STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable Roger L. Couch, Circuit Court Judge

THE STATE,

Respondent,

vs.

TIMOTHY WAYNE JOHNSON,

Appellant.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court did not err in allowing evidence of events surrounding the shoplifting that occurred the day the victim's car was stolen as it was probative evidence supporting the identification by store employees who saw Appellant again the next day and in actual possession of the stolen vehicle while Appellant was trying to return items to the store.

STATEMENT OF THE CASE

Appellant Timothy Wayne Johnson was indicted for receiving stolen goods valued more than $2,000 and shoplifting. Johnson was tried by jury before the Honorable Roger L. Couch. Prior to jury selection, Johnson pled guilty to shoplifting. Judge Couch deferred sentencing until after the trial. Johnson was found guilty of the stolen goods charge. Judge Couch sentenced Johnson to ten years' imprisonment for the shoplifting conviction and a consecutive ten year sentence for receiving stolen goods, suspended to three years imprisonment and five years' probation, plus restitution of $725. On appeal, Johnson does not challenge his guilty plea conviction and its ten-year sentence, but only the stolen goods conviction.

STATEMENT OF FACTS

On May 23, 2015, Michael Brewton drove to Lil' Cricket, parked his car by the door, left the motor running, and went into the store. While waiting at the counter, he saw a man jump in the car. Brewton ran after his car, but the thief spun out the car in reverse and drove away. Brewton's car was a grayish-green 2001 Grand Marquis. Tr. pp. 132-33.

Next day, Brewton and his wife were taking his mother to lunch. His wife spotted the Marquis. The Marquis was parked by a house on Nazareth Church Road, only a quarter to a half mile away from the store. Tr. pp. 134-35. Brewton knocked on the door, and a female answered. This female and a second female claimed they did not know whose car was parked in the driveway. Meanwhile, Brewton saw a male peeking through the blinds. Law enforcement arrived and brought Johnson out in hand cuffs. Tr. pp. 137-39. The car was severely damaged by the time Brewton recovered the vehicle. The car was totaled because of the damage and Brewton received $3,500 from the insurance company. Tr. pp. 142-43.

Brewton's wife, Tiffany Brewton, corroborated Brewton's testimony. She testified she spotted the stolen Marquis and called police after they discovered the Marquis. Tr. p. 147. Police arrived in ten minutes. Tr. p. 147. She saw the two women and a guy looking out of the house when they pulled into the driveway. Tr. p. 148.

Justine Esopa was working at Burlington Coat Factory on May 23. Appellant Johnson was involved in an incident at the store. As Johnson was walking out the store, the store alarm went off. Esopa assumed the cashier forgot to remove the sensors from the clothing in Johnson's shopping cart. As she walked towards Johnson, Johnson looked at her, but kept walking with the shopping cart full of clothes. He loaded the clothes in the back of a SUV. Another man was driving the SUV

and a woman was in the back seat. The suspect hopped in the SUV, dropping a pair of shoes, and knocked the shopping coat over as the SUV pulled away. He was wearing a yellow and blue striped shirt, the yellow really stood out. Tr. pp. 153-55.

The next morning, Esopa was dropped off for work and as the driver pulled into a parking spot, Esopa spotted a light colored car with Johnson and a woman. Johnson was leaning on the hood of the car holding some clothing items. The woman and Johnson quickly got in the car and pulled off while Esopa tried to inform the manager. Esopa testified Johnson was wearing the same clothing he wore the day before. She identified the pictures of the stolen Marquis as the car Johnson was sitting on and drove away on May 24. Tr. pp. 155-57.

Thomas Sean Warrick was the Loss Prevention supervisor at Burlington Coat Factory. On May 23, while Warrick was on a smoke break, Johnson walked up to the door. He asked Warrick about large size shorts.[1] Johnson was exceedingly close, in Warrick's personal space. Warrick was suspicious since clearly Warrick would not wear such a large size shorts. He kept his eyes on Johnson. However, Warrick's attention was drawn elsewhere. Warrick received a call from an associate advising someone was leaving the store with merchandise. Warrick testified Johnson was wearing a polo shirt with blue and yellow horizontal stripes. Tr. pp. 188-191; p. 198. Warrick also saw footage from the store's closed circuit television showing Johnson leaving the store with merchandise. Tr. p. 202, lines 11-21.

[1] The prosecution referenced size 48 shorts during closing argument. Tr. p. 315.

The next day, a woman trying to return stolen merchandise without a receipt fled the store to a vehicle Johnson was driving. Warrick identified a picture of the Marquis as the car upon which Johnson drove on May 24. The license plate on the Marquis was the same license plate number Warrick wrote in his notes. Tr. pp. 191-93. After some confusion during direct examination, Warrick described the circumstances under which he personally saw Johnson in the Marquis on May 24, 2015:

> [H]e came around the side of the building from Gold's Gym. As he proceeded – like I said, he had came [sic] in diagonally, stopped, did a three-point turn, and the female subject that was trying to return the goods or the merchandise without a receipt, she walked out cause – she was walking very slow cause all she had on was socks and she goes around, gets in the passenger side front, gets in, I notice him, the defendant, and he pulls out. Right as he's pulling out, the City P.D. is pulling up.

Tr. p. 206, lines 7-16. Warrick picked Johnson out of a photographic lineup at the police station. Tr. p. 196.

Officer John Walter testified law enforcement created a photographic array that included a picture of Johnson after a second officer provided him with Johnson's name. Tr. p. 165, p. 174. Kim Ritter from the Spartanburg Police Department showed Warrick the photographic array, one picture at a time. Upon reaching the fifth photograph, Johnson's photograph, Warrick positively identified Johnson as the person involved in the Burlington Coat Factory incident. Tr. p. 185.

Deputy James Rhodes testified that on May 24, he responded to the scene of a possible subject hiding in the closet of a house. His Dutch-born Belgian Malinois, Elko, was deployed. Deputy Rhodes and Elko were set to go upstairs when Johnson announced he was coming out from the small crawl space. Johnson did not respond to Deputy Rhodes prior warnings he was bringing a dog upstairs, but Johnson finally responded after Elko barked at Deputy Rhodes' command. Tr. pp. 210-13. Johnson crawled out of the crawl space towards Deputy Rhodes. Tr. p. 211. The crawl space was so small that Deputy Rhodes thought it would be difficult for him to go through the crawl space if Johnson had not crawled out. Tr. p. 213. Johnson was wearing a blue and yellow striped polo shirt and some white insulation. Tr. p. 215.

Deputy Kyle Jurek responded to a call about the recovery of a stolen vehicle. Arriving at the scene, Deputy Jurek first spoke with the car owner and then knocked on the door. Two females answered. Deputy Kyle Jurek personally knew Johnson was at the house two days ago and lived at the house recently. The women told Deputy Jurek that Johnson was out of town at work. They consented to Deputy Jurek looking around the house for Johnson. Tr. p. 220. While one woman, the girlfriend, was not looking, the other woman gestured to Deputy Jurek, pointing upstairs, which was where Johnson was hiding. Tr. pp. 221-22. Deputy Jurek was aware the car met the description of the stolen car from the incident report, and was also aware it met the description of the BOLO for an incident in the city. Johnson came downstairs after the search dog (Elko) arrived and spoke. It took half an hour from the time Deputy Jurek was informed Johnson was hiding in the attic until Elko[2] persuaded Johnson to reveal himself. Tr. p. 224-26.

[2] Elko retired after seven years of service. Tr. p. 210, lines 9-14.

Deputy Jurek performed an inventory search of the stolen Marquis and found items in a Burlington Coat Factory bag inside. The items were not the car owner's items. Tr. pp. 231-32.

The State rested its case, and Jackie Gregory, Johnson's girlfriend, testified on Johnson's behalf. She had convictions for shoplifting, possession of a stolen vehicle, and receiving stolen goods, all from 2015. She explained she was mixed up with drugs. Tr. pp. 273-75. Gregory remembered the Marquis and plead to possessing the Marquis. Tr. pp. 275-76. Gregory claimed she came into possession of the Marquis on May 24. She claimed she was renting the car from someone for drugs and Johnson would have no reason to believe the car was stolen. Tr. pp. 276-79. The following explanation was provided by Gregory:

> Q: Did you tell him that you had ---
>
> A: I just told him I had – he wanted to know where it come from. I told him I rented it.
>
> Q: Okay. Did you tell him who?
>
> A: I mean it's a drug world. Don't nobody care about all names and ---
>
> Q: Okay. But did you ---
>
> A: ---that.
>
> Q: Did he know that you rented it from some guy?
>
> A: No, I didn't want to tell him it was from some guy.
>
> Q: Okay. What did you tell him?
>
> A: I just said a friend.

Tr. p. 278, lines 4-17. She claimed she did not know herself the car was stolen and claimed Johnson would not have any reason to know the car was stolen. Tr. pp. 278-79. Gregory explained to the jury: **"I mean if he would of knew it was stolen why would he have drove the car to shoplift anyways."** Tr. p. 279, lines 24-25 (emphasis added).

Gregory explained they parked the car to keep out of sight of eighteen wheelers because there was a house behind them with transfer trucks. Tr. p. 280. The solicitor commented, "2015 was not one of your better years, was it?" Gregory replied, "It wasn't one of my worst either." Tr. p. 281, lines 6-8. Gregory complained Brewton and his wife were cussing at them when they came to Gregory's house and found their car. Tr. p. 285.

Guilty plea to shoplifting

Prior to trial for receiving stolen goods, Johnson pled guilty to shoplifting from the Burlington Coat Factory. The prosecution gave the following statement of facts to which Johnson agreed:

> On May 23rd, 2015, Officer Welcher with . . . Spartanburg Police Department responded to the Burlington Coat Factory here in Spartanburg County in reference to a shoplifting. He was able to speak with two employees of the Burlington Coat Factory. The first stated that a store alarm had gone off over by the exit door. She followed a white male outside and attempted to get his attention. She then saw him take clothing items and put them in the back seat of the vehicle and leave the scene.
>
> The loss prevention officer also stated that he had seen the male enter the store, wander around for approximately an hour and a half, and did become suspicious of him because he was looking for size 50 shorts, which obviously did not fit the man asking for them. That loss prevention officer was later shown a photo line-up and immediately identified the defendant from that lineup.

Tr. p. 20, line 14 – p. 21, line 5.

ARGUMENT

The trial court did not err in allowing evidence of events surrounding the shoplifting that occurred the day the victim's car was stolen as it was probative evidence supporting the identification by store employees who saw Appellant again the next day and in actual possession of the stolen vehicle while Appellant was trying to return items to the store.

Johnson claims the trial court erred in allowing testimony surrounding his May 23 shoplifting in his prosecution for receiving a stolen car. On May 23, Johnson shoplifted from Burlington Coat Factory. On May 24, Johnson returned with his girlfriend and was seen sitting on the stolen vehicle while his girlfriend attempted to return shoplifted items to Burlington Coat Factory and then was seen driving the vehicle away. The crimes were intertwined and so intimately connected that evidence of the shoplifting was necessary for a full presentation of the case.[3] Further, the issue is not preserved for review as Johnson never renewed his in limine objection, probably for strategic reasons.

Johnson made an in limine motion regarding the shoplifting, but never renewed his motion before the jury. The motion regarding the shoplifting was made prior to opening arguments. The first two witnesses were the Brewtons. The next witness, Esopa, described how Johnson shoplifted a shopping cart of clothes from the store and left with the clothes in the car. No objection was raised. Tr. pp. 154-55. Warrick was the sixth witness to testify and he was allowed to testify to the events he observed on the 23rd without objection, although a specific hearsay objection as to what he was

[3] Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion

told was sustained. Tr. pp. 189-91.

"A pretrial ruling on the admissibility of evidence is preliminary and is subject to change based on developments at trial. A ruling in limine is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review." State v. Smith, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999) (citation omitted). "One may not preserve a vice until he learns what the result will be and then take advantage of the error on appeal." State v. Penland, 275 S.C. 537, 273 S.E.2d 765, 766 (1981) (not preserved due to failure to move for mistrial until after the verdict). Likely, Johnson's counsel perceived the shoplifting incident, occurring prior to when Johnson was found hiding in the attic, gave the jury an alternate explanation as to why he was hiding from law enforcement. Regardless, the issue is not preserved for review because the in limine motion was not renewed before the jury.[4]

Further, the evidence was admissible res gestae evidence. "Evidence of other crimes is admissible under the *res gestae* theory when the other actions are so intimately connected with the crime charged that their admission is necessary for a full presentation of the case." Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003) (defendant's assault on defendant's former girlfriend and his threat to shoot her or the other man provides the context of subsequent shooting of the other man and is admissible as *res gestae*); accord State v. Benjamin, 345 S.C. 470, 549 S.E.2d 258 (2001) (finding, in prosecution of armed robbery and murder at a Citgo, evidence of subsequent robbery at a

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standard and gives great deference to the trial court.")).

[4] After the trial court's ruling allowing the facts surrounding the shoplifting to be admitted, but not the fact of conviction, defense counsel said "thank you" to the trial court. The trial court responded, "To that extent I will grant your motion." Tr. p. 100, lines 20-21. See generally State v. Morris, 307 S.C. 480, 486, 415 S.E.2d 819, 823 (Ct. App. 1991) (finding an issue is not preserved for review when a party affirmatively accepts the trial court's ruling).

Dodger's store, where defendant dropped his gun, was admissible under *res gestae* theory, as it was necessary to a full presentation of State's case); State v. Dickerson, 341 S.C. 391, 535 S.E.2d 119 (2000) (evidence of defendant's cocaine use during time period of "overkill" murder was admissible as *res gestae*); State v. Gagum, 328 S.C. 560, 492 S.E.2d 822 (Ct. App. 1997) (in strong arm robbery prosecution, evidence that defendant offered his civilian captors dope to let him go was admissible as *res gestae* of crime); State v. Crim, 327 S.C. 254, 489 S.E.2d 478 (1997) (Evidence of defendant's larceny of car defendant drove when the accident leading to the felony DUI charge occurred was admissible as *res gestae* in prosecution for felony DUI); State v. Hough, 325 S.C. 88, 480 S.E.2d 77 (1997) (finding evidence that defendants purchased crack cocaine with proceeds of stolen items sold was necessary for full presentation of the case and admissible as *res gestae*); State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) (defendant's use of cocaine prior to robbery and murder admissible as the drug usage was inextricably intertwined with robbery and murder) *overruled on other grounds by* State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014); State v. Johnson, 306 S.C. 119, 410 S.E.2d 547, 552 (1991) (finding that evidence of a dead body in defendant's van tended to explain why the defendant shot the trooper when the trooper opened the van door); State v. McGee, 408 S.C. 278, 289, 758 S.E.2d 730, 736 (Ct. App. 2014) (finding theft of truck the night before the murder was relevant because the truck allowed McGee access to a winch rod like the one used to commit the murder and placed McGee in the area around the time of the attack).

The Supreme Court explained res gestae as follows:

> 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 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.

Benjamin, 345 S.C. at 480, 549 S.E.2d at 263 (quoting Hough, 325 S.C. at 92, 480 S.E.2d at 79). This Court held that to constitute part of the res gestae of an offense, it is important the prior bad acts have a close temporal proximity to the charged crime. State v. Martucci, 380 S.C. 232, 258, 669 S.E.2d 598, 612 (Ct. App. 2008).

When evidence is relevant under the res gestae theory, the trial court must still undergo a Rule 403 balancing test to determine whether the probative value is substantially outweighed by the danger of unfair prejudice. McGee; Rule 403, SCRE. A trial court's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. State v. McLeod, 362 S.C. 73, 81, 606 S.E.2d 215, 219 (Ct. App.2004). Determination of relevancy is largely within the discretion of the trial court and will not be reversed absent an abuse of that discretion. State v. Sweat, 362 S.C. 117, 127, 606 S.E.2d 508, 513 (Ct. App. 2004). "A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." State v. Stephens, 398 S.C. 314, 320, 728 S.E.2d 68, 71 (Ct. App. 2012).

In the instant case, the trial court noted that testimony surrounding the shoplifting incident was admissible because employees of Burlington Coat Factory in the course of their investigation

and loss prevention measures observed Johnson in the stolen vehicle. The trial court noted the jurors would surmise Johnson was shoplifting from Burlington Coat Factory, but ordered that evidence Johnson pled guilty to or was convicted of shoplifting not be presented. Tr. pp. 99-100. The State complied with this request and Johnson never objected that the evidence presented exceeded the scope of the trial court's ruling.

In the instant case, the events of the shoplifting are necessary for the full presentation of the case. First, the events of the shoplifting and theft of the auto, and discovery of the stolen vehicle, are in close temporal proximity. Further, the testimony from the store employees was highly probative of the stolen vehicle charge. To be sure, without testimony regarding events at the Burlington Coat Factory, the State's evidence showed Johnson's constructive possession of the stolen vehicle when the car was found at the house he was residing and Johnson was found hiding in the attic. However, the Burlington Coat Factory employees, Esopa and Warrick, provided the only proof showing Johnson's actual possession of the stolen vehicle, and therefore, their testimony was necessary for the full presentation of the case. Their testimony on the events of the 24th established the actual possession of the vehicle. Further, their testimony concerning the events of the shoplifting on the 23rd was highly probative in establishing the efficacy of their testimony identifying Johnson as the male on or inside the Marquis on the 24th. Warrick's attention was focused on Johnson for a considerable time after their initial discussion because Warrick was monitoring Johnson, anticipating Johnson's theft. Esopa's attention was drawn to Johnson on the 23rd because she discovered him walking away from the store alarm, pushing a cart of clothes outside to a vehicle, and putting them in the car. This is why seeing Johnson sitting on the Marquis on the 24th motivated her to quickly find a manager before Johnson left. Therefore, in the instant case, the trial court did not make an error of law or

abuse its discretion in admitting this highly probative evidence. McGee, 408 S.C. at 288, 758 S.E.2d at 735-36 ("When evidence is admissible to provide this full presentation of the offense, there is no reason to fragmentize the event under inquiry by suppressing parts of the res gestae.") (internal quotation marks omitted) (quoting State v. Preslar, 364 S.C. 466, 474, 613 S.E.2d 381, 385 (Ct. App. 2005)).

Additionally, the evidence from both the 23rd and 24th is admissible under Rule 404(b) as evidence tending to establish Johnson's identity as the receiver/possessor of the stolen Marquis. Prior bad acts may be admissible when they establish (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan; or (5) identity of the person charged. Rule 404(b); State v. Lyle, 125 S.C. 406, 118 S.E.809 (1923). Evidence of prior bad acts meeting one of these purposes is admissible if the probative value of the prior bad acts clearly outweighs the prejudicial effect. State v. Blanton, 316 S.C. 31, 446 S.E.2d 438 (Ct. App. 1994).

The testimony regarding Johnson's shoplifting was probative in establishing the identity of Johnson as the receiver of the stolen Marquis. For instance, in State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004), this Court found evidence of Gillian's participation in a prior burglary relevant because it showed the gun stolen by Gillian was consistent with the type of firearm that fired the bullets recovered from the murder victim's body. Id. at 445, 602 S.E.2d at 68-69.

In State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000), Beck was accused of robbing and murdering an escort service date (referred to as Victim) after calling her to the apartment of an acquaintance where he stayed while the power was out at his own apartment. Another escort (identified as Employee) was allowed to testify that three days earlier she was called to his apartment. When Employee arrived, a man wearing black boots held a knife to her throat and took

$300 from her purse. Employee identified Beck as the assailant and identified the knife found at the acquaintance's apartment as the one he used during the assault. The acquaintance later provided police with black boots meeting the description Employee provided, and they were covered with Victim's blood. Bullard also owned the knife and the gun used in the murder, and both weapons were easily accessible to Beck. The Supreme Court found Employee's testimony admissible to prove the identity of Beck as the perpetrator of Vicitm's murder. Id. at 136, 536 S.E.2d at 683. In the instant case, Warrick and Esopa's testimony established Johnson's identity as the person in actual possession of the stolen vehicle. The strength of their identification is bolstered by their monitoring and observation of Johnson during the shoplifting on the 23rd. The highly probative value of their testimony is not outweighed by the danger of unfair prejudice. Accordingly, the trial court did not abuse its discretion.

Further, any error is harmless beyond a reasonable doubt. The harmless error doctrine preserves the central purpose of a criminal trial, which is to decide the factual question of a defendant's guilt or innocence. State v. Rivera, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013) (citing Arizona v. Fulminante, 499 U.S. 279, 306-08 (1991)). The "materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003); see also State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997) (finding no prejudice from admission of divorce complaint alleging appellant and his co-defendant had an adulterous affair where it was cumulative to other evidence and appellant admitted having the adulterous relationship). In the instant case, Johnson's girlfriend, Gregory, implied on direct examination that Johnson would not be concerned who she "rented" the car from because "it's a drug world" and presented the defense on Johnson's behalf that he would

not have brought the stolen car to shoplift if he knew it was stolen. Tr. p. 278, lines 4-17, p. 279, lines 24-25. Since she confirmed Johnson was shoplifting and also made a clear implication that he was in the drug world, testimony from Esopa and Warrick was harmless beyond a reasonable doubt in light of the evidence presented in the entire case.

CONCLUSION

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

Respectfully submitted,

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January 19, 2017

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SC Court of Appeals

January 19, 2017

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 116629
Columbia, South Carolina 29211

Re: The State v. Timothy Wayne Johnson
Appellate Case No: 2016-000608

Dear Ms. Kitchings:

Enclosed please find the Initial Brief of Respondent and Designation of Matter along with proof of service in the above-referenced case.

Sincerely,

David Spencer
Senior Assistant Attorney General
S.C. Bar No: 68571

DS/ab
Enclosures

cc: Laura R. Baer, Esquire
Ms. Trisha Allen