STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY

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SC Court of Appeals

Court of General Sessions
Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2016-002256

THE STATE,

Respondent,

v.

JOHNATHON GREEN,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The trial court's decision to admit testimony about a prior threat and an incident of violence by Appellant against Victim was not an abuse of discretion where the testimony was relevant to prove motive, intent, identity, and res gestae.

II.

The trial court's decision to admit a 911 recording in which the victim states that Appellant was harassing her, had threatened her in the past, and usually carries a gun was not an abuse of discretion because the evidence was relevant and not unfairly prejudicial to Appellant.

III.

Even if the trial court erred, Appellant suffered no prejudice because evidence of his guilt was overwhelming.

STATEMENT OF THE CASE

An Orangeburg County Grand Jury indicted Appellant for two counts of Attempted Murder and one count of Discharging a Firearm into a Dwelling. Respondent (the State) called the case for trial on October 24, 2016 before the Honorable Edgar W. Dickson. Byron Gipson, Esquire represented Appellant. Assistant Solicitors Tommy Scott and Josh Edwards represented the State. Following a four-day trial, a jury convicted Appellant on all counts. The court sentenced him to thirty years' incarceration for each count of Attempted Murder and ten years for Discharging a Firearm into a Dwelling, all to be served concurrently. This appeal follows.

STATEMENT OF FACTS

On December 13th, 2015, Elise Hogges was on a dinner date with her boyfriend, Ken Minus. Tr. 110. The couple was driving in Elise's car to Santee from Orangeburg on Highway 301 with Ken driving and Elise in the passenger's seat. Tr. 110. As the couple passed through the outskirts of Orangeburg in the left lane of the east-bound side of the highway, Elise noticed they were approaching a black Hyundai SUV with veteran's tags in the right lane. Tr. 110. Elise recognized the vehicle as Appellant's mother's, which Appellant normally drove. Tr. 110. Appellant's mother lived near this section of Highway 301. Tr. 110-11. Elise and Appellant had previously been in a long-term relationship and shared a child in common. Tr. 106, Pretrial Tr. 12-13. Elise remarked to Ken, "Oh, Lord, that's my baby's daddy." Tr. 110, ll. 15-16. Ken replied that they were not bothering him, and instructed Elise to remain calm. Tr. 110, l. 17.

Appellant's car slowed down until the two cars were side by side. Tr. 111, ll. 9-13. Appellant's window was down. Tr. 112, 146. Ken and Elise made eye contact with Appellant, and both testified at trial they were certain he was the driver. Tr. 111-12, 146. Appellant stared menacingly at the couple, causing Elise to so become afraid that she called 911. Tr. 111, ll.16, Tr. 146.[1] Ken sped up, trying to get away from Appellant. Tr. 112-14, 149. A chase ensued, with Appellant following the couple down Highway 301 at speeds reaching 100 miles per hour as Elise narrated the events to the 911 operator. Tr. 115, 149. Elise testified she received a call from a blocked number during the chase, and that Appellant always called her from a restricted number. Tr. 124, 142. Ken turned onto Old State Road, with Appellant following closely behind. Tr. 115. Appellant pulled even with the couple in the passing lane, but sped in front of them to avoid an oncoming car. Tr. 115. This gave Ken an opportunity to turn around in a

[1] "You could see hate in his eyes." Tr. 146.

church parking lot and drive back in the opposite direction, but Appellant quickly turned around and started following them again. Tr. 115, ll. 10-15. In a desperate attempt to find shelter, Ken pulled onto Omega Court, a small dirt road where some family members lived. Tr. 115-16. Ken pulled into the driveway of 129 Omega Court and the couple sprinted into the mobile home of Ken's cousin, Delphine Gavin. Tr. 149. There were eight other people in the home at the time, including five children. Tr. 176. Appellant pursued them onto Omega Court. Tr. 150.

Seconds later shots rang out. Tr. 150. Bullets flew through the walls of the home, shattering appliances and piercing furniture as the victims ducked for cover. Tr. 117, 83, 95, 181-82. Miraculously, no one was hit. Delphine Gavin observed Appellant's vehicle speeding away from the scene. Tr. 178, ll. 3-5. Crime scene investigators discovered nine bullet impacts across the front of the mobile home and recovered five bullet fragments, later determined to be 9mm caliber. Tr. 245, Tr. 314-15.

Investigators could not locate Appellant or his vehicle on the night of the incident, despite attempts to reach him through his mother and brother. Tr. 265-69. However, Appellant's mother provided police with Appellant's cell phone number. Tr. 269. Appellant's mother testified at trial that Appellant was in possession of her black Hyundai SUV on the night of the incident. Tr. 261, ll. 14-19. Investigators obtained arrest warrants and a search warrant to track Appellant's cell phone, but it was powered off and could not be tracked. Tr. 270, 290-91. Officers surveilled Appellant's residence and his mother's residence, but he never came home. Tr. 292, ll. 13-14. On December 17, investigators learned that Appellant's girlfriend, Lakeisha Heyward, had been reported missing, and that she was last seen with Appellant. Tr. 292, ll. 4-8. The United States Marshall's Service tracked Heyward's vehicle through a GPS device that had

been installed by the vehicle's lienholder, and the couple was apprehended heading south on I-95 near Savannah, Georgia. Tr. 292-93.

The State obtained Appellant's cell phone records and presented expert testimony that showed Appellant's cell phone's tower location data and call log from the night of the incident. Tr. 326, 350-69. The testimony corroborated the State's evidence, showing that Appellant's cell phone switched from tower to tower along the route of the chase and shooting at the exact times the events occurred. Tr. 357-362. The testimony also showed the phone had been used to communicate with Appellant's mother, brother, and girlfriend throughout the night, corroborating officer testimony, and that Appellant continually called Elise's cell phone using star 67 to block caller ID during and after the incident. Tr. 360-361. The State also obtained phone records from Elise Minus and Lakeisha Heyward which corroborated the evidence. Tr. 353-54, 270.

Appellant did not present a case. Defense counsel argued that Appellant was not the person who committed the acts. Tr. 434-35.

Prior Bad Act Evidence

Prior to trial, the court heard opposing motions regarding the admissibility of evidence detailing the history of Appellant's relationship with Elise Hoegges. The State proffered testimony from Hogges related to three specific events that transpired during the calendar year leading up to the incident. The first incident occurred in January, 2015, when Hogges went to pick up her child from Appellant's mother's house. An argument ensued, and Appellant pulled some of Hogges hair out of her scalp, destroyed tires on her car, and threw her keys into the woods. Pretrial Tr. 13-14. Hogges reported this incident to the police. Pretrial Tr. 15. The second incident occurred around Thanksgiving of 2015, several weeks before the incident date.

Appellant came to Hogges' home, ostensibly to repair her car. When Hogges' declined Appellant's help, he threatened to "blow her face off." Pretrial Tr. 14. Hogges did not report this incident to the police. Pretrial Tr. 15. The final incident occurred some time in 2015. During an argument, Appellant pulled out a gun in the presence of their young child, and threatened to kill Hogges. Pretrial Tr. 16. Hogges did not report this incident to the police. Pretrial Tr. 16.

The State argued the evidence was relevant to prove motive, intent, and malice as an element of Attempted Murder. Appellant argued that the testimony was unfair character evidence and not relevant. The trial court decided to admit the evidence of the first two incidents, explaining that the evidence was relevant to show motive and the "animus" that existed between the couple. Pretrial Tr. 31-32. The court suppressed testimony of the third incident, expressing concern that Hogges could not produce a specific date on which the prior incident occurred, her testimony about this incident wasn't as descriptive, and she did not file a police report. Pretrial Tr. 30.

Appellant also moved before trial to suppress the 911 call made by Hogges during the incident because it contained statements alleging Appellant had "violent tendencies." In response to the operator's question why Appellant was chasing them, Hogges said: "He's harassing me, I've done pressed— I done called the police.... I think he's got a gun. Nine times out of ten. He'll be threatening to kill me and stuff, I've done filed a report." The court heard argument from the parties, and ultimately admitted the 911 recording without redaction. Tr. 118-119.

ARGUMENT

I.

The trial court's decision to admit testimony about a prior threat and an incident of violence by Appellant against Victim was not an abuse of discretion where the testimony was relevant to prove motive, intent, identity, and res gestae.

A person is guilty of Attempted Murder if he "with the intent to kill attempts to kill another person with Malice Aforethought either expressed or implied." S.C. Code 16-3-29. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." SCRE 404(b). "The rule is based on the danger that the jury will reach a guilty verdict because of the defendant's bad character and not based on the evidence of the crime for which he is currently on trial." *State v. Smith*, 391 S.C. 353, 359–60, 705 S.E.2d 491, 494 (Ct. App. 2011), rev'd, 406 S.C. 215, 750 S.E.2d 612 (2013).

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. *State v. Cutter*, 261 S.C. 140, 147, 199 S.E.2d 61, 65 (1973). The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may disturb a ruling admitting or excluding evidence only 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 arises from an error of law or a factual conclusion that is without evidentiary support." *State v. Kirton*, 381 S.C. 7, 23, 671 S.E.2d 107, 115 (Ct. App. 2008).

"The process of analyzing bad act evidence begins with Rule 401, SCRE. Pursuant to Rule 401, the trial court must determine whether the evidence is relevant." *State v. Wallace*, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." SCRE 401. "The trial judge must have wide discretion on innumerable questions of relevancy before her, and her decision should be reversed only for abuse of that discretion." *State v. Anderson,* 253 S.C. 168, 182, 169 S.E.2d 706, 712 (1969).

"Upon determining the evidence is relevant, the trial court must then determine whether the bad act evidence fits within an exception of Rule 404(b) as interpreted by our jurisprudence." *State v. Wallace*, 384 S.C. at 433. "To be admissible, the bad act must logically relate to the crime with which the defendant has been charged." *State v. Clasby*, 385 S.C. 148, 155, 682 S.E.2d 892, 895 (2009). As a condition of admissibility, the State must prove the existence of the prior act by clear and convincing evidence. Appellate courts do not review a trial judge's ruling on the admissibility of other bad acts by determining *de novo* whether the evidence rises to the level of clear and convincing. If there is any evidence to support the admission of the bad act evidence, the trial judge's ruling will not be disturbed on appeal. *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001).

Once bad act evidence is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE. *State v. Wallace*, 384 S.C. at 435. Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. *State v. Gillian*, 373 S.C. 601, 611, 646 S.E.2d 872, 877 (2007). "Evidence is

unfairly prejudicial if it has an undue tendency to suggest decision on an improper basis, such as an emotional one." *State v. Kirton*, 381 S.C. 7, 24, 671 S.E.2d 107, 115 (Ct. App. 2008). "A trial court has particularly wide discretion in ruling on Rule 403 objections." *State v. Lee*, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct.App.2012); *State v. Dial*, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App.2013) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances. We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment.") (citation omitted).

Motive

This was such a bizarre, hateful act that a juror would naturally question who was motivated to commit it. The State theorized Appellant was motivated by "jealousy, hatred, and obsession," stemming from his terminated relationship with Elise Hogges. Tr. 389. In order to prove that fact, the State needed to provide context. Evidence of the tumultuous relationship was "part of the history of the case," *see State v. Petit*, 144 S.C. 452, 142 S.E. 725, 731 (1928), and relevant to motive. The two prior acts offered against Appellant both occurred during the calendar year leading up to the incident, during which time Appellant and Hogges broke up and Hogges started dating Minus. In the pretrial hearing, Hogges testified that the fighting had been getting worse as time passed, and that she believed Appellant's threats had become more dangerous and plausible. Pretrial Tr. 16. The couple's tumultuous history, including Appellant's threat to kill Hogges and an incident where the fighting became physical, was logically relevant to show Appellant had a motive to kill Hogges. *See State v. Lyle*, 125 S.C. 406, 118 S.E. 803, 807 (1923) ("The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. If it is logically pertinent in that it reasonably tends to

prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime.").

"The best evidence of the state of mind attending any act is what was said and done by the person whose motive is sought for." *State v. Coleman*, 6 S.C. 185, 186 (1875). Evidence of previous quarrels, ill feeling, or hostile acts between the parties is admissible to show the animus probably existing between them at the time of the homicide. *State v. Brooks*, 79 S.C. 144, 60 S.E. 518, 518 (1908); *State v. Plyler*, 275 S.C. 291, 296, 270 S.E.2d 126, 128 (1980) ("Evidence of previous difficulties or ill feelings between the accused and the victim and of facts showing the cause of such difficulties or ill will is admissible on the question of motives where there is some connection of cause and effect between the evidence and the crime.") (citations omitted). Clearly, a bitter breakup qualifies as "ill feelings" sufficient to motivate a person to commit an act of violence. *See State v. Sweat*, 363, S.C. 117, 126, 606 S.E.2d 508 (evidence of tumultuous relationship and breakup admissible to show defendant was "driven by anger" when he attacked ex-girlfriend and her new boyfriend).

Not only was evidence of a prior threat admissible to show a general animus between the parties, it was admissible to prove malice as an element of Attempted Murder. "It is well-settled that evidence of previous threats by the defendant is admissible to show malice." *Blakely v. State*, 360 S.C. 636, 639, 602 S.E.2d 758, 759 (2004), *citing State v. Lee*, 255 S.C. 309, 178 S.E.2d 652 (1971) and *State v. Alford*, 264 S.C. 26, 212 S.E.2d 252 (1975); *Sheppard v. State*, 357 S.C. 646, 663, 594 S.E.2d 462, 471 (2004) (approving a jury charge that stated "malice can be expressed where there is manifested a deliberate intention to violently and unlawfully take the life of another human being. **For instance with words.**") (emphasis added). "Generally, motive is not an element of a crime that the prosecution must prove to establish the crime charged, but

frequently motive is circumstantial evidence ... of the intent to commit the crime when intent or state of mind is in issue. State of mind is an issue any time malice or willfulness is an element of the crime." *State v. Sweat*, 362 S.C. 117, 124–25, 606 S.E.2d 508, 512 (Ct. App. 2004) (citing Danny R. Collins, *South Carolina Evidence* 319 (2d ed.2000)). Elise Hogges' testimony about the prior threat and incident of violence was relevant and highly probative of Appellant's motive, and fits squarely within what rule 404(b) allows.

Intent

The evidence was also highly probative of Appellant's intent. Not only was the State required to prove malice, it was required to prove the "highest possible mental state for criminal attempt" — specific intent to kill. *State v. King*, Op. No. 27744 (S.C.Sup.Ct. filed Oct. 25, 2017) (Shearouse Adv.Sh. No. 40 at 22, 35 n. 5) (noting "if there is no evidence that one charged with attempted murder had express malice and a specific intent to kill, we believe the crime would involve a lower level of intent and, thus, would fall within the lesser degrees of the assault and battery offenses"); *State v. Kinard,* 373 S.C. 500, 503–04, 646 S.E.2d 168, 169 (Ct. App. 2007) ("'Malice aforethought' is defined as 'the requisite mental state for common-law murder' and it utilizes four possible mental states to encompass both specific and general intent to commit the crime. These four possibilities are intent to kill, intent to inflict grievous bodily harm, extremely reckless indifference to the value of human life (abandoned and malignant heart), and intent to commit a felony (felony murder rule).") (citing Black's Law Dictionary 969 (7th ed.1999)). Proving "express malice and a specific intent to kill" is a difficult task and high burden, making the prior act testimony extremely probative and important to the State's case. The classic example of a case where express malice is shown is when the assailant contemporaneously verbalizes his intent to kill. Absent an expression at the time of the act, the next best evidence of

intent to kill is prior threats to kill. The Supreme Court has recognized that evidence of prior threats is admissible under Rule 404(b) to show intent. *Blakely v. State*, 360 S.C. 636, 639, 602 S.E.2d 758, 759 (2004) (holding prior threats admissible to show intent in ABIK trial). The State was entitled under rule 404(b) to present evidence of prior acts to meet its exceptionally high burden of proof that Appellant acted with intent to kill.

Identity

The evidence was also admissible to prove identity. Appellant's defense at trial was that he did not commit the alleged acts, calling into question not only whether he acted with malice, but whether he acted at all. Tr. 73, ll. 22-24. Because a person with a motive is more likely to commit a crime than a person with no motive, the existence of motive was relevant to prove identity. *See State v. Thomas*, 248 S.C. 573, 583, 151 S.E.2d 855, 861 (1966) (approving prior bad act evidence where it "was restricted to the minimum requirements of the case and tended directly and fairly to prove not only the identity of the appellant, but his motive as well"). "Certainly motive is useful in detective work and could be quite helpful in a jury's determination as to whether a particular person did the act." McAninch and Fairey, *The Criminal Law of South Carolina*, 52 (1982).

Res Gestae

Under the res gestae theory, "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. Dennis*, 402 S.C. 627, 635, 742 S.E.2d 21, 25 (Ct. App. 2013). Res gestae evidence is proper where it "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.'" *State v. Adams*, 322 S.C. 114, 122, 470 S.E.2d 366, 370–71 (1996) (quoting *United States v. Masters*, 622 F.2d 83, 86 (4th Cir.1980)). The State's presentation of its cased would have been incomplete without some testimony showing context. Without testimony describing the toxic nature of the relationship, the jury would have been forced to assume the relationship ended in a more normal fashion. The testimony was highly relevant to explain the animus between Appellant and Elise, and necessary for the presentation of a full case.

403 Analysis

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." SCRE 403. Unfair prejudice means "an undue tendency to suggest [a] decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Sweat*, 362 S.C. 117, 128, 606 S.E.2d 508, 514 (Ct. App. 2004). Even if evidence is "highly prejudicial" to a defendant, where the probative value is also high, the evidence should be admitted. *State v. Adams*, 322 S.C. 114, 119, 470 S.E.2d 366, 369 (1996) ("The evidence... obviously is highly prejudicial. However, its probative value is also high because the evidence tends to establish [defendant's] intent ... The trial judge properly admitted this evidence.") (citation omitted). Given the highly probative nature of the testimony and this Court's extremely deferential standard of review, the trial court's decision should be affirmed.

As explained above, evidence of prior difficulties was highly probative to explain motive, intent, identity, and res gestae. In contrast, the evidence does not suggest guilt on an improper

basis. The evidence of past conduct was not offered to show propensity, or that Appellant committed these acts because he was somehow disposed to act violently. It was offered to give context and explain to the jury why Appellant engaged in this behavior. This is precisely the type of evidence allowed under Rule 404(b), even though it may involve testimony about prior acts that could prejudice a defendant's case.

Any prejudice that resulted was low. The prior acts were fundamentally different in severity. They involved an episode of violence that equated to a simple domestic assault, and a verbal threat to shoot the victim. Certainly, these acts were not "equally heinous" so as to prompt "a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged." *State v. Lyle*, 125 S.C. 406, 118 S.E. 803, 807 (1923). Nor did the State offer extended or unnecessary details of the prior acts. *See State v. Thomas*, 248 S.C. 573, 583, 151 S.E.2d 855, 861 (1966) (approving prior bad act evidence where it "was restricted to the minimum requirements of the case"). Hogges' prior act testimony was brief; it fits on two pages of the trial transcript. Tr. 107 l. 6- Tr. 109 l. 7. Furthermore, Appellant was able to cross-examine Hogges regarding her testimony.

Appellant also claims that the January incident was too distant in time from the incident date to be relevant. There is no set rule as to what lapse of time will make particular evidence too remote to be probative, and the determination of remoteness is a matter within the discretion of the trial court. *State v. Glenn*, 328 S.C. 300, 309, 492 S.E.2d 393, 397 (Ct. App. 1997) (no abuse of discretion where prior acts "occurred sometime during the year prior to the incident"). The temporal attenuation between the making of a statement and the crime is of no moment in assessing its admissibility, but rather goes to the weight of the evidence. *State v. Beck*, 342 S.C. 129, 135, 536 S.E.2d 679, 682 (2000) ("The four month lapse is at most a matter bearing on the

weight of the evidence, which was for the jury to determine."); *State v. Brooks*, 79 S.C. 144, 60 S.E. 518, 518 (1908) (finding no error in admitting a threat made by defendant to victim eight months earlier); *State v. Thomas*, 248 S.C. 573, 151 S.E.2d 855 (1966) (no abuse of discretion in admitting testimony regarding prior bad act that occurred four years before incident where relevant to motive).

Appellant is asking this Court to second-guess the judgment of the trial court, even though that court's decision is one that can be overturned only if "clearly untenable." *Norris v. Clinkscales*, 47 S.C. 488, 25 S.E. 797, 801 (1896). The record supports the trial judge's findings that the incidents occurred, fit a 404(b) exception, and that their probative value was not substantially outweighed by the danger of unfair prejudice. Considering the high probative value of the testimony, low prejudice, and extremely deferential standard of review, the trial court's decision was well within his discretion and should be affirmed.

II.

The trial court's decision to admit a 911 recording in which the victim states that Appellant was harassing her, had threatened her in the past, and usually carries a gun was not an abuse of discretion because the evidence was relevant and not unfairly prejudicial to Appellant.

Appellant next claims the trial court erred in admitting a 911 call Hogges made during the incident because "the non-redacted portion of the 911 call contained improper character or propensity evidence and the probative value of that portion of the 911 tape was substantially outweighed by the danger of unfair prejudice." Brief of Appellant, 13. In other words, Appellant is again asking this court to conduct a *de novo* 403 analysis. However, "[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. If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." *State v. Hamilton*, 344 S.C. 344, 358, 543 S.E.2d 586, 593–94 (Ct. App. 2001) (citation omitted). This court must affirm if there is any evidence to support the trial court's ruling. *State v. Adams*, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003) ("We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment."); *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166–67 (2007) ("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. Mitchell*, 382 S.C. 1, 4, 675 S.E.2d 435, 437 (2009) ("This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial court's ruling is supported by any evidence."). *See* Standard of Review discussion, supra p. 7-8.

In a pretrial motion, Appellant moved to suppress the 911 call, alleging it contained statements that "suggest [Appellant] is a violent person" or had "violent tendencies." Pretrial Tr. 4. Appellant argued the statements concerned acts that were mere allegations and had "nothing to do with what happened on that particular evening." Pretrial Tr. 9. The statements were given in response to the operator's question **why Appellant was chasing them**. Hogges said: "He's harassing me, I've done pressed— I done called the police.... I think he got a gun. Nine times out of ten. He'll be threatening to kill me and stuff, I've done filed a report." State's Exhibit 16. The State did not ask Hogges any questions at trial related to Appellant carrying a gun, or offer any further evidence of Appellant's habit of carrying a firearm. The 911 call was cumulative to the trial testimony already given by Hogges with regard to prior threat and call to the police, discussed supra. The only additional evidence was Hogges' statement: "I think he's got a gun. Nine times out of ten."

Contrary to Appellant's claim on page 14 of his brief, evidence that Appellant usually carried a gun need not be "essential to the State's case" in order to be admissible— it need only be relevant. *See* SCRE 402 ("All relevant evidence is admissible unless otherwise provided..."). Appellant's habit of carrying a gun was certainly relevant to the case— this fact made it more likely that Appellant had a gun on the night of the attack, making it more likely that he had the means to accomplish the act, helping to prove his identity. Furthermore, it helps explain why the victims were so fearful that they risked their lives driving one hundred miles per hour fleeing from Appellant. "Evidence of the habit of a person [...] is relevant to prove that the conduct of the person [...] on a particular occasion was in conformity with the habit[.]" SCRE 406. Evidence that a person usually carries a gun is admissible habit evidence because it shows "a pattern of specific, particularized conduct" rather than a "general predisposition to violence."

State v. Brown, 344 S.C. 70, 75-76, 543 S.E.2d 552, 544-55 (2001). In *Brown*, the Supreme Court held that testimony regarding a defendant's habit of carrying a gun "was properly admitted to show appellant acted in conformity with this pattern of behavior on the night in question." *Brown*, 344 S.C. at 76. The court distinguished the habit evidence from improper propensity evidence that defendant "got violent" when he became angry. *Brown*. 344 S.C. at 74.

Nothing about carrying a gun in itself makes it more likely that a person has "violent tendencies" (the rationale of Appellant's objection at trial). Many citizens, e.g. police officers, carry guns on a daily basis, but this fact does not support an inference that these people are predisposed to violence. The State did not offer evidence of Appellant **using** guns in the past, or any past instances of violence against a third party not connected to the case. The evidence did not suggest that the jury base their verdict on propensity or any other improper basis, and Appellant offered little reasoning to demonstrate how the evidence caused him unfair prejudice other than a general insistence that the evidence was "highly prejudicial."[2] Consistent with this court's extremely deferential standard of review on 403 determinations, the trial court's ruling should be affirmed.

[2] Pretrial Tr. 5-6. Defense counsel objected: "He's known to have guns. I mean, things like that, Judge, I think are highly prejudicial." The Court: "Well, I understand that but I mean, I guess I probably need to listen to it."

III.

Even if the trial court erred, Appellant suffered no prejudice because evidence of his guilt was overwhelming.

Evidence of prior difficulties between Appellant and Elise Hogges was relevant because it provided context and showed Appellant's motive, intent to kill, and identity. Evidence of Appellant's habit of carrying a gun was relevant because it made it more likely that Appellant had the means to accomplish the alleged acts, and helped explain the conduct of the victims. But even without this evidence, the direct and circumstantial evidence offered by the state in the form of eyewitness testimony, police investigation, expert testimony, and evidence of flight was so overwhelming that Appellant's guilt was "conclusively proven such that no other rational conclusion could be reached." *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). Error is harmless where it could not reasonably have affected the result of the trial. *State v. Charping*, 313 S.C. 147, 437 S.E.2d 88 (1993). The determination of the prejudicial effect of prior bad act evidence must be based on the entire record and the result will generally turn on the facts of each case. Details of prior bad act evidence that may not be admissible are deemed harmless where they are minimal. *State v. Forney*, 321 S.C. 353, 358, 468 S.E.2d 641, 644 (1996) (citation omitted).

The State presented direct evidence in the form of testimony from Ken Minus and Elise Hogges that Appellant was without a doubt the person who chased them to Omega Court.[3] Other witnesses corroborated Elise and Ken's account. Delphine Gavin testified she saw Appellant's vehicle leaving the scene immediately after the shots were fired. Appellant's mother testified Appellant had possession of the vehicle on the night of the incident.

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[3] Tr. 111, l. 19: "I looked in his eyes." Tr. 146, l. 16. "I saw square in his face."

Appellant's flight showed consciousness of guilt. Although police notified Appellant's brother and mother of the attempt on Hogges' life, and that the police wanted to speak with him, Appellant did not turn himself in. Nor did he return to his residence, which police were surveilling. Rather, he fled, forcing federal marshalls to track him down and arrest him heading south on I-95.

If this wasn't enough, any doubt of Appellant's guilt was eliminated by the cell phone evidence offered through expert witness Scott McDonald. The evidence showed Appellant's cell phone was present at the scene of the crime. The expert was able to demonstrate how cell tower data proved Appellant's cell phone was moving east away from Orangeburg at 9:30pm, when the victims first encountered him; that Appellant's phone called Elise Hogges' cell phone multiple times during the incident, blocking caller ID; that the phone continued east toward 129 Omega Court and was near Omega Court at the time of the incident; and then moved back toward Orangeburg just after the incident. Tr. 357-362. During this time and immediately after, the phone was used to call Elise Hogges, Lakeisha Heyward (Appellant's girlfriend), Appellant's brother, and Palmetto Health Richland (Elise Hogges' place of employment at the time). Tr. 362, 105.

This was the evidence that most directly proved Appellant's guilt, and this was the evidence most heavily relied on by the State. By contrast, the State did not elicit any in-court testimony regarding Appellant's habit of carrying a gun— the evidence was limited to one brief statement on the 911 recording. Nor did the state introduce excessive or unnecessary details of the prior difficulties. Any error in the admission of this evidence was so insubstantial that it could not have affected the outcome. *State v. Sherard*, 303 S.C. 172, 399 S.E.2d 595 (1991) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not

affecting the result."). No rational juror could have reached a different conclusion as to Appellant's guilt. As the State argued at trial— given the strength of the evidence, how could there be **any** doubt, much less a reasonable doubt?

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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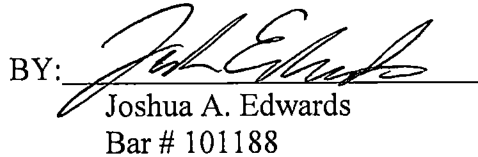
Attorney General

JOSHUA A. EDWARDS
Assistant Attorney General

DAVID PASCOE
Solicitor, First Judicial Circuit

BY: 
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March 5, 2018

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of General Sessions
Edgar W. Dickson, Circuit Court Judge

RECEIVED
MAR 05 2018
SC Court of Appeals

Appellate Case No. 2016-002256

THE STATE,

Respondent,

v.

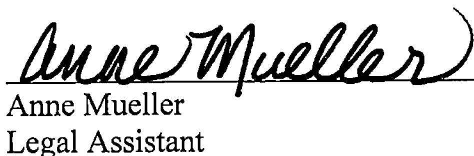
JOHNATHON GREEN,

Appellant.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to counsel of record Kathrine H. Hudgins, Esquire, S.C. Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This fifth day of March, 2018.



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March 5, 2018

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SC Court of Appeals

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Re: State v. **Johnathon Green**
Appellate Case No. **2016-002256**

Dear Ms. Hudgins:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Joshua A. Edwards
Assistant Attorney General
Bar # 101188

JAE/aam
Enclosures

~~cc: Honorable Jenny A. Kitchings (original and one enclosed)~~
Victim Advocacy Division