STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEYLAN J. DURHAM,

APPELLANT

APPELLATE CASE NO 2016-000837

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in failing to exclude evidence of a high speed police chase purportedly involving Appellant where (1) the evidence was irrelevant, (2) the danger of unfair prejudice from the presentation of the evidence substantially outweighed its limited probative value, and (3) the evidence was improper character evidence?

STATEMENT OF THE CASE

On January 14, 2015, a Richland County grand jury indicted Appellant for assault and battery in the first degree (2015-GS-40-00001), possession of a weapon during a crime of violence (2015-GS-40-00004), carjacking (2015-GS-40-00005), two counts of attempted murder (2015-GS-40-00007 and 2015-GS-40-00008), and two counts of kidnapping (2015-GS-40-08388 and 2015-GS-40-08389). R. 788-789; R. 791-792; R. 794-795; R. 797-798; R. 800-801; R. 803-804; R. 806-807. On January 21, 2016, a Richland County grand jury indicted Appellant for two counts of attempted armed robbery (2016-GS-40-00525 and 2015-GS-40-00526). R. 809-810; R. 812-813. The state, represented by Kathryn Luck Campbell, John Steadman, and J.J. Shellenberg, called the case to trial before the Honorable Clifton Newman and a jury on April 11-14, 2016. R. 1. Tracy Pinnock, Rhodes Bailey, and Rebecca Williams represented Appellant. R. 1. The jury found Appellant guilty of two counts of attempted armed robbery, two counts of kidnapping, carjacking, and assault and battery in the first degree. R. 757, ll. 3-15. The jury also found Appellant guilty of one count of attempted murder, guilty of assault and battery in the first degree as a lesser included offense of attempted murder, and possession of a weapon during a violent crime. R. 757, ll. 15-21.[1]

Judge Newman sentenced Appellant to ten years' imprisonment for each count of assault and battery in the first degree, to twenty-two years' imprisonment for each count of kidnapping, to twenty years' imprisonment for each count of carjacking, to twenty-four years' imprisonment for attempted murder, and to five years' imprisonment for the weapon. R. 782, l. 11 – R. 783, l. 1; R. 790; R. 793; R. 796; R. 799; R. 802; R. 805; R. 808; R. 811; R. 814.

[1] Appellant was charged with a third count of attempted murder, and the jury acquitted him of that charge. R. 757, ll. 16-17.

On April 20, 2016, Appellant, through counsel, filed and served his notice of appeal. This brief follows.

ARGUMENT

The trial judge erred in failing to exclude evidence of a high speed police chase purportedly involving Appellant where (1) the evidence was irrelevant, (2) the danger of unfair prejudice from the presentation of the evidence substantially outweighed its limited probative value, and (3) the evidence was improper character evidence.

Relevant facts

Pre-trial motion to exclude

Prior to trial, the defense moved to exclude any evidence of prior bad acts. The state expressed its intent "to go into pretty much everything he did on August the 4th and then during his arrest on August the 6th." R. 54, ll. 20-25. Specifically, defense counsel moved to exclude a car chase in which Appellant was alleged to have been driving. R. 55, ll. 11-16. Counsel explained the "car chase" "started on Columbiana went [to] Broad River Road I-20 and ended on Monticello Road." R. 73, ll. 15-17. The car chase did not fit with any exception to the rule against prior bad acts found in Rule 404(b), SCRE. R. 73, ll. 18-24. Counsel further explained there was no "logical connection" between the charged offenses and the car chase. R. 74, ll. 1-11.

The state claimed the car chase was "highly probative and relevant" because it was "crucial to explain what happened that day and how certain things happened in this case." R. 74, ll. 13-16. According to the state, Appellant accosted a couple, stealing their car, which he drove to Wal-Mart, where he was seen by two young men. R. 74, ll. 16-19. Appellant left Wal-Mart with a camera that was "ultimately found in the Camaro." R. 74, ll. 21-23. According to the state, after Appellant left Wal-Mart in the stolen car, he got into the Camaro, which had been following him in the stolen car. R. 74, l. 24 – R. 75, l. 3. The two young men saw Appellant

again in the Camaro and contacted the police, who responded to the scene. R. 75, ll. 4-14. The state posited that Appellant was the driver of the Camaro and led the police on a high speed chase. R. 75, ll. 15-17. After the Camaro crashed, two men ran from the passenger side of the car. R. 75, ll. 17-18. Devontae Bryant was arrested at the scene; the other person was not. R. 75, ll. 19-20. When the police interrogated Bryant, he implicated Appellant. R. 75, ll. 20-22. "Without him, they don't know who the other person is." R. 75, ll. 22-23. Thereafter, using the information from Bryant, the police conducted photographic line-ups with the individuals from whom the car was stolen. R. 75, l. 23 – R. 76, l. 1. The state claimed that the car chase explained why the police developed him as a suspect. R. 76, ll. 2-6. The state argued the evidence was admissible "as 404(b) and or as res gestae." R. 76, l. 6.

Defense counsel countered that Bryant could "identify who he says he was with and who he says was driving the car." R. 77, ll. 6-7. The "extended car chase" had nothing to do "with proving whether or not [Appellant] committed an armed robbery and a carjacking or whether he committed an attempted murder two days later." R. 77, ll. 7-11. Thus, defense counsel argued it was not relevant, and the state could present its case "without going into this bad act" because doing otherwise was simply an attack on Appellant's character. R. 77, ll. 11-13. The state was "trying to allege that he just goes around doing all these horrible things." R. 77, ll. 14-15.

The judge denied the motion. According to the judge there had to be "a starting point" and "a logical starting point." R. 78, ll. 1-8. However, the judge cautioned that he would rule on the evidence at the time it was offered, which would permit him the context to determine whether the prior bad act – the car chase – was logically related to the charged offenses. R. 78, ll. 8-15.

State's case-in-chief

Marck Drastich, an immigrant from Slovakia, and his wife, Lashonda Edwards were living at In-Town Suites in August 2014. R. 134, l. 25 – R. 135, l. 1; R. 135, ll. 9-10; R. 136, ll. 10-14; R. 180, ll. 18-19; R. 181, ll. 7-12; R. 181, l. 25 – R. 182, l. 3. On August 4, 2014, Drastich and Edwards went to Ale House and returned home to In-Town Suites. R. 137, l. 10 – R. 138, l. 1; R. 182, l. 23 – R. 183, l. 17. The couple sat in their car, a 1995 Oldsmobile Regency, talking upon their return. R. 138, ll. 5-7; R. 23-24; R. 183, ll. 9-14; R. 184, ll. 9-10. Drastich claimed an African-American man wearing a white shirt, wig, hat, and glasses, approached him and presented a silver handgun.[2] R. 139, l. 25 – R. 140, l. 5; R. 144, l. 23 – R. 145, l. 16; R. 150, ll. 8-10; R. 155, ll. 10-15; R. 184, l. 25 – R. 185, l. 8; R. 193, ll. 10-20; R. 196, ll. 10-14. Drastich told the man he did not have any money. R. 140, ll. 14-15; R. 185, l. 17. When Drastich tried to get out of the car, the man struck him in the face with the gun. R. 140, l. 20 – R. 141, l. 3; R. 186, ll. 8-10. The man then approached Edwards on the driver's side. R. 142, ll. 8-11; R. 188, ll. 15-16. Drastich used this as an opportunity to run away. R. 142, ll. 15-16; R. 189, ll. 5-7; R. 189, l. 17.

As the man approached Edwards, she stepped out of the car. R. 189, ll. 17-25. Edwards told the man he could take the car and walked away. R. 190, ll. 4-8. Edwards ran to another resident's door, knocked and went inside. R. 190, l. 21 – R. 191, l. 25.

Drastich called the police from the Fairfield Inn. R. 143, ll. 2-10. The police arrived shortly thereafter. R. 143, ll. 18-19; R. 194, ll. 1-2. In addition to selecting Appellant's

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[2] Marck Drastich initially told police the man was wearing a black cap. R. 159, ll. 1-12; R. 171, ll. 2-11. However, when he found a camouflage hat in his car upon its return by the police, he changed his story to say the man was wearing a camouflage hat. R. 145, ll. 7-9; R. 159, ll. 12-21. Additionally, Drastich told the police the man was "clean shaven," but at the trial, he claimed he could not remember if the man had any facial hair. R. 145, ll. 17-19; R. 155, l. 16 – R. 156, l. 10; R. 171, ll. 16-21.

photograph from a line-up, Drastich identified Appellant in court as the assailant. R. 147, l. 5 – R. 149, l. 5; R. 150, l. 21 – R. 151, l. 14. Edwards was unable to identify the assailant. R. 196, ll. 18-19. In the car that was stolen, Drastich had important papers, including his passport, driver's license, visa card, and European currency. R. 149, l. 19 – R. 150, l. 7.

Eventually, the Oldsmobile was found and returned to Drastich and Edwards. However, there was conflicting testimony on exactly how this happened. Officer Mark Sjolund explained that on August 6, 2014, he found the Oldsmobile while out "on normal patrol." R. 244, l. 21 – R. 25, l. 12. He was "riding around parking lots in the area" and found the car in the parking lot for the Wingate Inn. R. 245, ll. 9-16. He was not "actively looking for the car," but was aware "there was an alert out for it." R. 245, ll. 19-22. However, Emmitt Gilliam, the lead investigator on the carjacking case, claimed that Devontae Bryant provided information as to the location of the Oldsmobile. R. 605, ll. 11-14. Gilliam claimed he relayed that information to officers, and the car was recovered the next morning. R. 605, ll. 15-18. Gilliam's testimony regarding the discovery of the Oldsmobile directly contradicted Sjolund's claims.

Jason Van Valkenburgh responded to the carjacking call. R. 162, ll. 16-19. He learned from Drastich that there was a "blacked out sports car" waiting nearby during the encounter. R. 164, ll. 3-16. While conducting his investigation, Van Valkenburgh learned of a call for a civil disturbance at Paces Brook Apartments, which was nearby, involving a black Camaro. R. 164, ll. 18-24. He saw the Camaro drive by at a high rate of speed. R. 165, ll. 12-25.[3] Van Valkenburgh then began chasing the Camaro. R. 166, ll. 7-10.

According to Van Valkenburgh, it was "quite a chase." R. 166, l. 12. He elaborated on the chase, including giving his opinion on matters:

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[3] Defense counsel renewed the objection to the testimony about the high speed chase. R. 165, ll. 3-7; R. 167, ll. 10-11.

> We started on Columbiana Drive. Then we went onto Harbison Boulevard. From Harbison Boulevard, we passed the interstate and did a u-turn to get onto - - just pass the interstate onto - - just past the interstate onto Wood Cross. From Wood Cross, we went onto Fernandina Road. From Fernandina Road, we went onto Piney Grove. Throughout this whole chase, he kept turning his lights on to see. Once he saw - - he would turn his lights on and then would turn them off. Some of the times that he turned the lights off, he would go around corners. Sometimes going into oncoming lane during a corner. It was very dangerous. We went through neighborhoods off of Piney Grove road, through yards. Then we went onto Broad River Road. From Broad River Road, we drove until interstate 20, which is a long stretch of highway. At the intersection of Piney Grove and Broad River Road, he did strike a vehicle. I didn't see at the time focused on the vehicle, but after I saw the - - I believe they called law enforcement and then I reviewed the video and saw that he did strike that vehicle, speeds were incredible. It's definitely the fasted I ever been in a vehicle. My speedometer topped out at 140.

R. 166, l. 12 – R. 167, l. 9. Additionally, the state introduced the dash-cam video from his car regarding the chase. R. 168, ll. 1-12; State's Exhibit #3. In other words, after the long descriptive narrative from Van Valkenburgh, the judge permitted the jury to watch a long video during which the police chase a car in the dead of night through bedroom communities at extremely high rates of speed. State's Exhibit #3. Although defense counsel objected based on Rule 404(b), SCRE, and offered to elaborate outside of the jury's presence, the judge overruled the objection and permitted no additional argument. R. 168, ll. 4-10. Ultimately, the Camaro wrecked. R. 170, ll. 5-6. Police pursued the two men who got out on foot. R. 170, ll. 7-8; R. 172, ll. 2-3. Eventually, the police caught one of the men – Devontae Bryant. R. 170, ll. 14-17.

Meanwhile, teenagers Cullen Bennecker and Zane Harris, were at a gas station, trying to get someone to buy them beer. R. 173, l. 19 – R. 174, l. 18; R. 212, ll. 6-13. They saw a man in an Oldsmobile drive up and asked him to make the purchase. R. 174, ll. 15-18; R. 212, ll. 14-24 The man agreed, but asked them to follow him to Wal-Mart. R. 174, l. 24 – R. 175, l. 6; R. 212, ll. 16-18. When the man and Zane went inside Wal-Mart, Cullen noticed a guy in a black

Camaro pull up. R. 175, ll. 7-13; R. 212, ll. 18-19.[4] Cullen "saw a silver pistol holster" in the driver's seat of the Oldsmobile. R. 176, ll. 2-3. When Zane and the man returned, the man invited them to join him at the Ale House. R. 176, ll. 3-4; R. 214, ll. 13-17. Zane and Cullen told the man they would, but decided to go to the Waffle House instead. R. 176, ll. 4-6; R. 214, ll. 22-23. Cullen "guess[ed]" the Oldsmobile and Camaro went to the Ale House. R. 176, ll. 17-20. After eating at the Waffle House, Zane and Cullen went to Zane's apartment at Paces Brook. R. 176, l. 23 – R. 177, l. 4; R. 211, ll. 14-15; R. 215, ll. 1-2. Upon getting out of the car, they saw headlights coming into the complex. R. 177, ll. 5-8; R. 215, ll. 2-5. It was the Camaro and both men were in it. R. 177, ll. 9-10; R. 215, ll. 4-5. The men rolled down the windows and tried to flag them down, but Zane and Cullen ran into the apartment and called the police. R. 177, ll. 10-12; R. 215, ll. 5-10; R. 215, ll. 16-20. Zane identified Appellant as the person he "interacted with that night." R. 216, l. 12 – R. 217, l. 18.

Van Valkenburgh was not the only police officer to testify regarding the police chase; Michael McMillian also told the jurors about the chase.[5] McMillian had been dispatched to Paces Brook apartments for a disturbance involving a Camaro. R. 231, ll. 3-7. McMillian saw a Camaro in the parking lot and alerted other officers. R. 231, ll. 12-16. He saw an individual walking on the sidewalk. R. 232, ll. 3-4. McMillian "hollered police, stop, show me your

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[4] Zane recalled the Camaro at the gas station as well. R. 212, l. 25 – R. 213, l. 2.

[5] Defense counsel renewed the objection to the irrelevant, unfairly prejudicial, and improper character evidence during McMillian's testimony. R. 222, l. 24 – R. 223, l. 24. The state argued the evidence was not being offered as character evidence, but was being offered "as a series of events that occurred that night." R. 224, ll. 1-3. The state countered the evidence corroborated Zane Harris's testimony "as well as what was found in the Camaro once it wrecks after that speed that chase you seen." R. 224, ll. 4-6. The state claimed during a search of the car, the police found "the camera which was taken by this defendant." R. 224, ll. 7-10. The judge denied the defense's request to exclude the evidence. R. 226, ll. 6-10.

hands." R. 232, l. 5. The individual "dove in front of the car." R. 232, l. 6. McMillian watched the car exit the parking lot "at a high rate of speed." R. 232, ll. 16-18. Soon, McMillian joined Van Valkenburgh in the pursuit. R. 234, ll. 2-16. McMillian was present when police captured Devontae Bryant running from the crashed Camaro. R. 235, ll. 6-22.

After his capture, Bryant pointed the finger at Appellant as the driver of the Camaro. R. 271, ll. 4-11. At Appellant's trial, Bryant claimed he and Appellant went to In-Town Suites in the Camaro. R. 271, ll. 15-19. According to Bryant, Appellant said he was "about to go handle something." R. 271, ll. 20-25. Appellant got out of the car, leaving Bryant in the passenger seat. R. 272, ll. 3-4. Bryant told the jurors he did not see Appellant with a gun or a wig. R. 272, ll. 7-12. Bryant next saw Appellant in "an old kind of car" at a gas station. R. 272, ll. 13-21. Bryant was driving the Camaro. R. 272, ll. 24-25. Bryant denied talking to two white males at the gas station. R. 273, ll. 1-3. Bryant went to Wal-Mart, but just sat in the Camaro. R. 273, ll. 6-8. He saw Appellant enter and exit Wal-Mart. R. 273, ll. 13-16. Bryant then followed Appellant to a hotel, where Appellant parked the car he was driving. R. 273, ll. 17-25. Appellant joined Bryant in the Camaro. R. 274, ll. 1-2. Oddly, however, Bryant claimed Appellant got into the driver's seat and Bryant got into the passenger seat. R. 274, ll. 3-6.

Bryant and Appellant ended up at an apartment complex. R. 274, ll. 7-10. They parked their car. R. 274, ll. 13-16. They saw Zane and Cullen get out of their car and go into the apartment building. R. 274, ll. 17-19. According to Bryant, Appellant said "[n]othing" to them. R. 274, ll. 20-21. After parking, Appellant got out of the car. R. 274, l. 23. "[T]wo minutes later, the police officer walked up with a flashlight." R. 274, ll. 24-25. Appellant "ran to the car and jumped in and that's when the high speed chase started." R. 275, ll. 3-6. The car wrecked on Monticello Road. R. 275, ll. 7-8. Bryant claimed Appellant crawled over him to get out of

the car. R. 275, ll. 13-14. The two then ran from the police. R. 275, ll. 11-12. Bryant was arrested a short distance away. R. 275, ll. 17-19. Bryant, who had numerous pending charges, including possession of crack, two counts of possession of a stolen vehicle, auto breaking, unlawfully carrying a pistol, and accessory before the fact to a carjacking, cooperated with the police through five interrogations. R. 275, l. 20 – R. 277, l. 7; R. 278, ll. 10-25. Bryant received no "promises" for his testimony, but he certainly hoped "that one day the state [would] consider [his] testimony." R. 277, ll. 8-13.

A search of the Camaro revealed a camera in its box, which the state claimed Appellant stole from Wal-Mart shortly before the high speed chase. R. 372, l. 12 – R. 373, l. 2. The police swabbed the Camaro and Oldsmobile for "touch DNA," but the testing revealed no matches to anyone involved. R. 378, ll. 15-28; R. 520, l. 21 – R. 522, l. 17. Although the police found a brown wig in the Oldsmobile, the police found no DNA on the wig. R. 377, ll. 16-17; R. 522, l. 18 – R. 523, l. 1.

Appellant's girlfriend, Kiane Warner, recalled seeing Appellant in a black Camaro, but was unsure of the exact dates. R. 252, ll. 14-20; R. 253, ll. 8-13. On the morning of August 4, 2014, Appellant told her he had just taken the cops "on a high speed chase and when he got on the highway, he hit a curb." R. 253, ll. 14-21. Appellant also told her that he climbed over "Vonnie" to get out of the car. R. 253, ll. 24-25. Thereafter, Appellant was looking for the black Camaro because there was some money in a purse in the car. R. 256, ll. 20-25. Appellant told her "that somebody told him that it was on the news and that [Bryant] had got caught." R. 254, ll. 14-16. Additionally, Kiane gave her some "European currency," which the police found and confiscated. R. 255, ll. 2-8; R. 384, l. 5 – R. 385, l. 8.

On August 6, 2014, the police, Keith Thrower and Brian Zwolak, arrived at Kiane's home in Brook Pines Apartments looking for Appellant. R. 256, ll. 16-22; R. 323, ll. 8-19; R. 400, l. 21 – R. 401, l. 3. The police threatened to take her to jail along with Appellant if he were in her home. R. 256, ll. 23-25. As a result, Kiane allowed the police to search her home, but Appellant was not there. R. 256, l. 25 – R. 257, l. 2. Kiane told police Appellant was in her car along with her brother, Quinten Warner. R. 261, ll. 20-25; R. 324, ll. 2-8; R. 339, ll. 1-4; R. 387, ll. 21-24; R. 401, ll. 4-9.

Shortly after the police arrived, Kiane heard gunshots and ran outside. R. 257, ll. 11-14. She saw her car "hit another car and hit the light pole out there." R. 257, ll. 15-17. Kiane did not see Appellant driving the car. R. 258, ll. 12-20. She saw the police pull her brother through the driver's side and pull Appellant from the backseat. R. 258, ll. 18-20; R. 262, ll. 11-16.

Marcus Brown was one of the officers who surrounded Brook Pines in hopes of apprehending Appellant. R. 291, ll. 3-15; R. 425, ll. 12-15; R. 446, ll. 3-5. After Appellant and Quinten parked, Brown and his partner, Anna Bailey, pulled in at an angle behind Appellant's car in the parking lot. R. 292, ll. 6-14; R. 348, ll. 19-21; R. 389, ll. 16-18. Gun drawn, Brown got out and approached Appellant's car. R. 292, l. 18 – R. 293, l. 2; R. 389, ll. 20-22; R. 448, l. 13. Another officer, Jerry Hall, also approached the car with his "weapon in a ready position." R. 348, ll. 22-23. Bailey followed suit.[6] R. 389, ll. 23-25. Justin Britt, yet another officer, arrived on the scene to "backup" Brown as well.[7] R. 448, ll. 14-16.

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[6] Although she had her weapon ready, Anna Bailey never fired a single round. R. 397, ll. 5-6.

[7] Justin Britt denied telling the investigator over the police-involved shooting that he stayed in the threshold of his car with his gun in ready and support. R. 460, ll. 13-17. He claimed that if his statement said that, then it was not accurate. R. 460, ll. 17-18. When the lead investigator over the police-involved shooting testified, defense counsel questioned him regarding Britt's statement during that investigation. R. 594, l. 7. In essence, defense counsel was trying to

Brown claimed he saw the car go into reverse and head "straight back for" him. R. 293, ll. 2-7. He "jumped to the side," but was "sandwich[ed] between the vehicle[s]." R. 293, ll. 7-9. He claimed "[t]he rear bumper hit [him] and spun [him] around to the patrol car." R. 293, ll. 10-11; R. 349, ll. 14-15; R. 427, ll. 15-17; R. 432, ll. 1-3; R. 448, ll. 19-20. He also claimed "the mirror clipped [his] arm and broke the mirror off." R. 293, ll. 12-13. Brown drew his gun and fired several shots as the car drove past him. R. 293, ll. 14-15; R. 326, l. 22; R. 357, ll. 6-12; R. 390, ll. 15-16; R. 403, l. 7; R. 407, ll. 9-15; R. 427, ll. 18-19; R. 449, ll. 3-4; R. 450, ll. 22-23. Hall was in the direct line of fire from Brown's gun so he stepped "off line" so that he would not be struck by one of Brown's bullets. R. 349, ll. 20-23. Britt also claimed the car was "moving directly back toward [his] direction," and he ran to his car for safety. R. 448, l. 20 – R. 449, l. 2; R. 450, ll. 23-24; R. 450, l. 25 – R. 451, l. 8. The car hit a tree. R. 293, l. 16; R. 326, ll. 23-25; R. 350, l. 6; R. 390, l. 17; R. 403, l. 9; R. 428, ll. 1-2; R. 451, ll. 10-11. The officers continued firing shots and "closed in." R. 293, l. 19; R. 350, ll. 9-10.

The car "came down off the tree and spun around." R. 293, ll. 21-22; R. 391, l. 1. The police continued to fire. R. 293, ll. 22-23. In fact, Thrower claimed the car "launched off the

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impeach Britt with his prior inconsistent statement to the investigator. However, the state objected, stating "She's trying to impeach another witness through another witness." R. 594, ll. 8-9. When defense counsel explained she was trying to show Britt gave a prior inconsistent statement to this witness, the judge responded, "I'm aware of who he is and I've heard the question. And the objection is sustained." R. 594, ll. 10-13. Then, the judge stated, "You cannot pit witnesses." R. 594, l. 15. Quite clearly, defense counsel was not attempting to "pit witnesses" as the judge stated. Pitting witnesses involves asking a witness to comment on the veracity of another witness. State v. Sapps, 295 S.C. 484, 486, 369 S.E.2d 145, 145-146 (1988). Rather, defense counsel was eliciting a prior inconsistent statement of a witness who previously testified, and claimed to be a victim in the case, from the lead investigator, who took the statement. This was a classic example of impeachment. See State v. Foster, 354 S.C. 614, 622, 582 S.E.2d 426, 430 (2003)(explaining that asking a witness about a prior inconsistent statement is "simple impeachment" as it calls the witness's credibility into question).

tree straight at [his] position." R. 327, ll. 3-5.[8] Thrower fired his weapon at least five times at Appellant. R. 327, ll. 11-14; R. 328, ll. 17-21; R. 404, l. 1. Britt also claimed that after the car "slid[] down" and "bounce[d] off the tree," the car went "right at [him]." R. 452, ll. 5-8. Britt "shot him twice." R. 452, l. 14. Hall described the car leaving the tree "like a slingshot." R. 350, ll. 11-12.

While officers continued to shoot, Appellant's car hit a parked car and finally stopped after hitting a pole. R. 293, l. 23 – R. 294, l. 7; R. 327, ll. 14-15; R. 350, ll. 12-13; R. 391, ll. 2-3; R. 403, ll. 10-14; R. 428, ll. 4-11; R. 452, ll. 21-25. According to several officers, Appellant jumped to the backseat as the car "clipped the telephone pole." R. 295, ll. 3-4; R. 351, ll. 1-3; R. 404, ll. 2-5; R. 430, ll. 21-23. Brown claimed "the passenger look[ed] like he was going for a gun" so he "started firing again." R. 294, ll. 10-11. Brown stopped firing when he realized the passenger – Quinten – was only trying to take his seatbelt off. R. 294, ll. 11-12. Brown fired at least fourteen times. R. 312, ll. 1-5. Although Brown was aware that Kiane's brother was in the car with Appellant, he fired more than two shots into the passenger side of the car. R. 316, ll. 2-9. Quinten was shot three times, "[i]n his back, his neck, and in his leg." R. 263, ll. 14-17; R. 340, ll. 11-14; R. 579, ll. 19-22.[9] Although Quinten survived this shooting, he ultimately died on December 26, 2014, when he was shot in an unrelated incident. R. 582, ll. 6-15. Appellant was shot once to his left bicep. R. 560, ll. 11-12; R. 584, ll. 11-16.

Brown reloaded the magazine and approached the car with his comrades. R. 294, ll. 12-14; R. 391, ll. 17-19. Brown smashed the driver's side window with his baton and unlocked the

[8] Appellant was acquitted of attempted murder of Thrower. R. 757, ll. 16-17.

[9] The lead investigator for the police-involved shooting explained that Quinten Warner was shot once "to the back of his neck," once "to his thigh," and once in his left "upper back shoulder." R. 579, ll. 19-22.

car door. R. 294, ll. 20-25; R. 391, ll. 23-24. Other officers "pulled the passenger out through the driver side." R. 294, l. 25 – R. 295, l. 1; R. 391, l. 24 – R. 392, l. 1. Another officer pulled Appellant "out of the backseat." R. 295, ll. 1-3; R. 351, ll. 9-13; R. 404, ll. 6-7; R. 430, l. 24 – R. 431, l. 4.

A subsequent search of the car and its occupants revealed no weapons of any kind. R. 316, ll. 18-20; R. 343, ll. 6-12. The ensuing investigation showed the police fired at least twenty-one times at the unarmed men. R. 419, ll. 15-17.

Renewed motion to exclude

At the conclusion of the state's case, defense counsel renewed all prior motions and objections, including the request to exclude evidence of the "car chase with the black Camaro." R. 655, ll. 15-20. Counsel argued the chase was "irrelevant" under Rule 401, SCRE, and Rule 402, SCRE. R. 655, ll. 20-22. According to counsel, the state failed to show the car chase "satisfied an exception under 404" and introduction of the evidence "failed the balancing test [of] 403." R. 655, ll. 24-25. Defense counsel renewed this motion after the jury's verdict as well. R. 761, ll. 2-11. The judge found the police were in "hot pursuit" as "they chased him trying to catch him and he got away, but his passenger didn't." R. 761, l. 24 – R. 762, l. 1. The judge further found "all the evidence was found in the vehicle that connected the robbery and the shoplifting and the statement of the passenger that he was the one who was driving." R. 762, ll. 1-4. In the judge's estimation, "that was important evidence that established critical elements of the crime." R. 762, ll. 5-6. Thus, the judge denied the motion. R. 762, ll. 6-7.

Jury verdict

The jury found Appellant guilty of two counts of attempted armed robbery concerning Drastich and Edwards, two counts of kidnapping concerning Drastich and Edwards, carjacking

concerning Edwards, and assault and battery in the first degree concerning Drastich. R. 757, ll. 3-15. The jury found Appellant guilty of one count of attempted murder concerning Brown, guilty of assault and battery in the first degree as a lesser included offense of attempted murder concerning Britt, and possession of a weapon during a violent crime. R. 757, ll. 15-21. Appellant was acquitted of attempted murder of Thrower. R. 757, ll. 16-17.

Discussion

Although Appellant moved to exclude the admission of evidence regarding the police chase as (1) irrelevant, (2) unfairly prejudicial, and (3) improper character evidence, the analysis of whether evidence is admissible under Rule 404, SCRE, requires an examination of relevancy and the balancing of probative value and the danger of unfair prejudice. Thus, Appellant's discussion centers on the inadmissibility of the evidence under Rule 404, SCRE, with discussion of relevancy and the balancing test of Rule 403, SCRE, found therein. By analyzing the case in this way, Appellant does not waive or abandon his claims that the evidence was inadmissible as irrelevant and unfairly prejudicial.

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion. Rule 404(a), SCRE. In essence, evidence of other bad acts is not admissible to prove a person's guilt; however, such evidence may be admissible to show motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent. Rule 404(b), SCRE; see also State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). In addition, evidence of prior bad acts not subject to a conviction must be proven by clear and convincing evidence. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001).

As explained by the Supreme Court, the process of analyzing bad act evidence starts with Rule 401, SCRE. State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). Thus, the first

step is determining whether the evidence is relevant. Relevant evidence is "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." Rule 401, SCRE. Generally, "[a]ll relevant evidence is admissible." Rule 402, SCRE. "Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986)(citing Toole v. Salter, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967)). "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, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126, 606 S.E.2d 508, 513 (Ct. App. 2004).

According to this Court, "evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." State v. Lyles, 379 S.C. 328, 337, 665 S.E.2d 201, 206 (Ct. App. 2008). Stated another way, "[e]vidence is relevant if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears." Schmidt, 288 S.C. at 303, 342 S.E.2d at 403.

In Lyles, supra, this Court explained the analysis for determining the relevancy and admissibility of evidence. The state made a motion *in limine* to exclude any comments regarding drug use or the existence of drugs at the alleged victim's apartment. Lyles, 379 S.C. at 335, 665 S.E.2d at 205. Following a proffer, "[t]he state objected and the trial judge conducted an inquiry to determine the relevance of the testimony." Id. at 336, 665 S.E.2d at 205. Thereafter, the judge excluded the testimony finding it was not "'relevant in any fashion in this case.'" Id. According to this Court, "the testimony [did] not serve as a defense to any of the offenses charged in this case nor [did] it excuse or mitigate [the defendants'] actions. It was not probative of any issue material to

reaching a verdict. This absence of a logical connection to the facts in debate ma[de] the evidence irrelevant and inadmissible." Id.

The South Carolina Supreme Court held the introduction of evidence of a vendetta to establish motive, bias, and prejudice on the part of the alleged victim and her family by a criminal defendant "was clearly relevant and should have been admitted." Schmidt, 288 S.C. at 303, 342 S.E.2d at 403. The defendant's "entire defense at trial was that he did not commit the alleged act and that the child's story was concocted by her parents because of a 'vendetta' against him." Id. at 303-304, 342 S.E.2d at 403. The Court held "the trial court's ruling on the motion to limit the testimony and its refusal to allow [the defendant]'s proffer of testimony effectively denied [the defendant] a fair and impartial trial because he was not allowed to present his defense." Id. at 304, 342 S.E.2d at 403.

The Supreme Court dealt with multiple pieces of erroneously admitted irrelevant evidence in State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). The deceased, Joseph Barefoot, disappeared on May 25, 1997. Id. at 119, 551 S.E.2d at 243. Barefoot's body was found on September 16, 1997. Id. at 120, 551 S.E.2d at 243. Three of Saltz's friends provided statements implicating Saltz in Barefoot's death. Id. Appellant gave "seven consecutive statements" that were "highly contradictory" and one of which was "factually improbable." Id. at 120, 551 S.E.2d at 243-244.

The Court held the trial judge erred in admitting Saltz's attendance record showing he was absent from school on May 29, 1997. Id. at 127-128, 551 S.E.2d at 247-248. According to the Court, the fact Saltz "was absent from school on Thursday, May 29, 1997, did not tend to make 'the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.'" Id. at 127, 551 S.E.2d at 247 (citing Rule

401, SCRE). The Court rejected the state's argument that the evidence showed Saltz's "whereabouts on that date were [as] unknown as" the Barefoot's. Id. at 127-128, 551 S.E.2d at 247 (alterations in original). "[T]he state presented no evidence Thursday, May 29, 1997, had any consequence to this case." Id. at 128, 551 S.E.2d at 247. Rather, "introduction of this irrelevant evidence encouraged the jury to speculate that Thursday, May 29, 1997, must be significant to the case in some way unknown to them." Id. at 128, 551 S.E.2d at 248. Also, "admission of this irrelevant evidence served to portray [Saltz] as a delinquent." Id.

Recently, this Court reversed a trial judge's decision to exclude testimony from a witness as irrelevant. State v. Page, 406 S.C. 272, 750 S.E.2d 623 (Ct. App. 2013). Page was charged with criminal sexual conduct when a woman alleged he raped her. Id. at 280, 750 S.E.2d at 627. Page wanted to call the woman's boyfriend as a witness to examine the boyfriend about a voicemail he left for the woman in which he claimed the woman told him she fabricated the allegations against Page and that the sexual encounter was consensual as it involved a trade of sex for drugs, which was what Page told the police. Id. at 281, 750 S.E.2d at 628. The state objected, arguing the boyfriend's testimony was not relevant because he told police the voicemail was not true. Id. The judge excluded the testimony, finding "not a scintilla of relevancy" in the testimony to Page's trial. Id. at 281-282, 750 S.E.2d at 628.

This Court found the boyfriend's testimony was relevant to whether Page's encounter with the woman involved consensual sex, which was what Page maintained and the boyfriend's voicemail supported. Id. at 288, 750 S.E.2d at 632. This Court was not persuaded that the boyfriend's claim that the voicemail was a "pure fabrication" rendered his testimony irrelevant. Id. According to this Court, testimony about whether the woman told her boyfriend that she engaged in sexual acts in exchange for drugs would certainly assist the jury in arriving at the

truth of the issue because, if the jury believed the boyfriend was telling the truth in his voicemail, then the boyfriend's testimony "undoubtedly would have tended to make a determination that [Page] engaged in consensual sex with [the woman] more probable." Id. at 288-289, 750 S.E.2d at 632. Additionally, this Court held boyfriend's testimony was relevant to the credibility of the woman because her testimony conflicted with what she allegedly told the boyfriend. Id. at 289, 750 S.E.2d at 632.

In the present case, the prior bad act evidence submitted by the prosecution fails this basic test as it does not make it more or less probable that Appellant committed the armed robberies, carjacking, kidnappings, or attempted murders. The only purpose served by the evidence was to convince the jury Appellant was a bad person because he evaded police and drove at high speeds through residential neighborhoods. Quite simply, the state wanted to paint Appellant as a reckless and dangerous individual who needed to be taken off the streets whether he committed the charged offenses or not. The police chase, at most, was logically connected to the shoplifting at Wal-Mart or to the alleged "civil disturbance" at Paces Brook Apartments. However, it was unconnected to the charged offenses. Appellant's alleged involvement in the car chase failed to make it more or less probable that he was involved in the charged offenses.

If the evidence is relevant, the next step is determining whether the evidence fits within one of the exceptions of Rule 404(b). Wallace, 384 S.C. at 433, 683 S.E.2d at 277. "To be admissible, the bad act must logically relate to the crime with which the defendant has been charged." State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008). In addition, if the defendant were not convicted of the prior bad act, evidence of the conduct must be clear and convincing. Id. "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. "Such proof is intermediate, more than a

mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal." State v. Fletcher, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008). "Whether evidence of other distinct crimes properly falls within any of the recognized exceptions noted is often a difficult matter to determine." Lyle, 125 S.C. at 406, 118 S.E. at 807. "The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be included." Id. "[T]he dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by the courts to rigid scrutiny." Id. Judges must resolve the question of admissibility "in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors." Id. Therefore, "if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected." Id.

Although the state did not specifically state which exception it believed supported admission of the car chase, the argument appeared to suggest the chase was admissible regarding identity. One of the leading cases in South Carolina concerning the "identity" exception for the exclusion of prior bad acts is State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006). Pagan was accused of killing Gloria Cummings, whose body was found on December 11, 1997. Pagan, 369 S.C. at 205, 631 S.E.2d at 264. Semen found on Cummings' body matched Stephen Blathers, who lived near where her body was found. Id. Blathers admitted sexual intercourse with Cummings, but denied killing her. Id. Instead, he blamed Pagan. Id. He claimed he heard screaming and saw a shadow, which he believed belonged to Pagan, whom he had seen with Cummings earlier on the night of her death. Id. Cummings' friend, Cooks, claimed in court that she saw Pagan kill Cummings, but she had

previously been unable to identify Pagan and had never told the police she witnessed the killing. Id. at 206, 631 S.E.2d at 264. Pagan presented an alibi defense. Id. at 206-207, 631 S.E.2d at 264-265.

Another witness claimed that after Pagan was arrested and released on bond, approximately two years after Cummings' death, she was with Pagan in a car when the police attempted to pull them over. Id. at 207, 631 S.E.2d at 265. According to the witness, Pagan sped away, wrecked the car, and fled the scene. Id. When the witness ran into Pagan again, he apologized, saying he ran from the police because he did not have a driver's license and that he had been accused of killing a girl and was out on bond. He also mentioned the name of a potential witness against him. Id. Defense counsel objected to this witness's testimony, but the judge permitted it as evidence of identity under Rule 404(b), SCRE. Id.

The South Carolina Supreme Court held the judge erred in admitting the testimony. Id. at 210-211, 631 S.E.2d at 267. The Court explained the "bad act did not logically relate to the murder." Id. at 211, 631 S.E.2d at 267. "The failure to stop and the following explanation in no way identifie[d] [Pagan] as the person who murdered the victim." Id. The evidence "merely illustrate[d]" that Pagan, "who had already been charged with the victim's murder and released on bond for that charge, knew he had been accused of murder and knew the name of a witness in the case." Id.

The police car chase was *unconnected* to the carjacking or the attempted murders, which occurred days later. The car chase involved a different car than the one that was stolen during the carjacking. Allegedly the carjacking involved only one person, but two people were in the Camaro during the chase. The state simply could draw no logical connection between the car chase and the charged offenses to permit the jurors to use the car chase to establish the identity of the perpetrator of the charged offenses. The prosecution presented no evidence showing the alleged prior bad acts

were logically connected to the charged crime. In fact, the state could not articulate the logical connection between the alleged prior bad acts and one of the five exceptions because none existed. See Pagan, 369 S.C. at 211, 631 S.E.2d at 267. The evidence of the alleged prior bad acts – a high speed police car chase through residential neighborhoods – did not assist the jury in understanding a material issue in the case related to one of the five exceptions. See State v. Smith, 391 S.C. 353, 361, 705 S.E.2d 491, 495 (Ct. App. 2011).

The state also claimed the evidence of alleged prior bad acts by Appellant was admissible as part of the *res gestae* of the crimes charged. Evidence is admissible as part of the *res gestae* of the charged offenses when it provides part of the context of the crime or is necessary to the full presentation of the case or is "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." State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-371 (1996)(quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980)(internal citations omitted)). A prior bad act is admissible under the theory of *res gestae* when it is "so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other." Id. See also State v. Owens, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001) (stating "the *res gestae* theory recognizes evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred"); State v. Gilmore, 396 S.C. 72, 83, 719 S.E.2d 688, 694 (Ct. App. 2011)(explaining "the State may prove the actions of the defendant when those actions are part of the crime, not separate"); State v. Adams, 354 S.C. 361, 379-380, 580 S.E.2d 785, 794-795 (Ct. App. 2003)(permitting evidence of other crimes when the 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").

The high speed police car chase was not so linked to the carjacking, armed robbery, and kidnapping or the attempted murders in point of time and circumstances that the state could not fully show one without proving the other. The car chase was completely unrelated to the charged offenses. Again, it may have been related to the shoplifting and civil disturbance, but it was not linked to the carjacking or the attempted murders. The attempted murders occurred days later completely independent of the car chase. The witness to the car chase were different from the witnesses to the charged offenses. The car chase was not "part of the story" concerning the charged offenses. It was independent temporally and in its circumstances. Therefore, it was not part of the *res gestae* of the charged offenses.

Finally, even if the evidence fit within one of the enumerated exceptions and was proven by clear and convincing evidence, the trial court erred in admitting it as "its probative value was substantially outweighed by the danger of unfair prejudice." See Rule 403, SCRE. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; see also State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011). The first step requires a determination of the probative value of the evidence. The second step requires an evaluation of the danger of unfair prejudice resulting from the introduction

of the evidence. The third step requires balancing of the probative value and unfair prejudice. "When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case." Lyles, 379 S.C. at 338, 665 S.E.2d at 206. Unfair prejudice means an undue tendency to suggestion a decision on an improper basis, commonly, but not necessarily, an emotional one. Orozco, 392 S.C. at 218, 708 S.E.2d at 230 (citing State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001)); see also State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)(providing that "[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one").

The starting point for analyzing evidence under Rule 403 is determining the probative value of the evidence offered. "'Probative' means '[t]ending to prove or disprove.'" State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). According to this Court, "'[p]robative value' is the measure of the importance of that tendency to the outcome of a case." Id. at 610, 759 S.E.2d at 165. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

After determining the probative value of the evidence, the court must next evaluate the danger of unfair prejudice presented by the evidence. "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). "'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 [a] decision on an improper basis.'" State v. Gilchrist, 329 S.C.

621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998)(quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)). According to the United States Supreme Court, "[t]he term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172, 180 (1997). "Rule 403 only requires suppression of evidence that results in unfair prejudice – prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion." United States v. Mohr, 318 F.3d 613, 619-620 (4th Cir. 2003). Unfair prejudice means an undue tendency to suggestion a decision on an improper basis, commonly, but not necessarily, an emotional one. Orozco, 392 S.C. at 218, 708 S.E.2d at 230 (citing State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001)); see also State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)(providing that "[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one").

Once a court has determined the probative value and the danger of unfair prejudice of the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). Only after balancing the probative value and the danger of unfair prejudice may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE.

The high speed car chase offered very low probative value to the charged offenses. The allegation that Appellant was involved in a car chase with police failed to prove or disprove that Appellant was the person who committed the crimes against Drastich and Edwards. The car in the chase was a Camaro. The car in the carjacking was an Oldsmobile. The carjacking involved one assailant. The car chase involved two people. The car chase did not immediately follow the

carjacking. This was not a scenario where the police chased a suspect from the scene. The chase was hours after the alleged carjacking and concerned a separate set of facts and circumstances. The danger of unfair prejudice was high because the chase lasted for an extended period of time and showed the driver – alleged to be Appellant – acting very recklessly and dangerously. The chase showed speeds in excess of 140 miles per hour. The chase showed these high speeds through residential neighborhoods. The chase showed these high speeds through residential neighborhoods at night without the use of constant illumination. In short, the video and the testimony regarding the chase showed a danger to the community. Therefore, the danger that the jury would find Appellant guilty based on his alleged conduct during the high speed chase and not the evidence concerning the charged offenses was extremely high. Balancing the low probative value of the high speed chase against the very high danger of unfair prejudice required exclusion of the evidence. The trial judge erred in failing to exclude the evidence after a proper analysis under Rule 403, SCRE.

Appellant respectfully requests this Court reverse his convictions in light of the trial judge's erroneous admission of prior bad acts where (1) the evidence was not relevant, (2) the evidence was unfairly prejudicial, and (3) the state failed to show the acts fell within one of the exceptions to Rule 404(b), SCRE.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of August, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEYLAN J. DURHAM,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Keylan J. Durham states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent Appellant.

2. She has reviewed the record of Appellant's trial before Judge Clifton Newman, which was held on April 11-14, 2016, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. Pursuant to Anders v. California, 386 U.S. 738 (1967) she has briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Keylan J. Durham.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

This 3rd day of August, 2017.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEYLAN J. DURHAM,

APPELLANT

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) Entire trial transcript dated April 11-14, 2016 pages;
(2) State's Exhibit #3 (DVD Dash Cam Video);
(3) State's Exhibits #30-37 (photos);
(4) True-billed indictments: 2015-GS-40-00001, -00004,- 00005, -00007, -00008, -08388, -08389, 2016-GS-40-00525, & -00526; and
(5) Sentence sheets.

I certify that this designation contains no matter which is irrelevant to this appeal.

August 3, 2017

Susan B. Hackett

Susan B. Hackett
Appellate Defender
S.C. on Indigent Defense
Division of Appellate Defense
PO Box 11589
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(803) 734-1330
ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

August 3, 2017

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ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEYLAN J. DURHAM,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Keylan J. Durham, #347264, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 3rd day of August, 2017.

Susan B. Hackett

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 3rd day of August, 2017.

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