

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

Appeal from Beaufort County
The Honorable Larry B. Hyman, Circuit Court Judge

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SC Court of Appeals

THE STATE,

RESPONDENT,

v.

BRIAN KENDRICK SPEARS,

APPELLANT.

Appellate Case No. 2017-000480

INITIAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- I. Whether the lower court in its order on remand was incorrect in ruling that the probative value of the prior similar bad act was not outweighed by the danger of unfair prejudice?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

- I. Did the trial court abuse its discretion in finding that the probative value of Ms. Hammond's testimony was not substantially outweighed by unfair prejudice to Appellant after conducting a Rule 403 balancing test for admission of prior bad acts?

STATEMENT OF THE CASE

Appellant Brian Spears was indicted on one count of Murder and three counts of Assault and Battery with Intent to Kill ("ABWICK). (Case No. 2007-GS-26-3387, #2007-GS-26-3388, #2007-GS-26-3389, #2007-GS-26-3390). On May 10, 2010, the Honorable Larry B. Hyman, Jr. presided over Appellant's jury trial. (Tr. p. 1). Appellant was represented by Barbara Pratt and the State was represented by Assistant Solicitors Donna Elder and Lawrence Filiberto. (Tr. p. 1). After a three day trial, Appellant was convicted on all four charges and sentenced to thirty (30) years imprisonment for murder, and twenty (20) years imprisonment for each ABWIK charge, to run concurrently. (Tr. pp. 669, 680).

Following his conviction, Appellant sought direct Appeal to the South Carolina Court of Appeals on the basis that the trial court erred in admitting evidence of prior bad acts of Appellant that were unfairly prejudicial. Both Appellant and Respondent submitted their respective Final Briefs on September 12, 2011. Oral argument was heard by the Court of Appeals on January 17, 2013. The Court of Appeals then issued its published Opinion in the matter on April 17, 2013. The Court of Appeals agreed that the trial court was in error and remanded the issue back to the trial court with instructions that a 403 balancing test be conducted on the record to determine whether unfair prejudice substantially outweighed the probative value of the evidence in question. *State v. Spears*, 403 S.C. 247, 259, 742 S.E.2d 878, 884 (Ct. App. 2013).

Respondent filed a Petition for rehearing *en banc* on April 26, 2013. Appellant filed a petition for rehearing. Both parties' Petitions were denied on June 14, 2013. The State filed a Petition for Writ of Certiorari on July 12, 2013. On July 15, 2013, Appellant filed his own Petition for Writ of Certiorari. The Appellant's and the State's respective Returns to the Petitions were filed on August 1, 2013, and August 14, 2013. The South Carolina Supreme Court issued

an Order denying the Petitions of both parties on September 11, 2014.

As instructed, the rehearing on remand was heard on December 8, 2016, before the Honorable Judge Larry B. Hyman, Jr. Appellant was again represented by Barbara Pratt, however, Assistant Solicitor Thomas Terrell represented the Respondent at hearing. (Hearing Tr. p. 1). Following the arguments from both parties, Judge Hyman took the matter under advisement so that he could give further consideration to the matter. (Hearing Tr. p. 23). On February 9, 2017, Judge Hyman issued his Amended Order on Remand for Rule 403 Hearing (hereinafter “Amended Order”, finding the probative value of the admitted prior bad act was not substantially outweighed by unfair prejudice. (Amended Order, p. 8). Judge Hyman also held in his Order that in light of the evidence presented trial, there was no undue tendency to suggest a decision on an improper basis brought about by a propensity argument. (Amended Order, p. 8).

This appeal now follows.

STATEMENT OF FACTS

Testimony from initial trial

On May 26, 2007, Appellant, along with fellow gang members Nathaniel “June” Douglas, Ishmael “Ish” Douglas,¹ and Thomas “T.C.” Shaw (collectively Appellant’s group) left Lumberton, North Carolina and headed to Myrtle Beach over bike weekend.² (Tr. pp. 295-96, 566-67). The three individuals were all part of a Lumberton gang known as 41-Curve. (Tr. pp. 274-75, 288, 289, 360-61, 365, 439, 584).

Once arriving on Ocean Boulevard, Appellant’s group was joined by fellow 41-Curve member, Jeffrey “Bird” Bethea. (Tr. pp. 289-90). Testimony from trial indicated that Appellant

¹ Ishmael “Ish” Douglas is also known as Wa-Gee. (Tr. p. 296).

² Appellant, along with June, was a member of 41-Curve, a Lumberton gang affiliated with Gangster Disciples and Folk Nation. (Tr. pp. 274-75, 288, 289, 360-61, 365, 439, 584).

was wearing a white t-shirt and a black t-shirt underneath a red t-shirt along with a black and red New York Yankees hat, while fellow gang member Nathaniel Douglas, was wearing a red O.J. Simpson jersey.³ (Tr. pp 288-89, 299). Bethea, who did not know Appellant's group was coming to Myrtle Beach, wore a black shirt with colorful combination locks on it, a black hat, and blue jean shorts. (Tr. pp. 295-96, 441, 297, 298). Testimony elicited at trial demonstrated that Defendant's red colored attire was important: Red was actually the color of the "East Side Bloods", a rival gang to 41-Curve. Testimony from witnesses familiar with gang activity informed the jury that gang members would often wear the color of a rival gang when they intended to "go do something". (Tr. pp. 279-280).

Shortly after Bethea's arrival, a member of Appellant's group stated they had observed Aaron Hammonds ("Victim") walking down Ocean Boulevard. (Tr. p. 572). Victim was a high-ranking member of Lumberton's East Side Bloods, and had served four years in prison for "Accessory after the fact" in the murder of 41-Curve member Eric Floyd, also known as "G-Black" and "Turk". (Tr. pp. 225-26, 273-75, 289-291). Testimony from Brittney Maynor, Victim's girlfriend, showed that Victim, Aaron Hammonds, fellow East Side Blood Lemark Irons, and other members of the East Side Bloods were walking together along Ocean Boulevard. (Tr. pp. 192-193, 196-197). Lemark Irons, left the group and approached Appellant's group to compliment them on their clothes and jewelry stating "we need to stop beefing and get money together." (Tr. pp. 195-96, 197-98, 271, 273, 277, 279-81, 301). Irons, whose right arm was in a

³ Danyell Hammonds, who was the victim, Aaron Hammonds' younger sister and lived with him, would later testify that her brother was a Blood and that Bloods wear red. (Tr. pp. 279-80). However, Danyell Hammonds further explained that when gang members would "go to do something" they would wear opposite colors. (Tr. pp. 279-80). Additionally, Appellant's former cellmate in the detention center, Timothy Smith, testified that Appellant told him he received a phone call that Aaron Hammonds was in Myrtle Beach for bike week prompting Appellant's and his friends to come to Myrtle Beach. (Tr. pp. 506-07).

sling, then attempted to shake Bethea's hand with his left hand, which Nathaniel Douglas would later explain, was considered a sign of disrespect. (Tr. p. 301). In response to Irons' gesture, Bethea slapped Irons' hand and began cursing at him. (Tr. pp. 301, 312). Irons then left the group, and crossed Ocean Boulevard, once again rejoining his group on the other side of the street. (Tr. pp. 301, 197-98).

Immediately after the initial altercation, Bethea, who was a high-ranking member of 41-Curve, became angry and began talking to Appellant who was a foot soldier in 41-Curve and did not get along with Victim. (Tr. pp. 290, 440, 302, 310, 447-49). Specifically, Appellant expressed to Bethea his belief that Irons and his group, which included Victim, were going to kill someone in Appellant's group, unless Appellant and Bethea killed someone from Irons and Victim's group first. (Tr. pp. 447-48). Following this conversation, a shooting occurred resulting in Victim's death. (Tr. pp. 203-11, 216-18). In addition, three bystanders were wounded. (Tr. pp. 132, 156-57, 171, 189).

At the crime scene, authorities interviewed multiple witnesses and were able to produce a composite sketch matching Bethea's description. (Tr. 354-55). After interviewing Bethea, authorities also spoke with Appellant in Lumberton on June 4, 2007. (Tr. p. 355). In the June 4th interview, Appellant repeatedly denied being in Myrtle Beach on the date in question instead claiming he was in Lumberton all weekend. (Tr. pp. 358-59, 361). Additionally, Appellant informed authorities that he did not hang around Bethea. (Tr. p. 359). Following the first interview Appellant was charged with one count of Murder and three counts of ABWIK. (Tr. pp. 363-64).

After waiving extradition, Appellant was transported back to Myrtle Beach where he was interviewed a second time on June 7, 2007. (Tr. pp. 363-64). In his second statement, Appellant

admitted he was in Myrtle Beach on the date in question, but insisted that after the altercation between Bethea and Irons he walked away with Nathaniel Douglas and, when he heard gunshots, fled the scene. (Tr. pp. 367-68).

At trial, the State presented testimony that there were eight (8) shell casings recovered from the crime scene and three bullets recovered from Victim's body during the autopsy. (Tr. pp. 161-63, 173-74). SLED Agent Suzanne Cromer then testified that both the shell casings and bullets came from a .25 caliber automatic weapon. (Tr. pp. 431-32).

The State also introduced eyewitness testimony from Brittney Maynor. Maynor testified that the shooter was a black male who was approximately five-foot-seven (5'7) and was wearing a red shirt, a red bandana over his face, and a red fitted hat with another red bandana on his wrist.⁴ (Tr. pp. 203-04, 209, 211). She further noted that the shooter crossed the road and was right in front of her when she saw him begin shooting. (Tr. pp. 194, 203, 206). Maynor then told the jury that she turned and began running when she heard "five or six" shots. (Tr. pp. 207, 210). Maynor described the gun as a silver and black .380 that was small enough to fit in the palm of her hand. (Tr. p. 211).

Additionally the State presented testimony from Appellant's co-defendants, Nathaniel Douglas and Jeffrey Bethea. (Tr. pp. 287-350, 437-499). Nathaniel Douglas testified that after Irons' initial dispute with Bethea he walked off while Appellant remained with the rest of the group. Continuing, Nathaniel Douglas informed that jury that approximately ten minutes after he left Appellant's group, he heard gunfire and saw Appellant and the other members of his group running up the street. (Tr. pp. 302, 304-05). Nathaniel Douglas also confirmed that Appellant had a medium black and titanium handgun in his waistband on the night in question,

⁴ A South Carolina Department of Corrections incarcerated inmate search lists Appellant's height at five-foot-nine (5'9).

which was around the size of a .380, while also noting that Bethea did not appear to be carrying a gun. (Tr. pp. 302-04). Meanwhile, Bethea confirmed that Nathaniel Douglas left the group and explained that he and Appellant subsequently approached Irons' and Victim's group and attacked them. (Tr. p. 449). Specifically, Bethea told the jury that Appellant pulled out a small caliber handgun from his waistband and began shooting. (Tr. pp. 450-51).

To corroborate Bethea's version of the shooting, the State also introduced rap lyrics written by Appellant which indicated Appellant had killed Victim to avenge Eric Floyd's death. (Tr. pp. 293-95, 406-07, 415). There was also testimony from Appellant's former cellmate Timothy Smith, who shared a cell with Appellant while he was awaiting trial. (Tr. pp. 499-522). Smith told the jury that Appellant informed him he had pushed through the crowd and shot Victim because he believed Bethea would not do it. (Tr. pp. 506-07). Smith further added that Appellant said he would kill Bethea, his brother, his children and his whole family because he "snitched" on him. (Tr. pp. 506-07). Smith also learned through his conversations with Appellant, that Appellant had been told that Victim would be in Myrtle Beach, and that Appellant and his group drove to go take care of him. (Tr. pp. 505-06).

Following the close of the State's case, the defense presented testimony from eyewitness Alexis Brown who was part of Irons' and Victim's group on the night of the shooting. (Tr. p. 544). Brown testified that the composite generated by authorities was Bethea, but confirmed that the shooter was wearing a red bandana over his face and pulled a gun from his waistband. (Tr. pp. 547-48, 550-51).

Finally, Appellant testified in his own defense. (Tr. pp. 565-611). Specifically, Appellant explained he had walked off following the dispute between Irons and Bethea, heard gunshots and ran back to the K-Mart parking lot to meet with the rest of his group. (Tr. pp. 575-

76). He added that he did not shoot anyone. (Tr. p. 566). On cross-examination, Appellant admitted he brought a gun to Myrtle Beach, but left it in the car. (Tr. p. 589). Appellant also admitted he owned a .380, but gave it away. (Tr. p. 600).

PRESENTATION OF ISSUE AT TRIAL AND AT REMAND HEARING

The issue before the court after remand involves the admission of prior bad acts evidence against Appellant without the trial court first performing a 403 balancing test to determine whether unfair prejudice substantially outweighs the probative value of the evidence in question. *State v. Spears*, 403 S.C. 247, 259, 742 S.E.2d 878, 884 (Ct. App. 2013). The prior bad act comes from the testimony of Victim's sister, Danyell Hammonds (hereinafter "Ms. Hammonds"). Prior to her testimony before the jury, the trial court proffered her testimony in order to address concerns of hearsay and evidence of prior bad acts. (Tr. pp. 223-238).

During the proffered testimony, Ms. Hammonds recalled that about one month after Victim was released from prison for accessory after the fact in the murder of Eric Floyd, he came running into their home around midnight. (Tr. pp. 223-226, 229). She testified that Victim exclaimed that he had been shot, that she saw that the wound on his shoulder was still bleeding, and that he still had fresh blood on his hands. She asked who had shot him and recalled that Victim's response was "come on, man, you know who did it. . . Bos, man, Bos." (Tr. p. 231). Ms. Hammonds knew that "Bos" was Appellant's nickname. (Tr. p. 225).

The trial court heard this testimony and initially expressed concern that, while it was certainly relevant testimony, that it was hearsay and doubted that it would fall under the exception of "excited utterance". (Tr. p. 239). However, to corroborate the testimony of Ms. Hammonds, the State proffered the Walmart security video that showed the shooting take place. (Tr. pp. 247-248). The video showed that the shooting had taken place at 12:10am, which

corresponded closely the timeframe in which Ms. Hammonds claimed the Victim's statement occurred. (Tr. pp. 248, 228, 256). The video did not identify Appellant and the Solicitor acknowledged that they would not attempt to introduce the video, but only utilized it to corroborate the testimony of Ms. Hammonds as hearsay, admissible under excited utterance exception, and to show that the evidence was clear and convincing to purposes of admitting a prior bad act of Appellant. (Tr. pp. 248-249, 268-269)

The court heard initial arguments from both parties about the admissibility of Ms. Hammonds' testimony, and then gave the parties the opportunity to research the matter and present additional arguments and case law in support of their positions the following morning. (Tr. pp. 243-251).

Arguments continued the following morning, wherein the State put forth case law demonstrating that an excited utterance statement does not require the statement to be made contemporaneous with stressful event. (Tr. pp. 254-258). All that is required is that declarant still be under the influence of the stress from the event without opportunity to have calmed down. (Tr. pp. 254-258). The Court ultimately ruled that Ms. Hammonds' testimony demonstrating Appellant to have shot the Victim on a prior occasion was admissible under the excited utterance exception. (Tr. pp. 265-266). The court cited that Ms. Hammonds' testified it was approximately midnight when Victim informed her that "Bos" had shot him, which was corroborated by the time records of the Walmart video. (Tr. pp. 265-266). Also, the Court acknowledge that the description of how he entered the home, and the fact that he was still treating a bleeding wound would indicate that Victim was still under the stress of the shooting. (Tr. pp. 265-266). Furthermore, the trial court found that evidence of Appellant's prior bad act was clear and convincing when the testimony of Ms. Hammonds and the video were considered together. (Tr.

pp. 265-269). The Court found that the evidence met the *Lyle* exceptions and went to show motive, intent, lack of mistake or accident, and common plan or scheme. (Tr. pp. 246-247, 269). However, the trial court did not conduct an on the record 403 balancing test to determine whether the unfair prejudice of Ms. Hammonds' testimony outweighed its probative value. Ms. Hammonds testimony before the jury was substantially similar to her proffered testimony, and the evidence was admitted over the preserved objections of Appellant. (Tr. pp. 268-286).

The Court of Appeals remanded the matter back to the trial court so that a 403 balancing test could be performed on the record. *State v. Spears*, 403 S.C. 247, 259, 742 S.E.2d 878, 884 (Ct. App. 2013). A hearing on December 8, 2016 was held before Judge Hyman in order to perform the 403 balancing test. (Hearing Tr. pp. 1-25). The Court heard the arguments of counsel during the hearing and took the matter under advisement. (Hearing Tr. pp. 23). The Court then issued an extensive Amended Order, finding that the probative value of Ms. Hammonds' testimony was not substantially outweighed by unfair prejudice, along with detailed analysis and reasoning for the decision. (Amended Order, pp. 1-8).

Appellant now seeks to appeal the ruling of the trial court as set forth by the Amended Order.

STANDARD OF REVIEW

A trial judge is given broad discretion in ruling on questions concerning the relevancy of evidence. *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991); *State v. Jeffcoat* 354, 279 S.C. 167, 303 S.E.2d 855 (1983). A trial court's rulings pursuant to 403 balancing test are subject to an abuse of discretion standard and great deference is given to the trial court's decision. *State v. Myers*, 359 S.C. 40, 48, 596 S.E.2d 488, 492 (2004). An abuse of discretion "means nothing more or less than that the ruling of the trial court was without reasonable factual support, resulted

in prejudice to the rights of appellant, and therefore, in the circumstances, amounted to error of law.” *Bridges v. Wyandotte Worsted Co.*, 239 S.C. 37, 40, 121 S.E.2d 300, 302 (1961). “A trial judge’s balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence.” *State v. Hamilton*, 344 S.C. 344, 358, 543 S.E.2d 586, 594 (Ct. App. 2001), overruled on other grounds by *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005) (citing *United States v. Long*, 574 F.2d 761 (3d Cir.1978)). A trial judge’s decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in “exceptional circumstances.” *Hamilton*, at 593 (citing *United States v. Green*, 887 F.2d 25, 27 (1st Cir.1989)).

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion in finding that the probative value of Ms. Hammond’s testimony was not substantially outweighed by unfair prejudice to Appellant. The Amended Order demonstrates that the trial court’s recitation of the facts was supported by the record, and that the trial court conducted a thorough 403 balancing test of Ms. Hammonds’ testimony. The court’s reasoning that the evidence provided the full picture of the State’s gang retaliation theory in a way that other evidence could not, and that the evidence of the prior shooting by Appellant was overwhelmingly probative to show numerous *Lyle* exceptions to bad act evidence. The Court also articulated that concern over propensity arguments is considerably reduced given that there was substantial evidence presented at trial to prove identity of Defendant as the shooter. As such, the trial court did not abuse its discretion in admitting the evidence at trial and the conviction should be affirmed.

ARGUMENT

The sole issue on appeal of this matter is whether the trial court abused its discretion in finding that the probative value of Ms. Hammonds' testimony was not substantially outweighed by the unfair prejudice of the prior bad act of Appellant. Based upon the hearing transcript, and the extensive factual findings and reasoning of the Amended Order from the trial court, no abuse of discretion exists and the conviction should be affirmed.

A trial court's rulings pursuant to 403 balancing test are subject to an abuse of discretion standard and great deference is given to the trial court's decision. *State v. Myers*, 359 S.C. 40, 48, 596 S.E.2d 488, 492 (2004). Thus, in order for the trial court's 403 balancing test to be reversed on appeal, there must be a lack of reasonable factual support or errors of law in the trial court's analysis. *Bridges v. Wyandotte Worsted Co.*, 239 S.C. 37, 40, 121 S.E.2d 300, 302 (1961).

The trial court, per the Court of Appeals' instructions on remand, conducted a thorough hearing on the record with counsel for the State and Appellant. (Hearing Tr. pp. 1-24). At hearing, Appellant argued that the remand of the trial court should include a full rehearing of the admissibility of Ms. Hammonds' testimony, which would include argument regarding excited utterance, and whether the evidence was clear and convincing, so as to render the prior bad act admissible. (Hearing Tr. p. 8). The Court concludes, that while there were "three tiers" of analysis, the remand was strictly to conduct the third tier of analysis, the 403 balancing test. (Hearing Tr. pp. 7-15). As the instructions of the remand were specifically and solely for the conducting of a 403 balancing test, the trial court was correct to focus the hearing on the probative and prejudicial aspects of the witness testimony. *State v. Spears*, 403 S.C. 247, 259, 742 S.E.2d 878, 884 (Ct. App. 2013).

The Court then moves on to specifically address the probative value and the unfair prejudice that may exist. Counsel for the State argued that it is probative in numerous ways; chiefly, he argued that this testimony demonstrated Appellant's motive, intent, absence of mistake, and common plan or scheme. (Hearing Tr. pp. 15-16). As it applies to the State's case in chief, counsel argued that the evidence fits into the broader picture that Victim's death was a specific gang retaliation. As such, the testimony fit numerous factors for which prior bad acts may be admitted. (Hearing Tr. p. 16). The Court acknowledged these arguments and also added that, as this was a charge for murder of Victim, it would need to be shown that this wasn't just a random shooting, and that the Appellant went to Myrtle Beach with the purpose of shooting the victim. (Hearing Tr. pp. 16-17).

Appellant in response argued this evidence was unnecessary to show a theory of vendetta, and it was made known through other testimony that the gang had a vendetta against Victim for his role in killing Eric Floyd. (Hearing Tr. p. 17). However, the trial court felt that Ms. Hammonds' testimony adds even more to the theory, by showing intent for Appellant killing Victim specifically. (Hearing Tr. p. 17, line 24 through p. 18, line 7). Appellant acknowledges that argument, but suggests that it is cumulative and would be akin to a "propensity" argument, wherein the unfair prejudice should keep it out. (Hearing Tr. p. 18). Appellant then argue the unfair prejudice arises because the jury may find guilt on an improper basis of propensity. (Hearing Tr. pp. 20- 21).

The matter was taken under advisement for further consideration, and the trial court issued an Amended Order that thoroughly addressed all aspects of the Rule 403 dispute argued before it. (Amended Order, pp. 1-8).

In an effort to thoroughly address the concerns expressed in the Remand Opinion, Judge Hyman first provided a review of the facts of the case, how the arguments were presented at the trial, and the initial rulings that were made. Therein, the trial court reviewed his decisions regarding hearsay and excited utterance which formed the context of the task at hand. He noted that under the circumstances of this case the Victim's statements to Ms. Hammonds were admissible. (Amended Order, p. 3). The Court cites the video time stamp as corroboration of Ms. Hammonds' testimony that the Victim's statement came at near midnight. (Amended Order, p. 3). The trial court confirms his initial ruling by noting that excited utterance does not need to be made immediately after the stressing event, if the circumstances show that the stress was still affecting the declarant and there had not been time to calm down. (Amended Order, p. 3) (citing *State v. Burroughs*, 328 S.C. 489, 492 S.E.2d 408, (SC App. 1997)). The Court also cites the fresh blood and circumstances of Victim's entry into the house as his basis for confirming the applicability of excited utterance. (Amended Order, p. 3).

Next the Court addresses its prior ruling under 404(b), finding that the evidence of a prior bad act was clear and convincing, and therefore admissible under the *Lyle* exceptions. *State v. Lyle*, 125 S.C. 406, 118 S.E. 803, 807 (1923). The trial court acknowledged that the Appellant could not be identified in the security video, but based its finding of clear and convincing evidence of Appellant's involvement in the Walmart shooting on the fact that Victim *specifically* named Appellant as his shooter (Amended Order, p. 4). The trial court acknowledged that the two different shootings were related, in that they demonstrated a common plan or scheme of Defendant. (Amended Order, p. 4). It likewise showed the intent to kill the Victim specifically, and Appellant's motive for revenge. (Amended Order, p. 4). The trial court agreed that that Ms.

Hammonds' testimony corroborated all three theories in which the State was arguing at trial, and that the 41-Curve gang desired to kill Victim. (Amended Order, p. 4).

With the initial rulings examined, the trial court then addressed his failure to provide a 403 balancing test to determine whether unfair prejudice substantially outweighed the probative value, and identified the 403 analysis as the sole issue for consideration. (Amended Order, p. 4-5).

The Amended Order court correctly recited Rule 403 and that probative value must be substantially outweighed by danger of unfair prejudice. The trial court then correctly defined "unfair prejudice" to be "an undue tendency to suggest a decision on an improper basis." (Amended Order, p. 5 (citing *State v. Stokes*, 381 S.C. 390, 673 S.E.2d 434 (2009))).

The trial court found that the evidence of the Walmart shooting was overwhelmingly probative, as it demonstrates motive, intent, common scheme and plan, and the absence of a mistake or accident. All five are recognized Lyle exceptions. *State v. Lyle*, 125 S.C. 406, 118 S.E. 803, 807 (1923). Judge Hyman explained that the evidence showed the whole picture of the State's theory that this was a gang retaliation, specifically against this Victim, and not a random shooting. (Amended Order, p. 6-8) (citing *State v. Dennis*, 402 S.C, 627, 742 S.E.2d 21 (S.C. Ct. App., 2013)). Ms. Hammonds' testimony shows that the intent of Appellant to actually kill the Victim, as opposed to injuring or scaring him, and showed that it was not an accident or mistake that this particular individual was targeted and killed. (Amended Order, p. 8).

The trial court also addresses the potential of unfair prejudice in admitting this testimony, acknowledging the risk for the jury to use it as evidence of propensity. (Amended Order, p. 6). However, the Amended Order goes on to demonstrate that the danger of unfair prejudice in this case is decreased substantially by the other evidence tending to show the identity of Appellant as

the shooter in Victim's death. The trial court references the testimony of Appellant's cell mate, Tim Smith, wherein Defendant told him of the specific plan and intent to kill Victim, how Appellant did not think that Bethea would carry through with doing it himself, and admitted to killing Victim. (Amended Order, p. 6-7). Co-defendant Jeffrey Bethea identified Appellant as the shooter and corroborated the testimony of others who saw a small caliber pistol in Appellant's waste band that he used to murder the Victim. (Amended Order, p. 7). Brittney Maynor identified the shooter as wearing red shirt, red hat, and a red bandana, which was corroborated by both Nathaniel Douglas and Jeffrey Bethea. (Amended Order. P. 7). All of which the trial court accurately recounted and correctly attributes to "identity" evidence that would prevent the jury from convicting Appellant on the basis of propensity.

The trial court's 403 balancing test can only be overruled in the face of an abuse of discretion. Herein, Judge Hyman has provided an extensive legal reasoning for why Ms. Hammonds' testimony is admissible, and why it is "overwhelmingly" probative, along with accurate citations to proper authorities for his ruling. Additionally, numerous facts are discussed which show precisely how the evidence goes to show motive, intent, common plan, and absence of mistake under *Lyles*. Lastly, the court provided numerous facts proving Appellant's identity alleviate concern for unfair prejudice under improper propensity arguments. Consequently, there is no abuse of discretion in the trial court's ruling, and the admission of Ms. Hammonds testimony under the court's 403 balancing test was proper.

While absent from the initial trial record, the trial court's Amended Order provides a level of analysis and factual findings that well exceed the common 403 balancing tests performed contemporaneous with the admission of the evidence. As such, the ruling of the trial court and the conviction of Appellant should be affirmed.

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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BY: 
W. Joseph Maye

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
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ATTORNEYS FOR RESPONDENT

February 1, 2018

CERTIFICATE OF SERVICE

I, **W. Joseph Maye**, hereby certify that I have served the Initial Brief of Respondent and Designation of Matter in the foregoing by depositing copies in the InterAgency mail addressed to:

Robert M. Pachak
Appellate Defender
Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

This 1st day of February, 2018.



W. JOSEPH MAYE
Assistant Attorney General

RECEIVED

FEB 01 2018

SC Court of Appeals



ALAN WILSON
ATTORNEY GENERAL

February 1, 2018

RECEIVED

FEB 01 2018

SC Court of Appeals

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State v. Brian Kendrick Spears
Appellate Case No. 2017-000480

Dear Ms. Kitchings:

Enclosed please find the Initial Brief of Respondent and Designation of Matter in the above-captioned matter for filing in your office. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Lonetta B. Brawley
Legal Assistant to W. Joseph Maye
Assistant Attorney General

/lbb

cc: Robert M. Pachak, Esquire
Isaac McDuffie Stone, III, Solicitor
Trisha Allen, Victim Advocacy Division