jones at 1701. The State has put no evidence forth of any malice except for malice can be inferred from the use of a deadly weapon. **Well like I said, you can infer that the weapon was against Mr. Que Black (Nelson) and can prove Mr. Quanell is innocent**. Taking both of those in consideration they don't have malice. For those reasons I would ask that you find Mr. McIlwain not guilty.

R. 557, Tr.p. 626, ll. 4-13.

ANALYSIS

The appellant claims that the McIlwain-Stevens confrontation evidence was inadmissible under SCRE Rule 404 and 403. He claims, despite the prosecution's protestations otherwise, that the evidence was solely presented to show that the appellant had a violent character. Judge Gibbons rejected the characterization and agreed with these State that the testimony was offered to show appellant was armed immediately prior to the shooting. R. 295-96, Tr. 364-365.

The appellant agrees the introduction of the Stevens evidence would show that appellant was armed immediately prior to the Jones shooting, but claims other witnesses were available and offered similar testimony that they saw appellant with a weapon that day as an alternative. Initial Brief of Appellant, p. 13-14. the appellant contends due to this alternate evidence the probative value of the Stevens testimony linking appellant to the gun by Stevens was therefore slight. However, appellant neglects the fact that the focus of their defense was that the State's testimony was not reliable and that the State had not proven appellant possessed the weapon! This was strongly asserted during the defense counsel's closing argument. R. 548, 557, Tr. 617,

lines 12-21, p. 626, lines 4-13. Simply put, the defense theory was squarely that Timothy "Que Black" Nelson was the trigger person, not appellant, supported by the possession of the weapon and disposal of it. By suppressing the fact that appellant, not Timothy Nelson, was seen to possess a gun within minutes of the shooting of Jones, it would have removed the complete story from the jury by fragmenting this relevant information from its view.

The Stevens confrontation evidence further aided the jury in understanding appellant's inculpatory statement made to Mauricio Richardson. R. 338-39, Tr. 407-408. Absent the Stevens's testimony, there may have been no context to appellant's unchallenged comment to Richardson the day after the incident when appellant told him he was defending somebody and they got into an argument and he shot somebody. R. 338, Tr. 407. This inculpatory comment would have been in a vacuum absent the Stevens's testimony.

1. Others Handling the Weapon Evidence.

The probative value of the Stevens evidence was not to show similar crimes under rule 404 (B), as appellant seems to suggest, but rather to give the complete story as a part of the res gestae of the crime. The need for the evidence to tie up the possession at the time of the incident was enhanced by the testimony of Keith Benson. Benson testified that hours earlier that evening when it was getting dark, he saw appellant with a gun, but could not say he saw him with a gun later that night. R. 199, Tr. 268. Benson acknowledged that he also gave law enforcement a statement that he saw appellant with a "big ass gun" which was a silver chrome brown handle 357. R. 203-04, Tr. 272-273. Importantly for the probative value (and need) of the later showing of a weapons to Stevens, Benson testified that earlier that day, they "all actively had the gun that night" and that they had passed and held the gun around them, including Nelson. R. 207-08, Tr. 276-277. What Benson did not testify about concerning the handling of the weapon was whose

last held the gun! The probative value of whether appellant or Nelson continued in possession of the gun was a very important factor to the story in the State's presentation. The Stevens evidence of appellant having the gun 15 minutes before the shooting helped to address that question.

2. **Nelson with Weapon evidence.**

The need to show appellant in possession 15 minutes prior to the shooting was additionally necessary, as appellant recognizes in their summary the evidence, that Nelson possessed the weapon after the shooting. Dora Montgomery testified that she saw Nelson with a gun in her apartment after the shooting and told him to get out. R. 140, Tr. 209. Montgomery stated Nelson was the only one she saw with the weapon. R. 149, Tr. 218. Justine Gladden testified after the shooting she saw an unidentified man jumped the fence and tossed the gun did Nelson and that was when Nelson came into the apartment with a gun. Gladden and stated she told her boyfriend to make him leave the apartment at that time. R. 170-72, Tr. 239-241.

Respondent acknowledges that there was additional evidence presented from Timothy Nelson as to how he came in possession of the gun. However the defense was vigorously challenging Nelson's timing of his possession. Nelson testified that he was in the apartment when he heard the shots fired at around 4:00 AM. R. 219, Tr. 288. Although he was unaware anyone had been shot and thinking that someone was just shooting in the air, he left that apartment, screamed an expletive and saw appellant crossing the fence. R. 242-43, 252-53, Tr. 311-312, 321-322. He told appellant to toss him "the junk" (gun) which appellant did as appellant continued in his flight. R. 243-44, 252, Tr. 312-313, 321. Nelson admits returning to the apartment, unloading the cartridges from the gun and disposing them and a diaper which he trashed. R. 246-48, Tr. 315-317. Nelson admits that after he was seen with a gun he left and disposed of the gun by throwing it in the river. Ultimately he advises the police where it can be

located. R. 247-49, Tr. 316-318.[8]

It should not be seriously disputed that evidence that the appellant had possession of a weapon within minutes of the shooting is part of the res gestae of the crime. As the defense counsel revealed in his closing whether appellant or someone had possession of the gun was the critical part of the case.

The appellant is correct that there was evidence presented by the State that appellant had a gun and that he had committed the crime. However this fact should not foreclose the ability of the State to present this very probative evidence to support that conclusion. Tanisha Nelson testified that she saw the appellant shoot the victim shortly after the victim walked by her. However she claims she was not aware prior to that moment that the appellant had a gun in his possession. R. 364-65, Tr. 433-434. Timothy Nelson described the appellant tossing the gun to him after the shooting. R. 222, 242-43, Tr. 291, 311-312. Keith Benson, the appellant's friend, reluctantly described the appellant among others as to having the gun earlier in the evening. R. 199-200, 203-04, 207, Tr. 268-269, 272-273, 276. However, there were also a series of witnesses who did not see appellant with the gun that date. Dawnetta Montgomery testified she only saw a gun on Nelson after the shooting but not before. R. 149, Tr. 218.

Importantly, after the shooting, when other witnesses looked out their windows, they only saw the victim without seeing any perpetrator. R. 46-52, Tr. 75-81 (Melvina Izzard); R. 54-55, Tr. 83-84 (Annette Benson); R. 59-61, Tr. 88-90 (Patrick Benson); R. 62-68, Tr. 91-97 (Shawanda Mingo); R. 107, 110, Tr. 176, 179 (Semaj Barnette) (heard shots). Because a perpetrator was only identified by Tanisha, the evidence of appellant's close in time possession is very probative.

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[8] Lt. Phillip Hall confirms that Nelson told him where the gun was disposed of in the river. R. 460, Tr.p. 529. See also R. 447-48, Tr.p. 516-517 (locating gun in river). The gun is confirmed to be the murder weapon. R. 507-08, Tr.p. 576-577.

Respondent agrees that there were also a series of witnesses who testified that Timothy Nelson was in 1701 when the shots were fired and not outside. Justine Gladden, Dawnetta Montgomery, and Jatoya Wright stated Nelson was on the floor of 1701 at the time of the shooting. R. 122, 132, 148, Tr. 191, 201, 217. Keith Benson stated Nelson was in the kitchen with him at the apartment. R. 194-95, Tr. 263-265. Tanisha Nelson described Timothy being in the kitchen before she walked outside prior to her receiving the telephone from appellant before the shooting. R. 359-60, 366, Tr. 428-429, 435.

In contrast, evidence was presented that other than evidence from Tanisha and her cousin Timothy (R. 219, Tr. 288, lines 8-11); appellant was not seen at the instant of the shooting. Gladden and Montgomery stated appellant was not inside 1701 when the shots were fired, unlike Timothy Nelson. R. 134-38, 161, Tr. 203-207, 230. Keith Benson stated appellant had left the apartment about 30 minutes before R. 195-96, Tr. 264-265. Semaj Barnette set appellant had been gone for a while prior to the shooting. R. 109, Tr. 178. Jatoya Wright indicated that appellant had left 3 to 4 minutes before the shooting. R. 118, Tr. 187.

The evidence of the Stevens incident also brought in context the timing of the shooting and an understanding as to the basis of the telephone call to the appellant's phone by Stevens at the time of the shooting. Tanisha had just left the 1701 apartment on her way home after she picked up her child when appellant gave her the phone to speak with Stephens. R. 359-367, Tr. 428-436. Dora Montgomery recalled Tanisha picking up her child and the shooting occurring shortly thereafter. R. 137-38, Tr. 206-207. Qua Stevens described the earlier argument and his reason to call appellant's phone to speak with Tanisha which supported the fact that Stevens had not returned to the scene. R. 327, Tr. 396.

Respondent submits that the Stevens evidence placed the entirety the events in context

with a little undue prejudice. It revealed probative evidence as to who was last seen with the gun closest to the shooting. It aided in explaining the context of appellant's statement to Richardson. It corroborated Nelson as to who toss the gun to Nelson when Gladden cannot identify the person in the white shirt. R. 170-71, Tr. 239-240. The Stevens evidence revealing appellant's possession of the weapon at that time was so linked together in point in time and circumstance with the crime that it cannot be fully shown without the other. There was no reason to fragmentize the event by suppressing that probative evidence. Clearly it aided the jury and completed the story.

This case is similar to State v. Dennis, 402 S.C. 627, 635-37, 742 S.E.2d 21, 25-27 (Ct. App. 2013). In Dennis, the court found evidence of res gestae in the presentation of evidence of appellant's possession of a weapon when he had earlier sought to sell the weapon to buy crack cocaine. Like Dennis, the possession of the weapon by Appellant before the incident was at issue. Although it revealed evidence of a bad act, it was integral to the crime for which he was charged. Similarly, McIlwain's possession of a gun within 15 minutes of the shooting was highly probative. The temporal proximity of the prior act is closely related to the charged crime. Admission of the testimony was necessary and relevant to a full presentation of the evidence in this case. The "incident" provided the context for the crime at issue. The testimony regarding the "incident" was relevant to show the complete, whole, unfragmented story. See State v. Simmons, 352 S.C. 342, 573 S.E.2d 856 (Ct.App.2002).

Additionally, there is no dispute that the weapon, Nelson tossed into the river was the murder weapon. How and from whom and when Nelson gained possession of it is a relevant part of the res gestae of the crime. To trace that gun prior to the shooting to Appellant is significant. The trial judge recognized this in his holding.

The Appellant notes that the trial judge was inclined to allow its admission under an

alternate ground under 404(b). R. 294-95, Tr.p. 363-364. Clearly, the evidence would not be admissible to show propensity under Rule 404(a). However, an alternate argument could be made that it would show identity concerning who Gladden saw toss the gun to Nelson. However, since it is clearly a part of the *res gestae*, the Court need not rely simply on a 404(b) analysis. See State v. Wood, 362 S.C. 520, 527-29, 608 S.E.2d 435, 439-40 (Ct. App. 2004) ("Because we dispose of this issue under a *res gestae* analysis, we do not reach the Lyle/Rule 404(b) argument").

Further, the trial court's admission was proper under Rule 403. For the reasons set forth above, the probative value was not substantially outweighed by undue prejudice. The Stevens incident could be characterized as an encounter where Appellant came to the aid of Tanisha who he feared was to be bully or victimized by Stevens. It did not result in a violent confrontation, but Appellant's actions could be interpreted as preventing violence against Tanisha. Although, Appellant made a threat and revealed his weapon in response to Stevens' challenge, no violence occurred. There was already evidence in the record that Appellant had possessed a weapon earlier that day, so the mere possession of the weapon did not create prejudice. Therefore, under Rule 403, the probative and relevant evidence was properly admitted.

The Appellant's reliance on State v. Cope, 405 S.C. 317, 341, 748 S.E.2d 194, 206 (2013) and State v. Smith, 322 S.C. 107, 470 S.E.2d 364 (1996) is misplaced. Neither case involves *res gestae* evidence, but rather is attempting to show admissibility under a Lyle "common scheme or plan." In Cope, the Appellant was seeking to show earlier crimes revealed a common scheme that his co-defendant may have used. However, the Court concluded the other acts were dissimilar and therefore inadequate. Similarly, in Smith, the supreme court has held that evidence of a prior conviction for assault and battery of a high and aggravated nature of a

boy was not admissible in a later prosecution for homicide by child abuse of the boys sister because the type of injury was dissimilar. State v. Smith, 322 S.C. 107, 470 S.E.2d 364 (1996). Here, the state was not attempting to show that Appellant's action with Stevens were a "common scheme or plan" as it related to the shooting of Jones. Simply put, that argument is not relevant were it was not the basis for the admission of Stevens testimony that Appellant showed his gun to him.

Alternately, any error in the admission of the evidence is harmless. As noted, the Stevens evidence cogently supports evidence that Appellant possessed a weapon a brief time prior to the shooting of Jones. However, other than the disparaging of the remainder of the state's eyewitness account of Tanisha Nelson and the testimony of Timothy Nelson, there is evidence that Timothy was not outside at the time of the shooting, that Qua Stevens was not at Pardue at the time of the shooting and that Appellant was the person in the white shirt who Gladden saw toss the gun to Timothy Nelson. Appellant admitted to Mauricio Richardson that he had shot somebody that day. R. 337-38, Tr.p. 406-407. Appellant remained in fight after jumping the fence, going to York that day and then being located late June in Lawton, Oklahoma as evidence supportive of his guilt. R. 338, 433, 438-39, Tr.p. 407, 502, 507-508. This was in stark contrast to the actions of Timothy Nelson or Stevens who Appellant inferred were the perpetrators. A new trial is not warranted.

CONCLUSION

For the aforementioned reasons, the State respectfully asks this Court to affirm the judgment and conviction and sentences.

Respectfully Submitted,

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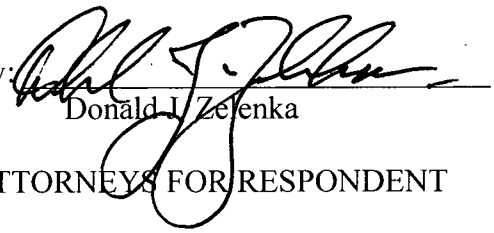

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ATTORNEYS FOR RESPONDENT

March 10, 2016

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County
Brian M. Gibbons, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

v.

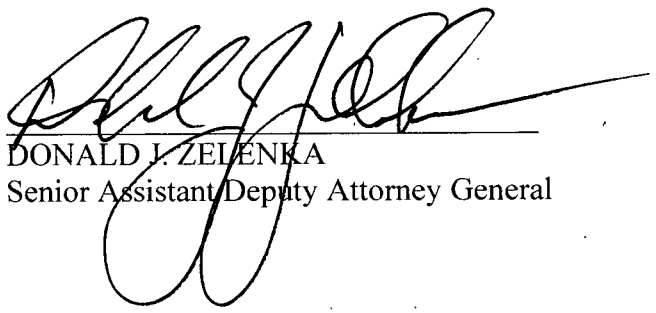
QUANELL MARQUAN McILWAIN,

Appellant

Appellate Case No. 2014-002539

CERTIFICATE OF COMPLIANCE

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



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March 10, 2016

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SC Court of Appeals

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that the Final Brief of Respondent in the above referenced case has been served upon counsel for Appellant by depositing two (2) copies of same in the InterAgency Mail to:

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This 10th day of March, 2016.

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