**STATE OF SOUTH CAROLINA**
**In the Court of Appeals**

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Appeal from Anderson County
R. Scott Sprouse, Circuit Court Judge

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**THE STATE,**

**Respondent,**

v.

**BOBBY JOE ARFLIN,**

**Appellant.**

Appellate Case No. 2015-001900

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# FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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## RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

I. Whether the trial court abused its discretion in excluding evidence of the victim's prior arrest where the arrest was not relevant, and the State did not open the door to the evidence but was presenting rebuttal evidence of the victim's good character after appellant first attacked the victim's character.

## STATEMENT OF THE CASE

An Anderson County Grand Jury indicted appellant, Bobby Joe Arflin, for murder, possession of a weapon during the commission of a violent crime, and three counts of solicitation of a felony, specifically kidnapping. (R.pp.1-2; pp.9-10; pp.14-15; pp.19-20). Appellant proceeded to a jury trial on August 24, 2015 and was represented by Druanne Dykes White, Esquire, and Ashlea Morgan White, Esquire. (R.p.169). Lauren Davis Price, Esquire, and Catherine Townsend Huey, Esquire, of the Tenth Circuit Solicitor's Office represented the State. (R.pp.168-69).

The jury found appellant guilty of all charges on August 27, 2015. (R.p.1017, line 25-p.1019, line 6). The Honorable R. Scott Sprouse sentenced appellant to thirty (30) years' imprisonment for murder, a consecutive ten (10) years' imprisonment for one of the solicitation charges, and concurrent terms of five (5) years' imprisonment for the weapons charge and twenty (20) years' imprisonment for the remaining two solicitation charges. (R.p.1023, line 25-p.1024, line 13).

This appeal follows.

## STATEMENT OF FACTS

On the evening of December 11, 2013, the deadly sound of gunfire tragically interrupted a young girl's birthday party in Anderson County. The victim, Jody Powell (Powell), was at the party for his girlfriend's eleven-year-old niece when appellant hit his pick-up truck. (R.p.264, lines 4-22; p.265, lines 4-7; p.387, line 12-p.388, line 19). The victim was inside with a group of adults when a child told them about the accident. (R.p.266, lines 17-23). James Madison (Madison) went outside first and saw appellant, who was also driving a pick-up, next to the vehicles, and spotted damage to the victim's truck, including a missing side mirror and caved-in front bumper. (R.p.267, lines 7-13; p.268, lines 2-23; p.268, line 24-p.269, line 7). The victim walked out, and both he and Madison walked to the trucks and saw appellant on the phone with 911 to report the accident. (R.p.270, lines 19-22, p.271, lines 10-25; p.349, line 23-p.350, line 7).

The victim asked appellant why he hit his truck and appellant told him it was in his way as he tried to drive down the street to his home.[1] (R.p.274, lines 14-22). Madison testified neither appellant nor the victim was acting aggressively; however, after the victim told appellant that although he had never met him, he had heard a lot about him, including that appellant was heartless, appellant "got up in [the victim's] face" and replied "he wasn't heartless, he was ruthless." (R.p.275, lines 6-25). The victim pushed appellant on his chest to get him to back away from him, appellant took a step back, and Madison testified appellant said, "I got something for you, big boy," pulled out a gun from behind his back, and fired a shot. (R.p.276,

[1] Appellant lived near the dead-end of Williamson Drive, which witnesses described as narrow, with ditches on both sides. (R.p.262, lines 15-23; p.376, line 21-p.377, line 12). However, measurements taken by law enforcement demonstrated the road was wide enough for both trucks to clear each other without bumping mirrors or touching in any way, and drivers could utilize the grassy shoulders that lined both sides of the road as well. (R.p.628, line 21-p.629, line 1; p.648, lines 10-19).

lines 9-18; p.277, lines 4-14). Madison stated the victim did not have a weapon and, when the victim saw the gun, he raised his hands. (R.p.277, lines 17-21). Madison testified appellant followed the victim as he ran away, and Madison saw the victim fall face down in a ditch and appellant shoot him again. (R.p.279, lines 7-13; p.279, line 20-p.280, line 3).

Madison ran inside the house to tell his wife to call 911.[2] (R.p.280, lines 12-20). After going back outside, Madison testified he saw the victim's girlfriend, Brenda Masters (Masters), in the ditch with the victim, begging appellant to, "Please, stop shooting." (R.p.280, lines 21-24; p.281, line 18-p.282, line 2). As Madison and Masters tried to save the victim, appellant moved his truck and waited for police. (R.p.282, lines 3-24; p.383, lines 9-18). Madison testified the victim never threatened appellant. (R.p.285, line 24-p.286, line 4).

Masters corroborated much of Madison's testimony. Masters testified she went outside prior to the shooting and heard the victim tell appellant he understood why appellant might have hit the truck's mirror, but could not understand why he backed up and hit it again. (R.p.350, line 23-p.351, line 2). Masters testified she saw appellant and the victim "in each other's faces" with their voices raised "a little," but stated the victim did not have a weapon and did not threaten appellant. (R.p.350, lines 18-22; p.353, lines 10-17). Masters testified she tried to calm the situation because law enforcement was on the way and she urged the men to let the sheriff's office handle it. (R.p.274, lines 3-13; p.351, line 20-p.352, line 4).

Masters testified the victim pushed appellant a little to get him out of his face, but the push was not even hard enough to cause appellant to fall back, then appellant told the victim, "I've got something for you, boy." (R.p.352, lines 14-24; p.353, lines 5-9; p.364, line 19).

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[2] Tonya Williamson (Williamson) testified she was already on the phone with 911 to report the initial accident when she saw appellant shoot the victim, as it was dark outside and the flash from the muzzle lit up appellant's face. (R.p.392, lines 2-24). Williamson stated she heard a second shot as she ran toward the back of the house. (R.p.395, lines 10-22).

Masters stated appellant pulled out a gun, the victim put his hands up, "and then it just all happened so fast. He just shot." (R.p.353, lines 20-22). Masters testified she momentarily lost sight of the victim so she did not see him get shot the second time, but she heard him say, "Oh, my God. Oh, my God, I'm going to die." (R.p.353, line 24-p.355, line 4). The victim fell and started convulsing and Masters dropped to her knees in the ditch to figure out where the victim was shot. (R.p.355, lines 7-12). Masters testified appellant had followed the victim away from the trucks and was standing over him, with the gun pointed at him. (R.p.355, lines 15-25). Masters begged appellant "please, to stop shooting, don't shoot anymore." (R.p.356, lines 1-3). As Madison previously testified, appellant walked away to move his truck while Masters and Madison tried to save the victim. (R.p.356, line 15-p.357, line 3).

The victim was pronounced dead at the hospital. (R.p.448, lines 18-21). An autopsy later determined appellant shot the victim once in the shoulder and once in the back, near his hip. (R.p.651, line 20-p.652, line 2; p.652, line 24-p.653, line 2). The bullet severed an artery in the victim's shoulder; however, the pathologist testified the victim could have survived that wound with medical treatment. (R.p.653, lines 3-21; p.654, lines 5-10). The pathologist stated the wound to the victim's hip was fatal—the bullet entered the victim's hip and traveled through his body, tearing through a kidney, the liver, and a lung before exiting near the victim's arm pit. (R.p.654, line 11-p.655, line 2; p.659, lines 7-12). The pathologist corroborated earlier eyewitness testimony when he testified the gunshot wound to the hip came from behind, possibly as the victim was lying face down. (R.p.660, line 13-p.661, line 18).

Many of the first deputies to arrive at the shooting scene saw the victim in the ditch as his friends tried to save him. (R.p.415, line 2-16; p.433, lines 17-23; p.442, lines 12-25). Deputy Shane Chandler (Chandler) was the first one to respond and testified the victim was not moving

when he arrived. (R.p.413, lines 13-15; p.414, line 20-p.415, line 16). Chandler asked the witnesses who shot the victim and they pointed toward appellant, who was standing by his truck. (R.p.415, lines 17-22). Chandler approached appellant and told him to put his hands up, and asked him if he was the shooter and appellant told him that he was. (R.p.415, line 23-p.416, line 8). Chandler handcuffed appellant and placed him in a patrol car. (R.p.416, lines 9-13; p.421, lines 14-21). Another deputy arrived at the scene shortly thereafter and asked where the gun was and appellant told him it was on the hood of his truck. (R.p.417, lines 5-11; p.443, line 18-p.444, line 1).

A search of appellant's truck revealed twelve bullets and two spent casings for a Smith and Wesson .41 caliber magnum revolver. (R.p.541, lines 17-22). The spent casings were found on the driver's seat. (R.p.543, lines 5-11). Moreover, a check of the gun by forensic investigators showed appellant had reloaded it, so that it contained six bullets. (R.p.576, lines 8-11; p.596, line 24-p.597, line 7). Investigators who searched the victim's truck found a closed pocketknife in the console, mixed in with a lot of other items such as tools and glue. (R.p.525, line 7-p.526, line 3; p.527, 13-24; p.528, lines 11-18). Additionally, forensic investigators noted two bullet holes in the victim's truck, as well as damage to both pick-ups from the initial accident. (R.p.465, line 2-p.467, line 1; p.547, lines 16-22).

While investigators processed the scene, appellant was taken to the Anderson County law enforcement center. (R.p.422, lines 1-6). Appellant did not have any visible injuries from the deadly incident, such as bruising, to corroborate his statements to law enforcement that the victim punched him, but appellant reported multiple pre-existing medication conditions when he was booked into the detention center. (R.p.470, lines 17-19; p.472, lines 19-23, p.473, lines 8-10). Those conditions included a hernia, high cholesterol, mood issues, and a prior incidence of

"head cancer."[3] (R.p.530, line 19-p.531, line 6; p.533, lines 22-23). Subsequently, appellant was charged with murder and possession of a weapon during the commission of a violent crime. (R.pp.5-8).

While appellant was in jail awaiting trial, he talked to his cellmate, Roy Lawrence (Lawrence), about the case against him, and told Lawrence "[h]e ran into somebody's car or vehicle and it seemed like the whole neighborhood came after him, and he had a confrontation with the guy, the guy pushed him in the chest and he shot him." (R.p.736, lines 3-12; p.738, lines 2-10). Lawrence was in jail on a pending charge of criminal sexual conduct with a minor. (R.p.752, line 24-p.753, line 1). Lawrence testified appellant told him there were eyewitnesses to the shooting, but there would be a mistrial if the witnesses disappeared. (R.p.738, line 25-p.739, line 3). Lawrence stated appellant asked him to kidnap three specific witnesses once he was released on bond. (R.p.739, lines 14-20; p.742, lines 18-22). In return, appellant promised to give Lawrence some land. (R.p.741, line 22-p.742, line 2).

Appellant drew a map of the witnesses' homes and showed Lawrence how to get inside them. (R.p.738, lines 18-23; p.739, lines 5-7). The homes belonged to James Madison, Brenda Masters, and Larry Williamson.[4] (R.p.741, lines 10-14). Once Lawrence was released, he told his brother-in-law, who was a state constable, about appellant's plan, and his brother-in-law told him he would contact someone in law enforcement. (R.p.743, lines 4-17). Lawrence testified an investigator arrived at his house, he told him about the plan, and gave him the list of names and map appellant drew. (R.p.743, lines 18-25; p.744, lines 21-25; p.778, line 20-p.779, line 1).

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[3] During his testimony at trial, appellant stated he also suffered from diabetes, arthritis, kidney disease, and neuropathy, or numbness, in both legs. (R.p.857, line 22-p.858, line 8).

[4] Larry Williamson was not at the party, did not witness the murder, and did not testify at trial. (R.Vol.1.pp.ii-iv; Vol.2.pp.i-iii; p.810, line 19-p.811, line 4).

Sergeant Robert Gebing (Gebing) with the Anderson County Sheriff's Office verified appellant wrote the document, verified the locations of the witnesses' homes, and that appellant owned the land promised to Lawrence. (R.p.775, lines 23-24; p.780, line 15-p.781, line 1; p.783, line 5-p.784, line 1; p.794, line 11-p.798, line 11). Gebing testified he told Lawrence to contact him if he heard anything further from appellant about carrying through with the plan. (R.p.800, lines 6-14).

A few days later, appellant called Lawrence from jail and they spoke again about the plan. (R.p.745, lines 1-8; p.745, line 25-p.746, line 16). Lawrence testified he lied to appellant and told him he had "scoped it all out," but that one of the witnesses was not home so appellant told Lawrence to "hold off" for a week. (R.p.747, lines 1-8). Appellant told Lawrence he would write him a letter with further instructions; however, Lawrence mistakenly gave appellant the wrong zip code and Lawrence never received a letter. (R.p.747, lines 15-20). The phone call was recorded and played for the jury at trial. (R.p.748, line 10-p.749, line 13). Gebing testified the phone call corroborated the information Lawrence gave him, leading to three counts of solicitation of a felony. (R.pp.12-13; pp.17-18; pp.22-23; p.802, line 23-p.803, line 7).

After the State rested its case, the defense called three witnesses. Sheila Arflin (Sheila), appellant's wife, testified she was at home on the night of the murder when appellant called her, upset. (R.p.826, lines 10-11; p.833, lines 19-24). Sheila stated appellant told her he was trying to get home when he hit the victim's truck, and the victim yelled at him and hit him on the jaw. (R.p.833, line 25-p.834, line 5). Sheila testified appellant admitted to her that he shot the victim. (R.p.834, lines 6-7). Sheila further acknowledged that a deputy asked her if appellant had any problems and she responded that appellant "just gets something on his nerves so bad sometimes." (R.p.843, line 23-p.844, line 5). Appellant's brother, Bobby Arflin (Bobby), testified appellant

also called him and told him he accidentally hit a truck, and appellant later overheard someone say, "I'm going to knock the piss out of you." (R.p.846, lines 1-5; p.848, lines 2-8). Bobby stated he believed, from his conversation with his brother, that appellant felt like he was in danger. (R.p.849, lines 20-25).

Appellant also testified at trial, continuing to advance his assertion that he acted in self-defense on the night he shot the victim twice. Appellant stated he was returning home after running errands when he saw the victim's truck in the road and thought he could get around it. (R.p.860, line 2-p.861, line 12; p.862, lines 4-25). As appellant tried to drive past, he heard something hit his truck and, because he did not want to cause any problems with his neighbors, he testified he backed up, but felt another bump. (R.p.863, line 3-p.864, line 22). Before he got out of his truck, appellant grabbed his cell phone and gun, putting the gun in the waistband of his pants, behind his back. (R.p.865, lines 20-24).

Appellant called 911 to report the accident and testified he heard the victim and Madison murmuring they were going to "kick [his] ass." (R.p.865, line 25-p.866, line 25; p.869, lines 8-11). Appellant stated the 911 operator asked him if anyone was hurt and appellant responded, "Not yet." (R.p.869, lines 12-15). Appellant testified he saw the victim rummage around in his truck but could not tell what he grabbed. (R.p.870, lines 4-23).

Appellant testified the victim acted aggressively and became more agitated as he tried to explain how the accident happened. (R.p.871, lines 10-19; p.872, line 9-20; p.874, lines 2-5). Appellant told the jury he tried to walk away from the victim, but the victim hit him in the jaw. (R.p.875, line 23-p.876, line 18). However, on cross-examination, appellant admitted he told the staff at the detention center that he did not have any recent injuries to his jaw. (R.p.903, lines 10-25). Appellant testified everything happened "so fast" after the victim hit him. (R.p.878,

lines 17-23). While appellant stated he did not remember firing his gun twice, he acknowledged he must have because investigators found two spent casings. (R.p.880, lines 1-6; p.881, line 4-6). Appellant further testified he was not aware the victim had been shot and stated, when Masters begged him to stop shooting, he told her, "Tell him to stay away from me." (R.p.882, lines 15-23). Appellant also admitted he laid the two spent casings on the front seat of his truck and that he put two more rounds in the revolver while he waited for law enforcement. (R.p.883, line 23-p.884, line 1; p.884, lines 12-20).

As for the plot to kidnap three witnesses to prevent the trial from taking place, appellant testified he never told his cellmate to commit the crimes. (R.p.890, lines 2-4). Appellant admitted he drew the map, but stated he never gave it to Lawrence and simply used it to illustrate where his property was in relation to the shooting scene. (R.p.890, line 24-p.891, line 4; p.892, line 22-p.893, line 15). Appellant testified he was surprised when Lawrence brought up kidnapping the witnesses during the phone call and, despite the evidence previously admitted in the form of the recorded call, appellant stated he tried to change the subject and he never sent Lawrence a letter.[5] (R.p.895, line 21-p.896, line 7; p.897, lines 7-9).

[5] As noted above, the call was played for the jury. (R.p.748, line 10-p.749, line 13). In addition to telling Lawrence to wait a week before kidnapping the witnesses, appellant also told him he would pay to "stash[] them away". (R.p.747, lines 1-8; p.899, line 17-p.900, line 1).

## ARGUMENT

I.

The trial court did not err in excluding evidence of the victim's arrest in 2009 for criminal domestic violence because it involved someone other than appellant, was too remote, and was not relevant. Further, the exclusion was harmless error where the charge did not show any propensity for violence.

### Introduction

The trial court did not abuse its discretion in excluding evidence of the victim's arrest in 2009 for criminal domestic violence (CDV) involving his wife because the evidence was not relevant and inadmissible. The State did not open the door to the arrest by presenting evidence of the victim's good character during re-direct examination of a witness when asking if he had ever seen the victim fight someone. Instead, the State was presenting rebuttal evidence of the victim's good character after appellant first attacked his character and alleged the victim was the primary aggressor. Any error excluding the remote evidence of the dismissed CDV charge was harmless beyond a reasonable doubt because the record shows the exclusion had minimal impact on the verdict.

### How the Issue Was Raised

Prior to trial, the State made a motion to exclude evidence of the victim's prior arrest for CDV in 2009. (R.p.94, lines 17-20). The State argued a victim's reputation for violence is only admissible if the violence was directed at the defendant or, if directed at others, must be "so closely connected at the point in time" with the homicide to reasonably indicate the victim's state of mind at the time or to "produce a reasonable apprehension of great bodily harm." (R.p.95, lines 4-13). The State maintained the prior arrest was inadmissible because it was too remote as it occurred four years before the murder and involved the victim's ex-wife. (R.p.95, line 14-p.96,

line 2; p.108, lines 2-4). The State asserted the arrest was not relevant or probative of the victim's propensity for violence at the time of his death. (R.p.96, lines 2-3).

Appellant proffered the testimony of the victim's ex-wife and the deputy who arrested Powell. Deputy Brian Lewis (Lewis) responded to the incident on July 18, 2009 and stated Kerri Powell (Kerri) told him she and her husband[6] argued over a bill. (R.p.96, lines 20-23; p.97, lines 1-4; p.97, lines 20-25). The couple kept fighting as Kerri collected her belongings, and Powell slapped her. (R.p.98, lines 3-14). Kerri left, went to a friend's house, and called 911. (R.p.98, lines 15-17). Lewis testified Powell admitted he hit Kerri when asked about the incident. (R.p.98, lines 17-23).

Kerri testified she and Powell slapped each other during the argument. (R.p.100, lines 16-20; p.101, lines 3-12). Kerri admitted she told Lewis that Powell hit her, but stated the shock was worse than the physical pain because it was out of character for Powell and he had never done anything like that during their fifteen-year marriage. (R.p.101, lines 15-25; p.106, lines 7-12). Moreover, Kerri testified she and Powell had a good relationship following their divorce, talking regularly and spending occasional holidays together. (R.p.105, lines 10-18).

The trial court initially excluded evidence of the dismissed CDV charge, finding "it was a mutual combat situation." (R.p.108, lines 9-13).

During direct examination, the State questioned James Madison (Madison) at length about the events leading up to the deadly shooting. The State elicited specific details about what Madison witnessed that night and never asked him about the victim's past or his character, including whether the victim had a reputation for either violence or peacefulness. (R.pp.262-300).

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[6] Kerri and the victim divorced in 2012. (R.p.104, line 23-p.105, line 1).

During cross-examination, however, defense counsel advanced the assertion that appellant acted in self-defense and the victim was the primary aggressor. Specifically, counsel asked Madison if he was aware of appellant's various medical conditions, if he recalled telling law enforcement the victim "confronted" appellant, and further asked if Madison agreed "when it's dark and when someone is filching through their truck and they come out with a dark object and they're threatening to harm you that you might not be able to see it very well to tell what it is," indicating appellant thought the victim retrieved a weapon. (R.p.311, lines 20-23; p.312, lines 4-7; p.313, lines 18-25; p.319, line 22-p.320, line 16). Counsel asked Madison if he was aware a pocketknife was found in the console of the victim's truck, to which Madison responded, "No, ma'am." (R.p.324, lines 18-20; p.525, lines 11-13). The following exchange then occurred:

> Q: But you and [the victim], when there was murmuring about kicking [appellant's] ass, you were looking around in that area of his truck in the dark; is that correct?
>
> A: No, ma'am.
>
> Q: Were you all looking for the knife?
>
> A: I didn't know [the victim] had a knife.

(R.p.324, line 21-p.325, line 1). On re-direct, to rebut evidence that the victim was the primary aggressor, the State elicited from Madison that no one said anything about beating up appellant, and the only time the victim reached into his truck was to retrieve his cell phone. (R.p.328, line 24-p.329, line 14). The State asked Madison:

> Q: Did you ever see [the victim] fight someone?
>
> A: No, ma'am.
>
> Q: Until he died, did you ever see him fight someone?
>
> A: No, ma'am.

(R.p.328, lines 20-23). Following a brief re-cross, in which defense counsel asked Madison about statements he made during a 911 call, counsel asked for a bench conference. (R.p.330, line 19-p.332, line 7).

Subsequently, the trial court excused the jury and defense counsel argued the State opened the door to evidence of the victim's prior CDV arrest when the solicitor asked Madison if he had ever seen the victim in a fight. (R.p.332, line 8-p.333, line 15). Counsel asserted she was entitled to rebut the testimony that the victim did not have a violent past. (R.p.334, lines 15-23). The State maintained the testimony from Madison was elicited during re-direct and in response to defense counsel's questions regarding whether the victim and Madison "were threatening to kick [appellant's] ass" and the State did not open an additional door, but was reacting to something defense counsel brought up during her cross-examination of Madison. (R.p.335, line 20-p.336, line 2).

The trial court ruled evidence of the victim's prior arrest was inadmissible, noted defense counsel's objection, but allowed counsel to proffer testimony from Madison regarding the CDV charge. (R.p.336, lines 5-15). When asked during the proffer, Madison stated he knew the victim was previously married to Kerri Powell, but he was not aware of the victim's arrest in 2009 for CDV, had not talked to the victim about the incident, and had not heard about it. (R.p.336, line 18-p.337, line 4).

## Analysis

### *Standard of Review*

The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb such a ruling upon a showing of a "manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429,

632 S.E.2d 845, 847-48 (2006). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011); *see also State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (holding appellate courts review errors of law only and are bound by the trial court's factual determinations unless they are clearly erroneous).

Whether counsel opens the door to the admission of otherwise inadmissible evidence during trial, as with other evidentiary matters, is left to the sound discretion of the trial court. *State v. Page*, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008) (citing *State v. Adcock*, 194 S.C. 234, 234, 9 S.E.2d 730, 732 (1940)); *see also State v. White*, 361 S.C. 407, 415-16, 605 S.E.2d 540, 544 (2004) (holding otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence). "When a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." *State v. Jackson*, 364 S.C. 329, 336, 613 S.E.2d 374, 377 (2005).

*Victim's Prior Arrest Not Relevant*

Ordinarily, all relevant evidence is admissible. Rule 402, 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. Rule 401, SCRE. Evidence of a person's character is generally not relevant and not admissible to prove conduct, except:

> Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

Rule 404(a)(2), SCRE. More specifically, the State cannot offer evidence of the victim's good character because it is not relevant to the issue of a defendant's guilt, unless the defendant first attacks the victim's character. *Id.*; *see also State v. Langley*, 334 S.C. 643, 648, 515 S.E.2d 98, 100 n.3 (1999) (holding testimony from the sister of a murder victim about their family, how the victim got the nickname "Bunny," and that the victim played drums in the high school band was not relevant to issue of defendant's guilt in a murder prosecution because the defendant did not first attack the victim's character).

Here, the trial court did not abuse its discretion in excluding evidence of the victim's prior CDV arrest because the evidence was not relevant and inadmissible. The record shows the State did not question James Madison (Madison) about the victim's character during direct examination and did not open the door to that type of reputation testimony. *See* Rule 404(a) (providing that character evidence is generally inadmissible); *White*, 361 S.C. at 415-16, 605 S.E.2d at 544 (stating opposing counsel may open the door to admit otherwise impermissible evidence by its questions). The State confined its questions to specific details that Madison witnessed on the night of the homicide. However, once defense counsel attacked the victim's character during cross-examination and asserted he was the primary aggressor, the State was entitled to rebut that testimony during re-direct with evidence of the victim's peacefulness. *See* Rule 404(a)(2) (providing that the prosecution is entitled to offer evidence of the victim's peacefulness to rebut evidence by the defendant in a murder case that the victim as the primary aggressor). Accordingly, the testimony from Madison on re-direct that he had never seen the victim in a fight did not open the door to evidence of the victim's prior CDV arrest, but was simply rebuttal evidence and admissible under Rule 404(a)(2). *See Langley*, 334 S.C. at 648, 515 S.E.2d at 100 n.3 (citing Rule 404(a)) (noting that the State can offer evidence of the

victim's good character after the defendant first attacks that character).

Additionally, and as the trial court ruled during the pre-trial hearing, the victim's prior charge was not relevant because it was too remote to allow for its admission. *See State v. Day*, 341 S.C. 410, 419-20, 535 S.E.2d 431, 436 (2000) (holding, where a defendant argues self-defense, a victim's reputation for violence, if directed at someone other than the defendant, is only admissible where it is "so closely connected at the point of time or occasion with the homicide to reasonably indicate" the victim's state of mind). The arrest at issue here happened more than four years before the victim's death and there was no evidence to show appellant was aware of the incident. Appellant could have no "reasonable apprehension of great bodily harm" when he was not even aware of the victim's alleged violent past, especially where there was evidence presented that the CDV incident was out of character for the victim. *See id.* (holding, in addition to being closely connected in time to the homicide, the previous violent incident on the part of the victim must also "produce reasonable apprehension of great bodily harm," if it does not reasonably indicate the victim's state of mind at the time).

For all of the above reasons, the evidence of the victim's prior arrest was not relevant, its exclusion did not prejudice appellant, and the State did not open the door to the evidence by its rebuttal evidence during re-direct examination of Madison. Therefore, the trial court did not abuse its discretion in excluding the evidence.

*Harmless Error*

If the Court were to find the trial court abused its discretion in excluding the victim's prior arrest, the error was harmless. To warrant reversal based on the exclusion of evidence, an appellant must prove both the error and that there is a reasonable probability the wrongly excluded evidence influenced jury's verdict. *See State v. Livingston*, 282 S.C. 1, 6, 317 S.E.2d

129, 132 (1984) ("[W]here guilt is conclusively proven by competent evidence and no rational conclusion can be reached other than the accused is guilty, a conviction will not be set aside because of insubstantial errors not affecting the result."). Whether an error is harmless depends on the circumstances of the particular case. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. *Id.*

Here, an examination of the record shows any error in excluding the victim's prior CDV charge was harmless because appellant's guilt was established by other evidence and hearing the fact of the victim's remote past arrest likely would not have impacted the jury's verdict.[7] *See Livingston*, 282 S.C. at 6, 317 S.E.2d at 132 (holding an error admitting evidence is harmless beyond a reasonable doubt where guilt is proven by other competent evidence, such that the error could not have reasonably affected the result at trial). As discussed above, the State's case against appellant was strong—not only did eyewitnesses see appellant shoot the victim, they testified to the statements he made to the victim, and appellant himself testified he killed the victim while claiming he did so in self-defense. The State further elicited from appellant that he did not report any injuries to his jaw, despite his claim that the victim punched him, and did not have any bruising on his face at the time of his arrest. Additionally, empty bullet casings were found in appellant's truck, and appellant admitted during his testimony that he fired the gun collected at the scene.

Moreover, the record demonstrates the jury carefully considered the evidence presented

[7] Not only was evidence of the 2009 CDV charge remote, the proffered testimony of Kerri Powell (Kerri) would have ameliorated the singular incident and any suggestion that the victim had a propensity for violence. (R.pp.100-06). Kerri specifically testified the incident was out of character for the victim, it was a mutual combat situation, and she did not want the victim arrested. (R.pp.101-02).

by the State and the evidence presented by appellant of his health problems, age, and lack of criminal background, as well as appellant's assertions that he acted in self-defense. *See Mitchell*, 286 S.C. at 573, 336 S.E.2d at 151 (holding the materiality and prejudicial character of an error must be determined after a review of the entire record). The trial court instructed the jury extensively on self-defense based on appellant's testimony at trial and, importantly, recharged the law a second time after a jury question regarding the elements of the defense. (R.p.998, line 8-p.1001, line 6; p.1008, line 17-p.1012, line 25). This fact indicates the jury thoughtfully considered the defense before ultimately finding appellant did not meet the elements and finding him guilty of murder. Accordingly, the effect of the excluded evidence was minimal and any error that resulted from its exclusion was harmless.

## CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

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December 20, 2016.

**STATE OF SOUTH CAROLINA**
**In the Court of Appeals**

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Appeal from Anderson County
R. Scott Sprouse, Circuit Court Judge

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**THE STATE,**

**Respondent,**

v.

**BOBBY JOE ARFLIN,**

**Appellant.**

Appellate Case No. 2015-001900

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## CERTIFICATE OF COMPLIANCE

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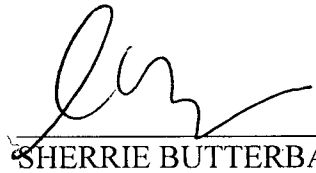
The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 20th day of December, 2016.



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