

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Larry B. Hyman, Circuit Court Judge

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SC Court of Appeals

THE STATE,

V.

RESPONDENT,

BRIAN SPEARS

APPELLANT

APPELLATE CASE NO 2017-000480

RECORD ON APPEAL

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INDEX

INDEX	i
ORIGINAL RECORD ON APPEAL FILED AUGUST 22, 2011	1
TRIAL TRANSCRIPT DATED MAY 10-13, 2010	5
DEFENSE MOTION IN LIMINE TO EXCLUDE GANG TESTIMONY AND GANG MATERIAL	12
DEFENSE MOTION EXCLUDE WALMART INCIDENT	18
DEFENSE MOTION EXCLUDE BULLETPROOF VEST	33
DEFENSE MOTION EXCLUDE RAP LYRICS	34
DEFENSE MOTION SEQUESTER WITNESSES	38
DEFENSE MOTION LIMIT JEFFREY BETHEA TESTIMONY	41
OPENING STATEMENT BY MR. FILIBERTO	47
OPENING STATEMENT BY MS. PRATT	49
TESTIMONY	
OFFICER TRAVIS M. PRESTON	
Direct Examination by Ms. Elder	52
Cross Examination by Ms. Pratt	60
SPECIAL AGENT W. BRADLEY KELLER	
Direct Examination by Mr. Filiberto	65
Cross Examination by Ms. Pratt	70
OFFICER BRYAN L. TRUEX	
Direct Examination by Ms. Elder	72
Cross Examination by Ms. Pratt	86
DETECTIVE CAROL ANN ALLEN	
Direct Examination by Mr. Filiberto	92
Cross Examination by Ms. Pratt	98

CS OFFICER CANDY MICHELLE MCSPADDEN	
Direct Examination by Mr. Filiberto	110
Cross Examination by Ms. Pratt	112
BRITTNEY MAYNOR	
Direct Examination by Ms. Elder	114
Cross Examination by Ms. Pratt	134
Redirect Examination by Ms. Elder.....	136
DR. EDWARD LEROY PROCTOR, JR.	
Direct Examination by Ms. Elder	137
Cross Examination by Ms. Pratt	141
DANYELL HAMMONDS (IN CAMERA)	
Direct Examination by Ms. Elder	144
Cross Examination by Ms. Pratt	148
Redirect Examination by Ms. Elder.....	159
COLLOQUY	160
DANYELL HAMMONDS	
Direct Examination by Ms. Elder	192
Cross Examination by Ms. Pratt	198
NATHANIEL DOUGLAS	
Direct Examination by Ms. Elder	209
Cross Examination by Ms. Pratt	229
Redirect Examination by Ms. Elder.....	263
Recross Examination by Ms. Pratt.....	271
DETECTIVE MICHAEL A. HULL	
Direct Examination by Ms. Elder	272
Cross Examination by Ms. Pratt	332
Redirect Examination by Ms. Elder.....	340
Recross Examination by Ms. Pratt.....	341
SERGEANT LYNN BAKER	
Direct Examination by Ms. Elder	342
Cross Examination by Mr. Pratt	347
Redirect Examination by Ms. Elder.....	348
AGENT SUZANNE CROMER	
Direct Examination by Ms. Elder.....	349
Cross Examination by Ms. Pratt	356
Redirect Examination by Ms. Elder.....	357

JEFFREY BETHEA	
Direct Examination by Ms. Elder.....	359
Cross Examination by Ms. Pratt.....	378
Redirect Examination by Ms. Elder.....	410
Recross Examination by Ms. Pratt.....	415
TIMOTHY F. SMITH	
Direct Examination by Ms. Elder	421
Cross Examination by Ms. Pratt	430
Redirect Examination by Ms. Elder.....	441
Recross Examination by Ms. Pratt.....	442
ALEXIS DENISE BROWN	
Direct Examination by Ms. Pratt	449
Redirect Examination by Ms. Pratt.....	455
Cross Examination by Ms. Elder	455
MATTHEW JENKINS	
Direct Examination by Ms. Pratt.....	458
DEANDRE BISHOP	
Direct Examination by Ms. Pratt	462
Cross Examination by Ms. Elder.....	464
BRIAN KENDRICK SPEARS	
Direct Examination by Ms. Pratt.....	471
Cross Examination by Ms. Elder.....	504
Redirect Examination by Ms. Pratt	520
CLOSING ARGUMENT BY MS. PRATT	527
CLOSING ARGUMENT BY MS. ELDER.....	540
JURY CHARGE.....	550
VERDICT.....	579
DEFENSE MOTION FOR ARREST OF JUDGMENT	580
SENTENCING.....	587
INDICTMENTS.....	590
FINAL BRIEF OF APPELLANT FILED SEPTEMBER 12, 2011	599

FINAL BRIEF OF RESPONDENTS FILED SEPTEMBER 12, 2011.....	610
OPINION NO. 5119 FILED APRIL 17, 2013	632
APPELLANT’S PETITION FOR REHEARING FILED MAY 2, 2013	642
RESPONDENT’S PETITION FOR REHEARING <i>EN BANC</i> FILED APRIL 26, 2013	646
ORDER DENYING PETITION FOR REHEARING FILED JUNE 14, 2013.....	669
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FILED JULY 15, 2013	670
STATE’S PETITION FOR WRIT OF CERTIORARI FILED JULY 12, 2013	679
SPEARS’ RETURN TO PETITION FOR WRIT OF CERTIORARI FILED AUGUST 1, 2013	707
STATE’S RETURN TO SPEARS’ PETITION FOR WRIT OF CERTIORARI FILED AUGUST 14, 2013	716
ORDER DENYING CERTIORARI FILED SEPTEMBER 11, 2014	731
TRANSCRIPT ON REMAND DATED DECEMBER 8, 2016.....	732
AMENDED ORDER ON REMAND FILED FEBRUARY 9, 2017	757
INDICTMENTS	765
CERTIFICATE OF COUNSEL	773

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

595

1 FRIENDS?

2 A NO, MA'AM.

3 Q AND WOULD YOU HAVE TOLD HIM THINGS THAT
4 WOULD BE REAL PRIVATE?

5 A NO, MA'AM.

6 Q NOW THERE'S BEEN SOME LANGUAGE READ INTO
7 THE RECORD ABOUT DISCOVERY, BIRD'S DISCOVERY, AND AARON'S
8 PHOTO ON A TEE SHIRT; DO YOU REMEMBER ANYTHING ABOUT THAT?

9 A YES, MA'AM.

10 Q OKAY, AND THAT WAS IN A LETTER THAT YOU
11 WROTE TO WHO?

12 A TO MY FRIEND TRILL.

13 Q ALL RIGHT, AND WHO IS TRILL?

14 A BRAD MCCORMICK.

15 Q ALL RIGHT, HOW DO YOU KNOW HIM?

16 A I'VE KNOWN HIM FOR A LONG TIME SINCE I WAS
17 PROBABLY ABOUT 13, HE'S BEEN A GOOD FRIEND.

18 Q IS HE INVOLVED WITH THE 41 WITH YOU?

19 A YES, MA'AM.

20 Q OKAY, AND DID YOU SAY IN THAT, THAT LETTER
21 THAT YOU WANTED TO HAVE AARON'S AUTOPSY PHOTO ON A TEE
22 SHIRT?

23 A NO, MA'AM.

24 Q WHAT DID YOU SAY, WHAT WERE YOU TALKING
25 ABOUT?

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

596

1 A WELL BRAD TOLD ME THAT HE WANTED ME TO SEND
2 HIM ALL THE STATEMENTS, BASICALLY HE WANTED ME TO GIVE HIM
3 THE WHOLE MOTION CAUSE HE WANTED TO LOOK OVER IT AND I TOLD
4 HIM IF I SENT YOU STATEMENTS I WOULD NEED PROBABLY ABOUT 20
5 ENVELOPES BUT I AM GOING TO SEND YOU THE PICTURES AND I
6 SENT HIM THE PICTURES AND I TOLD HIM, HELL, SHIT, IF YOU
7 WANT TO GET A SHIRT MADE WITH AARON IT.

8 Q OKAY, SO I GUESS IT COULD BE INTERPRETED
9 DIFFERENT WAYS DEPENDING ON HOW YOU PUT THE EMPHASIS ON IT
10 WHEN YOU READ IT, RIGHT?

11 A YES, MA'AM.

12 Q OKAY, ALL RIGHT, WERE YOU ALWAYS IN THE
13 SAME CELL THAT YOU'VE BEEN IN?

14 A NO, MA'AM.

15 Q OKAY, TELL ME A LITTLE BIT ABOUT THAT?

16 A WELL I, I'VE BEEN MOVED A COUPLE OF TIMES,
17 ONCE CAUSE THEY SHUT DOWN A-2 AND MOVED EVERYBODY INTO A-1.
18 SOMETIMES I HAVE PUT IN INMATE REQUESTS, I'VE BEEN IN MAX.
19 I WANTED TO BE IN MAX BECAUSE I WANTED TO GO OVER MY
20 DISCOVERY AND I FELT THAT I COULDN'T GO OVER MY DISCOVERY
21 IN PRIVATE CAUSE WITH A LOT OF PEOPLE IN YOUR CELL YOU PULL
22 OUT A THICK EVERYBODY WANT TO LOOK, EVERYBODY WANT TO ASK,
23 YOU KNOW WHAT I MEAN, AND I FELT LIKE PEOPLE WERE GOING
24 THROUGH MY STUFF SO I'VE BEEN MOVED A LOT AND SOMETIMES I
25 REFUSED TO SIGN WRITE UPS AND BEEN MOVED TO MINI MAX.

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

597

1 Q OKAY, AND IN MINI MAX ARE YOU ALONE?

2 A NO, MA'AM, NOT REALLY.

3 Q OKAY, HOW ABOUT DID YOU EVER GO TO MAX?

4 A YES, MA'AM.

5 Q OKAY, AND YOU WERE ALONE THEN?

6 A NO, MA'AM.

7 Q NO?

8 A NO, YOU'RE NOT EVEN ALONE IN SOLITARY

9 CONFINEMENT.

10 Q OKAY, I'M GOING TO SHOW YOU WHAT IS MARKED
11 AS DEFENSE EXHIBIT 3 AND ASK IF YOU KNOW WHO THAT IS?

12 A YES, MA'AM, THAT'S JEFFREY BETHEA.

13 Q KNOWN AS BIRD?

14 A YES, BIRD.

15 Q IS THAT THE WAY HE LOOKED ON THE NIGHT THAT
16 AARON HAMMONDS WAS SHOT?

17 A YEAH, BUT OTHER THAN HE'S, HE'S GOT THEM
18 PULLED BACK SO HE CAN TAKE A CLEAR PICTURE, HE LET'S THEM
19 HANG.

20 Q ALL RIGHT, AND THIS COMPOSITE THAT IS
21 DEFENSE EXHIBIT 4 DOES THAT LOOK MORE LIKE HOW JEFFREY
22 LOOKED THAT NIGHT?

23 A YES, MA'AM.

24 Q IS THAT THE WAY HIS HAIR WAS?

25 A YES, MA'AM.

MR. SPEARS - CROSS EXAMINATION BY MS. ELDER

598

1 Q THANK YOU. ONE LAST QUESTION, BRIAN, DID
2 YOU, YOU HEARD BRITTNEY MANOR AND ALEXIS BROWN TESTIFY
3 ABOUT WHAT THEY SAW THE SHOOTER WITH DREADS, RIGHT?

4 A YES, MA'AM.

5 Q DO YOU KNOW ALEXIS OR BRITTNEY PERSONALLY?

6 A NO, MA'AM.

7 Q DO YOU THINK YOU WENT TO SCHOOL WITH THEM
8 OR ANYTHING?

9 A NO, MA'AM.

10 Q ALL RIGHT, AND THEY WERE AARON'S FRIENDS,
11 CORRECT?

12 A YES, MA'AM.

13 MS. PRATT: THANK YOU, I HAVE NOTHING FURTHER.

14 THE COURT: MS. ELDER.

15 MS. ELDER: THANK YOU, YOUR HONOR.

16 CROSS EXAMINATION

17 BY MS. ELDER:

18 Q ALL RIGHT, LET'S MAKE SURE I GOT THIS
19 STRAIGHT, FIRST OF ALL YOU WEREN'T IN MYRTLE BEACH ON MAY
20 27TH, CORRECT?

21 A THAT'S WHAT I TOLD MIKE HULL.

22 Q OKAY, THEN A WEEK LATER YOU SAID, WELL, I
23 WAS IN MYRTLE BEACH, THAT I DIDN'T SEE ANYTHING, I DON'T
24 KNOW WHO SHOT AARON, NOTHING, RIGHT?

25 A YES, MA'AM.

VOLUME 2 OF 2

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INDEX

INDEX	i
TRIAL TRANSCRIPT DATED MAY 10-13, 2010	1
DEFENSE MOTION IN LIMINE TO EXCLUDE GANG TESTIMONY AND GANG MATERIAL	8
DEFENSE MOTION EXCLUDE WALMART INCIDENT	14
DEFENSE MOTION EXCLUDE BULLETPROOF VEST	29
DEFENSE MOTION EXCLUDE RAP LYRICS	30
DEFENSE MOTION SEQUESTER WITNESSES	34
DEFENSE MOTION LIMIT JEFFREY BETHEA TESTIMONY	37
OPENING STATEMENT BY MR. FILIBERTO	43
OPENING STATEMENT BY MS. PRATT	45
TESTIMONY	
OFFICER TRAVIS M. PRESTON	
Direct Examination	48
Cross Examination	56
SPECIAL AGENT W. BRADLEY KELLER	
Direct Examination	61
Cross Examination	66
OFFICER BRYAN L. TRUEX	
Direct Examination	68
Cross Examination	82
DETECTIVE CAROL ANN ALLEN	
Direct Examination	88
Cross Examination	94
CS OFFICER CANDY MICHELLE MCSPADDEN	
Direct Examination	106
Cross Examination	108

BRITTNEY MAYNOR.	
Direct Examination.....	110
Cross Examination.....	130
Redirect Examination	132
DR. EDWARD LEROY PROCTOR, JR.	
Direct Examination.....	133
Cross Examination.....	137
DANYELL HAMMONDS (IN CAMERA)	
Direct Examination.....	140
Cross Examination.....	144
Redirect Examination	155
COLLOQUY	156
DANYELL HAMMONDS.	
Direct Examination.....	188
Cross Examination	194
NATHANIEL DOUGLAS	
Direct Examination.....	205
Cross Examination.....	225
Redirect Examination	259
Recross Examination	267
DETECTIVE MICHAEL A. HULL	
Direct Examination.....	268
Cross Examination.....	328
Redirect Examination	336
Recross Examination	337
SERGEANT LYNN BAKER	
Direct Examination.....	338
Cross Examination	343
Redirect Examination	344
AGENT SUZANNE CROMER	
Direct Examination.....	345
Cross Examination	352
Redirect Examination	353

JEFFREY BETHEA	
Direct Examination.....	355
Cross Examination	374
Redirect Examination.....	406
Recross Examination.....	411
TIMOTHY F. SMITH	
Direct Examination.....	417
Cross Examination.....	426
Redirect Examination.....	437
Recross Examination.....	438
ALEXIS DENISE BROWN	
Direct Examination.....	445
Cross Examination	451
MATTHEW JENKINS	
Direct Examination.....	454
DEANDRE BISHOP	
Direct Examination.....	458
Cross Examination	460
BRIAN KENDRICK SPEARS	
Direct Examination.....	467
Cross Examination	500
Redirect Examination.....	512
COLLOQUY	514
CLOSING ARGUMENT BY MS. PRATT	519
CLOSING ARGUMENT BY MS. ELDER.....	532
JURY CHARGE.....	542
VERDICT	571
DEFENSE MOTION FOR ARREST OF JUDGMENT.....	572
SENTENCING	573
INDICTMENTS	582
CERTIFICATE OF COUNSEL.....	590

MR. SPEARS - CROSS EXAMINATION BY MS. ELDER

599

1 Q YOU ALSO SAID THAT YOU WALKED OFF WITH
2 JUNE, RIGHT?

3 A I MIGHT HAVE DID, YEAH.

4 Q AND YOU HEARD JUNE TESTIFY AND SAY YOU
5 DIDN'T WALK OFF WITH HIM? YOU HEARD HIM TESTIFY YESTERDAY?

6 A I HEARD HIM TESTIFY THAT HE GOT INTO AN
7 ARGUMENT AND HE WALKED OFF, YES, MA'AM.

8 Q AND I ASKED SPECIFICALLY IF YOU WENT WITH
9 HIM AND HE SAID NO YOU STAYED WITH BIRD?

10 A I STAYED WITH THE CROWD AND THEM, YES,
11 MA'AM.

12 Q SO WHEN YOU TOLD INVESTIGATORS THAT YOU
13 WALKED OFF WITH JUNE TO TAKE YOURSELF OUT OF THE SITUATION,
14 ON THE SECOND INTERVIEW WHEN YOU FINALLY ADMITTED YOU WERE
15 IN MYRTLE BEACH YOU SAID BUT I WALKED OFF JUNE WHICH IS NOT
16 TRUE; IS THAT CORRECT?

17 A MA'AM, WHEN JUNE WALKED OFF HE WALKED OFF
18 IN THE SAME DIRECTION THAT OUR CROWD STARTED MOVING IN,
19 MA'AM.

20 Q YOU DIDN'T GO WITH JUNE LIKE YOU ORIGINALLY
21 TOLD POLICE?

22 A HAND AND HAND, NO.

23 Q NOW WHAT I FIND REAL INTERESTING IS THAT IN
24 YOUR INTERVIEWS WITH POLICE YOU NEVER TOLD THEM YOU HAD A
25 GUN THAT NIGHT?

MR. SPEARS - CROSS EXAMINATION BY MS. ELDER

600

1 A NO, MA'AM.

2 Q THAT'S NEW TODAY, RIGHT?

3 A YES, MA'AM.

4 Q WHY DIDN'T YOU TELL THEM YOU HAD A GUN?

5 A MA'AM, I DIDN'T WANT TO GET INTO TROUBLE
6 THE SAME REASON THAT I TOLD THEM THE FIRST TIME I WASN'T
7 THERE AT ALL, I DIDN'T WANT TO GET INVOLVED.

8 Q ALL RIGHT, SO YOU DIDN'T TELL THEM A GUN,
9 ANYTHING ABOUT A GUN UNTIL TODAY FIVE MINUTES AGO AFTER YOU
10 HEARD TIM SMITH SAY YOU HAD A GUN, JEFFREY BETHEA SAID YOU
11 HAD A GUN, AND NATHANIEL DOUGLAS SAY, SAID YOU HAD A GUN,
12 THAT'S WHEN YOU FINALLY TOOK THE STAND AND SAY, YEP, YOU
13 KNOW WHAT I HAD A GUN THAT NIGHT BUT IT WASN'T ME, RIGHT?

14 A NO, I DIDN'T DO IT BECAUSE OF THEIR
15 TESTIMONY.

16 Q WELL YOU DIDN'T DO IT BEFORE EITHER, DID
17 YOU?

18 A NO, MA'AM.

19 Q WHAT KIND OF GUN DID YOU HAVE?

20 A IT WAS A BLACK, FADED BLACK 380 11 SHOT.

21 Q AND WHERE, WHERE WAS THE GUN, WHERE'S THE
22 GUN NOW, WHAT DID YOU DO WITH IT?

23 A I GAVE IT TO A FRIEND.

24 Q WHY?

25 A BECAUSE I DIDN'T NEED IT.

MR. SPEARS - CROSS EXAMINATION BY MS. ELDER

601

1 Q YOU DIDN'T THINK IT WAS IMPORTANT TO GIVE
2 YOUR GUN TO THE POLICE TO HAVE IT TESTED?

3 A NO, MA'AM.

4 Q COULD HAVE EXONERATED YOU, WASN'T YOUR GUN,
5 YOU DIDN'T GIVE IT TO POLICE, THOUGH, DID YOU?

6 A NO, MA'AM.

7 Q YOU WERE ANGRY ABOUT ERIC GETTING KILLED,
8 G-BLACK GETTING KILLED, RIGHT?

9 A YEAH, I WAS SAD AND ANGRY.

10 Q AND WHEN YOU WERE TALKING ABOUT THE GANG
11 WAS DISCUSSING IT AND THEY WERE ANGRY AND THEY WERE TALKING
12 ABOUT RETALIATION YOU WERE PART OF THAT GANG, RIGHT?

13 A I'M A PART OF G.D., YES, MA'AM.

14 Q AND WHEN DETECTIVES INTERVIEWED ABOUT IT
15 THE SECOND TIME ALTHOUGH YOU DENIED IT THE FIRST YOU CALLED
16 IT A GANG? YOU KNOW IT'S A GANG, WE ALL KNOW IT'S A GANG,
17 RIGHT?

18 A NO, MA'AM, IT'S NOT A GANG AND FOR ME TO
19 CALL IT A GANG I WOULD BE DISRESPECTING WHAT I AM.

20 Q DO YOU EDUCATE YOURSELF ON GANG HISTORY?

21 A YES, MA'AM.

22 Q WHAT KIND OF GANG HISTORY DO YOU EDUCATE
23 YOURSELF ON?

24 A MAINLY ON MY ORGANIZATION.

25 Q AND WHAT IS YOUR ORGANIZATION?

602

1 A G.D.

2 Q NOW YOU HAVE DESCRIBED BIRD AS A TALKER, HE
3 TALKED A LOT?

4 A YES, MA'AM.

5 Q AND YOU TOLD POLICE THAT HE'S A BIG TALKER?

6 A YES, MA'AM.

7 Q AND YOU ALSO TOLD THEM YOU DIDN'T TAKE HIM
8 SERIOUS BECAUSE HE ALWAYS TALKED SO MUCH?

9 A YES, MA'AM.

10 Q NEVER FOLLOWS THROUGH?

11 A SOMETIMES.

12 Q YOU WERE UPSET AT HIM AND ANGRY AT HIM
13 BECAUSE HE DIDN'T FOLLOW THROUGH AND GET RETRIBUTION FOR G-
14 BLACK'S MURDER; ISN'T THAT RIGHT?

15 A NO, MA'AM.

16 Q AND YOU WENT TO WALMART IN APRIL OF '07 TO
17 DO WHAT BIRD HAD NOT DONE; ISN'T THAT CORRECT?

18 A NO, MA'AM.

19 Q AND YOU AFTER YOU WERE SERVED WITH MURDER
20 WARRANTS FOR SHOOTING SOMEBODY GOT A TATTOO THAT SAID REST
21 IN PEACE G-BLACK WITH A GUN UNDERNEATH IT, RIGHT?

22 A YES, MA'AM.

23 Q YOU ALSO GOT TATTOOED AFTER YOU HAD BEEN
24 SERVED WARRANTS FOR MURDERING SOMEBODY WITH THE WORD
25 RESPECT TATTOOED UNDER YOUR GANG SYMBOL, RIGHT?

MR. SPEARS - CROSS EXAMINATION BY MS. ELDER

603

1 A YES, RESPECT AND HONOR.

2 A YOU ALSO, AFTER YOU GOT SERVED WITH MURDER
3 WARRANTS FOR MURDERING AARON HAMMONDS, GOT YOUR G.D. TATTOO
4 OF YOUR GANG YOU GOT IT COLORED IN, THE TAIL OF IT COLORED
5 IN, AND YOU GOT A TEARDROP ADDED TO END WITH THE WORD HONOR
6 WRITTEN UNDER IT, TOO; ISN'T THAT RIGHT?

7 A NO, MA'AM, IT'S NOT A TEARDROP. IF I
8 WANTED TO PUT A TEARDROP I WOULD HAVE PUT IT ON THE RIGHT
9 SIDE UNDER MY EYE.

10 Q WHAT'S A TEARDROP MEAN?

11 A A TEARDROP MEANS YOU KILLED SOMEBODY.

12 Q YOU SAID TIM SMITH CAME IN AND MADE ALL
13 THIS UP ABOUT YOU, RIGHT?

14 A YES, MA'AM, HE ADD SOME THINGS THAT HE KNOW
15 ABOUT ME, YES, MA'AM.

16 Q AND HE MADE UP ALL THAT STUFF ABOUT YOUR
17 FAMILY, NONE OF THAT WAS TRUE, RIGHT?

18 A SOME OF IT.

19 Q ALL THAT STUFF HE KNEW ABOUT YOUR MAMA AND
20 WHO THEY WERE AND YOUR DADDY AND CAME OUT AND HANGING OUT
21 IN LUMBERTON THAT WAS ALL FALSE, TOO?

22 A YES, MA'AM, AND HE DOESN'T KNOW MY MOTHER
23 AND I NEVER SPOKE WITH HIM ABOUT MY MOTHER.

24 Q AND ALL THAT STUFF HE ADMITTED ABOUT HOW HE
25 USED TO KNOW SOME OF THE SAME PEOPLE CAUSE HE WAS KIND OF A

1 PLAYER FROM LUMBERTON HE MADE ALL THAT UP, TOO, RIGHT?

2 A YES, MA'AM.

3 Q AND THE AUTOPSY PICTURE HE SAID YOU SHOWED
4 HIM YOU NEVER SHOWED HIM?

5 A I SHOWED EVERYBODY IN THE CELL. I HAD MY
6 MOTION OUT, THEY STEPPED UP, I LET THEM SEE IT.

7 Q CAUSE YOU WERE PROUD OF IT, WEREN'T YOU?

8 A NO, MA'AM.

9 Q IT WAS A TROPHY?

10 A NO, MA'AM, IT WAS A STACK OF PAPERWORK.

11 Q AND I AM CURIOUS, THOUGH, BECAUSE SINCE
12 THIS IS THE FIRST TIME YOU MENTIONED A GUN HERE IN THIS
13 COURTROOM HOW IS IT IF TIM SMITH NEVER TALKED TO YOU ABOUT
14 THIS HOW IS IT THAT TIM SMITH KNEW EXACTLY WHAT YOU WERE
15 GOING TO TESTIFY TO TODAY, THAT YOU HAD A GUN AND IT WAS IN
16 YOUR CAR IN MYRTLE BEACH BECAUSE NONE OF US KNEW IT UNTIL
17 TODAY? WE'LL GET BACK TO THAT.

18 MS. PRATT: YOUR HONOR, I WOULD ASK THAT HE BE
19 ALLOWED TO ANSWER THAT QUESTION.

20 THE COURT: HE CAN ANSWER IT.

21 MS. ELDER: (CONTINUING)

22 A MA'AM, I DON'T KNOW WHERE HE GOT HIS STORY
23 FROM BUT HIS STORY DOESN'T MAKE NO SENSE. BY THE TIME I
24 WOULD HAVE SEEN AARON AND I WOULD HAVE TRIED TO RUN BACK TO
25 MY VEHICLE TO GET A GUN I WOULD HAVE NEVER FOUND HIM AGAIN.

MR. SPEARS - CROSS EXAMINATION BY MS. ELDER

605

1 ALL THOSE PEOPLE OUT THERE IT WOULD HAVE TOOK ME AT LEAST
2 10 MINUTES TO GET BACK TO THE CAR.

3 Q MY QUESTION WAS IF YOU NEVER TALKED TO TIM
4 SMITH HOW IS IT THAT HE KNEW YOUR GUN WAS IN THE CAR WHEN
5 NOBODY FROM THE STATE, WHEN THE POLICE, NOTHING IN YOUR
6 DISCOVERY SAID ANYTHING ABOUT YOU HAVING A GUN BECAUSE THIS
7 IS THE FIRST DAY WE LEARNED ABOUT IT? HOW IS IT THAT IF
8 TIM SMITH NEVER TALKED TO YOU ABOUT ANY OF THIS STUFF HE
9 KNEW THAT? HOW DID HE KNOW THAT?

10 A MA'AM, I DON'T KNOW HOW HE PUT THAT STORY
11 TOGETHER.

12 Q THIS LETTER TO TRILL YOU WRITE?

13 A YES, MA'AM.

14 Q YOU SAID YOU COULDN'T SEND THE 41 PAGES OF
15 BIRD'S STATEMENT, WHY DID HE WANT BIRD'S STATEMENT IN
16 PARTICULAR?

17 A HE WANTED EVERYBODY'S STATEMENTS.

18 Q BUT YOU DON'T TALK ABOUT EVERYBODY'S
19 STATEMENTS, YOU TALK ABOUT BIRD'S STATEMENT?

20 A YEAH, HE REALLY WANTED TO READ WHAT BIRD
21 SAID.

22 Q BECAUSE BIRD WAS IN YOUR GANG, RIGHT?

23 A YES, MA'AM.

24 Q AND HE WAS NOW, YA'LL THOUGHT HE WAS A
25 SNITCH; IS THAT CORRECT?

1 A NO, MA'AM, HE WAS IN DISBELIEF FROM HOW
2 THIS MAN WOULD JUST, JUST ULTIMATELY JUST DISRESPECT LIKE
3 THAT.

4 Q BECAUSE HE SNITCHED?

5 A NO, MA'AM.

6 Q ARE YOU TELLING ME IN EVERYTHING THAT
7 YOU'VE WRITTEN YOU HAVE NEVER CALLED BIRD A SNITCH?

8 A BIRD HAS TURNED PEOPLE IN IN THE PAST ON
9 THINGS.

10 Q AND HE TURNED YOU IN, RIGHT?

11 A HE GAVE POLICE MY NAME.

12 Q AND THAT MAKES HIM A SNITCH, RIGHT?

13 A NOT NECESSARILY, MA'AM, MAKES HIM A DIRTY
14 GUY.

15 Q NOW YOU DON'T SAY I CAN'T SEND BIRD'S
16 STATEMENT AND I'M JUST GOING TO SEND YOU A COUPLE OF
17 PICTURES BECAUSE THIS IS ALL I CAN SEND? YOU SAID I AM
18 SENDING AARON'S DEAD ASS AND YOU SENT ONE PAGE, YOU SENT
19 ONE PAGE OF PAPER, ONE PICTURE?

20 A YES, MA'AM.

21 Q YOU HAD A LOT OF PICTURES IN YOUR
22 DISCOVERY, DIDN'T YOU?

23 A YES, MA'AM.

24 Q YOU HAD SOME OF THE BOULEVARD?

25 A YES, MA'AM.

MR. SPEARS - CROSS EXAMINATION BY MS. ELDER

607

1 Q YOU HAD SOME OF THE SHELL CASINGS THAT WERE
2 TAKEN, RIGHT?

3 A YES, MA'AM.

4 Q YOU DIDN'T SEND HIM THOSE, DID YOU?

5 A HE SPECIFICALLY REQUESTED HE WANTED THE
6 GUYS STATEMENTS AND THE PICTURES OF AARON.

7 Q SO THE ONLY THINGS YOU SENT HIM WAS AARON'S
8 AUTOPSY PICTURE?

9 A YES, MA'AM, AND I ---

10 Q YOU DID WRITE THAT'S AARON'S DEAD ASS,
11 RIGHT?

12 A YES, MA'AM.

13 Q NOW MS. PRATT ASKED YOU SPECIFICALLY ABOUT
14 HOW YOU WERE MOVING AROUND THE JAIL. WHY WAS IT REALLY
15 THAT YOU WERE MOVED AROUND THE JAIL SO MANY TIMES?

16 A I WAS MOVED FOR NOT SIGNING WRITE UPS. I
17 WAS MOVED CAUSE I REQUESTED TO BE MOVED. I WAS MOVED CAUSE
18 POD SHUT DOWN.

19 Q YOU GOT A LOT OF WRITE UPS, DIDN'T YOU?

20 A OH, YES, MA'AM.

21 Q SO YOU HAD SOME TROUBLE AT THE JAIL?

22 A ONLY WHEN I REALLY WANTED IT.

23 Q YOUR RAP LYRICS NONE OF IT IS BASED ON LIFE
24 EXPERIENCES?

25 A SOME AND SOME NOT.

1 Q OKAY, SO SOME OF THIS THAT YOU WRITE IS IN
2 FACT THINGS THAT YOU HAVE EXPERIENCED, CORRECT?

3 A SOMEWHAT.

4 Q SO YOUR HOMIE G-BLACK WAS IN FACT KILLED?

5 A YEAH, HE WAS MURDERED.

6 Q OKAY, AND YOU ADMIT IT NOW THAT YOU CARRY A
7 GUN, RIGHT?

8 A YEAH, I CARRY A GUN.

9 Q LET ME ASK YOU THIS, "MURDER WAS THE CASE
10 REVENGE FOR G-BLACK LOOK IN MY EYES YOU CAN SEE MY PAIN,
11 HEART TURNED COLD I'LL PUT A BULLET STRAIGHT IN YOUR BRAIN,
12 YOU SAY I'M A NOBODY, WHY DO HOMICIDE UNIT BE SCREAMING MY
13 NAME," ALL OF THAT IS PRETTY MUCH TRUE, ISN'T IT?

14 A NO, MA'AM.

15 MS. ELDER: ONE MOMENT, YOUR HONOR.

16 Q (CONTINUING) WHAT DO YA'LL DO TO SNITCHES?

17 A WHAT DO WE DO TO SNITCHES?

18 Q IN GANGS WHAT DO YOU DO TO SNITCHES?

19 A WELL I DON'T KNOW WHAT PEOPLE WOULD THINK
20 WOULD HAPPEN TO THEM BUT I KNOW QUITE A FEW OF THEM THAT'S
21 STILL WALKING AROUND IN THE NEIGHBORHOOD.

22 Q BUT SOME OF THEM GET TAKEN OUT BY THEIR
23 GANG, RIGHT?

24 A MAYBE IN CERTAIN AREAS.

25 Q AND WERE YOU GOING TO GIVE TRELL BIRD'S

MR. SPEARS - CROSS EXAMINATION BY MS. ELDER

609

1 STATEMENT TO SHOW THAT HE WAS A SNITCH, DISRESPECT, HE
2 DISRESPECTED YOUR GANG?

3 A NO.

4 Q HE NEEDED TO BE TAKEN CARE OF?

5 A I WAS GOING TO GIVE HIM THE STATEMENT SO
6 HE'LL BE AWARE OF EXACTLY WHAT HE SAID.

7 Q YOU IN FACT MADE THREATS AGAINST BIRD WHEN
8 YOU FOUND OUT HE WAS GOING TO TESTIFY AGAINST YOU, DIDN'T
9 YOU?

10 A NO, MA'AM.

11 Q YOU IN FACT MADE THREATS AGAINST A LOT OF
12 PEOPLE IN THIS CASE WHEN YOU FOUND OUT THIS WAS GOING TO
13 TRIAL, DIDN'T YOU?

14 A NO, MA'AM.

15 Q NEVER MADE A THREAT?

16 A NO, MA'AM.

17 Q NOBODY'S LIFE?

18 A NO, MA'AM.

19 Q NOT BIRD'S?

20 A NO, MA'AM.

21 Q NONE OF THE WITNESSES?

22 A NO, MA'AM.

23 Q AND NOT MINE?

24 A NO, MA'AM.

25 MS. ELDER: NO OTHER QUESTIONS, YOUR HONOR.

MR. SPEARS - REDIRECT EXAMINATION BY MS. PRATT

610

1 THE COURT: ANY FOLLOW UP, MS. PRATT?

2 MS. PRATT: JUST A TOUCH.

3 REDIRECT EXAMINATION

4 BY MS. PRATT:

5 Q WHAT MS. ELDER SAID ABOUT THIS EVERYBODY
6 HAVING GUNS, THAT'S NOT THE FIRST TIME THAT THAT'S ACTUALLY
7 COME OUT IN THIS CASE, IS IT?

8 A NO, MA'AM.

9 Q I MEAN THAT WAS IN YOUR DISCOVERY, WASN'T
10 IT?

11 A YES, MA'AM.

12 Q IT WAS IN JUNE'S STATEMENT?

13 A YES, MA'AM.

14 Q AND HE SAID EVERYBODY HAD GUNS, DIDN'T HE?

15 A YES, MA'AM.

16 Q AND DO YOU REMEMBER HIM SAYING IN HIS
17 STATEMENT THAT I DON'T KNOW IF THEY BROUGHT THEM TO THE
18 BEACH?

19 A YES, MA'AM.

20 Q OKAY, SO IT'S NOT THE FIRST TIME THAT
21 ANYBODY SAID THAT EVERYBODY HAD GUNS OR CARRIED; IS IT?

22 A NO, MA'AM.

23 Q OKAY, AND YOU WERE TALKING ABOUT A DROP OF
24 BLOOD AS OPPOSED TO A TEARDROP?

25 A YES, MA'AM.

MR. SPEARS - REDIRECT EXAMINATION BY MS. PRATT

611

1 Q A TEARDROP YOU SAID WOULD NORMALLY BE AT
2 THE EYE?

3 A YEAH, I WOULD HAVE PUT IT ON THE, G WOULD
4 HAVE PUT IT ON HIS RIGHT SIDE OF HIS EYE.

5 Q AND THAT WOULD MEAN THAT HE'D KILLED
6 SOMEBODY?

7 A YOU KILLED SOMEBODY.

8 Q AND WOULD THAT NORMALLY BE OPEN LIKE --

9 A IT WOULD HAVE BEEN CLOSED UP OR OPEN.

10 Q OKAY, AND WHAT DID YOU PUT ON YOUR ARM?

11 A I PUT A DROP OF BLOOD, I DIDN'T DESIGN THE
12 TATTOO, THE INDIAN GUY DESIGNED IT BUT IT'S A DROP OF BLOOD
13 FOR THE SHED IN THE STRUGGLE.

14 Q BLOOD SHED IN THE STRUGGLE?

15 A YES, MA'AM.

16 MS. PRATT: OKAY, I THINK THAT'S ALL I'VE GOT,
17 THANK YOU.

18 THE COURT: MS. ELDER?

19 MS. ELDER: NO FURTHER QUESTIONS, YOUR HONOR.

20 THE COURT: YOU MAY STEP DOWN, SIR. IS THAT THE
21 DEFENSE?

22 MS. PRATT: THAT WOULD BE THE DEFENSE CASE, YOUR
23 HONOR.

24 THE COURT: ALL RIGHT, LADIES AND GENTLEMEN OF
25 THE JURY, I HAVE BEEN WORKING DURING THIS TRIAL AND YOU MAY

1 HAVE SEEN MS. HALL ON HER COMPUTER. WHAT WE WERE DOING
2 DURING THAT TIME WAS PREPARING A CHARGE ON THE LAW IN THIS
3 CASE. I LIKE TO HAVE MY CHARGES ON THE LAW PREPARED SO
4 THAT I CAN SHARE THEM WITH THE ATTORNEYS BEFORE THEY DO
5 THEIR, THEIR CLOSING REMARKS SO THEY'LL UNDERSTAND WHAT I
6 DEEM TO BE A PROPER CHARGE ON THE LAW IN THIS CASE.

7 NOW WHAT I PROPOSE TO DO AT THIS TIME IS TO, TO
8 GO OVER THOSE CHARGES WITH THE ATTORNEYS TO MAKE SURE THERE
9 ANY ADDITIONS THAT I NEED TO PUT IN OR DELETIONS THAT I
10 NEED TO MAKE AND WE'RE GOING TO BE DISCUSSING FINAL
11 ARGUMENTS. SO WHAT I WANT TO DO AND I KNOW IT'S A LITTLE
12 BIT EARLY THIS MORNING BUT IN THE INTEREST OF TIME WHY
13 DON'T WE, IT'S 11:30, WHY DON'T I LET YOU GO TO LUNCH UNTIL
14 1:00, OKAY, AND WHEN YOU COME BACK AT 1:00 I WILL HAVE ALL
15 THESE MATTERS TAKEN CARE OF AND WE CAN GO DIRECTLY INTO
16 CLOSING REMARKS.

17 NOW LET ME TELL YOU ONE OTHER THING THAT I DO, I
18 REALLY DON'T KNOW ANY OTHER JUDGES THAT DO IT. I GUESS IT
19 JUST CREATES WORK FOR ME BUT MS. HALL AND I ALWAYS PREPARE
20 A WRITTEN TRANSCRIPT OF THE CHARGE WHICH I WILL GIVE YOU ON
21 THE LAW. THE LAW IN THESE CASES AND IN FACT MOST CASES IS
22 VERY COMPLEX AND WHERE I CERTAINLY DON'T EXPECT A JURY OF
23 LAYPERSONS TO UNDERSTAND EVERYTHING THAT I, I CHARGE THEM
24 OR TO REMEMBER IT ALL CAUSE THEY'RE QUITE LENGTHY, SO WHAT
25 I DO IS I PREPARE A TRANSCRIPT AND THE SUPREME COURT HAS

1 SAID THAT IT'S ALL RIGHT FOR ME TO DO THAT AND GIVE YOU
2 THAT TRANSCRIPT TO USE IN YOUR JURY ROOM AS LONG AS I GIVE
3 YOU MY CHARGE DIRECTLY VERBATIM FROM MY TRANSCRIPT AND
4 THAT'S WHAT I WILL DO FOR YOU AT THE END OF THIS TRIAL.
5 IT'S A LITTLE DIFFERENT FROM WHAT THE USUAL YOU MIGHT HAVE
6 EXPECTED OR, OR EXPERIENCED IF YOU WERE IN TRIALS BUT IT'S
7 JUST MY POLICY. I FIND THAT IT REALLY IS HELPFUL FOR THE
8 JURIES WHEN I DO THAT, SO WHEN WE COME BACK WE'LL HAVE
9 EVERYTHING READY TO GO FOR YOU.

10 AS I SAID I HAVE MY CHARGES, I'M GOING TO REVIEW
11 THEM ONE MORE TIME WITH THE ATTORNEYS AND TAKE UP ANY FINAL
12 MOTIONS AND WHEN YOU GET BACK AT 1:00 WE'LL BE READY TO GO
13 WITHOUT DELAY, OKAY. THANK YOU VERY MUCH. MR. ROPP, TAKE
14 YOUR JURY OUT.

15 (WHEREUPON, THE JURY WAS EXCUSED FOR LUNCH AT
16 11:30 A.M.)

17 THE COURT: MS. PRATT, I ASSUME YOU WANT TO
18 RENEW YOUR MOTION?

19 MS. PRATT: YES, YOUR HONOR, I RENEW ALL THE
20 MOTIONS THAT I'VE MADE IN THIS TRIAL IN REGARDS TO EVIDENCE
21 OR OTHER MATTERS INCLUDING MY MOTION FOR A DIRECTED
22 VERDICT.

23 THE COURT: ANY ADDITIONAL GROUNDS THAN THOSE
24 PREVIOUSLY STATED?

25 MS. PRATT: NO, YOUR HONOR.

614

1 THE COURT: ALL RIGHT, AND FOR THE SAME REASONS
2 I WOULD RESPECTFULLY DENY YOUR MOTIONS.

3 LADIES, I HAVE PREPARED FOR YOU COPIES OF THE
4 TRANSCRIPT OF MY CHARGE FOR EACH ONE OF YOU TO USE AND
5 REVIEW. I THINK IT WILL BE HELPFUL TO YOU DURING YOUR
6 CLOSING ARGUMENTS.

7 I WANTED TO DISCUSS WITH YOU THE VERDICT FORM.
8 WE HAVE FOUR CHARGES. WOULD YOU PREFER THAT WE HAVE FOUR
9 SEPARATE VERDICT FORMS OR WOULD YOU LIKE FOR CLAIRE TO SORT
10 OF CRAFT THIS IN SOME WAY THAT WE HAVE ALL THE VERDICTS ON
11 ONE PAGE?

12 MS. ELDER: YOUR HONOR, I'D PREFER SEPARATE
13 VERDICT FORMS.

14 THE COURT: ALL RIGHT, VERY WELL, THAT'S NOT A
15 PROBLEM, IN FACT IT'S PROBABLY THE BETTER WAY TO DO IT.
16 CLAIRE, IF YOU WOULD JUST DO A STANDARD, AND A VERDICT FORM
17 WILL SAY NOTHING BUT AS TO THE CHARGE OF ASSAULT AND
18 BATTERY WITH INTENT TO KILL, I THINK IT WOULD PROBABLY BE
19 BETTER IF WE PUT IN THE NAME OF THE VICTIM AS TO EACH
20 INDICTMENT.

21 MS. ELDER: YES, SIR.

22 THE COURT: WE'LL PUT THE INDICTMENT NUMBER AT
23 THE TOP BUT I'M SURE THE JURY CAN'T KEEP UP WITH THAT, PUT
24 THE INDICTMENT NUMBER AND IN THE, THE ACTUAL VERDICT FORM
25 I'LL SAY AS TO THE CHARGE OF ASSAULT AND BATTERY WITH

1 INTENT TO KILL WE, WITH INTENT TO KILL KRYSTAL FOWLER, WE
2 THE JURY UNANIMOUSLY FIND THE DEFENDANT, AND WE'LL HAVE
3 GUILTY, NOT GUILTY, THEY CAN CIRCLE ONE OR THE OTHER AND
4 WE'LL DO THAT ON EACH ONE OF THE THREE AND THE MURDER OF
5 AARON HAMMONDS WHATEVER, OKAY.

6 MS. ELDER: YES, SIR.

7 THE COURT: ALL RIGHT, AND THAT WILL BE
8 SUFFICIENT, DO YOU AGREE?

9 MS. PRATT: YES, SIR.

10 THE COURT: ALL RIGHT, ANYTHING FURTHER THAT WE
11 NEED TO TAKE UP BEFORE 1:00?

12 MS. ELDER: NO, SIR.

13 THE COURT: OKAY, LADIES, THANK YOU FOR MOVING
14 THIS ALONG. HOW LONG DO YOU ANTICIPATE YOU'LL NEED? I
15 DON'T WANT TO CRAMP YOU UP BUT WHAT ARE WE LOOKING AT, MS.
16 ELDER? I ASSUME YOU'RE GOING TO OPEN AND CLOSE?

17 MS. ELDER: NO, SIR, JUST CLOSE.

18 THE COURT: OKAY, YOU ARE GOING TO THEN ARGUE
19 FIRST, MS. PRATT?

20 MS. PRATT: YES, YOUR HONOR, ANTICIPATE, I AGREE
21 WITH YOU ON THE SERMON LENGTH 15 MINUTES TO 30 MINUTES OR
22 PEOPLE STOP LISTENING YOUR HONOR, SOMEWHERE IN THERE.

23 THE COURT: OKAY, AND HOW ABOUT YOU, MS. ELDER,
24 SOMETHING LIKE THAT?

25 MS. ELDER: YEAH, I USUALLY TRY TO STICK UNDER A

1 HALF AN HOUR, YOUR HONOR.

2 THE COURT: OKAY, SO WE DEFINITELY CAN GET THIS
3 INTO THE JURY'S HANDS ---

4 MS. ELDER: YES, SIR.

5 THE COURT: I WOULD ANTICIPATE THAT MY CHARGE
6 WILL TAKE ABOUT 30 MINUTES SO WE'LL HAVE IT TO THEM BY
7 2:30. OKAY, THANK YOU VERY MUCH.

8 MS. PRATT: THANK YOU, YOUR HONOR.

9 (WHEREUPON, COURT WAS RECESSED FOR LUNCH AND THE
10 FOLLOWING TAKES PLACE ON THE RECORD AFTER THE LUNCH
11 RECESS.)

12 THE COURT: ALL RIGHT, ANYTHING BEFORE THE JURY
13 COMES IN?

14 MS. ELDER: NO, SIR, YOUR HONOR.

15 THE COURT: LET THE RECORD REFLECT ATTORNEYS ARE
16 HERE AND SO IS THE DEFENDANT. MR. GREEN, WOULD YOU BRING
17 THE JURY IN?

18 (WHEREUPON, THE JURY RETURNS TO THE COURTROOM AT
19 1:14 P.M.)

20 THE COURT: ALL RIGHT, LADIES AND GENTLEMEN OF
21 THE JURY, AS YOU KNOW ALL THE EVIDENCE IS IN IN THIS CASE
22 AND WE WILL NOW PROCEED WITH CLOSING ARGUMENTS. MS. PRATT
23 I BELIEVE WILL GO FIRST.

24 MS. PRATT: MAY IT PLEASE THE COURT?

25 THE COURT: YES.

CLOSING ARGUMENT

BY MS. PRATT:

LADIES AND GENTLEMEN, THE FIRST THING I WANT TO SAY IS I DON'T GET TO HAVE THE LAST WORD TODAY AND I'VE GOT A HUSBAND THAT THINKS I ALWAYS WANT TO HAVE THE LAST WORD, SO I WANT TO ASK YOU TO PLEASE CONSIDER AND REMEMBER SOME OF THE THINGS I'VE SAID THROUGHOUT AND AFTER BECAUSE MS. ELDER WILL GET THE CHANCE TO HAVE THE LAST WORD IN THE SITUATION.

DO YOU REMEMBER WHEN I FIRST WAS TALKING TO YOU IN THE OPENING AND I SAID THAT WHAT WE WERE LOOKING AT WAS A SITUATION OF WHAT YOU WOULD HEAR AND WHAT YOU WOULDN'T HEAR, WELL I THINK YOU AGREE THAT THAT'S EXACTLY WHAT'S GONE ON IN THIS CASE TODAY.

YOU HAVE A SITUATION WHERE YOU'VE HEARD SOME THINGS BUT THERE'S A LOT OF THINGS THAT JUST AREN'T THERE. FOR EXAMPLE, I TOLD YOU THAT THERE WOULD BE ONE GUN AND ONE SHOOTER AND NO OTHER FORENSICS AND THAT'S EXACTLY WHAT WE'VE GOT HERE.

I WANT YOU TO THINK IN TERMS OF THIS CASE AS BEING SIX, TWO, AND ONE. WE HAVE SIX INMATES, I THINK I CALLED THEM PERSONALITIES IN MY OPENING, SIX INMATES; WE'VE GOT TWO GIRLS THAT WERE AARON HAMMONDS GIRLFRIENDS, ONE OF WHOM IS NOW HIS BABY MAMA; AND WE'VE GOT ONE GUN, AND THAT'S HOW OUR NUMBERS SHAKE DOWN IN THIS CASE.

618

1 WE'VE GOT ONE GUN. WE KNOW THAT THERE WERE THREE
2 CASINGS AND, THERE WERE, I MEAN THREE BULLETS, EXCUSE ME,
3 AND EIGHT CASINGS AND THEY COULD SAY THAT IT WAS CONSISTENT
4 WITH EACH OTHER. WE DON'T HAVE A GUN SO SHE COULDN'T
5 SPECIFICALLY SAY THAT THE BULLETS CAME FROM THE SAME
6 CASING, BUT THEY WERE CONSISTENT AND THAT THAT INDICATED
7 THAT BASICALLY WE'RE TALKING ONE GUN AND IT WOULD MAKE NO
8 SENSE TO HAVE CASINGS THERE THAT DIDN'T MATCH THE BULLETS
9 THAT WERE IN THE VICTIM. THAT WOULDN'T FIT WITH WHAT THE
10 CASE WOULD BE ABOUT, SO WE HAVE THREE BULLETS CONSISTENT
11 WITH THE EIGHT CASINGS.

12 WE'VE GOT TWO FEMALES AND I DON T KNOW IF YOU
13 PICKED UP ON IT, IT WAS KIND OF INTERESTING TO ME THAT
14 WE'VE GOT ONE THAT SAID SHE WAS HIS GIRLFRIEND AND ONE THAT
15 SAID SHE WAS PREGNANT WITH HIS BABY AND BOTH OF THEM WERE
16 THERE THAT NIGHT WALKING WITH HIM SO I WONDER WHAT WAS
17 GOING ON THAT SITUATION BUT THE INTERESTING THING TO ME IS
18 THAT BOTH OF THEM SAID THAT THE SHOOTER HAD DREADS, BOTH OF
19 THEM, AND THEY DIDN'T HAVE ANY REASON TO SAY THAT THE
20 SHOOTER HAD DREADS OR NOT HAD DREADS. THERE'S NO REASON
21 FOR THEM TO BE LYING ABOUT IT CAUSE AFTER ALL THEY'RE THE
22 DECEASED'S WOMEN AND THEY SAID DREADS AND WHO IS THE ONLY
23 PERSON THAT WE HAVE OUT OF THESE THREE DEFENDANTS THAT HAD
24 DREADS. IT'S JEFFREY BETHEA, IT'S BIRD, AND BIRD TOLD YOU
25 HIMSELF THAT HE SAW THIS COMPOSITE AND HE CAME DOWN CAUSE

1 HE WAS GOING TO CLEAR HIS NAME, HE WAS GOING TO GET HIMSELF
2 OUT OF IT AND GO BACK UP TO NORTH CAROLINA. I THINK THAT'S
3 POWERFUL AND I HOPE THAT YOU'LL AS THE JUDGE TELLS YOU
4 ABOUT CREDIBILITY THAT YOU'LL THINK ABOUT THAT BECAUSE YOU
5 KNOW CREDIBILITY CAN BE JUDGED OR DECIDED IN A LOT OF WAYS.

6 YOU KNOW WE TALK ABOUT YOU USING YOUR COMMON
7 SENSE YOU KNOW HOW DO YOU TELL WHEN YOUR CHILDREN ARE
8 LYING. WHEN DO YOU EXPECT YOUR CHILDREN TO BE LYING. WELL
9 IF YOU WALK IN AND THE VASE IS BROKEN ON THE FLOOR AND YOUR
10 CHILD'S STANDING RIGHT BESIDE IT YOU KNOW WHAT YOUR COMMON
11 SENSE TELL YOU. IF THEIR HAND IS IN THE COOKIE JAR AND
12 THEY CAN'T GET IT OUT BECAUSE THE COOKIES ARE IN THEIR HAND
13 YOU KNOW WHAT IT'S TELLING YOU.

14 COMMON SENSE WOULD TELL YOU THAT THOSE TWO GIRLS
15 HAD NO REASON TO FABRICATE THEIR STORY AND IT'S INTERESTING
16 THAT ONE OF THEM WAS THE STATE'S WITNESS AND ONE OF THEM
17 WAS MINE, COULDN'T EVEN SAY WELL THEY WERE BOTH DEFENSE
18 WITNESSES, THOUGH, DAH, DAH, DAH, YOU KNOW IT WAS SOMETHING
19 A LITTLE DIFFERENT THAN THAT.

20 THEN WE HAVE SIX INMATES OR SIX PERSONALITIES AND
21 I WANT TO LOOK AT EACH ONE OF THEM BECAUSE I THINK IT'S
22 PRETTY IMPORTANT TO SEE EACH ONE OF THEM DIFFERENTLY. WHEN
23 YOU EVALUATE TESTIMONY YOU LOOK AT WHETHER SOMEBODY'S GOING
24 TO BE BIASED. YOU LOOK AT WHETHER OR NOT THEY'VE GOT SOME
25 REASON TO LIE OR SOME REASON TO TELL THE TRUTH, RIGHT, AND

620

1 YOU SPECIFICALLY LOOK AT WHAT A PERSON MIGHT HAVE TO GAIN
2 BY TESTIFYING TODAY, WHAT THEY MIGHT HAVE TO LOOSE BY
3 TESTIFYING TODAY, WHETHER THEY'VE GOT A REASON TO LIE, A
4 REASON TO TELL THE TRUTH, AN OPPORTUNITY TO SPEAK WITH THE
5 DEFENDANT, AND A REASON THAT THE DEFENDANT WOULD TALK TO
6 THEM ABOUT SOMETHING, AND WE'VE GOT THAT ON ALL SIX OF
7 THESE INMATES.

8 THE FIRST INMATE THAT YOU HEARD FROM WAS
9 NATHANIEL DOUGLAS AND I'LL SAY THAT THAT BOY HAD A LOT TO
10 LOOSE. HIS CHARGES ARE STILL PENDING. HE HAS NO DEAL WITH
11 THE STATE. HE COULD HAVE DECIDED NOT TO TESTIFY AT ALL
12 BECAUSE HIS CHARGES ARE PENDING AND HE MAY STILL COME BACK
13 UP FOR TRIAL. I THINK HE SAID THAT, HE DOESN'T KNOW, BUT
14 HE GOT UP HERE AS THE STATE'S WITNESS AND HE TOLD YOU WHAT
15 HAPPENED AND HE TOLD YOU ABOUT THE ARGUMENT WITH BIRD AND
16 THE BOYS FROM CONWAY AND HOW HE WAS TRIPPING, TOLD YOU
17 ABOUT THE ARGUMENT WITH BIRD AND LEMARK AND HOW HE WAS
18 FREAKING OUT AND WHAT HE WAS SAYING AND THEN JUNE TOLD YOU
19 HE TURNED AROUND AND WALKED AWAY, AND I THINK EVERYBODY
20 ACTUALLY AGREED ON THAT TODAY AND I HOPE THAT MAKES A
21 DIFFERENCE FOR MR. DOUGLAS BECAUSE NOT ONLY DID HE SAY HE
22 TURNED AROUND AND WALKED AWAY BUT AFTER GIVING TWO
23 STATEMENTS SAYING HE WAS THERE BIRD SAYS HE WALKED AWAY AND
24 OBVIOUSLY BRIAN SAID HE WALKED AWAY CAUSE HE WALKED AWAY
25 BEFORE BRIAN DID.

1 NATHANIEL DOUGLAS TOLD YOU SOME OTHER THINGS. HE
2 TOLD YOU ABOUT A COMMENT BY BETHEA THE NEXT DAY TALKING
3 ABOUT IT, YOU KNOW, IT'S ON THE NEWS, THEY JUST HAD A
4 SHOOTING THE NIGHT BEFORE, IT'S NOT LIKE NOBODY'S GOING TO
5 BE TALKING ABOUT IT. I MEAN LET'S GET REAL THEY WOULDN'T
6 BE TALKING ABOUT MEMORIAL DAY, THEY'D BE TALKING ABOUT
7 SOMEBODY BETTING SHOT THE NIGHT BEFORE, AND HE SAYS THAT
8 NOT ONLY WAS BIRD SAYING AARON HAMMONDS IS SMOKED SAUSAGE
9 HE'S DANCING AROUND GLOATING ABOUT IT. BETHEA SAID THEY
10 WEREN'T EVEN TALKING ABOUT THE SHOOTING AT THE BARBECUE,
11 THAT MAY DEFY BELIEF.

12 BETHEA, NATHANIEL DOUGLAS TOLD YOU THAT THEY CAME
13 DOWN, JUNE AND BOS CAME DOWN TOGETHER AND HE TOLD YOU THERE
14 WAS NO PLAN. HE TOLD THERE WASN'T ANY CONSPIRACY OR SOME
15 FANCY PHONE CALL GET DOWN THERE AND LET'S KILL AARON. HE
16 TOLD YOU THAT. HE TOLD YOU THEY DECIDED TO COME DOWN TO
17 THE BEACH, THEY WERE CHASING WOMEN, THAT WAS WHAT THEY WERE
18 HERE FOR.

19 HE ALSO TOLD YOU THAT THEY SEARCHED HIS ROOM AND
20 IF YOU REMEMBER DETECTIVE HULL TOLD YOU THAT THEY SEARCHED
21 NATHANIEL DOUGLAS' ROOM AND THEY SEARCHED BRIAN SPEARS
22 ROOM, THEY DIDN'T SEARCH JEFFREY BETHEA.

23 NOW JEFFREY BETHEA WAS THE NEXT INMATE AND THIS
24 MAN HAS A LOT TO GAIN BY TESTIFYING. REMEMBER WE TALKED
25 ABOUT THE PROFFER AGREEMENT AND THE PROFFER AGREEMENT IS IN

622

1 EVIDENCE HERE. THE PROFFER AGREEMENT, IF I CAN LAY MY HAND
2 ON IT, WELL YOU GET TO LOOK AT IT SO I'M NOT GOING TO WORRY
3 ABOUT IT, I CAN TELL YOU WHAT IT SAYS. THE PROFFER
4 AGREEMENT SAYS THAT HE IS PLEADING GUILTY TO VOLUNTARY
5 MANSLAUGHTER FOR A NEGOTIATED 20 YEARS AND REMEMBER I ASKED
6 HIM SPECIFICALLY HE'S UP FOR MURDER WHAT COULD HE GET FOR
7 THAT, HE COULD GET LIFE. LIFE MEANS LIFE, IT MEANS YOU DIE
8 IN PRISON. HE COULD GET 20 YEARS FOR EACH ABIK CONSECUTIVE
9 ALTHOUGH I DON'T KNOW HOW YOU SERVE LIFE PLUS 60 BUT WE'VE
10 SEEN LIFE PLUS SOMETHING, SO HE HAD A LOT TO LOSE. HE
11 COULD HAVE GOTTEN AN ESTIMATED 130 YEARS AND HE GETS 20 AND
12 AFTER HE FINISHES SERVING WHATEVER PART OF THAT HE HAS TO
13 SERVE HE'LL BE BACK OUT ON THE STREET. HE'LL BE ABLE TO
14 SEE HIS CHILDREN. HE'LL BE ABLE TO SEE HIS GRANDCHILDREN.
15 HE'LL BE ABLE TO EAT MCDONALDS OR A STEAK. HE HAS A LOT TO
16 GAIN BY DOING THIS AND YOU NOTICE WHAT HE DID RIGHT FROM
17 THE VERY BEGINNING. FROM THE VERY BEGINNING HE WAS GOING
18 TO PUT SOMEBODY ELSE IN IT. HE SAID IT IN THE IN CAR VIDEO
19 THAT HE WAS GOING TO COME DOWN HERE, HE HAD BABIES, HE HAD
20 THIS OR THAT HE WAS GOING TO TELL THEM SO THAT HE COULD GO
21 BACK HOME. HE KNEW HE HAD TO DO THAT. I MEAN AFTER ALL HE
22 MATCHED THIS. HE KNEW THAT IT WAS A MATTER OF TIME BEFORE
23 THESE FINE DETECTIVES OVER HERE WOULD GET HIS NAME OUT OF
24 THE OFFICERS IN LUMBERTON AND COME AND PICK HIM UP SO HE
25 MIGHT AS WELL JUST COME DOWN HERE AND HE DID GO TO

1 FAYETTEVILLE FIRST.

2 NOW HE TOLD YOU THAT IT WASN'T THAT HE WAS
3 LEAVING BUT HE WENT SOMEWHERE FIRST AND THEN HE DECIDED TO
4 COME DOWN AND TALK AND HIS FIRST STATEMENT HE TELLS YOU HE
5 HAD NOTHING TO DO WITH IT, RIGHT, IT'S ALL BOS.

6 SECOND STATEMENT SUDDENLY HE'S AN ACCESSORY. HE
7 MIGHT HAVE, MIGHT HAVE LEFT OUT SOMETHING, MIGHT HAVE LEFT
8 OUT THAT HE WAS AN ACCESSORY. LET'S SEE HOW WAS HE AN
9 ACCESSORY, HE IN HIS STATEMENT TO DETECTIVE HULL TOLD HIM
10 HE TOLD THOSE BOYS TO KILL AARON.

11 NOW THE SOLICITOR WANTS YOU TO BELIEVE THAT
12 JEFFREY BETHEA IS ALL TALK BUT IF HE'S ALL TALK HOW DID HE
13 GET TO BE PRINCE. HOW DID HE GET TO BE OOG.

14 JEFFREY BETHEA WAS THE ONE WHO WAS THERE WHEN
15 TURK DIED. JEFFREY BETHEA WAS THE ONE WHO WAS BEING
16 FEELING THAT HE WAS RESPONSIBLE FOR TURK'S DEATH. HE WAS
17 THE ONE THAT HAD A REASON TO DO ANYTHING AT ALL TO AARON
18 HAMMONDS.

19 AND THEN WE GET TO TIMOTHY SMITH. TIMOTHY SMITH
20 WOULD HAVE YOU BELIEVE THAT BECAUSE HE'S WORRIED ABOUT HIS
21 GRANDCHILDREN HE DOESN'T WANT THEM IN A SITUATION THAT
22 MIGHT BE DANGEROUS. HE NEEDS TO COME TO THE SOLICITOR'S
23 OFFICE AND TELL THEM SOMETHING. TIMOTHY SMITH HAS A RECORD
24 THAT GOES ALL THE WAY BACK TO 1995 FOR LYING AND STEALING,
25 PUBLIC ASSISTANCE FRAUD, FOOD STAMP FRAUD, LARCENY,

1 ALLUDING ARREST, PROBATION VIOLATION, FAILURE TO APPEAR,
2 CONSPIRACY TO POSSESS STOLEN GOODS, LARCENY OF A MOTOR
3 VEHICLE, POSSESSION OF STOLEN GOODS, B&E, LARCENY AFTER
4 B&E, POSSESSION OF A FIREARM, TWO, COUNT THEM, TWO ALLUDING
5 ARREST, AND THEN B&E LARCENY AND LARCENY AFTER BREAK IN.

6 NOW HE TOLD US ON THE WITNESS STAND THAT HE'D
7 ONLY EVER SERVED 15 MONTHS IN JAIL WITH ALL THAT STUFF
8 SINCE 1995, 15 MONTHS IN JAIL. THAT'S A YEAR AND THREE
9 MONTHS OVER 12 DIFFERENT TYPES OF CHARGES. YOU THINK HE
10 MIGHT KNOW HOW TO WORK THE SYSTEM. YOU THINK HE MIGHT KNOW
11 WHAT HE HAS TO DO TO HELP CUT HIS TIME DOWN AND I REALIZE
12 THAT THE SOLICITOR DIDN'T MAKE A PROFFER WITH HIM OR MAKE A
13 DEAL WITH HIM BUT SHE DID SOMETHING THAT HE KNEW WOULD HELP
14 HIM OUT. SHE GAVE HIM A PR BOND SO THAT HE COULD GO BACK
15 TO NORTH CAROLINA AND DEAL WITH HIS NORTH CAROLINA CHARGES.
16 NOW I AM SURE THAT IN HIS LITTLE HEART OF HEARTS HE FIGURED
17 HE WAS GOING TO DO A LITTLE BIT OF TIME ON THAT STILL BE
18 OUT ON THAT PR BOND AND I DON'T KNOW MAYBE ALLUDE ARREST OR
19 FAIL TO APPEAR AND WE'D NEVER HAVE HIM BACK HERE TO DEAL
20 WITH OUR CHARGES CAUSE A PR BOND WHAT'S THERE TO BRING HIM
21 BACK.

22 BUT THAT BEING ASIDE LET'S LOOK AT SOME OTHER
23 THINGS IN REGARDS TO TIMOTHY SMITH. THERE WAS NO TAPE, I
24 GOT NO TRANSCRIPT. THERE'S NOTHING WHERE WE CAN SAY WHAT
25 HE REALLY SAID THE FIRST TIME HE TALKED TO DETECTIVE HULL

1 AT THE HOSPITAL OR ANY OTHER TIME THAT HE MIGHT HAVE TALKED
2 TO THE DETECTIVE OR THE SOLICITOR IN PREPARATION FOR THIS
3 TRIAL. WE'VE GOT NOTHING THAT WE COULD LOOK AT TO SEE WHAT
4 HE ACTUALLY SAID SO YOU DON'T KNOW IF HE CHANGED HIS STORY
5 OR NOT, AND I'M NOT TRYING TO SAY, AND PLEASE DON'T GET ME
6 WRONG, I AM NOT SAYING THAT MS. ELDER OR THESE DETECTIVES
7 TOLD HIM WHAT TO SAY BECAUSE I KNOW THESE PEOPLE, FOR 20
8 YEARS I KNOW THEM, THEY WOULDN'T DO THAT, BUT I BELIEVE
9 TIMOTHY SMITH KNOWS WHAT THEY NEEDED TO HEAR. I BELIEVE
10 HE'S BEEN IN WITH ENOUGH INMATES WITH ENOUGH CHARGES OVER
11 THE LAST 15 YEARS TO KNOW WHAT THEY NEED FOR MURDER. THEY
12 NEED A PLAN AND THEY NEED A WEAPON AND HE WAS MORE THAN
13 HAPPY TO PUT THAT IN.

14 NOW BRIAN TOLD YOU ABOUT THE WAY THAT IT WORKS IN
15 THEIR CELLS AND I HOPE YOU COULD IMAGINE HAVING NINE PEOPLE
16 IN ABOUT HALF YOUR JURY BOX. I GUESS YOU'VE GOT EIGHT
17 THERE RIGHT NOW SO PICTURE NINE 19 HOURS OUT OF A DAY.
18 YOU CAN'T PUT YOUR STUFF ANYWHERE. IT'S EASY TO GET AT IT
19 IF PEOPLE ARE INTERESTED. MR. SMITH HAD AMPLE OPPORTUNITY
20 TO LOOK AT THINGS. HE HAD AMPLE OPPORTUNITY TO TRY AND
21 PICK BRIAN'S BRAIN TO GET THINGS THAT HE MIGHT NEED TO HELP
22 HIMSELF.

23 HE SAYS HE'S WORRIED ABOUT HIS GRANDCHILDREN,
24 WELL WAS HE WORRIED ABOUT HIS GRANDCHILDREN WHEN HE STOLE
25 THE CAR. WAS HE WORRIED ABOUT HIS GRANDCHILDREN WHEN HE

1 BROKE INTO THE HOUSE OR ALLUDED ARREST OR COMMITTED THE
2 LARCENIES, NO, HE WASN'T. HE IS WHAT HE IS; HE'S A 45 YEAR
3 OLD WHITE MALE AND HE WANTS YOU TO BELIEVE THAT THIS 20-
4 YEAR-OLD YOUNG MAN WHEN HE WAS ARRESTED, 23-YEAR-OLD YOUNG
5 MAN NOW, FROM THE STREETS OF LUMBERTON WOULD JUST OPEN HIS
6 HEART AND TELL HIM THAT HE MURDERED SOMEBODY, AND IT'S A
7 GREAT STORY BUT I'LL POINT SOMETHING OUT TO YOU THAT YOU
8 NEED TO THINK ABOUT IT. YOU HAVE TO REMEMBER WHAT YOU
9 HEARD, YOU KNOW, CAUSE YOU, YOU WERE THE, YOU ARE THE
10 TRIERS OF THE FACT BUT HIS STORY DIDN'T MATCH WHAT BIRD
11 TOLD US.

12 IT DIDN'T MATCH WHAT BIRD TOLD US OR WHAT JUNE
13 SAID BECAUSE WHAT HE SAID WAS THAT BIRD WAS SUPPOSED TO
14 TAKE CARE OF IT AND DIDN'T AND THAT'S WHY BRIAN DID IT.
15 WELL THAT'S NOT WHAT EITHER ONE OF THOSE PEOPLE SAID.

16 AND THEN YOU HEARD FROM TWO OTHER, THREE OTHER
17 INMATES. THE FIRST ONE WAS MATTHEW JENKINS. MATTHEW
18 JENKINS CAME DOWN FROM NORTH CAROLINA, HE HAD NO DOG IN
19 THIS FIGHT, HE HAD NOTHING TO GAIN, NOTHING TO LOOSE. HE'S
20 SERVING A SENTENCE AND HE DIDN'T TRY AND LIE AND SAY IT WAS
21 THIS PERSON OR THAT PERSON. HE SIMPLY TOLD YOU HOW LEMARK
22 WAS WHEN HE CAME BACK, DIDN'T THINK THERE WAS ANY PROBLEM,
23 DIDN'T SEE THE SHOOTER, BUT WHEN HE SAW THE COMPOSITE HE
24 THOUGHT IT WAS BIRD.

25 AND YOU HAD DEANDRE BISHOP AND DEANDRE BISHOP HAD

1 A LOT TO LOSE TODAY AND HE AS HE TOLD YOU WAS AFRAID THAT
2 WHAT HE WAS DOING TODAY WAS GOING TO CAUSE HIM PROBLEMS
3 CAUSE IF YOU THINK ABOUT IT HE'S GOT A PROFFER WITH THE
4 STATE ON SOMETHING ELSE SO HE'S GOING TO BE TESTIFYING FOR
5 THEM AND HE NEEDS THEM TO CONSIDER WHAT HE'S DOING IN WHAT
6 THEY DO WITH HIM, BUT HE GOT UP ON THAT WITNESS STAND AND
7 HE TESTIFIED FOR US AND HE TOLD THE TRUTH.

8 HE TOLD YOU THAT HE HEARD BIRD SAY THAT HE DID IT
9 BUT HE WASN'T GOING DOWN ALONE. NOW WHY WOULD BIRD SAY
10 THAT, WELL THERE'S LOTS OF REASONS WHY PEOPLE SAY THINGS IN
11 PRISON. YOU KNOW THERE'S, THERE'S A REASON THAT HE MIGHT
12 HAVE TOLD HIM THAT BECAUSE THEY WERE IN THE SAME AREA AND
13 HE MIGHT HAVE WANTED TO SAY WHAT WAS GOING ON HIS CASE. HE
14 MAY HAVE THOUGHT THAT DEANDRE WAS JUST AS BAD A DUDE AS
15 HIM.

16 AND THEN BRIAN, BRIAN TESTIFIED, AND HE DIDN'T
17 HAVE TO, HE DIDN'T HAVE TO TELL YOU HIS SIDE OF THE STORY
18 BUT HE WANTED TO AND HE TOLD YOU ESSENTIALLY THE SAME THING
19 AS HIS SECOND STATEMENT. HE DIDN'T TELL YOU THE SAME
20 THINGS AS THE FIRST STATEMENT.

21 THE FIRST STATEMENT HE SAID I WASN'T EVEN THERE
22 BUT IN THE SECOND STATEMENT HE SAID I WENT; THIS IS WHAT I
23 DID. HE TOLD YOU ABOUT CARRYING A GUN AND THAT WAS
24 DANGEROUS THAT HE TOLD YOU THAT HE USUALLY CARRIES A GUN
25 BUT HE DIDN'T LIE ABOUT IT.

1 THE SOLICITOR ASKED WHY HE DIDN'T TURN THE GUN
2 OVER AND HAVE IT CHECKED. WELL I DON'T REMEMBER BETHEA
3 TURNING OVER HIS GUN AND HAVING IT CHECKED AND FRANKLY WITH
4 THE PASSAGE OF TIME IT'S THE SAME PROBLEM THAT WE HAD WITH
5 THE GUNSHOT RESIDUE. THE POLICE WOULDN'T HAVE KNOWN
6 WHETHER THAT, SOMEBODY HAD WASHED THEIR HANDS AND THAT'S
7 WHY THEY DIDN'T HAVE GUNSHOT RESIDUE AND THEY WOULDN'T HAVE
8 KNOWN IF IT WAS EVEN THE SAME GUN SO IT PROBABLY WOULDN'T
9 HAVE HAD ANY PROBATIVE VALUE AT ALL ANYWAY. HE TOLD YOU
10 WHAT HAPPENED IN THE CASE.

11 NOW BRIAN HAS BEEN CHARGED WITH MURDER AND THE
12 JUDGE IS GOING TO TELL YOU THE ELEMENTS OF THAT AND ASSAULT
13 AND BATTERY WITH INTENT TO KILL AND BASICALLY ASSAULT AND
14 BATTERY WITH INTENT TO KILL IS MURDER WITHOUT THE DEATH.
15 IT'S THE SAME KIND OF THING. HE'S GOING TO TALK TO YOU
16 ABOUT THE ELEMENTS. HE'S GOING TO TALK TO YOU ABOUT IDEAS
17 OF INTENT AND SO ON. THERE'S JUST ONE THING I WANT TO KIND
18 OF BRING TO YOUR MIND REAL QUICK CAUSE I KNOW YOU'RE
19 PROBABLY HOT AND TIRED AND EVERYTHING ELSE.

20 THEY MAY TRY TO ARGUE THAT BIRD AND BRIAN WERE
21 TOGETHER IN THIS AND, THEREFORE, EVEN YOU DON'T THINK THAT
22 BRIAN WAS THE SHOOTER THAT HE SHOULD BE CONVICTED BECAUSE
23 HE'S AN ACCOMPLICE. THE JUDGE IS ALSO GOING TO TELL YOU
24 THAT THE MERE PRESENCE OF A PERSON AT THE SCENE DOES NOT
25 MAKE THEM GUILTY. THERE HAS TO BE MORE THAN THAT. THERE

1 HAS TO BE A PLAN, A CONSPIRACY, SOME PUTTING TOGETHER THE
2 FACT THAT YOU WERE INVOLVED IN IT. JUST STANDING THERE
3 BESIDE SOMEBODY IS NOT ENOUGH AND THAT'S IMPORTANT FOR YOU
4 TO UNDERSTAND CAUSE A LOT OF PEOPLE GET THAT CONFUSED.

5 NOW THERE IS SOMETHING IN THE LAW THAT IS THE
6 PRESUMPTION OF INNOCENCE AND I TOLD YOU ABOUT THAT AND THE
7 JUDGE WILL TELL YOU ABOUT THAT. THAT MEANS THAT A
8 DEFENDANT IS PRESUMED INNOCENT AND THE STATE HAS TO REMOVE
9 THAT PRESUMPTION JUST LIKE TAKING THAT CHOIR ROBE OFF BY
10 GIVING YOU PROOF BEYOND A REASONABLE DOUBT.

11 A LOT OF TIMES WHAT WE DO WHEN WE LOOK AT PROOF
12 AND WHEN I TEACH ABOUT IT I TALK ABOUT THE FACT THAT YOU
13 HAVE TO HAVE BRICKS IN A WALL AND EACH BRICK IS A PIECE OF
14 EVIDENCE. FOR EXAMPLE IF WE HAD A BRICK THAT WAS DNA THAT
15 MATCHED THAT'D BE A BIG BRICK. IF WE HAD A BRICK THAT WAS
16 GUNSHOT RESIDUE THAT MATCHED THAT WOULD BE A BIG BRICK, AND
17 THEN WE'D BUILD ON TOP OF THAT AN I.D., A COMPOSITE, A
18 STATEMENT, A DESCRIPTION, AND WE'D HAVE A WALL AND WHEN YOU
19 GET TO A CERTAIN POINT YOU'RE BEYOND A REASONABLE DOUBT.

20 WHAT IS A REASONABLE DOUBT? IT'S A DOUBT THAT
21 WOULD MAKE A REASONABLE PERSON HESITATE TO ACT. HESITATE
22 TO ACT MEANS THAT YOU STOP AND YOU THINK ABOUT IT. YOU
23 DON'T GO THROUGH WITH WHAT YOU'RE THINKING ABOUT, OKAY.

24 YOUR VERDICT YOU, TO GIVE A VERDICT YOU NEED TO
25 BE CONVINCED BEYOND A REASONABLE DOUBT OF GUILT BEFORE YOU

630

1 CAN GIVE THAT VERDICT AND THAT VERDICT HAS TO BE UNANIMOUS,
2 NUMBER ONE. EACH OF YOU HAVE THE RIGHT TO ACT ON YOUR OWN
3 FEELINGS WHATEVER THEY ARE. YOU NEED TO USE YOUR OWN MORAL
4 CONVICTIONS. YOU DON'T HAVE TO COMPROMISE OR GIVE IN OR DO
5 ANYTHING ELSE THAT MIGHT CHANGE YOUR OPINION UNLESS YOU'RE
6 FIRMLY CONVINCED BY THE DISCUSSIONS THAT YOU HAVE BACK
7 THERE IN THE JURY ROOM, AND IF YOU HAVE A CONVICTION ABOUT
8 SOMETHING YOUR JURORS, YOUR FELLOW JURORS OUGHT TO RESPECT
9 YOUR CONVICTION ABOUT THAT.

10 THE LAST THING THAT I WANT TO LEAVE WITH YOU IS
11 THIS, IN MATH CLASS I KNOW YOU LEARNED A PLUS B EQUALS C.
12 WELL A IS THE COMPOSITE; B IS THE TWO GIRLS, THE TWO
13 GIRLFRIENDS OF AARON HAMMONDS; AND THERE'S C WHEN YOU ADDED
14 THIS WITH THEM WAS BIRD, JEFFREY BETHEA, BUT WHAT THAT ALSO
15 MEANS IN THAT A PLUS B PLUS C IS THAT BRIAN SPEARS IS NOT
16 GUILTY, THANK YOU.

17 THE COURT: THANK YOU. MS. ELDER?

18 MS. ELDER: THANK YOU, YOUR HONOR.

19 CLOSING ARGUMENT

20 BY MS. ELDER:

21 "I FIND TROUBLE WHEN I WANT IT," THAT PRETTY MUCH
22 SUMS IT UP. WE GOT THAT FROM BRIAN SPEARS LESS THAN AN
23 HOUR AGO, FIND TROUBLE WHEN I WANT IT. BOY HE SAID A MOUTH
24 FULL.

25 ON MAY 27TH, 2007, BRIAN SPEARS WAS OUT FOR

1 VENGENCE. HE WAS OUT FOR RETALIATION. HE BROUGHT THAT
2 QUEST FOR VENGENCE, RETALIATION INTO OUR STATE, INTO OUR
3 COUNTY, AND DOWN TO OUR BEACH.

4 I KNOW IT'S CONFUSING CAUSE IT WAS CONFUSING TO
5 ME, ALL THE STREET NAMES AND THE GANG SO I WROTE THIS UP SO
6 WE COULD GO THROUGH IT TO MAKE SURE WE ALL KNEW WHO WAS
7 WHO.

8 THERE IS ABSOLUTELY NO QUESTION BRIAN SPEARS,
9 JEFFREY BETHEA, NATHANIEL DOUGLAS WERE ALL IN A GANG. YOU
10 CAN DRESS IT UP; YOU CAN CALL IT ORGANIZATION; YOU CAN CALL
11 IT A CLUB; YOU CAN CALL IT WHATEVER YOU WANT TO, IT'S A
12 GANG, GANGSTER DISCIPLES, FOLK.

13 ERIC FLOYD WAS ALSO A MEMBER OF THAT GANG. HE
14 WENT BY THE STREET NAME G-BLACK. ERIC FLOYD WAS KILLED
15 SEVERAL YEARS BEFORE THIS INCIDENT AT THE BEACH. AARON
16 HAMMONDS WAS ARRESTED FOR IT. BRIAN SPEARS TOOK AARON
17 HAMMONDS OUT FOR THAT VERY REASON. HE HAD TO EXACT HIS
18 JUSTICE.

19 NOW BOS, BRIAN SPEARS, WAITED AND WAITED AND
20 WAITED CAUSE AARON HAMMONDS WAS IN PRISON, WAS IN JAIL, BUT
21 HE GOT OUT, WAS OUT FOR A FEW MONTHS. BOS TOOK HIS FIRST
22 OPPORTUNITY WALMART IN LUMBERTON, AGAIN A PUBLIC PLACE.
23 DON'T, IT DON'T MATTER WHO'S THERE, WENT TO WALMART IN
24 LUMBERTON TRIES TO TAKE AARON HAMMONDS OUT THERE. HE DOES
25 HIT HIM, SHOOTS HIM, BUT HE DOESN'T KILL HIM, BUT HE GETS

1 HIS OPPORTUNITY A LITTLE OVER A MONTH LATER ON THE
2 BOULEVARD, COMES DOWN HERE, HE LOADS UP WITH HIS BOYS, HE
3 AND JUNE, AND ISH, THEY GET IN THE CAR, ONE OTHER, GET IN A
4 CAR COME DOWN HERE. THEY DIDN'T HAVE ANY RESERVATIONS;
5 THEY DIDN'T HAVE A PLACE TO STAY. THEY CAME HERE ON
6 SATURDAY AFTERNOON. THEY GOT DOWN HERE ABOUT 8:00 AT NIGHT
7 AND THEY IMMEDIATELY START WALKING THE BOULEVARD.

8 NOW HE WAS IN RED. WELL NOW WAIT A MINUTE, HE'S
9 NOT A BLOOD, WONDER WHY HE'S WEARING RED. DANYELL HAMMONDS
10 WHO LIVES THERE, SHE'S KNOWS THE DEAL, SHE'S IN THE
11 COMMUNITY, SHE TOLD YOU WHY HE WAS WEARING RED. WHY WOULD
12 A RIVAL GANG MEMBER WEAR THE OTHER GANGS COLORS BECAUSE
13 THEY DO THAT WHEN THEY'RE GETTING READY TO DO SOMETHING, SO
14 ALL THE BOYS THAT BOS BROUGHT DOWN HAD ON RED, MET UP WITH
15 BIRD. THEY GOT DOWN TO THE BOULEVARD.

16 YOU HEARD THERE WAS SOME, THERE WAS SOME VERBAL
17 CONVERSATION BETWEEN JEFFREY BETHEA AND LEMARK IRONS AND
18 LEMARK IRONS WALKED OFF. IT'S DONE, BUT BRIAN SPEARS IS
19 ALL JACKED UP. HE MISSED AARON THE MONTH BEFORE. HE KNOWS
20 HE'S AT THE BEACH. HE'S SEEN HIM SEVERAL TIMES AND HE'S
21 PUMPING IT UP. "I'M GOING TO KILL HIM, WE'VE GOT TO DO
22 SOMETHING ABOUT THIS MAN, HE'S GOING TO TAKE US OUT, WE GOT
23 TO TAKE HIM OUT BEFORE HE TAKES US OUT. BIRD, MAN, WE GOT
24 TO DO SOMETHING, WE GOT TO DO SOMETHING," AND ALL THROUGH
25 HIS TRANSCRIPT BIRD TELLS YOU ON AT LEAST FOUR DIFFERENT

1 OCCASIONS THAT I READ OUT TO YOU BOS SAYING "I'M GOING TO
2 KILL THAT MOTHER FUCKER." BIRD SAYS "HEY, MAN, IF THEY
3 GOING TO GET US WE GOT TO GET THEM FIRST, LET'S GO."

4 HE GETS UP, GOES THAT WAY, THEY CROSS THE STREET,
5 AND THEY'RE GOING AFTER HIM. BIRD ADMITS "HEY, I WAS RIGHT
6 THERE WITH HIM. I'M GOING, I'M GOING, I'M GOING TO DO SOME
7 DAMAGE, BUT BEFORE I HAD THE CHANCE TO BOS TOOK CARE OF
8 IT." AND WHY DID BOS TAKE CARE OF IT, BECAUSE JUST ABOUT
9 EVERYBODY WHO GOT ON THAT STAND SAID BIRD'S A TALKER AND WE
10 ALL KNOW PEOPLE LIKE THAT, THEY TALK AND TALK AND TALK.
11 THEY TALK BIG, VERY RARELY DO THEY HAVE ANY FOLLOW THROUGH,
12 BOS KNEW THAT. BOS KNEW THAT BETHEA WAS NOT GOING TO TAKE
13 CARE OF AARON HAMMONDS SO HE PULLED OUT THAT GUN AND HE
14 FIRED THOSE SHOTS IN A PUBLIC PLACE WHERE THOUSANDS OF
15 PEOPLE WERE ON THAT BOULEVARD NOT CARING WHO HIS BULLET HIT
16 EXCEPT FOR ONE PERSON AARON HAMMONDS. HE KNEW HE WAS GOING
17 TO GET HIM. ALL THESE OTHER PEOPLE DON'T MATTER, THAT'S MY
18 TARGET.

19 NOW THE DESCRIPTION YOU'VE GOT TWO PEOPLE, BIRD
20 AND BOS, AND BIRD TELLS YOU, YEAH, I HAD DREADS, I WAS
21 WEARING BLACK. HOW MANY OTHER PEOPLE TOLD YOU HE WAS
22 WEARING BLACK. HE TOLD YOU NATHANIEL DOUGLAS TOLD YOU;
23 THEY BOTH TOLD YOU, WEARING BLACK. WHO WAS WEARING RED,
24 BOS SAID HE'S WEARING RED, BIRD SAID BOS WAS WEARING RED.
25 NATHANIEL DOUGLAS, BOS WAS WEARING RED. TWO GIRLS WHO GOT

634

1 UP ON THE STAND WHAT DID THEY TELL YOU THE SHOOTER WAS
2 WEARING, BOTH OF THEM HE WAS WEARING RED. BOTH OF THEM
3 SAID HE HAD A RED BANDANNA TIED AROUND HIS FACE. BOTH OF
4 THEM SAID THAT, RED BANDANNA.

5 BRITTNEY WHEN I ASKED ABOUT HEIGHT SHE SAID "WELL
6 I'M FIVE SIX, HE'S PROBABLY, HE WAS PROBABLY AN INCH OR TWO
7 TALLER THAN ME, MAKE HIM FIVE SEVEN, FIVE EIGHT, YOU GOT
8 TO, YOU GOT TO SEE BRIAN SPEARS AND YOU GOT TO SEE JEFFREY
9 BETHEA. JEFFREY BETHEA IS A BIG BOY. THERE AIN'T NO
10 MISTAKING HIM FOR FIVE SIX, FIVE SEVEN."

11 THERE IS A LOT OF MENTION ON THIS COMPOSITE AND I
12 WANT YOU TO THINK ABOUT WHAT YOU'VE HEARD ABOUT THIS
13 COMPOSITE, THE TESTIMONY THAT YOU'VE HEARD. EVERYBODY ON
14 THAT STAND SAID, NUMBER ONE, THIS IS A POSSIBLE SUSPECT.
15 DID YOU HEAR THEM SAY THIS IS THE SHOOTER? AND, NUMBER
16 TWO, THE PEOPLE SHE IDENTIFIED THAT DIDN'T SEE THE SHOOTING
17 ALL THEY SAID WAS, YEAH, LOOKS LIKE BIRD. WELL YOU KNOW
18 WHAT IT DOES LOOK LIKE BIRD BUT THINK ABOUT THIS, YOU TAKE
19 THIS BACK, SOMEBODY GAVE THIS AS A POSSIBLE DESCRIPTION OF
20 SOMEBODY WHO WAS THERE AT THE TIME OF THE SHOOTING.

21 YOU GOT TWO PEOPLE, TWO GIRLS, ONE BY THE STATE
22 ONE BY THE DEFENSE, THINK ABOUT WHAT THEY SAID, BOTH OF
23 THEM SAID RED BANDANNA ON THE FACE, SO TELL ME HOW WOULD
24 SOMEBODY GOING TO GIVE A COMPOSITE OF HIM HAVING A GOATEE
25 IF HE IN FACT HAD A RED BANDANNA ON HIS FACE. THIS IS NOT

1 THE SHOOTER. THIS IS SOMEBODY WHO'S STANDING BESIDE THE
2 SHOOTER AT THE TIME THAT IT HAPPENED, CAN'T HAPPEN IF YOU
3 LISTEN THE DESCRIPTION. THERE'S NO WAY THEY COULD DESCRIBE
4 THIS RIGHT HERE IF HE WAS IN FACT THE SHOOTER BECAUSE HE
5 HAD, THE SHOOTER HAD A RED BANDANNA SCARF TIED AROUND HIS
6 FACE.

7 NOW YOU HAVE SEVERAL INTERVIEWS, GOT AN INTERVIEW
8 FROM JEFFREY BETHEA. HE GIVES TWO INTERVIEWS BEFORE HE
9 MAKES A DEAL FOR ME, BEFORE HE AGREED TO TESTIFY, AND IN
10 BOTH INTERVIEWS HE PUTS HIMSELF HERE. HE PUTS HIMSELF
11 CLOSE TO THE TIME THAT THIS HAPPENED. HE SAID, THE FIRST
12 INTERVIEW BOS SHOT HIM. SECOND INTERVIEW, BOS SHOT HIM.
13 AFTER PROFFER, BOS SHOT HIM, TESTIFIED, BOS SHOT HIM.

14 ON THE SECOND INTERVIEW THAT HE GAVE BEFORE EVEN
15 TALKING TO THE STATE KNOWING THAT HE HAD BEEN CHARGED WITH
16 MURDER HE TELLS THEM, YOU KNOW WHAT I WAS INVOLVED, THIS IS
17 HOW I WAS INVOLVED. I WAS THERE, I'M THE LEADER OF THIS
18 GANG. I SAID WELL YOU KNOW WHAT WE BETTER GO, WE BETTER
19 GO DO IT. IT'S GOT TO BE TAKEN CARE OF, YOU NEED TO TAKE
20 CARE OF HIM, NEEDS TO BE KILLED BEFORE HE DOES SOMETHING TO
21 US, AND, YES, HE PLED GUILTY TO THAT, AND THE JUDGE IS
22 GOING TO GIVE YOU A CHARGE ABOUT ACCOMPLICE LIABILITY. HAND
23 OF ONE HAND OF ALL AND IT'S GOING TO SAY ---

24 MS. PRATT: OBJECTION, YOUR HONOR.

25 THE COURT: MY RULING, GO AHEAD.

1 MS. ELDER: AND HE'S GOING TO SAY THAT WHEN YOU
2 HAVE TWO PEOPLE ACTING TOGETHER TO COMMIT A CRIME IT DOES
3 NOT MATTER WHO PULLED THE TRIGGER. YOU ARE BOTH GUILTY
4 EVEN IF THERE'S ONE GUN, ONE BULLET, ONE DEATH, BOTH PEOPLE
5 ARE GUILTY OF MURDER, BOTH OF THEM.

6 NOW YOU ALSO HAVE AN INTERVIEW WITH NATHANIEL
7 DOUGLAS. DOES NATHANIEL TELL YOU, HE'S NOT UNDER
8 AGREEMENT, DOES HE TELL YOU THAT BIRD HAS A GUN, NO,
9 DOESN'T TESTIFY TO THAT. THE ONLY PERSON HE PUTS A GUN ON
10 IS BOS.

11 YOU GOT THE INTERVIEW WITH BOS. THE FIRST
12 INTERVIEW I WASN'T EVEN THERE. THE SECOND INTERVIEW I WAS
13 THERE BUT I WALKED OFF WITH JUNE. WELL THAT'S NOT TRUE.

14 THE THIRD INTERVIEW, THIRD, THIRD TIME HE
15 TESTIFIED TODAY WELL I HAD A GUN, IT WAS IN THE CAR, BUT I
16 DID HAVE A GUN, LITTLE BIT MORE, AND YOU KNOW WHAT WE DON'T
17 HAVE A GUN IN THIS CASE AND YOU KNOW WHY, BOS TOLD YOU WHY.
18 WELL I ASKED HIM, "WHAT DID YOU DO WITH THE GUN, YOU COULD
19 HAVE GIVEN THE GUN TO THE POLICE IF WE HAD OF KNOWN YOU HAD
20 A GUN YOU COULD HAVE GIVEN THE GUN TO THE POLICE. WHY
21 DIDN'T YOU GIVE IT TO THE POLICE, SHOW IT WASN'T YOUR GUN?
22 WELL I GOT RID OF IT. WHY DID YOU GET RID OF IT, CAUSE I
23 DIDN'T NEED IT ANYMORE." OF COURSE HE DIDN'T NEED IT
24 ANYMORE AARON HAMMONDS WAS DEAD. HE HAD ACCOMPLISHED HIS
25 GOAL.

1 NOW SINCE THE SHOOTING BRIAN SPEARS HAS DONE MANY
2 THINGS AND IT IS ALMOST LIKE THE THINGS HE HAS DONE SINCE
3 THE DEATH OF AARON HAMMONDS IT'S ALMOST LIKE HE'S BRAGGING.
4 IT'S ALMOST LIKE HE'S PUTTING IT OUT THERE SHOWING THESE
5 DIFFERENT THINGS SHOWING TROPHIES OF WHAT HE DID.

6 AFTER HE IS ARRESTED FOR MURDER, NOW G-BLACK HAS
7 BEEN DEAD, I BELIEVE THE TESTIMONY WAS SINCE ABOUT 2003
8 HE'S BEEN DEAD BUT BRIAN SPEARS WAITS UNTIL HE IS ARRESTED
9 FOR MURDER, GOES TO JAIL BEFORE HE GETS THIS TATTOO RIGHT
10 HERE. HE WANTS YOU TO THINK HE'S JUST HONORING HIS FRIEND.
11 WHY DIDN'T HE GET IT BEFORE, WHY DID HE WAIT FOUR YEARS AND
12 GET A MURDER CHARGE BEFORE HE GOT THIS? BECAUSE THIS IS A
13 TROPHY. HE GOT REVENGE FOR G-BLACK AND THERE'S THAT GUN TO
14 SHOW IT, REST IN PEACE G-BLACK.

15 NINE(B), YOU ARE SITTING IN JAIL FOR MURDER WITH
16 A SMALL CALIBER HANDGUN OUT ALLEGING AND WHAT DO YOU DO,
17 YOU GET NOT ONE GUN TATTOOED YOU GET TWO, ANOTHER TROPHY.

18 FOURTEEN(A), ONCE AGAIN YOU ARE IN JAIL FOR
19 MURDER, YOU GOT YOUR GANG TATTOO HERE WHEN YOU COME INTO
20 JAIL AND WHAT DO YOU DO AFTER YOU GET ARRESTED, AFTER YOU
21 HAVE KILLED SOMEBODY, YOU GET YET ANOTHER TROPHY. HERE WE
22 GO, B.O.S., G-UP RESPECT, YEP, HE'S EARNED SOME RESPECT NOW
23 HIS GANG AND HE WANTS EVERYBODY TO KNOW WHO HE IS AND HE
24 WANTS TO KNOW WHY. HE'S GOT RESPECT BECAUSE HE TOOK CARE
25 OF A PROBLEM THAT ANOTHER MEMBER COULD NOT.

1 FOURTEEN(B), ANOTHER TROPHY, HE'S GOT HIS GANG
2 TATTOO ON THERE ALREADY. AFTER HE'S ARRESTED CHARGED WITH
3 MURDER IN JAIL YOU CAN SEE WHAT HE GOT DONE. HE GOT THE
4 TAIL COLORED IN AND HE GOT THIS TEARDROP AND THAT WAS
5 ADDED.

6 MS. PRATT: OBJECTION, YOUR HONOR.

7 THE COURT: OVERRULED.

8 MS. PRATT: HE ALSO GOT THE WORD HONOR TATTOOED
9 ON THERE, ANOTHER TROPHY FOR WHAT HE DID, ANOTHER TROPHY
10 FOR TAKING CARE OF A PROBLEM.

11 BEFORE I GET INTO THIS I DID WANT TO PLAY OUT ONE
12 THING, REMEMBER DR. PROCTOR'S STATEMENT, ANGLE, WHERE THE
13 BULLETS WENT IN. THIS WAS ABOUT THE HEIGHT OF THE VICTIM
14 BRITTNEY SAYING THE DEFENDANT OR, I'M SORRY, THE SHOOTER
15 ABOUT FIVE-SEVEN, FIVE-EIGHT, A LITTLE TALLER THAN ME,
16 STRAIGHT OUT, WHERE'S THAT GOING TO GO. WE'RE TALKING
17 ABOUT SOMEONE NOT VERY TALL. WHO DOES THAT FIT? FROM THE
18 THREE PEOPLE YOU SAW IN THIS COURTROOM THIS WEEK WHO FITS
19 THAT DESCRIPTION? WHO IS THE SHORTEST OF THE THREE? YOU
20 SAW JEFFREY BETHEA, HE'S ABOUT AS BIG AS THE HEM.

21 NOW THE JUDGE IS GOING TO GIVE YOU THE CHARGE ON
22 MURDER AND WHAT HE'S GOING TO TELL YOU IS THAT THE KILLING
23 OF ANOTHER PERSON WITH MALICE AFORETHOUGHT, HATRED, ILL
24 WILL, THE INTENTIONAL DOING OF A WRONGFUL ACT. HE'S ALSO
25 GOING TO TELL YOU THAT A MALICE CAN BE EXPRESSED OR IMPLIED

1 AND I WANT TO TALK FIRST ABOUT EXPRESSED MALICE.

2 "MURDER WAS THE GAME, REVENGE FOR G-BLACK, LOOK
3 IN MY EYES YOU CAN SEE MY PAIN, HEART TURNED COLD, I'LL PUT
4 A BULLET STRAIGHT IN YOUR BRAIN. YOU SAY I'M NOBODY WHY
5 THE HOMICIDE UNIT BE SCREAMING MY NAME?" THAT'S ABOUT AS
6 EXPRESSED AS YOU CAN GET AND THIS WAS WRITTEN BY BOS AND
7 THIS WAS WRITTEN AFTER AARON GOT KILLED, THOSE THREE PEOPLE
8 GOT SHOT, AFTER HE WAS ARRESTED FOR MURDER AND PUT IN JAIL.

9 MALICE EXPRESSED: ILL WILL, HATRED, "YO, BRO,
10 BIRD'S STATEMENT IS 41 PAGES. I CAN'T MAIL IT, BUT I AM
11 SENDING AARON'S DEAD ASS. WHEN YOU GET OUT IF I'M STILL IN
12 MY CURRENT PLACE COME WITH GRANDMA BELL AND I'LL SIGN THE
13 STATEMENT OUT TO YOU, FUCK, GET A SHIRT MADE WITH AARON ON
14 IT THAT SAY NIGGA'S DEAD ASS."

15 TIM SMITH SAID IT BEST. HE SENT AN AUTOPSY
16 PICTURE OF THE VICTIM AND HIS MURDER TO HIS BUDDY, TO HIS
17 GANG FRIEND IN NORTH CAROLINA. HE WAS SHOWING THAT THING
18 LIKE HE HAD JUST KILLED A 10-POINT BUCK AND IT WAS A
19 TROPHY. WHY ELSE WOULD YOU PUT THAT AND WRITE THAT IN A
20 LETTER, SEND IT WITH A PICTURE AFTER YOU HAVE BEEN CHARGED
21 WITH MURDER AND IN JAIL? WHY WOULD YOU DO THAT IF IN FACT
22 YOU WEREN'T BRAGGING ABOUT IT, IF IN FACT IT WAS NOT TRUE?
23 THAT HAS TO BE ONE OF THE VILEST THINGS I'VE EVER HEARD
24 READ IN THIS COURTROOM AND THERE IS NO END TO THE ILL WILL
25 AND HOSTILITY CONTAINED IN THAT.

640

1 AND YOU HAVE TO ASK YOURSELF WHAT KIND OF PERSON
2 WOULD SAY THOSE THINGS, WOULD DO THOSE THINGS. WOULD BRAG
3 ABOUT TAKING THE LIFE OF ANOTHER HUMAN BEING AND YOU KNOW
4 WHAT IT DOESN'T MATTER HOW YOU DRESS HIM UP. . YOU CAN DRESS
5 HIM UP, YOU CAN PUT GLASSES ON HIM, YOU CAN MAKE HIM LOOK
6 LIKE HE'S 15 YEARS OLD, BUT YOU KNOW WHAT? THE INSIDE
7 DOESN'T CHANGE. HE IS COLD. HE TELLS YOU THAT HIMSELF.
8 HE IS A KILLER AND HE NEEDS TO BE CONVICTED.

9 AND I'M GOING TO LEAVE YOU WITH THIS BECAUSE I
10 CAN'T THINK OF ANY OTHER WAY BETTER TO SUM IT UP THAN HOW
11 HE DID IT HIMSELF WHILE HE WAS SITTING IN JAIL WAITING FOR
12 THIS TRIAL. "SOMEBODY KILLED MY HOMIE AND I GOT TO EASE MY
13 PAIN AND THE ONLY WAY TO DO THAT IS TO SQUEEZE MY THANG,
14 THE MADNESS I'M FEELING IS DRIVING ME INSANE. I CAN FEEL
15 IT, IT'S CALLED MURDER, IT'S IN MY VEINS. IT'S REAL
16 SIMPLE, LOAD IT, COCK IT, SQUEEZE IT, BANG," AND YOU KNOW
17 WHAT THAT BANG WAS THE LAST THING AARON HAMMONDS EVER
18 HEARD.

19 THE COURT: THANK YOU. MR. ROPP, IF YOU WOULD,
20 MR. ROPP, AND THE EASEL, TOO. THANK YOU VERY MUCH.

21 **JURY CHARGE**

22 LADIES AND GENTLEMEN OF THE JURY, I REMIND YOU
23 THAT DURING THIS TRIAL, YOU AND I HAVE CERTAIN DUTIES TO
24 PERFORM. AS THE TRIAL JUDGE IT IS MY RESPONSIBILITY TO
25 PRESIDE OVER THE TRIAL OF THE CASE, AND I ALSO HAVE THE

1 DUTY TO RULE ON THE ADMISSIBILITY OF EVIDENCE OFFERED
2 DURING THIS TRIAL. YOU ARE TO CONSIDER ONLY THE COMPETENT
3 EVIDENCE BEFORE YOU. IF THERE WAS ANY TESTIMONY ORDERED
4 STRICKEN FROM THE RECORD IN THIS CASE DURING THE TRIAL, YOU
5 MUST DISREGARD THAT TESTIMONY. YOU ARE TO CONSIDER ONLY
6 THE TESTIMONY WHICH HAS BEEN PRESENTED FROM THIS WITNESS
7 STAND, ANY EXHIBITS WHICH MAY HAVE BEEN MADE A PART OF THE
8 RECORD IN THIS CASE, AND ANY STIPULATIONS OF COUNSEL.

9 I HAVE THE ADDITIONAL DUTY TO CHARGE YOU THE LAW
10 APPLICABLE TO THIS CASE. AS THE PRESIDING JUDGE, I AM THE
11 SOLE JUDGE OF THE LAW OF THIS CASE, AND IT IS YOUR DUTY AS
12 JURORS TO ACCEPT AND APPLY THE LAW AS I NOW STATE IT TO YOU.
13 IF YOU ALREADY HAVE ANY IDEA AS WHAT THE LAW IS OR WHAT THE
14 LAW OUGHT TO BE AND IT DOES NOT AGREE WITH WHAT I NOW TELL
15 YOU THE LAW IS, YOU MUST ABANDON THIS IDEA BECAUSE YOU ARE
16 SWORN TO ACCEPT THE LAW AND APPLY THE LAW EXACTLY AS I NOW
17 STATE IT TO YOU.

18 IN EVERY CASE TRIED IN THIS COURT BEFORE A JURY,
19 THE JURY BECOMES THE SOLE AND EXCLUSIVE JUDGE OF THE FACTS
20 IN A CASE. A TRIAL JUDGE CANNOT INTIMATE, STATE, COMMENT
21 ON, OR MAKE ANY STATEMENT TO A TRIAL JURY ABOUT THE FACTS
22 IN A CASE. SINCE YOU, THE JURY, ARE THE SOLE JUDGE OF THE
23 FACTS IN THE CASE, YOU ARE NOT TO INFER FROM WHAT I HAVE
24 SAID DURING THE PROGRESS OF THIS TRIAL IN RULING UPON THE
25 ADMISSIBILITY OF EVIDENCE, OR OTHERWISE, OR ANYTHING THAT I

1 SAY NOW DURING THE COURSE OF THIS INSTRUCTION TO YOU, THAT
2 I HAVE ANY OPINION ABOUT THE FACTS OF THIS CASE. THE LAW
3 DOES NOT ALLOW ME TO HAVE AN OPINION ABOUT THE FACTS IN
4 THIS CASE. THIS IS A MATTER SOLELY FOR YOU, THE JURY, TO
5 DETERMINE. AS JURORS IT IS YOUR DUTY TO DETERMINE THE
6 EFFECT, VALUE, WEIGHT, AND TRUTH OF THE EVIDENCE PRESENTED
7 DURING THIS TRIAL.

8 THE INDICTMENTS IN THIS CASE CHARGES THE
9 DEFENDANT WITH MURDER AND THREE COUNTS OF ASSAULT AND
10 BATTERY WITH INTENT TO KILL. I REMIND YOU THAT THE FACT
11 THE DEFENDANT WAS ARRESTED, CHARGED AND INDICTED IN THIS
12 CASE, IS NOT EVIDENCE IN THIS CASE AND CANNOT BE CONSIDERED
13 BY YOU AS EVIDENCE OF GUILT IN THIS CASE, NOR DOES IT
14 CREATE ANY PRESUMPTION OR INFERENCE OF GUILT. THIS
15 DOCUMENT OR THESE DOCUMENTS THAT I'VE REFERRED TO AS
16 INDICTMENTS ARE SIMPLY THE FORMAL WRITTEN INSTRUMENTS WHICH
17 CONTAIN THE CHARGES MADE AGAINST THE DEFENDANT. IT IS THE
18 FORMAL DOCUMENT OR THEY ARE THE FORMAL DOCUMENTS BY WHICH
19 THE CASE IS BROUGHT INTO THIS COURT.

20 THE FOUR INDICTMENTS IN THIS CASE ALLEGE TWO
21 DIFFERENT OFFENSES AGAINST THE DEFENDANT. THE CHARGES ARE:
22 INDICTMENT NO. ONE: MURDER; INDICTMENT NO. TWO, THREE, AND
23 FOUR; ASSAULT AND BATTERY WITH INTENT TO KILL.

24 EACH INDICTMENT CHARGES A SEPARATE AND DISTINCT
25 OFFENSE. YOU MUST DECIDE EACH INDICTMENT SEPARATELY ON THE

1 EVIDENCE AND THE LAW APPLICABLE TO IT UNINFLUENCED BY YOUR
2 DECISION AS TO ANY OTHER INDICTMENT. THE DEFENDANT MAY BE
3 CONVICTED OR ACQUITTED ON ANY OR ALL OF THE OFFENSES
4 CHARGED. YOU WILL BE ASKED TO WRITE A SEPARATE VERDICT OF
5 GUILTY OR NOT GUILTY FOR EACH INDICTMENT.

6 THE DEFENDANT HAS PLED NOT GUILTY TO THESE
7 INDICTMENTS, AND THAT PLEA PUTS THE BURDEN ON THE STATE TO
8 PROVE THE DEFENDANT GUILTY. A PERSON CHARGED WITH
9 COMMITTING A CRIMINAL OFFENSE IN SOUTH CAROLINA IS NEVER
10 REQUIRED TO PROVE HIMSELF INNOCENT.

11 I CHARGE YOU THAT IT IS AN IMPORTANT RULE OF LAW
12 THAT THE DEFENDANT IN A CRIMINAL TRIAL, NO MATTER WHAT THE
13 SERIOUSNESS OF THE CHARGE MAY BE, WILL ALWAYS BE PRESUMED
14 TO BE INNOCENT OF THE CRIME FOR WHICH THE INDICTMENT WAS
15 ISSUED UNLESS GUILT HAS BEEN PROVED BY EVIDENCE SATISFYING
16 YOU OF THAT GUILT BEYOND A REASONABLE DOUBT. THIS
17 PRESUMPTION OF INNOCENCE DOES NOT END WHEN YOU BEGIN YOUR
18 DELIBERATIONS BUT IT ACCOMPANIES THE DEFENDANT THROUGHOUT
19 THE TRIAL UNTIL YOU REACH A VERDICT OF GUILT BASED ON THE
20 EVIDENCE SATISFYING YOU OF THAT GUILT BEYOND A REASONABLE
21 DOUBT.

22 THE PRESUMPTION OF INNOCENCE IS LIKE A ROBE OF
23 RIGHTEOUSNESS PLACED ABOUT THE SHOULDERS OF THE DEFENDANT
24 WHICH REMAINS WITH THE DEFENDANT UNTIL IT HAS BEEN STRIPPED
25 FROM THE DEFENDANT BY EVIDENCE SATISFYING YOU OF THE

1 DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT.

2 THE PRESUMPTION OF INNOCENCE IS NOT A MERE LEGAL
3 THEORY. IT IS NOT JUST A LEGAL PHRASE. IT IS A
4 SUBSTANTIAL RIGHT TO WHICH EVERY DEFENDANT IS ENTITLED
5 UNLESS YOU THE JURY, ARE SATISFIED FROM THE EVIDENCE OF THE
6 DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT.

7 THE STATE HAS THE BURDEN OF PROVING THE DEFENDANT
8 GUILTY BEYOND A REASONABLE DOUBT. SOME OF YOU MAY HAVE
9 SERVED AS JURORS IN CIVIL CASES, WHERE YOU WERE TOLD THAT
10 IT'S ONLY NECESSARY TO PROVE THAT A FACT IS MORE LIKELY
11 TRUE THAN NOT, SUCH AS BY THE GREATER WEIGHT OR
12 PREPONDERANCE OF THE EVIDENCE. IN CRIMINAL CASES, THE
13 STATE'S PROOF MUST BE MORE POWERFUL THAN THAT. IT MUST BE
14 BEYOND A REASONABLE DOUBT.

15 PROOF BEYOND A REASONABLE DOUBT IS PROOF THAT
16 LEAVES YOU FIRMLY CONVINCED OF THE DEFENDANT'S GUILT.
17 THERE ARE VERY FEW THINGS IN THIS WORLD THAT WE KNOW WITH
18 ABSOLUTE CERTAINTY AND IN CRIMINAL CASES THE LAW DOES NOT
19 REQUIRE PROOF THAT OVERCOMES EVERY POSSIBLE DOUBT. IF,
20 BASED ON YOUR CONSIDERATION OF THE EVIDENCE, YOU ARE FIRMLY
21 CONVINCED THAT THE DEFENDANT IS GUILTY OF THE CRIME
22 CHARGED, YOU MUST FIND THE DEFENDANT GUILTY. IF ON THE
23 OTHER HAND, YOU THINK THAT THERE IS A REAL POSSIBILITY THAT
24 THE DEFENDANT IS NOT GUILTY, YOU MUST GIVE THE DEFENDANT
25 THE BENEFIT OF THAT DOUBT AND FIND HIM NOT GUILTY.

1 WHAT IS A REASONABLE DOUBT IN THE LAW? A
2 REASONABLE DOUBT IS THE KIND OF DOUBT THAT WOULD CAUSE A
3 REASONABLE PERSON TO HESITATE TO ACT.

4 THERE ARE TWO TYPES OF EVIDENCE WHICH ARE
5 GENERALLY PRESENTED DURING A TRIAL, DIRECT EVIDENCE AND
6 CIRCUMSTANTIAL EVIDENCE.

7 DIRECT EVIDENCE IS THE TESTIMONY OF A PERSON WHO
8 CLAIMS TO HAVE ACTUAL KNOWLEDGE OF A FACT, SUCH AS AN
9 EYEWITNESS. IT IS EVIDENCE WHICH IMMEDIATELY ESTABLISHES
10 THE MAIN FACT TO BE PROVED.

11 CIRCUMSTANTIAL EVIDENCE IS PROOF OF A CHAIN OF
12 FACTS AND CIRCUMSTANCES INDICATING THE EXISTENCE OF A FACT.
13 IT IS EVIDENCE WHICH IMMEDIATELY ESTABLISHES COLLATERAL
14 FACTS FROM WHICH THE MAIN FACT MAY BE INFERRED.

15 CIRCUMSTANTIAL EVIDENCE IS BASED ON INFERENCE AND NOT ON
16 PERSONAL KNOWLEDGE OR OBSERVATION.

17 THE LAW MAKES ABSOLUTELY NO DISTINCTION BETWEEN
18 THE WEIGHT OR VALUE TO BE GIVEN TO EITHER DIRECT OR
19 CIRCUMSTANTIAL EVIDENCE. NOR IS A GREATER DEGREE OF
20 CERTAINTY REQUIRED OF CIRCUMSTANTIAL EVIDENCE THAN OF
21 DIRECT EVIDENCE. YOU SHOULD WEIGH ALL OF THE EVIDENCE IN
22 THE CASE. AFTER WEIGHING ALL THE EVIDENCE, IF YOU ARE NOT
23 CONVINCED OF THE GUILT OF THE DEFENDANT BEYOND A REASONABLE
24 DOUBT, YOU MUST FIND THE DEFENDANT NOT GUILTY.

25 IN THIS TRIAL YOU HAVE HEARD EVIDENCE REGARDING

1 AN ALTERCATION BETWEEN THE DEFENDANT AND THE VICTIM THAT
2 ALLEGEDLY OCCURRED ABOUT ONE MONTH BEFORE THE INCIDENT
3 WHICH IS THE SUBJECT OF THIS TRIAL. EVIDENCE OF OTHER
4 CRIMES, WRONGS OR ACTS IN GENERAL, EXCUSE ME, OR ACTS IS
5 GENERALLY NOT ADMISSIBLE TO PROVE THE CHARACTER OF A PERSON
6 IN ORDER TO SHOW HIS ACTION IN CONFORMITY THEREWITH;
7 HOWEVER, SUCH EVIDENCE MAY BE ADMISSIBLE TO SHOW MOTIVE,
8 IDENTITY, THE EXISTENCE OF A COMMON SCHEME OR PLAN, THE
9 ABSENCE OF MISTAKE OR ACCIDENT, OR INTENT.

10 YOU MAY CONSIDER THIS EVIDENCE ONLY TO PROVE
11 MOTIVE, IDENTITY, THE EXISTENCE OF A COMMON SCHEME OR PLAN,
12 THE ABSENCE OF MISTAKE OR ACCIDENT, OR INTENT.

13 NECESSARILY, YOU MUST DETERMINE THE CREDIBILITY
14 OF THE WITNESSES WHO HAVE TESTIFIED IN THIS CASE.
15 CREDIBILITY SIMPLY MEANS BELIEVABILITY. IT BECOMES YOUR
16 DUTY AS JURORS TO ANALYZE AND EVALUATE THE EVIDENCE AND
17 DETERMINE WHICH EVIDENCE CONVINCES YOU OF ITS TRUTH.

18 IN DETERMINING THE BELIEVABILITY OF WITNESSES WHO
19 HAVE TESTIFIED IN THE CASE, YOU MAY BELIEVE ONE WITNESS
20 OVER SEVERAL OR SEVERAL WITNESSES OVER ONE WITNESS. YOU
21 MAY BELIEVE A PART OF THE TESTIMONY OF A WITNESS AND REJECT
22 THE REMAINING PART OF THE TESTIMONY OF THAT SAME WITNESS.
23 YOU MAY BELIEVE THE TESTIMONY OF A WITNESS IN ITS ENTIRETY
24 OR REJECT THE TESTIMONY OF A WITNESS IN ITS ENTIRETY. YOU
25 MAY CONSIDER WHETHER ANY WITNESS HAS EXHIBITED TO YOU ANY

1 INTEREST, PREJUDICE, BIAS, OR OTHER MOTIVE IN THIS CASE.
2 YOU MAY ALSO CONSIDER THE APPEARANCE AND MANNER OF A
3 WITNESS WHILE ON THE WITNESS STAND SOMETIMES REFERRED TO
4 THAT AS A WITNESSES DEMEANOR.

5 A STATEMENT ALLEGED TO HAVE BEEN MADE BY THE
6 DEFENDANT HAS BEEN ADMITTED INTO EVIDENCE IN THIS CASE.
7 WHILE THE COURT HAS DETERMINED THAT THE STATEMENT IS
8 ADMISSIBLE, I INSTRUCT YOU THAT YOU MAKE THE ULTIMATE
9 DECISION OF WHETHER OR NOT THE DEFENDANT MADE THE
10 STATEMENT. IF THE DEFENDANT DID MAKE THE STATEMENT YOU
11 MUST DETERMINE WHETHER THE STATEMENT WAS MADE BY THE
12 DEFENDANT VOLUNTARILY AND OF HIS OWN FREE WILL. THIS MEANS
13 THAT THE STATEMENT WAS NOT CAUSED BY PRESSURE, FORCE, FEAR,
14 THREATS, COERCION OR INTIMIDATION, OR BY HOPE OR A PROMISE
15 OF REWARD OR LENIENCY OF ANY KIND. IN DETERMINING WHETHER
16 THE STATEMENT WAS VOLUNTARILY, VOLUNTARY, YOU SHOULD
17 CONSIDER BOTH THE CHARACTERISTICS OF THE DEFENDANT AND THE
18 DETAILS OF THE QUESTIONING. SOME OF THE FACTORS THAT YOU
19 MUST CONSIDER ARE: THE AGE OF THE DEFENDANT; THE
20 DEFENDANT'S EDUCATION OR LACK OF EDUCATION; THE DEFENDANT'S
21 MENTAL ABILITY OR CAPACITY; THE DEFENDANT'S I.Q. OR
22 INTELLIGENCE; THE DEFENDANT'S BACKGROUND AND ENVIRONMENT;
23 (6) PLACE AND LENGTH OF DETENTION; THE NATURE OF THE
24 QUESTIONING; AND THE ADVICE, OR LACK THEREOF, TO THE
25 DEFENDANT OF HIS CONSTITUTIONAL RIGHTS INCLUDING, BUT NOT

1 LIMITED TO, THE RIGHT TO REMAIN SILENT; THAT ANY STATEMENT
2 COULD BE USED AGAINST HIM IN A COURT OF LAW; THE RIGHT TO
3 HAVE A LAWYER PRESENT; THAT IF HE COULD NOT AFFORD A
4 LAWYER, A LAWYER WOULD BE APPOINTED TO REPRESENT HIM
5 WITHOUT ANY COST; AND THAT HE COULD STOP MAKING A STATEMENT
6 AT ANY TIME. YOU MUST CAREFULLY CONSIDER ALL OF THE
7 SURROUNDING CIRCUMSTANCES BEFORE YOU GIVE ANY WEIGHT TO AN
8 ALLEGED STATEMENT.

9 THE STATE HAS THE BURDEN OF PROVING BEYOND A
10 REASONABLE DOUBT THAT THE ALLEGED STATEMENT WAS VOLUNTARY.
11 IF YOU DETERMINE THAT IT WAS, YOU MAY GIVE THE STATEMENT
12 ANY FURTHER CONSIDERATION THAT YOU DEEM PROPER. YOU MUST
13 DECIDE WHAT WEIGHT, IF ANY, SHOULD BE GIVEN TO THE ALLEGED
14 STATEMENT. IF YOU DETERMINE THE ALLEGED STATEMENT WAS NOT
15 A FREE AND VOLUNTARY STATEMENT OF THE DEFENDANT, YOU SHOULD
16 NOT CONSIDER THE STATEMENT AT ALL.

17 NOW THE RULES OF EVIDENCE ORDINARILY DO NOT
18 PERMIT WITNESSES TO TESTIFY TO OPINIONS OR CONCLUSIONS. AN
19 EXCEPTION TO THIS RULE EXISTS FOR A WITNESS WE CALL AN
20 EXPERT WITNESS. A WITNESS WHO BY EDUCATION AND EXPERIENCE,
21 HAS BECOME EXPERT IN SOME ART, SCIENCE, PROFESSION, OR
22 CALLING MAY STATE AN OPINION TO A RELEVANT AND MATERIAL
23 MATTER, IN WHICH THE WITNESS CLAIMS TO BE AN EXPERT, AND
24 MAY ALSO STATE THE REASONS FOR THE OPINION.

25 YOU SHOULD CONSIDER ANY EXPERT OPINION RECEIVED

1 IN EVIDENCE AND, LIKE ANY OTHER EVIDENCE, GIVE IT THE
2 WEIGHT YOU THINK IT DESERVES. IF YOU DECIDE THAT THE
3 OPINION OF AN EXPERT WITNESS IS NOT BASED ON SUFFICIENT
4 EDUCATION AND EXPERIENCE, OR IF YOU CONCLUDE THAT THE
5 REASONS GIVEN IN SUPPORT OF THE OPINION ARE NOT SOUND, OR
6 THAT THE OPINION IS OUTWEIGHED BY OTHER EVIDENCE, YOU MAY
7 DISREGARD THE OPINION COMPLETELY AND ENTIRELY.

8 AN EXPERT'S, EXPERT WITNESS' TESTIMONY IS TO BE
9 GIVEN NO GREATER WEIGHT THAN THAT OF OTHER WITNESSES SIMPLY
10 BECAUSE THE WITNESS IS AN EXPERT. FURTHER, YOU ARE NOT
11 REQUIRED TO ACCEPT AND EXPERT'S OPINION, EVEN THOUGH IT IS
12 NOT CONTRADICTED.

13 THERE HAS BEEN EVIDENCE PRESENTED THAT WITNESSES
14 HAVE MADE PRIOR STATEMENTS WHICH ARE NOT CONSISTENT WITH
15 THE WITNESSES' PRESENT STATEMENT OR TESTIMONY. YOU MAY USE
16 THIS EVIDENCE TO DECIDE WHETHER TO BELIEVE THE WITNESS.
17 YOU MAY ALSO USE THE EVIDENCE OF THE EARLIER CONTRADICTORY
18 STATEMENT TO DETERMINE THE TRUTH OF THOSE STATEMENTS. IT
19 IS UP TO YOU TO DECIDE WHETHER TO BELIEVE THE EARLIER
20 STATEMENTS OR THE TESTIMONY GIVEN AT TRIAL.

21 IF A WITNESS IS SHOWN TO HAVE KNOWINGLY TESTIFIED
22 UNTRUTHFULLY CONCERNING ANY MATERIAL MATTER, YOU MAY
23 CONSIDER THIS IN DETERMINING WHETHER TO TRUST THE WITNESS'
24 TESTIMONY AS TO OTHER MATTERS. YOU MAY REJECT ALL THE
25 TESTIMONY OF THAT WITNESS OR GIVE ALL OR PART OF THE

1 TESTIMONY THE WEIGHT YOU THINK IT DESERVES.

2 IF A CRIME IS COMMITTED BY TWO OR MORE PEOPLE WHO
3 ARE ACTING TOGETHER IN COMMITTING A CRIME, THE ACT OF ONE
4 IS THE ACT OF ALL. A PERSON WHO JOINS WITH ANOTHER TO
5 COMMIT AN UNLAWFUL ACT IS CRIMINALLY RESPONSIBLE FOR
6 EVERYTHING DONE BY THE OTHER PERSON WHICH HAPPENS AS A
7 PROBABLE OR NATURAL CONSEQUENCE OF THE ACTS DONE IN
8 CARRYING OUT THE COMMON PLAN AND PURPOSE. IF TWO OR MORE
9 PEOPLE ARE TOGETHER, ACTING TOGETHER, ASSISTING EACH OTHER
10 IN COMMITTING THE OFFENSE, THE ACT OF ONE IS THE ACT OF
11 ALL.

12 PRIOR KNOWLEDGE OF THAT CRIME IS GOING TO BE,
13 EXCUSE ME, PRIOR KNOWLEDGE THAT A CRIME IS GOING TO BE
14 COMMITTED, WITHOUT MORE, IS NOT SUFFICIENT TO MAKE A PERSON
15 GUILTY OF THAT CRIME. MERE KNOWLEDGE THAT ANOTHER PERSON
16 IS GOING TO COMMIT A CRIME, EVEN IF THE DEFENDANT IS
17 PRESENT WHEN THE CRIME IS COMMITTED, IS NOT SUFFICIENT TO
18 CONVICT THE DEFENDANT AS A PRINCIPAL, GUILTY AS A PRINCIPAL
19 AS SHOWN BY ACTUAL OR CONSTRUCTIVE PRESENCE AT THE SCENE,
20 OR EXCUSE ME, GUILT AS A PRINCIPAL AS SHOWN BY ACTUAL OR
21 CONSTRUCTIVE PRESENCE AT THE SCENE AS A RESULT OF PRIOR
22 ARRANGEMENT. THEREFORE, A FINDING OF A PRIOR ARRANGED PLAN
23 OR COMMON SCHEME IS NECESSARY FOR A FINDING OF GUILT AS A
24 PRINCIPAL. THE STATE MUST PROVE BEYOND A REASONABLE DOUBT
25 BY COMPETENT EVIDENCE THE THEORY OF ACCOMPLICE LIABILITY.

1 A PRINCIPAL IN A CRIME IS ONE WHO EITHER ACTUALLY
2 COMMITTS THE CRIME OR WHO IS PRESENT AIDING, ABETTING, OR
3 ASSISTING IN COMMITTING THE CRIME. WHEN A PERSON DOES AN
4 ACT IN THE PRESENCE OF AND WITH THE ASSISTANCE OF ANOTHER,
5 THE ACT IS DONE BY BOTH. WHERE TWO OR MORE ACTING WITH A
6 COMMON PLAN OR INTENT ARE PRESENT AT THE COMMISSION OF THE
7 CRIME, IT DOES NOT MATTER WHO ACTUALLY COMMITTS THE CRIME.
8 ALL ARE GUILTY. PRESENCE AT THE COMMISSION OF A CRIME
9 MEANS TO BE SUFFICIENTLY NEAR TO AID AND ABET AND ASSIST IN
10 THE COMMISSION OF THE CRIME. HOWEVER, MERE PRESENCE AT THE
11 SCENE OF A CRIME IS NOT SUFFICIENT TO CONVICT ONE AS A
12 PRINCIPAL ON THE THEORY OF AIDING AND ABETTING. INTENT IS
13 ALSO A NECESSARY ELEMENT FOR THERE MUST HAVE BEEN A COMMON
14 DESIGN OR INTENT TO COMMIT THE CRIME AND THE CRIME MUST
15 HAVE BEEN COMMITTED PURSUANT THERETO WITH THE PERSON'S
16 AIDING AND ABETTING BY SOME OVERT ACT. INTENT MEANS
17 INTENDING THE RESULT WHICH ACTUALLY OCCURS, NOT
18 ACCIDENTALLY OR INVOLUNTARY. INTENT MAY BE SHOWN BY ACTS
19 AND CONDUCT OF THE DEFENDANT AND OTHER CIRCUMSTANCES FROM
20 WHICH YOU MAY NATURALLY AND REASONABLY INFER INTENT. THE
21 STATE MUST PROVE THESE ELEMENTS BEYOND A REASONABLE DOUBT.

22 AS I SAID, MERE PRESENCE AT A SCENE IS NOT
23 SUFFICIENT TO PROVE SOMEONE GUILTY OF A CRIME. A
24 DEFENDANT'S PRESENCE WHERE A CRIME IS BEING COMMITTED OR
25 MERE ASSOCIATION WITH A PERSON WHO COMMITTS A CRIME DOES NOT

1 MAKE A DEFENDANT AN ACCOMPLICE OR AN AIDER AND AN ABETTOR
2 OF THE PERSON COMMITTING THE CRIME.

3 THE BURDEN IS ON THE STATE TO PROVE EVERY ELEMENT
4 OF THE CRIME CHARGED. IF YOU FIND, AFTER REVIEWING ALL THE
5 EVIDENCE, THAT THE STATE HAS PROVED THAT THE DEFENDANT WAS
6 ONLY PRESENT AT THE SCENE OF A CRIME, AND THEY HAVE NOT
7 PROVED BEYOND A REASONABLE DOUBT, ANY OTHER PARTICIPATION
8 IN THE CRIME, THEN YOU MUST FIND THE DEFENDANT NOT GUILTY.
9 THE LAW IS THAT PROOF OF PRESENCE AT THE SCENE OF A CRIME
10 IS NOT SUFFICIENT TO FIND SOMEONE GUILTY.

11 NOW, THE DEFENDANT IS CHARGED WITH MURDER. THE
12 STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE
13 DEFENDANT KILLED ANOTHER PERSON WITH MALICE AFORETHOUGHT.

14 MALICE IS HATRED, ILL-WILL, OR HOSTILITY TOWARDS
15 ANOTHER PERSON. IT IS THE INTENTIONAL DOING OF A WRONGFUL
16 ACT WITHOUT JUST CAUSE OR EXCUSE AND WITH AN INTENT TO
17 INFLICT AN INJURY OR UNDER CIRCUMSTANCES THAT THE LAW WILL
18 INFER AN EVIL INTENT.

19 MALICE AFORETHOUGHT DOES NOT REQUIRE THAT MALICE
20 EXISTS FOR ANY PARTICULAR TIME BEFORE THE ACT IS COMMITTED,
21 BUT MALICE MUST EXIST IN THE MIND OF THE DEFENDANT JUST
22 BEFORE AND AT THE TIME THE ACT IS COMMITTED. THEREFORE,
23 THERE MUST BE A COMBINATION OF THE PREVIOUS ILL INTENT AND
24 THE ACT.

25 MALICE AFORETHOUGHT MAY BE EXPRESSED OR INFERRED.

1 THESE TERMS, "EXPRESSED" AND "INFERRED" DO NOT MEAN
2 DIFFERENT KINDS OF MALICE BUT MERELY THE MANNER IN WHICH
3 SUCH MALICE MAY BE SHOWN TO EXIST. THAT IS EITHER BY
4 DIRECT EVIDENCE OR BY INFERENCE FROM THE FACTS AND
5 CIRCUMSTANCES WHICH ARE PROVED. EXPRESSED MALICE IS SHOWN
6 WHEN A PERSON SPEAKS WORDS WHICH EXPRESS HATRED OR ILL WILL
7 FOR ANOTHER OR WHEN THE PERSON PREPARED BEFOREHAND TO DO
8 THE ACT WHICH WAS LATER ACCOMPLISHED, FOR EXAMPLE, LYING IN
9 WAIT FOR A PERSON OR ANY OTHER ACT OF PREPARATION GOING TO
10 SHOW THAT THE DEAD WAS WITHIN THE DEFENDANT'S MIND WOULD BE
11 EXPRESSED MALICE. MALICE MAY BE INFERRED FROM CONDUCT
12 SHOWING A TOTAL DISREGARD FOR HUMAN LIFE.

13 NOW THE DEFENDANT HAS ALSO BEEN CHARGED WITH
14 ASSAULT AND BATTERY WITH INTENT TO KILL. IN ORDER TO PROVE
15 ASSAULT AND BATTERY WITH INTENT TO KILL, THE STATE MUST
16 PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT
17 COMMITTED AN UNLAWFUL ACT OF A VIOLENT NATURE TO THE PERSON
18 OF ANOTHER WITH MALICE AFORETHOUGHT.

19 AN ASSAULT OCCURS WHEN A PERSON UNLAWFULLY
20 ATTEMPTS OR OFFERS TO COMMIT A VIOLENT INJURY UPON ANOTHER
21 PERSON AND HAD THE PRESENT ABILITY TO COMPLETE THE ATTEMPT.
22 AN ASSAULT IS THE INTENTIONAL CREATION OF A REASONABLE FEAR
23 OF IMMEDIATE BODILY HARM. IT IS NOT NECESSARY THAT THE
24 ATTEMPTED INJURY OR HARM TAKE PLACE. FOR EXAMPLE, IF I
25 WALK UP TO YOU, AND WHEN WE ARE WITHIN ARM'S REACH, I DRAW

1 BACK TO HIT YOU, THAT IS AN ASSAULT.

2 A BATTERY IS THE UNLAWFUL TOUCHING OF ANOTHER
3 PERSON BY A PERSON WHO HAS COMMITTED THE ASSAULT. AN
4 UNLAWFUL TOUCHING CAN BE CAUSED BY A PART OF THE ACCUSED'S
5 BODY OR BY ANY OBJECT THAT THE ACCUSED PUTS INTO MOTION. A
6 BATTERY IS THE COMPLETION OF THE ASSAULT BY USING OR
7 APPLYING FORCE TO ANOTHER PERSON HOWEVER SLIGHT, IN A RUDE,
8 ANGRY, OR RESENTFUL MANNER WITHOUT LEGAL JUSTIFICATION FOR
9 DOING SO. USING MY EARLIER EXAMPLE, IF I CARRY THROUGH
10 WITH THE ASSAULT BY HITTING YOU, THEN THAT IS A BATTERY.

11 MALICE IS HATRED, ILL-WILL, OR HOSTILITY TOWARDS
12 ANOTHER PERSON. IT IS THE INTENTIONAL DOING OF A WRONGFUL
13 ACT WITHOUT JUST CAUSE OR EXCUSE AND WITH AN INTENT TO
14 INFLICT AN INJURY OR UNDER CIRCUMSTANCES THE LAW WILL INFER
15 EVIL INTENT.

16 MALICE AFORETHOUGHT DOES NOT REQUIRE AGAIN THAT
17 MALICE EXISTS FOR ANY PARTICULAR TIME BEFORE THE ACT IS
18 COMMITTED, BUT MALICE MUST EXIST IN THE MIND OF THE
19 DEFENDANT JUST BEFORE AND AT THE TIME OF THE ACT OR THE ACT
20 IS COMMITTED. THEREFORE, THERE MUST A COMBINATION OF THE
21 PREVIOUS EVIL INTENT AND THE ACT.

22 MALICE AFORETHOUGHT MAY BE EXPRESSED OR INFERRED.
23 THESE TERMS, EXPRESSED AND INFERRED DO NOT MEAN DIFFERENT
24 KINDS OF MALICE AGAIN BUT MERELY THE MANNER IN WHICH THE
25 MALICE MAY BE SHOWN TO EXIST. THAT IS EITHER BY DIRECT

1 EVIDENCE OR BY INFERENCE FROM THE FACTS AND CIRCUMSTANCES
2 WHICH ARE PROVED. EXPRESSED MALICE IS SHOWN WHEN A PERSON
3 SPEAKS WORDS WHICH EXPRESS HATRED OR ILL WILL FOR ANOTHER
4 OR WHEN THE PERSON PREPARED BEFOREHAND TO DO THE ACT WHICH
5 WAS LATER ACCOMPLISHED; FOR EXAMPLE, LYING IN WAIT FOR A
6 PERSON OR ANY OTHER ACT OF PREPARATION GOING TO SHOW THAT
7 THE DEED WAS WITHIN THE DEFENDANT'S MIND. WOULD BE EXPRESSED
8 MALICE.

9 AND MALICE MAY BE INFERRED FROM CONDUCT SHOWING A
10 TOTAL DISREGARD FOR HUMAN LIFE.

11 IF FACTS ARE PROVED BEYOND A REASONABLE DOUBT
12 SUFFICIENT TO RAISE AN INFERENCE OF MALICE TO YOUR
13 SATISFACTION, THEN THIS INFERENCE WOULD SIMPLY, WOULD BE
14 SIMPLY AN EVIDENTIARY FACT TO BE CONSIDERED BY YOU ALONG
15 WITH OTHER EVIDENCE IN THE CASE, AND YOU MAY GIVE IT SUCH
16 WEIGHT AS YOU DECIDE IT SHOULD RECEIVE.

17 A SPECIFIC INTENT TO KILL IS NOT AN ELEMENT OF
18 ASSAULT AND BATTERY WITH INTENT TO KILL, BUT THERE MUST BE
19 A GENERAL INTENT TO COMMIT SERIOUS BODILY INJURY. INTENT
20 MEANS INTENDING THE RESULT WHICH ACTUALLY OCCURS; NOT
21 ACCIDENTALLY OR INVOLUNTARILY. INTENT MAY BE SHOWN BY ACTS
22 AND CONDUCT OF THE DEFENDANT AND OTHER CIRCUMSTANCES FROM
23 WHICH YOU MAY NATURALLY AND REASONABLY INFER INTENT.
24 EVIDENCE OF THE CHARACTER OF THE ASSAULT, THE CHARACTER OF
25 THE INSTRUMENT USED, THE MANNER IN WHICH IT WAS USED, THE

1 PURPOSE TO BE ACCOMPLISHED, AND THE RESULTING WOUNDS OR
2 INJURIES MAY BE CONSIDERED IN DETERMINING THE INTENT WITH
3 WHICH THE ASSAULT WAS COMMITTED. INTENT MAY BE INFERRED
4 WHEN IT IS DEMONSTRATED THAT THE DEFENDANT VOLUNTARILY AND
5 WILLFULLY COMMITS AN ACT, THE NATURAL TENDENCY OF WHICH IS
6 TO DESTROY ANOTHER'S LIFE.

7 AND FINALLY, IF THE DEFENDANT, WITH MALICE
8 AFORETHOUGHT, ATTEMPTS TO KILL ANOTHER PERSON, BUT BY
9 MISTAKE, INJURES OR KILLS A DIFFERENT PERSON, THE DEFENDANT
10 STILL HAS THE INTENT TO KILL. THE INTENT TO KILL IS MERELY
11 TRANSFERRED FROM THE ORIGINAL PERSON THE DEFENDANT
12 ATTEMPTED TO KILL TO THE ACTUAL PERSON KILLED OR INJURED.
13 THE DEFENDANT WOULD BE GUILTY OF ASSAULT AND BATTERY WITH
14 INTENT TO KILL JUST AS IF THE ATTEMPT HAD RESULTED IN THE
15 DEATH OR INJURY OF THE PERSON THE DEFENDANT ATTEMPTED TO
16 KILL.

17 NOW, LADIES AND GENTLEMEN OF THE JURY, THERE ARE
18 TWO POSSIBLE VERDICTS WHICH YOU MAY FIND ON EACH INDICTMENT
19 IN THIS CASE, AND I HAVE PREPARED FOUR INDICTMENTS. THOSE
20 VERDICTS ARE GUILTY OR NOT GUILTY, AND AGAIN THERE'S NO
21 SIGNIFICANCE WHATSOEVER IN THE ORDER THAT I STATE THESE
22 POSSIBLE VERDICTS. IT IS SIMPLY THAT ONE MUST BE STATED
23 FIRST.

24 LET ME TELL YOU THAT YOUR VERDICT MUST BE A
25 UNANIMOUS ONE. NOW, MR. FOREPERSON, WHEN YOUR JURY AGREES

1 UPON A VERDICT, I WANT YOU TO CIRCLE THE VERDICT THAT HAS
2 BEEN REACHED. AGAIN, THE VERDICT THAT HAS BEEN REACHED IS
3 THE ONE YOU WILL CIRCLE, AND THEN I WILL ASK YOU TO SIGN
4 YOUR NAME AND KNOCK ON THE DOOR.

5 NOW I'M GOING TO ASK YOU TO RETURN TO YOUR JURY
6 ROOM. I MAY HAVE AN ADDITIONAL INSTRUCTION; I DON'T THINK
7 SO, I'VE ALREADY GONE OVER THIS WITH THE JURY. IF I DO, I
8 MEAN THE ATTORNEYS, IF I DO HAVE TO INSTRUCT FURTHER I WILL
9 BRING YOU BACK OUT. I DON'T WANT YOU TO BEGIN YOUR
10 DELIBERATIONS YET. I WANT THE TWO ALTERNATES PLACED IN A
11 SEPARATE ROOM BECAUSE THEY CANNOT BE IN ON THE PROCESS AT
12 THIS POINT ANYWAY. I WANT YOU TO GO IN YOUR ROOM, DON'T
13 BEGIN YOUR DELIBERATIONS UNTIL I TELL YOU TO DO SO, AND LET
14 ME TELL YOU HOW I WILL DO THAT.

15 IF I SEND MR. ROPP IN AND HE HAS THE EXHIBITS IN
16 THIS CASE AND THE VERDICT FORMS AND THIS COPY OF MY CHARGE,
17 WHICH I AM HAVING THE COURT REPORTER MARK AS COURT'S
18 EXHIBIT NUMBER 4, AS I SAID THE CHARGE IN THIS CASE, AS IN
19 MANY CASES, IS VERY COMPLEX AND THAT'S WHY I DO A
20 TRANSCRIPT OF IT SO THAT YOU'LL HAVE A VERBATIM TRANSCRIPT
21 OF WHAT I'VE INSTRUCTED YOU. IF I SEND THOSE MATTERS TO
22 YOU THAT IS YOUR SIGNAL TO BEGIN YOUR DELIBERATIONS, IS
23 THAT CLEAR? OKAY, AND UNTIL I DO THAT DON'T BEGIN. I WILL
24 NOT SEND THEM UNTIL I AM PREPARED FOR YOU TO GO FORWARD,
25 ALL RIGHT. ALL RIGHT, MR. ROPP, IF YOU WOULD TAKE THEM.

1 BACK AND MAKE SURE THEY HAVE SOME REFRESHMENTS. THEY'VE
2 BEEN HERE FOR QUITE SOME TIME AND I KNOW THEY'RE VERY
3 TIRED.

4 (WHEREUPON, COURT'S EXHIBIT NUMBER 4 MARKED FOR
5 IDENTIFICATION.)

6 (WHEREUPON, THE JURY RETIRED TO THE JURY ROOM AT
7 2:31 P.M.)

8 THE COURT: LADIES, DO YOU WANT TO LOOK AT THE
9 VERDICT FORMS?

10 (WHEREUPON, COUNSEL REVIEWED THE VERDICT FORMS
11 AND AGREED TO THEIR CONTENT.)

12 THE COURT: ALL RIGHT, NOW ARE THERE ANY
13 ADDITIONS TO OR DELETIONS TO THE CHARGE?

14 MS. ELDER: NO, SIR, NONE FROM THE STATE, YOUR
15 HONOR.

16 THE COURT: ALL RIGHT, FROM THE DEFENSE?

17 MS. PRATT: NO, YOUR HONOR.

18 THE COURT: ALL RIGHT, VERY WELL, WOULD YOU,
19 LADIES, PLEASE COME FORWARD AND GET THE VERDICT FORMS AND
20 YOUR EXHIBITS AND LET'S GET EVERYTHING TOGETHER, MAKE SURE
21 WE'RE ALL IN THE RIGHT TRACK AND GET THIS STUFF READY TO
22 SEND INTO THE JURY.

23 (WHEREUPON, THE VERDICT FORMS AND EXHIBITS WERE
24 DELIVERED TO THE JURY ROOM WITH INSTRUCTIONS TO BEGIN
25 DELIBERATIONS AT 2:36 P.M.)

1 THE COURT: ALL RIGHT, I DON'T THINK THERE'S
2 ANYTHING WE CAN DO. I AM GOING TO, IT'S MY POLICY THAT IF
3 WE GET ALL THE WAY THROUGH THE TRIAL AND I SEND THEM OUT I
4 DON'T BRING AN ALTERNATE IN HALFWAY THROUGH THE
5 DELIBERATIONS. I'M GOING TO SET, OR RELEASE THE ALTERNATES
6 AT THIS TIME, OKAY, ALL RIGHT.

7 (WHEREUPON, THE ALTERNATES WERE EXCUSED.)

8 THE COURT: MS. PRATT?

9 MS. PRATT: YES, YOUR HONOR, I JUST WANTED TO
10 PUT ON THE RECORD MY REASONS FOR MY OBJECTIONS DURING THE
11 SOLICITOR'S CLOSING ARGUMENT.

12 THE COURT: ALL RIGHT.

13 MS. PRATT: THE FIRST OBJECTION, AND I KNOW THEY
14 WERE OVERRULED, I JUST NEEDED TO PUT MY REASONS IN. THE
15 FIRST OBJECTION I MADE WAS WHEN SHE MADE THE STATEMENT HAND
16 OF ONE IS THE HAND OF ALL AND THROUGHOUT THIS TRIAL I'VE
17 MAINTAINED THAT THE LAW IN HAND OF ONE IS SLIGHTLY
18 DIFFERENT FROM THE LAW OF ACCOMPLICE LIABILITY. I'VE
19 ALREADY GIVEN THE COURT ON ANOTHER REASON THE SAME CASE
20 STATE V. CURRY ---

21 THE COURT: YES.

22 MS. PRATT: --- WHICH SPEAKS TO THAT. AND THE
23 SECOND OBJECTION THAT I MADE WAS WHEN SHE CALLED THE
24 ADDITION A TEARDROP. MY OBJECTION IS THAT SHE WAS ARGUING
25 FACTS NOT IN EVIDENCE BECAUSE IT WAS NOT TESTIFIED TO AS

1 BEING A TEARDROP.

2 THE COURT: I UNDERSTAND AND THERE HAS BEEN
3 TEARDROP TESTIMONY IN HERE ABOUT WHAT A TEARDROP MAKES --
4 MEANS. I THINK IT'S A FAIR COMMENT. WE TALKED ABOUT IT IN
5 THE TRIAL AND AS TO HER USE OF THE WORDS THE HAND OF ONE IS
6 THE HAND OF ALL AT THE BEGINNING OF THIS TRIAL AND I THINK
7 I MADE IT VERY CLEAR DURING MY INSTRUCTION THAT I WAS THE
8 SOLE JUDGE OF THE LAW IN THIS CASE AND I WAS VERY CAREFUL
9 TO REFER TO IT AS ACCOMPLICE LIABILITY OR THINGS OF THAT
10 NATURE AND I STRUCK FROM MY CHARGE THAT REFERENCE THAT YOU
11 MADE JUST AS AN ACCOMMODATION TO THE DEFENDANT. I DON'T
12 THINK IT MAKES A WHOLE LOT OF DIFFERENCE, BUT AT ANY RATE
13 THAT'S WHAT I DID, OKAY.

14 MS. PRATT: THANK YOU, YOUR HONOR.

15 THE COURT: YOU'RE WELCOME. OKAY, ANYTHING
16 FURTHER?

17 MS. PRATT: NO, YOUR HONOR.

18 THE COURT: OKAY, LET'S WAIT FOR A VERDICT.

19 (WHEREUPON, THE JURY KNOCKED WITH A QUESTION AT
20 4:06 P.M.)

21 THE COURT: ALL RIGHT, LET'S LET THE RECORD
22 REFLECT THAT THE DEFENDANT IS IN THE COURTROOM AS WELL AS
23 THE ATTORNEYS FOR BOTH SIDES.

24 I HAVE A NOTE FROM THE FOREMAN. THE NOTE SAYS WE
25 NEED TO HEAR THE TESTIMONY OF BRIAN SPEARS AND JEFFREY

1 BETHEA AGAIN, SO, OF COURSE, WE'RE GOING TO LET THEM HEAR
2 THAT. I THINK THAT PROBABLY IT'S GOING TO BE EASIER FOR
3 MS. BABB IF WE DO IT IN THE ORDER THAT THE TESTIMONY WAS
4 RECEIVED, JEFFREY BETHEA FIRST AND THEN WE'LL FOLLOW THAT
5 WITH BRIAN SPEARS.

6 THERE WAS A BREAK IN THE TESTIMONY, OR A COUPLE
7 OF BREAKS IN THE TESTIMONY OF JEFFREY BETHEA, AND WE'RE
8 GOING TO, WE'RE GETTING THE NUMBERS NOW SO THAT WE CAN EDIT
9 THAT OUT, OKAY.

10 MS. PRATT: AND THAT WOULD INCLUDE CROSS
11 EXAMINATION AND REBUTTAL?

12 THE COURT: YES.

13 MS. PRATT: THANK YOU.

14 THE COURT: WELL THE WAY, I USUALLY DO IT, MS.
15 PRATT, IS IF AT ANY TIME THE JURY DECIDES THAT THEY HAVE
16 HEARD THAT PORTION OF THE TESTIMONY THAT THEY WANTED TO
17 HEAR AND THEY DO NOT CARE TO HEAR ANYMORE I WILL CUT IT
18 OFF. I USUALLY TELL THEM THAT IF THEY REACH THE POINT THAT
19 THEY HAVE HEARD WHAT THEY WANT TO HEAR CAUSE SOMETIMES THEY
20 JUST WANT TO HEAR SOMETHING VERY SPECIFIC, OTHER TIMES THEY
21 MAY WANT TO LISTEN TO ALL OF IT, BUT THEY'RE CERTAINLY
22 GOING TO HAVE THE OPPORTUNITY TO LISTEN TO EVERYTHING.

23 MS. PRATT: THANK YOU, YOUR HONOR.

24 (WHEREUPON, COURT'S EXHIBIT NUMBER 5 MARKED FOR
25 IDENTIFICATION.)

1 (WHEREUPON, THE JURY ENTERED THE COURTROOM AT
2 4:26 P.M. AND THE FOLLOWING PROCEEDINGS WERE HAD.)

3 THE COURT: YOUR JURY WISHES TO HEAR THE
4 TESTIMONY OF THE DEFENDANT BRIAN SPEARS AND JEFFREY BETHEA
5 AS WELL; IS THAT CORRECT?

6 MR. FOREMAN: THAT IS CORRECT, YOUR HONOR.

7 THE COURT: OKAY, AND WE HAVE MADE PREPARATIONS
8 FOR THAT TO OCCUR, SORRY THAT IT TOOK QUITE SO LONG, BUT WE
9 HAVE TO GO BACK THROUGH THE TAPES AND FIND WHERE EACH ONE
10 STARTS BUT WE HAVE DONE THAT.

11 NOW WE'RE GOING TO, TO START I BELIEVE WITH MR.
12 BETHEA FIRST; IS THAT CORRECT?

13 MADAM COURT REPORTER: YES, SIR.

14 THE COURT: WE'RE GOING TO START WITH MR.
15 BETHEA. IF AT ANY TIME, OF COURSE WE'RE HERE TO PLAY THE
16 ENTIRE TESTIMONY DIRECT AND CROSS EXAMINATION FOR YOU, BUT
17 IF THERE WAS ANYTHING SPECIFIC, AND SOMETIMES JURORS ARE
18 LOOKING FOR A SPECIFIC SPOT, IF YOU REACH A POINT THAT YOU,
19 YOU'VE HEARD WHAT WAS IN DISPUTE OR WHAT YOU WANTED TO HEAR
20 JUST RAISE YOUR HAND LET ME KNOW AND WE'LL GO TO THE NEXT
21 ONE. FEEL FREE TO LISTEN TO ALL OF IT, THOUGH, IF THAT'S
22 WHAT YOU WISH, OKAY.

23 (WHEREUPON, THE TESTIMONY OF JEFFREY BETHEA WAS
24 PLAYED IN OPEN COURT FOR THE JURY.)

25 THE COURT: OKAY, GO TO THE JURY ROOM.

1 (WHEREUPON, AT 5:03 P.M. THE JURY RETIRED TO THE
2 JURY ROOM TO PERMIT THE COURT REPORTER TO LOCATE THE
3 REMAINING TESTIMONY OF MR. BETHEA:)

4 THE COURT: GET THE JURY.

5 (WHEREUPON, THE JURY RETURNS TO THE COURTROOM AT
6 5:09 P.M. AND THE FOLLOWING PROCEEDINGS WERE HAD)

7 THE COURT: ALL RIGHT, LADIES AND GENTLEMEN OF
8 THE JURY, LET ME ASK YOU NOT TO TAKE NOTES. IT'S NOT
9 PROPER IN SOUTH CAROLINA.

10 (WHEREUPON, THE REMAINING TESTIMONY OF JEFFREY
11 BETHEA WAS PLAYED FOR THE JURY IN OPEN COURT.)

12 THE COURT: DO YOU NEED A BREAK BEFORE WE PLAY
13 THE TESTIMONY OF MR. SPEARS?

14 MR. FOREMAN: YES, SIR.

15 (WHEREUPON, THE JURY RETIRED TO THE JURY ROOM AT
16 5:55 P.M.)

17 THE COURT: WE'RE AT BREAK.

18 (WHEREUPON, A RECESS WAS TAKEN AT THIS TIME AND
19 THE FOLLOWING TAKES PLACE ON THE RECORD AFTER THE BREAK.)

20 THE COURT: ARE WE READY?

21 MADAM COURT REPORTER: YES, SIR.

22 THE COURT: SAM, GET THE JURY.

23 (WHEREUPON, THE JURY RETURNS TO THE COURTROOM AT
24 6:20 P.M.)

25 THE COURT: ALL RIGHT, WE HAVE THE JURY BACK IN

1 AND WE'RE GOING TO LISTEN NOW TO THE TESTIMONY OF THE
2 DEFENDANT.

3 (WHEREUPON, THE TESTIMONY OF BRIAN SPEARS PLAYED
4 FOR THE JURY IN OPEN COURT.)

5 THE COURT: ALL RIGHT, MR. ROPP, TAKE THE JURY
6 TO THE JURY ROOM.

7 (WHEREUPON, AT 7:22 P.M. THE JURY AGAIN RETIRED
8 TO THE JURY ROOM AND RESUMED THEIR DELIBERATIONS.)

9 THE COURT: OKAY, WE'RE AT EASE.

10 (WHEREUPON, THE JURY KNOCKED WITH A QUESTION AT
11 7:46 P.M.)

12 THE COURT: LET THE RECORD REFLECT THAT THE
13 DEFENDANT IS PRESENT WITH HIS ATTORNEY AS WELL AS COUNSEL
14 FOR THE STATE. I HAVE A MESSAGE FROM THE, OR A REQUEST
15 FROM THE FOREPERSON, IT READS "COULD WE, PLEASE, SEE THE
16 LETTERS WAS (A) WRITTEN BY MR. SPEARS?" OF COURSE THAT'S
17 NOT IN EVIDENCE. I COULD BRING THE JURY IN IF YOU REQUEST
18 AND TELL THEM THAT THEY CAN ONLY CONSIDER THE EVIDENCE THAT
19 HAS BEEN PRESENTED TO THEM IN THE TRIAL, OR IF NO ONE HAS
20 AN OBJECTION I CAN WRITE THAT ON THIS NOTE AND RETURN THE
21 NOTE TO THEM. IT MIGHT SAVE A LITTLE BIT OF TIME.

22 MS. ELDER: YOUR HONOR, MY REQUEST WOULD BE THAT
23 I HAVE NO OBJECTION TO YOUR WRITING IT ON A NOTE BUT MY
24 REQUEST WOULD BE THAT YOU WOULD INCLUDE LANGUAGE ON THAT
25 NOTE THAT SAYS THEY CAN BE, THE PORTIONS THAT ARE ADMITTED

1 INTO EVIDENCE CAN BE REREAD TO THEM IF THAT IS WHAT THEY
2 WANT BECAUSE I DON'T KNOW IF THEY'RE ASKING TO SEE THE
3 ACTUAL WRITING OR IF THEY'RE ASKING TO HEAR WHAT THE
4 CONTENT IS.

5 THE COURT: NO, THEY WANT TO SEE IT ALL, THEY
6 WANT TO SEE, I KNOW THEY'RE TALKING ABOUT THE RAP LYRICS
7 AND THE LETTERS.

8 MS. ELDER: SO, I MEAN I, I, I THINK WE NEED TO
9 AT LEAST TELL THEM THAT THAT IS AVAILABLE THAT IF THEY WANT
10 TO HEAR THE PORTION THAT'S IN EVIDENCE THAT THEY CAN HEAR
11 THAT AGAIN.

12 THE COURT: THIS JURY I'M A LITTLE AFRAID TO,
13 BUT WE'LL SEE.

14 MS. PRATT: AND MY CONCERN WAS I DON'T WANT TO
15 SUGGEST TO THEM THAT THAT IS WHAT THEY NEED TO BE DOING AND
16 MAKE THEM THINK THAT THEY HAVE TO DO THAT. I DON'T KNOW
17 HOW YOU GOING TO WORD IT.

18 MS. ELDER: THEY ASKED FOR THEM.

19 THE COURT: WELL WHAT I'M GOING TO DO IS WRITE
20 HERE THAT, I'LL DO IT THIS WAY, THE LETTERS WERE NOT
21 INTRODUCED INTO EVIDENCE AND THEY MAY NOT SEE THEM. THEY
22 MAY ONLY CONSIDER THE EVIDENCE THAT WAS PRESENTED.

23 MS. ELDER: YOUR HONOR, I UNDERSTAND WHAT YOU'RE
24 SAYING, YOUR HONOR, BUT IT WAS IN FACT, PORTIONS OF THOSE
25 WERE IN FACT ADMITTED.

1 THE COURT: BUT ALL THEY'VE ASKED IS TO SEE,
2 THEY WANT TO SEE.

3 MS. ELDER: I THINK THAT IS MISLEADING.

4 THE COURT: I DON'T THINK THEY'RE TRYING TO
5 MISLEAD ME.

6 MS. ELDER: NO, I THINK THAT THAT IS MISLEADING
7 TO TELL THEM THAT THAT IS NOT IN EVIDENCE BECAUSE THAT IN
8 FACT THOSE PORTIONS OF IT ARE IN EVIDENCE, THE AGREEMENT
9 THAT WE ---

10 THE COURT: ALL RIGHT, WELL THEN I'LL SAY THAT
11 YOU MAY ONLY CONSIDER THE EVIDENCE THAT HAS BEEN ADMITTED
12 IN THIS TRIAL.

13 MS. PRATT: THAT'S FAIR.

14 MS. ELDER: YOUR HONOR ---

15 THE COURT: AND WE WILL REVIEW ANY PART OF THE
16 TESTIMONY THAT YOU WISH.

17 MS. ELDER: THAT'S FINE.

18 THE COURT: OKAY, THIS IS WHAT I'VE WRITTEN,
19 "YOU MAY CONSIDER THE TESTIMONY AND EVIDENCE AND EXHIBITS
20 INTRODUCED DURING THE TRIAL. WE WILL ALLOW YOU TO HEAR ANY
21 OF THE TESTIMONY YOU DESIRE."

22 MS. ELDER: YES, SIR.

23 THE COURT: OKAY, MS. PRATT?

24 MS. PRATT: YES, YOUR HONOR.

25 THE COURT: OKAY, ALL RIGHT, LET'S SEND IT.

1 MIKE, IF YOU WOULD TAKE THAT BACK TO THEM.

2 (WHEREUPON, COURT'S EXHIBIT NUMBER 6 MARKED FOR
3 IDENTIFICATION.)

4 (WHEREUPON, THE COURT'S RESPONSE TO THE QUESTION
5 FROM THE JURY WAS DELIVERED TO THE JURY AT 7:59 P.M.)

6 THE COURT: ALL RIGHT, STAY CLOSE JUST IN CASE
7 THEY HAVE ANOTHER QUESTION.

8 MS. ELDER: YES, SIR.

9 (WHEREUPON, THE JURY KNOCKED WITH A QUESTION AT
10 8:50 P.M.)

11 THE COURT: ALL RIGHT, WE HAVE ANOTHER QUESTION.
12 "COULD WE, PLEASE, LISTEN TO NATHANIEL DOUGLAS TESTIMONY?"
13 CAN YOU LOCATE THAT, MS. BABB?

14 MADAM COURT REPORTER: YES, SIR. NO, YOUR
15 HONOR, THE TAPE IS NOT HERE.

16 MS. ELDER: I ASSUME THAT WE'LL HAVE TO SUSPEND
17 THE DELIBERATIONS THIS EVENING AND HAVE THEM COME BACK IN
18 THE MORNING?

19 MS. PRATT: I AGREE, YOUR HONOR.

20 THE COURT: I'M GOING TO TELL THEM THAT TAPE IS
21 NOT HERE AND IF IT'S NECESSARY FOR THEIR DELIBERATIONS AND
22 LET THEM MAKE THE CALL.

23 MS. ELDER: YES, SIR.

24 (WHEREUPON, COURT'S EXHIBIT NUMBER 7 MARKED FOR
25 IDENTIFICATION.)

1 THE COURT: BRING THEM IN.

2 MS. PRATT: WILL YOU INFORM THEM, YOUR HONOR,
3 THAT IF THEY DO TAKE A BREAK THEY'LL GO HOME AND THEY'LL
4 COME BACK IN THE MORNING TO HEAR IT?

5 MADAM COURT REPORTER: I FOUND IT.

6 THE COURT: OKAY, THAT'S GOOD.

7 (WHEREUPON, THE JURY ENTERED THE COURTROOM AT
8 9:14 P.M. AND THE TESTIMONY OF NATHANIEL DOUGLAS WAS PLAYED
9 FOR THE JURY IN OPEN COURT.)

10 THE COURT: OKAY, TAKE THE JURY TO THE JURY
11 ROOM.

12 (WHEREUPON, THE JURY EXITED THE COURTROOM AT
13 10:02 P.M.)

14 THE COURT: WE'RE AT EASE.

15 (WHEREUPON, THE JURY KNOCKED WITH A VERDICT AT
16 10:25 P.M..)

17 THE COURT: BRING IN THE JURY.

18 (WHEREUPON, THE JURY ENTERED THE COURTROOM AT
19 10:28 P.M. TO DELIVER ITS VERDICT AS TO DEFENDANT
20 SPEARS.)

21 THE COURT: ALL RIGHT, MR. FOREMAN, I UNDERSTAND
22 THAT YOU HAVE REACHED A VERDICT; IS THAT CORRECT?

23 MR. FOREPERSON: YES, WE HAVE, YOUR HONOR.

24 THE COURT: AND WAS IT A UNANIMOUS VERDICT?

25 MR. FOREPERSON: YES, IT WAS, YOUR HONOR.

1 THE COURT: WAS IT A VERDICT AS TO EACH COUNT?

2 MR. FOREPERSON: YES, IT WAS.

3 THE COURT: ALL RIGHT, LET ME ADVISE ALL THOSE
4 WHO ARE IN THE COURTROOM THAT I WILL TOLERATE NO OUTBURSTS
5 AND NO SHOW OF EMOTION ONE WAY OR THE OTHER. I HAVE NO
6 IDEA WHAT THIS VERDICT MAY BE BUT I WILL NOT TOLERATE ANY
7 EMOTIONAL SHOWS OR SHOWS OF EMOTION. I'M GOING TO HAVE THE
8 DEPUTIES PLACE YOU IN JAIL IF YOU DO.

9 MADAM CLERK, WOULD YOU RECEIVE THE VERDICT?

10 MADAM CLERK: YES, SIR.

11 THE COURT: THANK YOU VERY MUCH.

12 MADAM CLERK, PUBLISH THE VERDICT.

13 MADAM CLERK: INDICTMENT NUMBER 2007-GS-26-3388,
14 THE STATE OF SOUTH CAROLINA V. BRIAN KENDRICK SPEARS AS TO
15 THE CHARGE OF MURDER OF AARON HAMMONDS WE THE JURY
16 UNANIMOUSLY FIND THE DEFENDANT GUILTY.

17 INDICTMENT NUMBER 2007-GS-26-3387, THE STATE OF
18 SOUTH CAROLINA V. BRIAN KENDRICK SPEARS AS TO THE CHARGE OF
19 ASSAULT AND BATTERY WITH INTENT TO KILL KRYSTAL FOWLER WE
20 THE JURY UNANIMOUSLY FIND THE DEFENDANT GUILTY.

21 INDICTMENT NUMBER 2007-GS-26-3389, THE STATE OF
22 SOUTH CAROLINA V. BRIAN KENDRICK SPEARS AS TO THE CHARGE OF
23 ASSAULT AND BATTERY WITH INTENT TO KILL DJUAN QUINTELL
24 MONROE WE THE JURY UNANIMOUSLY FIND THE DEFENDANT GUILTY.

25 INDICTMENT NUMBER 2007-GS-26-3390, THE STATE OF

1 THE COURT: ARE YOU READY FOR SENTENCING?

2 MS. PRATT: YES, YOUR HONOR, I WOULD HAVE
3 OBVIOUSLY SOME MOTIONS.

4 THE COURT: THAT'S WHAT I MEANT.

5 MS. PRATT: I'M SORRY, YOUR HONOR, I WAS NOT
6 AWARE THAT YOU WOULD HAVE ME DO MOTIONS IN FRONT OF THE
7 JURY.

8 THE COURT: THE JURY HAS COMPLETED THEIR WORK.
9 I'M GOING TO LET YOU MAKE YOUR MOTIONS RIGHT HERE.

10 MS. PRATT: THANK YOU, YOUR HONOR, I'M SORRY I
11 WASN'T AWARE OF THE PROCEDURE.

12 YOUR HONOR, AT THIS TIME I WOULD MAKE, FIRST OF
13 ALL I WOULD RENEW EVERY MOTION THAT I HAVE MADE THROUGHOUT
14 THE TRIAL INCLUDING MY MOTION FOR A DIRECTED VERDICT AND MY
15 MOTION AT THE END OF THE CASE AS IT WENT TO THE JURY.

16 I WILL BE AT THIS POINT ASKING FOR A MOTION IN
17 ARREST OF JUDGMENT. WHILE I UNDERSTAND THAT WE HAVE BEEN
18 IN DELIBERATIONS FOR SOME EIGHT HOURS, FOUR HOURS OF THAT
19 WAS LISTENING TO TESTIMONY MUCH OF WHAT CAME IN IN THE
20 TRIAL, WAS EMOTIONAL AND APPEALED TO THE SENSES AND THERE
21 WERE THINGS THAT WOULD, WOULD CAUSE A PERSON TO BE
22 EMOTIONAL THAT MAY HAVE HAD NOTHING TO DO WITH THE ACTUAL
23 CRIME SINCE THEY HAPPENED AFTERWARDS. BECAUSE OF THAT,
24 YOUR HONOR, AND BECAUSE I BELIEVE THAT THERE MAY HAVE BEEN
25 AN EMOTIONAL APPEAL AND EMOTIONAL INVOLVEMENT IN THIS I

1 WOULD ASK THAT THE JUDGE, THAT YOU SET ASIDE THIS VERDICT
2 AND DIRECT A VERDICT OF NOT GUILTY.

3 THE COURT: YES, MA'AM, AND, MS. PRATT, LET ME
4 COMMEND YOU ON YOUR ZEALOUS REPRESENTATION OF YOUR CLIENT.
5 YOU HAVE DONE AN EXCELLENT JOB. I DON'T THINK ANYONE CAN
6 FAULT YOU, HOWEVER THE EVIDENCE IN THIS CASE CERTAINLY
7 SUPPORTS THE VERDICT THAT HAS BEEN RENDERED AND I WOULD
8 RESPECTFULLY DENY YOUR MOTIONS, THANK YOU.

9 MS. PRATT: THANK YOU, YOUR HONOR.

10 THE COURT: ALL RIGHT, MR. SPEARS, MS. PRATT?

11 MS. PRATT: THANK YOU, YOUR HONOR. YOUR HONOR,
12 I DON'T KNOW THE BASIS BUT THE JURY HAS MADE THEIR
13 DECISION. I DON'T KNOW WHETHER THEY THOUGHT HE WAS THE
14 SHOOTER OR WAS AN ACCOMPLICE. WHAT I KNOW IS THAT THIS IS
15 A MAN WHO IS A YOUNG MAN WHO HAS COME FROM A BACKGROUND
16 WHERE HE HAS JUST A 9TH GRADE EDUCATION. HIS PARENTS WERE
17 SEPARATED. HE GREW UP IN A VERY DIFFICULT AREA. HE WAS
18 SENT TO, HE SPENT SOME OF HIS TIME IN PRISON BECAUSE OF GUN
19 CHARGES. THINGS ARE DIFFERENT IN NORTH CAROLINA, THINGS
20 THAT PROBABLY WE WOULD CHANGE OR DO DIFFERENTLY IN HORRY
21 COUNTY. THE SUPPORT SYSTEMS AREN'T THERE THAT THE
22 SITUATIONS THAT MIGHT HAVE HELPED THIS YOUNG MAN IN GETTING
23 INVOLVED WITH THIS GROUP AND DOING THE THINGS THAT HE WAS.
24 I THINK THAT THE GANG INVOLVEMENT THAT HE HAD WAS
25 HIS WAY OF SEEKING FOR FAMILY AND HIS WAY OF SEEKING A

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1 GROUP. I DON'T KNOW THAT WHEN HE GOT INVOLVED WITH THEM AT
2 THE AGE OF 13 OR 14 THAT HE HAD ANY IDEA WHERE IT WOULD
3 LEAD HIM OR THE KINDS OF THINGS THAT MIGHT BECOME NORMAL
4 FOR HIM.

5 I THINK THAT THE WRITINGS THAT HE HAD THAT
6 PROBABLY SHOCKED THE CONSCIOUS OF ALL OF US WERE THINGS
7 THAT THEY TALKED ABOUT ON A REGULAR WAY SO THAT IT DIDN'T
8 SEEM TO BE A DIFFICULT THING. I DON'T THINK THAT THIS IS
9 AN EVIL MAN. I HAVE KNOWN HIM NOW FOR THREE YEARS. I'VE
10 MET WITH HIM REGULARLY. I'VE TALKED TO HIM. HE'S
11 INTELLIGENT. HE IS HARD WORKING. HE IS ABLE TO
12 COMMUNICATE IN SUCH A BEAUTIFUL FASHION. HE HAS ART. HE'S
13 JUST NOT A LIFE TO THROW AWAY AND I WOULD ASK THE COURT IN
14 DEFERENCE TO THAT EVEN THOUGH THIS WAS A DANGEROUS CRIME,
15 AND I UNDERSTAND -- I'VE LIVED IN MYRTLE BEACH FOR 30 YEARS
16 NOW, THAT'S ALMOST BEING A LOCAL -- AND I UNDERSTAND THAT
17 WE DON'T LIKE THE KINDS OF THINGS THAT CAN HARM SO MANY
18 PEOPLE AS THIS ONE COULD HAVE. BUT AS I SAY WITH THIS
19 YOUNG MAN AND THE INCIDENT AND THE WAY IT CAME DOWN AND THE
20 FACT THAT, THAT HE COMES FROM A BACKGROUND THAT HE DOES I
21 ASK THAT THE COURT IN DEFERENCE TO THAT AND ALSO IN
22 DEFERENCE TO THE VERY LOW SENTENCE THAT THE CODEFENDANT WHO
23 VERY LIKELY MAY HAVE BEEN THE ACTUAL SHOOTER RECEIVED THAT
24 THE COURT CONSIDER NOTHING MORE THAN 30 YEAR LIFE ON THE
25 SITUATION.

1 THE COURT: MS. ELDER?

2 MS. ELDER: THANK YOU, YOUR HONOR. AS YOUR
3 HONOR KNOWS MR. SPEARS HAS NOT HAD A LONG TIME TO GET A
4 RECORD AS AN ADULT BUT HE DOES IN FACT HAVE A CONVICTION IN
5 2002 FOR CARRYING A CONCEALED WEAPON. HE ALSO HAS ANOTHER
6 CONVICTION FOR A WEAPONS OFFENSE IN 2006. HE WAS ON ACTUAL
7 PROBATION AT THE TIME OF THIS MURDER. HE SHOULDN'T HAVE
8 BEEN IN SOUTH CAROLINA AT ALL.

9 HE COMMITTED THE, YOU HEARD EVIDENCE ABOUT THE
10 SHOOTING AT WALMART. YOU HEARD THAT FROM HIS SISTER. YOU
11 ALSO HAD AN OPPORTUNITY, AND IT'S A COURT'S EXHIBIT OF THE
12 POLICE INCIDENT REPORT WHEN THEY RESPONDED TO THAT
13 INCIDENT, THE I.D. ON THE VIDEO WAS SUCH THAT WE, THAT THEY
14 COULD NOT CHARGE MR. SPEARS AT THAT TIME.

15 YOU'RE ALSO, YOUR HONOR HAS HAD A UNIQUE
16 OPPORTUNITY THAT THIS JURY DID NOT GET TO HEAR THE GANG
17 LYRICS THAT HE WROTE WHILE HE WAS IN JAIL AND THIS BOOK IS
18 ONLY A PIECE OF THOSE.

19 THE COURT: I HAVE SEEN MANY OF THEM.

20 MS. ELDER: AND AS YOUR HONOR CAN RECALL WHEN WE
21 WERE DOING THOSE MOTIONS OUTSIDE THE PRESENCE OF THE JURY
22 EVERYTHING I READ TALKED ABOUT A COMPLETE DISREGARD FOR
23 LIFE. IT TALKED ABOUT KILLING. IT TALKED ABOUT MURDER.
24 IT TALKED ABOUT ROBBERY. IT TALKED ABOUT GUNS, ALMOST
25 EVERY SINGLE LINE WAS ABOUT THAT. HE HAS GLORIFIED

1 VIOLENCE. HE HAS GOT THOSE TATTOOS SINCE HE'S BEEN
2 INCARCERATED.

3 YOUR HONOR, MR. SMITH TESTIFIED THAT HE CAME
4 FORWARD BECAUSE OF HIS CHILDREN. WHAT HE DIDN'T, WASN'T
5 ABLE TO TESTIFY TO IN FRONT OF THE JURY WAS THE REASON WE
6 WERE ABLE TO INTERCEPT THAT LETTER IN NORTH CAROLINA IS
7 BECAUSE HE GAVE US THAT INFORMATION TO INTERCEPT IT.
8 THAT'S WHY WE CALLED NORTH CAROLINA DEPARTMENT OF
9 CORRECTIONS. HE CAME FORWARD BECAUSE HE SAID HE COULD NOT
10 LIVE WITH HIMSELF BECAUSE OF ALL THE THREATS THAT BRIAN
11 SPEARS MADE WHILE HE WAS IN JAIL TO THE LIFE OF NOT ONLY
12 JEFFREY BETHEA BUT OF JEFFREY BETHEA'S WIFE, HIS CHILDREN,
13 THE PEOPLE IN THIS CASE, INVOLVED IN THIS CASE, THE VILE
14 THINGS THAT MR. SPEARS INDICATED THAT HE WAS GOING TO DO TO
15 THE PEOPLE INVOLVED IN THIS CASE.

16 YOUR HONOR, IN ADDITION TO THAT THAT'S NOT ENOUGH
17 MR. SPEARS SINCE HE'S BEEN OUT AT THE JAIL HE GOT SOMETHING
18 RIGHT, HE WAS MOVED AROUND QUITE A BIT BECAUSE HE CAN'T
19 EVEN BE MAINTAINED INSIDE A JAIL.

20 YOUR HONOR, I KNOW HE IS YOUNG BUT YOU HAVE SEEN
21 SOME OF THE THINGS HE'S CAPABLE OF, SOME OF THE THINGS HE
22 GLORIFIES AND BELIEVES IN, AND I THINK IF ANY CASE DESERVES
23 A LIFE SENTENCE THIS IS THE CASE FOR THAT.

24 THE COURT: THANK YOU, MS. ELDER, AND AGAIN I
25 WANT TO THANK YOU AND MR. FILIBERTO FOR THE JOB THAT YOU

1 HAVE DONE HERE THIS WEEK AS WELL.

2 MS. ELDER: THANK YOU, YOUR HONOR.

3 THE COURT: YOU ARE IN THE SAME CATEGORY IN MY
4 VIEW AS, AS MS. PRATT. YOU'RE EXCELLENT ATTORNEYS AND YOU
5 HAVE ZEALOUSLY REPRESENTED THE STATE.

6 MR. SPEARS, DO YOU WANT TO TELL ME ANYTHING?

7 DEFENDANT SPEARS: YOUR HONOR, I JUST ASK YOU
8 FOR YOUR MERCY, THANK YOU.

9 THE COURT: ALL RIGHT, MR. SPEARS, LET ME, LET
10 ME SAY THIS. I DON'T KNOW THE BASIS FOR THE JURY'S FINDING
11 OF GUILT, WHETHER IT BE THAT THE JURY FELT THAT YOU WERE
12 THE SHOOTER OR YOU WERE AN ACCOMPLICE. IT REALLY DOESN'T
13 MAKE ANY DIFFERENCE. THE JURY HAS DETERMINED THAT YOU ARE
14 GUILTY OF THE MOST SERIOUS CRIME THAT WE HAVE IN THIS STATE
15 AND THAT IS MURDER.

16 I BELIEVE, MR. SPEARS, THAT YOU ARE A SERIOUSLY
17 MISGUIDED YOUNG MAN. I HAVE READ SOME OF YOUR LYRICS. I
18 HAVE HEARD ABOUT, ABOUT YOUR LIFESTYLE. MR. SPEARS, THAT'S
19 NOT LIFE. THAT'S NOT THE WAY IT SHOULD BE IN ANY SOCIETY.
20 YOUR ACTIONS, YOUR THOUGHTS, YOUR FRIENDS ARE NOT WHAT WE
21 CAN TOLERATE. I THINK IN GREAT PART THAT'S BECAUSE OF YOUR
22 IMMATURITY.

23 PERHAPS YOU BELIEVE THAT BY HAVING A FIREARM OR
24 HAVING A GUN AND CARRYING ABOUT A GUN AND TAKING LIFE SO
25 CHEAPLY AS YOU AND YOUR ASSOCIATES SEEM TO DO THAT IT MAKES

1 YOU A MAN, IT MAKES YOU AN ADULT. LET ME TELL YOU IT
2 DOESN'T. I'VE WATCHED MANY DOCUMENTARIES. I'VE BEEN TO
3 MANY SEMINARS ABOUT GANGS AND I CAN TELL YOU THAT IN MOST
4 CASES AS THESE MEMBERS FINALLY MATURE THEY LEAVE IT AND
5 THEY REALIZE WHAT A DESTRUCTIVE INFLUENCE THAT IS ON THEIR
6 COMMUNITY AND THEIR SOCIETY.

7 YOU CALL YOURSELF GROWTH AND DEVELOPMENT BUT YOU
8 ALL CARRY GUNS, YOU SHOOT AT EACH OTHER, YOU QUARREL AND
9 YOU FIGHT. YOU'RE BASED IN VIOLENCE. THAT IS SO CONTRARY
10 TO WHAT YOU TRY TO TELL PEOPLE YOU ARE. THAT'S NOT HOW IT
11 IS.

12 I HOPE, MR. SPEARS, THAT YOU'LL BE ABLE TO, TO
13 MAKE SOMETHING OUT OF YOUR LIFE. YOU HAVE TO HAVE A
14 SUBSTANTIAL PERIOD OF INCARCERATION. YOUR LAWYER KNOWS
15 THAT. YOUR LAWYER KNOWS THAT THERE'S A 30-YEAR MINIMUM
16 MANDATORY INVOLVED HERE. SHE KNOWS THAT.

17 YOU WILL BE AN OLD MAN WHEN YOU ARE RELEASED FROM
18 PRISON OR ON THE WAY TO BEING ONE. I HOPE THAT YOU CAN
19 TURN YOURSELF AROUND AND THAT YOU CAN CONTRIBUTE TO
20 SOCIETY. IN SENTENCING YOU I PLACE GREAT EMPHASIS ON THE
21 FACT THAT YOUR CODEFENDANT, AND AS I SAID I DON'T KNOW
22 WHICH ONE OF YOU WERE THE TRIGGER MAN, I JUST KNOW THAT
23 THIS JURY HAS TOLD ME THAT YOU WERE INVOLVED IN IT, AND I
24 BELIEVE THAT YOU AND MR. BETHEA SET OUT TO AND DID MURDER
25 THE VICTIM IN THIS CASE.

1 I'VE CONSIDERED THE FACT THAT HE'S WALKING AWAY
2 WITH A RELATIVELY MINOR SENTENCE. I'VE CONSIDERED THE FACT
3 THAT HE'S OLDER THAN YOU. I'VE CONSIDERED THE FACT THAT HE
4 HAS TESTIFIED THAT HE INITIATED THIS WHOLE INCIDENT, THAT
5 HE WAS THE ONE WHO TOLD YOU TO COMMIT THIS MURDER. I'VE
6 CONSIDERED THE FACT THAT YOU ARE JUST A YOUNG MAN, THAT YOU
7 WERE ONLY 19 I THINK WHEN THIS OCCURRED. WHAT A WAY TO
8 START YOUR LIFE. WHAT A WAY TO WASTE, WASTE YOUR
9 PRODUCTIVE ADULTHOOD. I AM SORRY TO HAVE TO SENTENCE YOU,
10 MR. SPEARS, BUT I MUST.

11 THE SENTENCE OF THIS COURT AS TO THE OFFENSE OF
12 MURDER IS THAT YOU BE INCARCERATED AT THE STATE DEPARTMENT
13 OF CORRECTIONS FOR A PERIOD OF 30 YEARS.

14 AS TO EACH COUNT OF ASSAULT AND BATTERY WITH
15 INTENT TO KILL IT'S MY SENTENCE THAT YOU BE INCARCERATED
16 FOR A PERIOD OF 20 YEARS. THESE SENTENCES ARE TO RUN
17 CONCURRENTLY. GOOD LUCK TO YOU, MR. SPEARS. ANYTHING
18 FURTHER FROM THE STATE?

19 MS. ELDER: NO, YOUR HONOR, IF I CAN GET A
20 SENTENCING SHEET?

21 THE COURT: ANYTHING FURTHER FROM THE DEFENSE?

22 MS. PRATT: NO, YOUR HONOR.

23 THE COURT: LADIES AND GENTLEMEN OF THE JURY, I
24 WANT TO THANK YOU FOR THE HARD WORK YOU DID. THIS WAS NOT
25 AN EASY CASE I CAN TELL YOU. I DID NOT KNOW HOW YOU WERE

1 GOING TO, TO VOTE. I DID NOT KNOW WHEN THIS CASE BEGAN
2 WHAT THE OUTCOME WOULD BE AND I'LL BE QUITE HONEST WITH YOU
3 I COULD HAVE SEEN YOU GOING EITHER WAY, BUT YOUR COLLECTIVE
4 LOGIC IS MUCH BETTER THAN MINE. I'M JUST ONE PERSON.
5 THAT'S THE REASON WE HAVE THE 12 JURORS. YOU LISTENED
6 INTENTLY. I HAVE NEVER HAD A JURY COME BACK AND WANT TO
7 HEAR FIVE MORE HOURS OF TESTIMONY, NEVER HAD THAT HAPPEN.
8 THAT TELLS ME HOW DILIGENT YOU WERE IN PERFORMING YOUR
9 DUTY. I WANT TO THANK YOU FOR WHAT YOU'VE DONE. AS I SAID
10 IT IS A DIFFICULT PROCESS TO, TO JUDGE ANOTHER HUMAN BEING
11 BUT YOU HAVE STEPPED UP TO THE PLATE. YOU ACCEPTED YOUR
12 RESPONSIBILITY. YOU FULFILLED YOUR DUTY.

13 I HOPE THAT IN THE FUTURE YOU'LL HAVE AN
14 OPPORTUNITY OR I'LL HAVE AN OPPORTUNITY TO RUN INTO YOU OR
15 SEE YOU. I MIGHT NOT RECOGNIZE YOU BUT IF YOU RECOGNIZE ME
16 PLEASE DON'T HESITATE TO STOP ME WHEREVER I AM AND REMIND
17 ME THAT YOU WERE ON MY JURY. I'D LOVE TO TALK WITH YOU
18 ABOUT YOUR EXPERIENCE AND NOT ABOUT THE CASE JUST JURY
19 SERVICE AND, AND WHAT YOU LEARNED OR WHAT YOU THOUGHT ABOUT
20 THIS PROCESS. IT'S A GREAT PROCESS. IT'S THE ONLY PROCESS
21 THAT I KNOW OF IN THE WORLD THAT GIVES THE DEFENDANT THE
22 PROTECTION OF 12 OF HIS FELLOW CITIZENS.

23 THANK YOU AGAIN, I APPRECIATE YOU BEING HERE.
24 YOU MAY DISCUSS THIS CASE WITH ANYONE YOU PLEASE. YOU MAY
25 DECIDE YOU DON'T WANT TO DISCUSS THIS CASE WITH ANYONE.

1 THAT IS YOUR PREROGATIVE BUT IF YOU ARE PRESSED BY ANYONE
2 AND YOU TELL THEM YOU DO NOT WANT TO DISCUSS THIS CASE OR
3 YOU'RE BOTHERED ABOUT THIS CASE OR CONTACTED ABOUT THIS
4 CASE AND YOU ASK THAT PERSON NOT TO CONTACT YOU AND THEY
5 PERSIST YOU BRING IT TO MY ATTENTION. YOU CONTACT SHERIFF
6 PHILLIP THOMPSON AND WE'LL TAKE CARE OF IT FOR YOU. OKAY.
7 THANK YOU VERY MUCH. MR. ROPP, WOULD YOU PLEASE ESCORT THE
8 JURY OUT OF THE COURTROOM?

9 OFFICERS, COULD YOU MAKE SURE THAT WE HAVE
10 SECURITY FOR THESE JURORS GOING TO THEIR AUTOMOBILES.
11 THANK YOU VERY MUCH, IT'S BEEN A PLEASURE.

12 (WHEREUPON, THE JURY WAS EXCUSED AT 10:47 P.M.)
13 END OF REQUESTED TRANSCRIPT- - - -

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HULL/MBPD

CERTIFIED COPY

2010 MAY 20 AM 9:04

CLERK OF COURT
HORRY COUNTY

ARREST WARRANT NO.

J-735111

CDR: 0014 16-03-0620

CDR:

DOA: 07/08/2007

ACTION OF GRAND JURY

THIS BILL

AUG 23 2007

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury Date:

DOCKET NO. 2007-GS-26-3387

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY

85959-3

DEE

COURT OF GENERAL SESSIONS

AUGUST

TERM 2007

THE STATE

vs.

BRIAN FREDERICK SPEARS B/M

DOB

SSN:

ATTORNEY: BARBARA WILSON PRATT

INDICTMENT FOR:
ASSAULT AND BATTERY WITH INTENT TO KILL

ORIGINAL

J. GREGORY HEMBREE, SOLICITOR

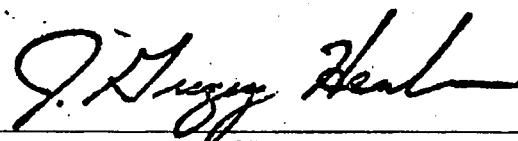
STATE OF SOUTH CAROLINA)
) **INDICTMENT FOR:**
COUNTY OF HORRY) ASSAULT AND BATTERY WITH INTENT TO KILL

At a Court of General Sessions, convened on August 23, 2007, the Grand Jurors of Horry County present upon their oath:

ASSAULT AND BATTERY WITH INTENT TO KILL
(CDR: 0014 16-03-0620)

That BRIAN FREDERICK SPEARS along with codefendants did in Horry County on or about May 27, 2007, commit an unlawful act of violent injury to the victim, Krystal Fowler, with malice, by shooting said victim, thus committing the crime of Assault and Battery with Intent to Kill, in violation of Section 16-3-620, Code of Laws of South Carolina, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR

CERTIFIED COPY

2010 MAY 20 AM 9:04

Melanie [unclear]
CLERK OF COURT
HORRY COUNTY

HULL/MBPD
WITNESSES

DOCKET NO. 2007-GS-26- 3388

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY
85959-3 DEE

COURT OF GENERAL SESSIONS

AUGUST TERM 2007

THE STATE

vs.

BRIAN KENDRICK SPEARS B/M

DOB:
SSN:

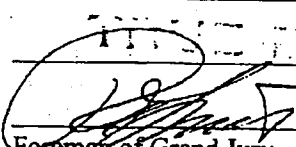
ARREST WARRANT NO. _____

J-735112
CDR: 0116 16-03-0010,0020

CDR: _____

DOA: 07/08/2007

ACTION OF GRAND JURY


AUG 23 2007
Foreman of Grand Jury

VERDICT

Foreman of Petit Jury Date: _____

ATTORNEY: BARBARA WILSON PRATT

INDICTMENT FOR:
MURDER

ORIGINAL

J. GREGORY HEMBREE, SOLICITOR

HORRY COUNTY
CLERK OF COURT

2010 MAY 20 AM 9:04

CERTIFIED COPY

STATE OF SOUTH CAROLINA)

INDICTMENT FOR:

COUNTY OF HORRY)

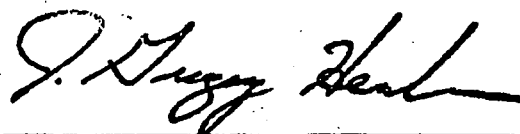
MURDER

At a Court of General Sessions, convened on August 23, 2007, the Grand Jurors of Horry County present upon their oath:

MURDER**CDR: 0116 16-03-0010,0020**

That BRIAN KENDRICK SPEARS along with codefendants did in Horry County, on or about May 27, 2007, willfully, feloniously, and intentionally kill the victim, Aaron Hammonds, with malice aforethought, either express or implied, by means of shooting the victim, and the victim did die as a proximate result thereof on or about May 27, 2007 in Horry County, in violation of Section 16-3-10, S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



SOLICITOR

CERTIFIED COPY

2010 MAY 20 AM 9:04

Melanie
CLERK OF COURT
HORRY COUNTY

HULL/MBPD
WITNESSES

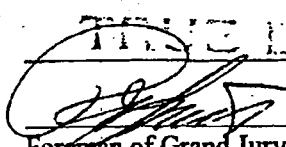
ARREST WARRANT NO. _____

J-735113
CDR: 0014 16-03-0620

CDR:

DOA: 07/08/2007

ACTION OF GRAND JURY


Foreman of Grand Jury

VERDICT

Foreman of Petit Jury Date: _____

DOCKET NO. 2007-GS-26- 3389

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY
85959-3 DEE

COURT OF GENERAL SESSIONS

AUGUST TERM 2007

THE STATE

vs.

BRIAN FREDERICK SPEARS B/M

DOB:
SSN: _____

ATTORNEY: BARBARA WILSON PRATT

**INDICTMENT FOR:
ASSAULT AND BATTERY WITH INTENT TO KILL**

J. GREGORY HEMBREE, SOLICITOR

CLERK OF COURT
HORRY COUNTY

2010 MAY 20 AM 9:04
CERTIFIED COPY

STATE OF SOUTH CAROLINA)
) **INDICTMENT FOR:**
COUNTY OF HORRY) **ASSAULT AND BATTERY WITH INTENT TO KILL**

At a Court of General Sessions, convened on August 23, 2007, the Grand Jurors of Horry County present upon their oath:

ASSAULT AND BATTERY WITH INTENT TO KILL
(CDR: 0014 16-03-0620)

That BRIAN FREDERICK SPEARS along with codefendants did in Horry County on or about May 27, 2007, commit an unlawful act of violent injury to the victim, Dijaun Quintell Monroe, with malice, by shooting said victim, thus committing the crime of Assault and Battery with Intent to Kill, in violation of Section 16-3-620, Code of Laws of South Carolina, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

CERTIFIED COPY

2010 MAY 20 AM 9:04

Melanie
CLERK OF COURT
HORRY COUNTY

HULL/MBPD
WITNESSES

DOCKET NO. 2007-GS-26-3390

THE STATE OF SOUTH CAROLINA

COUNTY OF Horry
85959-3 DEE

COURT OF GENERAL SESSIONS

AUGUST TERM 2007

THE STATE

vs.

BRIAN FREDERICK SPEARS B/M

DOB:
SSN:

ARREST WARRANT NO.

J-735114
CDR: 0014 16-03-0620

CDR:

DOA: 07/08/2007

ACTION OF GRAND JURY

TRUE BILL

Foreman of Grand Jury

AUG 23 2007

VERDICT

Foreman of Petit Jury Date:

ATTORNEY: BARBARA WILSON PRATT

INDICTMENT FOR:
ASSAULT AND BATTERY WITH INTENT TO KILL

J. GREGORY HEMBREE, SOLICITOR

CERTIFIED COPY
2010 MAY 20 AM 9:04
CLERK OF COURT
Horry County

STATE OF SOUTH CAROLINA)

INDICTMENT FOR:

COUNTY OF HORRY)

ASSAULT AND BATTERY WITH INTENT TO KILL

At a Court of General Sessions, convened on August 23, 2007, the Grand Jurors of Horry County present upon their oath:

ASSAULT AND BATTERY WITH INTENT TO KILL

(CDR: 0014 16-03-0620)

That BRIAN FREDERICK SPEARS along with codefendants did in Horry County on or about May 27, 2007, commit an unlawful act of violent injury to the victim, Lasheika Felton, with malice, by shooting said victim, thus committing the crime of Assault and Battery with Intent to Kill, in violation of Section 16-3-620, Code of Laws of South Carolina, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

 SOLICITOR

CERTIFIED COPY

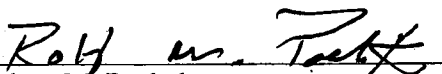
2010 MAY 20 AM 9:04

*Melanie Ruffalo-Wood*CLERK OF COURT
HORRY COUNTY

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

August 22nd, 2011


Robert M. Pachak
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRIAN K SPEARS,

APPELLANT

FINAL BRIEF OF APPELLANT

ROBERT M. PACHAK

Appellate Defender

South Carolina Commission on Indigent Defense

Division of Appellate Defense

PO Box 11589

Columbia, S. C. 29211-1589

(803) 734-1343

ATTORNEY FOR APPELLANT.

TABLE OF CONTENTS

TABLE OF CONTENTS.....	1
TABLE OF AUTHORITIES.....	2
STATEMENT OF ISSUE ON APPEAL.....	3
STATEMENT OF THE CASE.....	4
ARGUMENT.....	5
CONCLUSION.....	8

TABLE OF AUTHORITIES

Cases

<u>Green v. State</u> , 338 S.C. 428, 527 S.E.2d 98 (2000)	7
<u>State v. Alexander</u> , 303 S.C. 377, 382, 401 S.E.2d 146 (1991).....	6
<u>State v. Colf</u> , 337 S.E.2d 622, 525 S.E.2d 246 (2000).....	7
<u>State v. Conyers</u> , 268 S.C. 276, 233 S.E.2d 95 (1977).....	7
<u>State v. Drew</u> , 316 S.E.2d 367 (S.C. 1984)	7
<u>State v. Gore</u> , 283 S.C. 118, 322 S.E.2d 12 (1984).....	6
<u>State v. Lyle</u> , 125 S.C. 406, 118 S.E. 803 (1923)	7
<u>State v. Rivers</u> , 273 S.C. 75, 254 S.E.2d 299 (1979)	7
<u>State v. Smith</u> , 279 S.C. 440, 308 S.E.2d 794 (1983)	7

Rules

Rule 403, SCRE.....	5, 6
Rule 803(2), SCRE	6

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in admitting evidence that appellant shot the victim about a month prior to the shooting death for which appellant was on trial because it was unfairly prejudicial under Rule 403, SCRE?

STATEMENT OF THE CASE

Appellant was convicted of murder and three (3) counts of assault and battery with intent to kill after a jury trial held before the Honorable Larry B. Hyman, Jr. on May 10-13, 2010, in Horry County. Appellant was sentenced to thirty (30) years for murder and to twenty (20) years each on the remaining charges.

This appeal follows.

ARGUMENT

The trial court erred in admitting evidence that appellant shot the victim about a month prior to the shooting death for which appellant was on trial because it was unfairly prejudicial under Rule 403, SCRE.

Appellant, Jeffrey Bethea, and Nathaniel Douglas were in a gang from the southside of Lumberton, North Carolina. The victim was in a competing gang from the eastside of Lumberton. On May 27, 2007, the victim, his girlfriend, and several others decided to drive down to Myrtle Beach to see bike weekend. Appellant, Bethea and Douglas were also in Myrtle Beach that weekend. The victim was shot and killed that evening and three bystanders were hit by stray bullets. The State's theory of the case was one of accomplice liability and that the shooting was done by appellant, Douglas and Bethea. The killing was thought to have been done in retaliation because the victim had killed a member in appellant's gang. Nathaniel Douglas testified for the State and implicated Bethea. Bethea testified for State in exchange for more lenient treatment and implicated appellant. Appellant's defense was that Bethea was the (1) one shooter.

In an effort to prove that appellant was the shooter, the State wanted to put into evidence testimony from the victim's sister that appellant shot the victim at a Walmart parking lot in Lumberton about a month prior to the shooting in Myrtle Beach.

At an in camera hearing, Danyell Hammonds, the victim's sister, testified that the victim came home one night in April of 2007 with blood on his shirt and said that he got shot at Walmart by "Bos" who is appellant's nickname. She also said her brother was in a rival gang and gotten out of prison about a month prior to this shooting. He had been

convicted of accessory after the fact of murder. The victim in that case was in the gang appellant belonged to. (R. p. 141, line 6 – p. 144, line 17).

After much discussion, the trial court held that the victim's sister could testify to what her brother told her because it was an excited utterance under Rule 803(2), SCRE. (R. p. 183, line 11 – p. 184, line 14). Defense counsel had argued earlier that the evidence should not come in under Rule 403, SCRE because of unfair prejudice. (R. p. 182, lines 7-10; p. 159, line 20 – p. 160, line 1). Later, the trial court allowed the solicitor the opportunity to put on the record that she was also putting in this evidence as a prior bad act under Rule 404, SCRE. She said it went to motive, intent, common scheme of plan, continuous scheme of plan and identity. The trial judge found there was clear and convincing evidence of the prior bad act. (R. p. 186, line 18 – p. 187, line 14). The decision to admit this evidence was in error.

Rule 403, SCRE provides that “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...” “Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis.” State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146 (1991). If we assume that the victim's sister is telling the truth about what her brother told her,¹ there is still the danger that the jury will conclude that , if appellant shot the victim once, he must also be the one who shot him a second time.

In State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984) the Court wrote:

Under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial

¹ In “most cases, proof that the event occurred is furnished either by testimony other than the declarant, or by circumstantial evidence that something out of the ordinary occurred.” Weinstein's Federal Evidence §803. 04 [2][a] at p 803-20-21 (March, 1977 ed).

rather than prior criminal or immoral acts. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Furthermore, where bad acts did not result in a conviction, guilty plea, indictment, or arrest of the appellant, this Court has limited the State's use of evidence. State v. Smith, 279 S.C. 440, 308 S.E.2d 794 (1983). (Appellant's lover improperly related instance of the appellant's unconvicted sexual battery upon her in his trial for murder of another woman); State v. Rivers, 273 S.C. 75, 254 S.E.2d 299 (1979). (In trial for criminal sexual conduct with the prosecutrix, the court erred in receiving testimony from the appellant's wife regarding his prior unconvicted acts of sexual misconduct on her). State v. Conyers, 268 S.C. 276, 233 S.E.2d 95 (1977). (Allegations that the appellant poisoned her first husband not admissible because the evidence was not clear and convincing); State v. Drew, 316 S.E.2d 367 (S.C. 1984). (Cross-examination and reply testimony regarding unconvicted act of burning a combine not proper in criminal conspiracy trial for burning a business.)

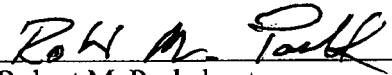
The Court went on to conclude that "when, as here, the previous alleged bad act is strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced."

The trial court in this case failed to conduct a balancing test to determine whether the probative value of the prior bad act substantially outweighed its prejudicial effect. See, State v. Colf, 337 S.E.2d 622, 525 S.E.2d 246 (2000); Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000). At the end of the case the trial court remarked that , "I don't know the basis for the jury's finding of guilt, whether it be that the jury felt that you were the shooter or you were an accomplice." (R. p. 577, lines 10-12). Appellate counsel would suggest that the basis was the unfair prejudice of the prior bad act.

CONCLUSION

Appellant's conviction should be reversed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert M. Pachak", is written over a horizontal line.

Robert M. Pachak
Appellate Defender

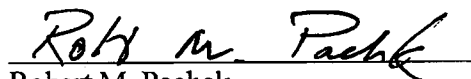
ATTORNEY FOR APPELLANT.

This 12th day of September, 2011.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 12th, 2011

A handwritten signature in cursive script, reading "Robert M. Pachak", written over a horizontal line.

Robert M. Pachak
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry CountyLarry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

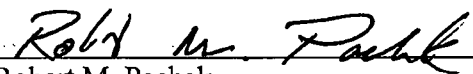
V.

BRIAN K SPEARS,

APPELLANT

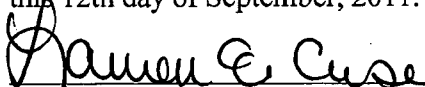
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 12th day of September, 2011.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 12th day of September, 2011.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: August 23, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRIAN K. SPEARS,

APPELLANT

FINAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	1
TABLE OF AUTHORITIES.....	2
QUESTIONS PRESENTED.....	3
INTRODUCTION.....	4
STATEMENT OF THE CASE.....	4
STATEMENT OF THE FACTS.....	5-9
PRESENTATION OF ISSUE AT TRIAL.....	9-12
STANDARD OF REVIEW.....	12
ARGUMENT(S).....	12-17
I. <u>The trial court did not abuse its discretion in admitting, pursuant to Rule 403, SCRE, testimony from Danyell Hammonds, that Appellant had previously shot at, and wounded the victim a month before he was fatally shot and killed</u>	
II. <u>Even assuming the question presented on appeal is preserved for appellate review, the record demonstrates that Appellant's prior bad act is admissible pursuant to Rule 403, SCRE as the probative value of the prior bad act testimony is not substantially outweighed by the danger of unfair prejudice</u>	
CONCLUSION.....	17-18
CERTIFICATE OF COUNSEL.....	19-20
CERTIFICATE OF SERVICE.....	21

TABLE OF AUTHORITIES

Cases

<u>Green v. State</u> , 338 S.C. 428, 527 S.E.2d 98 (2000).....	14
<u>I'On, L.L.C. v. Town of Mt. Pleasant</u> , 338 S.C. 406, 526 S.E.2d 716 (2000).....	12
<u>State v. Anderson</u> , 386 S.C. 120, 687 S.E.2d 35 (2009).....	11
<u>State v. Braxton</u> , 343 S.C. 629, 541 S.E.2d 833 (2001).....	17
<u>State v. Colf</u> , 337 S.C. 622, 525 S.E.2d 246 (2000).....	14
<u>State v. Gore</u> , 283 S.C. 118, 322 S.E.2d 12 (1984).....	15
<u>State v. Hernandez</u> , 386 S.C. 655, 690 S.E.2d 582 (Ct. App. 2010).....	11
<u>State v. Holder</u> , 382 S.C. 278, 676 S.E.2d 690 (2009).....	16
<u>State v. Holland</u> , 385 S.C. 159, 682 S.E.2d 904 (Ct. App. 2009).....	16
<u>State v. Kornahrens</u> , 290 S.C. 281, 350 S.E.2d 180 (1986).....	11
<u>State v. Lyle</u> , 125 S.C. 406, 118 S.E. 803 (1923).....	9
<u>State v. Rosemond</u> , 335 S.C. 593, 518 S.E.2d 588 (1999).....	11
<u>State v. Smith</u> , 391 S.C. 353, 705 S.E.2d 491 (Ct. App. 2011).....	14
<u>State v. Wiles</u> , 383 S.C. 151, 679 S.E.2d 172 (2009).....	14
<u>State v. Williams</u> , 303 S.C. 410, 401 S.E.2d 168 (1991).....	12
<u>Staubes v. City of Folly Beach</u> , 339 S.C. 406, 529 S.E.2d 543 (2000).....	12

Rules

Rule 403, SCRE.....	10
Rule 404(b), SCRE.....	9
Rule 609(a)(1), SCRE.....	14
Rule 609(b), SCRE.....	14

APPELLANT'S QUESTION PRESENTED

Whether the trial court erred in admitting evidence that appellant shot the victim about a month prior to the shooting death for which appellant was on trial because it was unfairly prejudicial under Rule 403, SCRE?

RESPONDENTS' COUNTER QUESTION PRESENTED

Whether the argument presented on appeal is preserved for appellate review where trial counsel argued a completely different rationale for exclusion of the evidence at issue during trial.

INTRODUCTION

On May 27, 2007, gunfire rang out near the intersection of 11th Ave. North and Ocean Boulevard in Myrtle Beach resulting in the death of Aaron Hammonds and the wounding of Krystal Fowler, Lasheika Felton and Dajuan Monroe. (R. 50, 74-75, 134-45, 89, 107). The ensuing investigation led to the indictment and subsequent conviction of Brian "Bos" Spears ("Appellant"). (#2007-GS-26-3387, #2007-GS-26-3388, #2007-GS-26-3389, #2007-GS-26-3390, R. 669-70).

STATEMENT OF THE CASE

Appellant was indicted on one count of Murder and three counts of Assault and Battery with Intent to Kill ("ABWIK"). (#2007-GS-26-3387, #2007-GS-26-3388, #2007-GS-26-3389, #2007-GS-26-3390). On May 10, 2010, Appellant's case was called to trial before the Honorable Larry B. Hyman, Jr. and a jury. (R. 8). At trial, Appellant was represented by Barbara Pratt, while the State was represented by Assistant Solicitors Donna Elder and Lawrence Filiberto. (R. 1). Three days later, on May 13, 2010, Appellant was convicted of all charges and sentenced to thirty (30) years on the murder charge along with twenty (20) years concurrent on each ABWIK charge. (R. 571-72, 575).

STATEMENT OF THE FACTS

On May 26, 2007, Appellant, 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 (R. 213-14, 468-69). Upon arriving in Myrtle Beach that night, Appellant's group, who had not made arrangements for a place to stay, parked their car at a nearby K-Mart and proceeded to Ocean Boulevard. (R. 215). Once they were on

¹ Ishmael "Ish" Douglas is also known as Wa-Gee. (R. 214).

² Appellant, along with June, was a member of 41-Curve, a Lumberton gang affiliated with Gangster Disciples and Folk Nation. (R. 192-93, 206, 207, 278-79, 283, 357, 486).

Ocean Boulevard, Appellant's group was joined by Jeffrey "Bird" Bethea, who, like Appellant and Nathaniel Douglas, was from Lumberton and was a member of 41-Curve. (R. 289-90). At the time of the incident, Appellant 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 (App. 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. (App. 295-96, 441, 297, 298).

Shortly after Bethea's arrival, a member of Appellant's group stated they had observed Aaron Hammonds ("Victim"), a high-ranking member of Lumberton's East Side Bloods who had previously been implicated in the murder of fellow 41-Curve member Eric Floyd, walking down Ocean Boulevard.⁴ (App. 365, 273-75, 290-91, 572). Following this comment, Lemark Irons, another member of Lumberton's East Side Bloods, crossed Ocean Boulevard and approached Appellant's group to compliment them on their clothes and jewelry stating "we need to stop beefing and get money together." (R. 195-96, 197-98, 271, 273, 277, 279-81, 301). Irons, whose right arm was in a sling, then attempted to shake Bethea's hand with his left hand, which Nathaniel Douglas would later explain, was considered a sign of disrespect. (R. 301). In response to Irons' gesture, Bethea slapped Irons' hand and began cursing at him. (R. 219, 230). Irons then left the group, and crossed Ocean Boulevard once again joining Victim, Hammonds and others on the opposite side of the street. (R. 219, 115-16).

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. (R. 197-98). However, Danyell Hammonds further explained that when gang members would "go to do something" they would wear opposite colors. (R. 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. (R. 426-27).

⁴ Eric Floyd was also known as "G-Black" or "Turk." (R. 193).

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 the gang and did not get along with Victim. (R. 208, 358, 220, 228, 365-67). 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. (R. 365-66). Following this conversation, a shooting occurred resulting in Victim's death. (R. 121-29, 134-36). In addition, three bystanders were wounded. (R. 50, 74-75, 89, 107).

At the crime scene, authorities interviewed multiple witnesses and were able to produce a composite sketch matching Bethea's description. (R. 272-73). After interviewing Bethea, authorities also spoke with Appellant in Lumberton on June 4, 2007. (R. 273). 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. (R. 276-77, 279). Additionally, Appellant informed authorities that he did not hang around Bethea. (R. 277). Following the first interview Appellant was charged with one count of Murder and three counts of ABWIK. (R. 281-82).

After waiving extradition, Appellant was transported back to Myrtle Beach where he was interviewed a second time on June 7, 2007. (R. 281-82). 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. (R. 285-86).

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. (R. 79-81, 91-92). SLED Agent Suzanne Cromer then testified that both the shell casings and bullets came from a .25 caliber automatic weapon. (R. 349-50).

The State also introduced eyewitness testimony from Brittney Maynor, who was dating Victim and had accompanied Irons and Victim to Myrtle Beach. (R. 111). 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.⁵ (R. 121-22, 127, 129). She further noted that the shooter crossed the road and was right in front of her when she saw him begin shooting. (R. 112, 121, 124). Maynor then told the jury that she turned and began running when she heard "five or six" shots. (R. 125, 128). Maynor described the gun as a silver and black .380 that was small enough to fit in the palm of her hand. (R. 129).

Additionally, the State presented testimony from Appellant's co-defendants, Nathaniel Douglas and Jeffrey Bethea. (R. 205-268, 355-417). 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 the 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. (R. 220, 222-23). Nathaniel Douglas also confirmed that Appellant had a medium black and titanium handgun in his waistband on the night in question, which was around the size of a .380, while also noting that Bethea did not appear to be carrying a gun. (R. 220-22). 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. (R. 367). Specifically, Bethea told the jury that Appellant pulled out a small caliber handgun from his waistband and began shooting. (R. 368-69).

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.

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

(R. 211-13, 324-25, 333). There was also testimony from Appellant's former cellmate Timothy Smith, who shared a cell with Appellant while he was awaiting trial. (R. 417-40). 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. (R. 424-25). Smith further added that Appellant said he would kill Bethea, his brother, his children and his whole family because he "snitched" on him. (R. 424-25).

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. (R. 448). 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. (R. 449-50, 452-53).

Finally, Appellant testified in his own defense. (R. 467-513). 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. (R. 477-78). He added that he did not shoot anyone. (R. 468). On cross-examination, Appellant admitted he brought a gun to Myrtle Beach, but left it in the car. (R. 491). Appellant also admitted he owned a .380, but gave it away. (R. 502).

PRESENTATION OF ISSUE ON APPEAL

At trial, the State proceeded under the theory that either Appellant or Bethea shot Victim to avenge Eric Floyd's death. (R. 12-15, 43-44). To that end, the State proffered testimony from Victim's sister, Danyell Hammonds ("Danyell") that approximately one month before Victim was fatally shot, Appellant had shot and grazed Victim outside of a Wal-Mart in Lumberton. (R. 141-43). Specifically, in her proffer, Danyell explained that "around midnight" Victim and

Lemark Irons came into the house and went straight to her room where she observed wet blood on Victim's shirt. (R. 146, 142). She then asked Victim what happened. (R. 142). Victim, who Danyell described as "shocked[.]" explained he had just been shot at Wal-Mart. (R. 147, 142). Danyell then asked Victim who had shot him. (R. 142). In response, Victim told Danyell that Appellant had shot him and further informed her that he and Appellant did not get along. (R. 142). Danyell, who was studying to be a nurse at the time, further testified in the proffer that she believed the shooting had just occurred because Victim had blood on his hand and the blood was still wet. (R. 145, 142-43).

Additionally, Danyell testified during the proffer that: (1) Victim was an East Side Blood (R. 143); (2) Appellant was a member of 41-Curve (R. 143); (3) Victim was previously "locked up" for his role in the murder of Eric Floyd (R. 144); (4) Floyd was also a member of 41-Curve (R. 144); (5) Victim was released from custody approximately one month before the Wal-Mart shooting (R. 144); and (6) a group of 41-Curve members, including Nathaniel Douglas, had recently told her that they were going to get Victim. (R. 154-155).

Following the proffer, defense counsel argued Danyell's testimony regarding the Wal-Mart shooting was inadmissible hearsay. (R. 158). Additionally, defense counsel maintained:

It's a 4(B) (sic) issue; my client has not been convicted of it. It's a prior bad act. It's not clear and convincing evidence of his guilt of it. There is a video, but you can't identify my client in it so I have a lot of problems as far as that, and put those together and taking it together with the whole more prejudicial than probative thing you've got my argument.

(R. 159-60). The State then responded arguing Danyell's testimony regarding the prior shooting was admissible as an excited utterance; the prior bad act was admissible under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) and they would proffer the Wal-Mart video which would show the shooting occurred after midnight on April 17, 2007. (R. 160, 165-66). After continued

discussion, the trial court recessed for the day and instructed counsel to research the issue overnight and argument would continue on the objections the next day. (R. 168-69).

The next morning, during additional argument on the issue, defense counsel, when asked by the trial court if she had anything further, stated:

I would just reiterate my 403 argument from yesterday as well with it being a clear and convincing standard if the court looks at that rather than simply a statement, ball statement like what's coming out here and we do not have a conviction and we do not have his face on the video and we don't have a witness that's going to say it was him[.]

(R. 182). Defense counsel again responded stating, "I understand that you've ruled, I would just like to say something that just occurred to me that I just think maybe we need to look at that video before that testimony happens." (R. 184). Continuing, defense counsel noted her belief that the video would show Victim punched the shooter which counsel believed could affect whether the statement was an excited utterance. (R. 184). The trial court then asked the State to play the video from the Wal-Mart shooting. (R. 185). After reviewing the video, the State proffered additional photographs showing the time stamp on the video and proffered an incident report which noted the date and time at which the incident occurred. (R. 186). The trial court then questioned the State on its' intent in offering the additional proffers. (R. 186). Responding to the trial court's inquiry, the State explained that it was offering the additional proffer as evidence of the prior bad act and stated the entire event went to "motive and intent[.]" (R. 186). Continuing, the State further argued the evidence was "certainly relevant to the charges [Appellant] is facing." (R. 186). Finally, the State noted that outside of Lyle, the evidence at issue was admissible pursuant to the excited utterance exception. (R. 187).

Defense counsel then reiterated that under Lyle there must be clear and convincing evidence of the prior bad act. (R. 187). The trial court responded by finding the prior bad act was proven by clear and convincing evidence. (R. 187).

STANDARD OF REVIEW

In criminal cases, appellate courts sit only to review errors of law and are bound by the factual findings of the trial court unless they are found to be clearly erroneous. State v. Hernandez, 386 S.C. 655, 659, 690 S.E.2d 582, 584 (Ct. App. 2010). The materiality, relevance and admissibility of evidence are within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. State v. Rosemond, 335 S.C. 593, 596, 518 S.E.2d 588, 589 (1999). "An abuse of discretion occurs when the conclusions of the trial court lack evidentiary support or are controlled by an error of law." State v. Anderson, 386 S.C. 120, --, 687 S.E.2d 35, 38 (2009). Moreover, the trial court is afforded considerable latitude in ruling on the admissibility of evidence and its rulings will not be disturbed absent a showing of probable prejudice. State v. Kornahrens, 290 S.C. 281, 288, 350 S.E.2d 180, 185 (1986).

ARGUMENTS

- I. The argument presented on appeal is not preserved for appellate review as trial counsel argued a completely different rationale for exclusion of the evidence at issue during trial

Appellant contends the trial court erred in admitting Danyell's testimony that Appellant shot Victim approximately one month before Victim's murder because it was unfairly prejudicial under Rule 403, SCRE. Br. of App. p. 3. Specifically, Appellant argues this evidence was unfairly prejudicial because the jury could have concluded, "if appellant shot the victim once, he must also be the one who shot him a second time." Br. of App. p. 6. To that end, Appellant notes the trial court "failed to conduct a balancing test to determine whether the probative value

of the prior bad act substantially outweighed its prejudicial effect.” Br. of App. p. 7. In response, the State notes an on-the-record Rule 403, SCRE, balancing test was not performed because defense counsel never requested the trial court exclude the prior bad act evidence on the basis that it was too similar to the charged offense as Appellant now argues. Accordingly, the State submits this issue is not preserved for appellate review. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (“It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.”); I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding an appellant must present both his issues and arguments to the lower court and obtain a ruling before presenting the issues and arguments on appeal); State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) (concluding appellate courts will generally not address an issue unless the issue was raised to and ruled upon by the trial court).

In I’On, the Supreme Court of South Carolina explained the preservation requirement placed on an appellant stating, the “preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered *all relevant facts, law, and arguments*.” 338 S.C. at 422, 526 S.E.2d at 724 (emphasis added). Elaborating, the I’On Court found, “the requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve - intentionally or by chance - in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.” Id.

While defense counsel admittedly cited Rule 403, SCRE and its balancing test as a rationale for exclusion of the prior bad act evidence, defense counsel’s intent in doing so was clearly not rooted in concerns related to the similarity between the prior bad act and the offense.

for which Appellant was charged. Specifically, as noted above, defense counsel submitted her Rule 403, SCRE objection twice. (R. 159-60, 182).

In her first objection, counsel stated:

It's a 4(B) (sic) issue; my client has not been convicted of it. It's a prior bad act. It's not clear and convincing evidence of his guilt of it. There is a video, but you can't identify my client in it so I have a lot of problems as far as that, and put those together and taking it together with the whole more prejudicial than probative thing you've got my argument.

(R. 159-60). The following day, after thoroughly discussing whether Victim's statement to Danyell amounted to an excited utterance, defense counsel, when asked whether she had anything else to add, alerted the trial court to her prior objection stating:

I would just reiterate my 403 argument from yesterday as well with it being a clear and convincing standard if the court looks at that rather than simply a statement, ball statement like what's coming out here and we do not have a conviction and we do not have his face on the video and we don't have a witness that's going to say it was him[.]

(R. 182).

The State submits defense counsel's rationale for exclusion in this objection was clearly not related to a concern that the jury would conclude Appellant shot Victim on this occasion, because he had previously shot him a month prior. Rather, the objection is obviously based upon defense counsel's belief that the prior bad act had not been proven by clear and convincing evidence, and as such, the introduction of the prior bad act would unfairly prejudice her client. Indeed, both opposing counsel and the trial court clearly came away with the same impression in light of their subsequent responses. Specifically, the State responded to defense counsel's argument stating that the clear and convincing evidence standard only applied to exceptions under Lyle and clarified that the clear and convincing standard did not apply to an excited utterance. (R. 182). Similarly, the trial court indicated, "we may be looking at Lyles (sic)

because this is a prior bad act. It may have to come in under that analysis.” (R. 183). At no point did the State or the trial court interpret defense counsel’s objection in the way that Appellant is now interpreting the objection. Accordingly, the States asks this Court to find Appellant’s current argument is not preserved for appellate review. See State v. Smith, 391 S.C. 353, 365, 705 S.E.2d 491, 497 (Ct. App. 2011) (concluding appellant did not preserve for review arguments that trial court conducted an improper analysis under Rule 403, SCRE, where the arguments were never presented to the trial judge).

II. Even assuming the question presented on appeal is preserved for appellate review, the record demonstrates that Appellant’s prior bad act is admissible pursuant to Rule 403. SCRE as the probative value of the prior bad act testimony is not substantially outweighed by the danger of unfair prejudice

Assuming this Court finds the argument advanced by Appellant is available for appellate review, the State submits the trial court did not abuse its discretion in admitting the testimony regarding the prior shooting.⁶ Specifically, the testimony, along with the supporting video and incident report, all of which prove the prior shooting by clear and convincing evidence, establish Appellant’s motive and intent in the current action—exacting revenge on Victim for his role in Eric Floyd’s death. See State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (concluding evidence which is logically relevant to establish a material element of the offense charged should not be excluded simply because it reveals that the defendant is guilty of another crime).

Appellant maintains the trial court came down on the wrong side of the Rule 403, SCRE, analysis because the jury could have concluded, “if appellant shot the victim once, he must also

⁶ Moreover, the State notes the two cases which Appellant cites to for the proposition that the trial court is required to conduct a balancing test to determine whether the probative value of a prior bad act is substantially outweighed by its prejudicial effect do not stand for such a proposition. Specifically, State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000) and Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000) deal with Rule 609(b), SCRE (Colf) and Rule 609(a)(1), SCRE (Green) and make no reference to when a trial court is required to employ a Rule 403 balancing test.

be the one who shot him a second time.” Br. of App. p. 6. In support of this proposition, Appellant cites to State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984). In Gore, the South Carolina Supreme Court reversed a voluntary manslaughter and arson conviction in which appellant burnt down a trailer containing his ex-girlfriend when the State cross-examined appellant on a previous incident which was strikingly similar to the charged offense. 283 S.C. at 119-21, 322 S.E.2d at 12-13. However, despite reversing appellant’s convictions, the Gore Court clearly noted in footnote one, that had the prior bad act been proven, the evidence of the prior misconduct could have been admissible under a Lyle exception. See Gore, 283 S.C. at 121 n.1, 322 S.E.2d at 13 n.1 (“If provable, evidence of this prior misconduct could have been admissible under Lyle to show motive or common scheme or plan. However, the State properly concedes that the proof was insufficient to connect appellant to the setting of the previous trailer fire.”).

Here, unlike Gore, the State indisputably established motive and intent pursuant to Rule 404(b), SCRE, by clear and convincing evidence. (R. 187). Thus, the only question left for this Court to consider is whether the trial court abused its discretion in admitting the prior bad acts testimony under Rule 403, SCRE where the prior bad act was proven by clear and convincing evidence and went to both motive and intent.

“Evidence is relevant and admissible if it tends to establish or make more or less probable the matter in controversy.” Wiles, 383 S.C. at 157-58, 679 S.E.2d at 175-76. Furthermore, “evidence of other crimes, wrongs, or acts is generally not admissible to prove the character of a person in order to show action in conformity therewith; however, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.” Wiles, 383 S.C. at 158, 679 S.E.2d at 176 (internal quotations

omitted) (citing Rule 404(b), SCRE). Additionally, evidence which is “logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused’s guilt of another crime.” Id.

Nevertheless, otherwise admissible evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]” Rule 403, SCRE. Pursuant to Rule 403, SCRE, “the trial judge must determine whether the logical connection articulated by the State is sufficiently strong that the probative value found in the connection is not substantially outweighed by the tendency of the evidence to show propensity, or by some other form of unfair prejudice.” Smith, 391 S.C. at 361, 705 S.E.2d at 496. In other words, “[u]nfair prejudice means an undue tendency to suggest decision on an improper basis.” Wiles, 383 S.C. at 158, 679 S.E.2d at 176. Similarly, “[t]he determination of the prejudicial effect of the challenged evidence must be based on the entire record, and the result will generally turn on the facts of each case.” State v. Holder, 382 S.C. 278, 293, 676 S.E.2d 690, 698 (2009).

At the outset, the State notes that appellate courts must give “great deference to the trial court’s judgment under Rule 403 and . . . should be reversed only in exceptional circumstances.” Smith, 391 S.C. at 364, 705 S.E.2d at 497 (citing State v. Holland, 385 S.C. 159, 171-72, 682 S.E.2d 898, 904 (Ct. App. 2009)). Quite simply, this case is not one of those exceptional circumstances. Indeed, the State submits the prior shooting did not go to show Appellant’s general propensity to shoot people, which also would be at odds with the general rule expressed in the first portion of Rule 404(b), but was instead extremely probative as it provided the jury with Appellant’s motive for killing Victim—seeking vengeance for his friend and fellow 41-Curve member, Eric Floyd. Likewise, the prior shooting was clearly probative of Appellant’s intent in shooting Victim, namely malice.

Furthermore, while this evidence may be prejudicial to Appellant in that it makes it more likely that Appellant shot Victim, such prejudice is not "unfair prejudice" as the prior bad act was proven by clear and convincing evidence. (R. 187). Similarly, any unfair prejudice which may exist as a result of the admission of the prior shooting does not substantially outweigh its probative value. See State v. Braxton, 343 S.C. 629, 636, 541 S.E.2d 833, 836-37 (2001) (concluding evidence of previous quarrels and ill feelings or hostile acts between parties is admissible to show that animus probably existed between the parties at the time of the homicide). Specifically, the same motive that existed during the prior shooting—revenge—still existed when Appellant fired and fatally shot Victim in Myrtle Beach. The same can be said for Appellant's intent, he obviously wanted to kill Victim the first time he shot him and nothing within the record demonstrated that this changed within the month prior to the second shooting. To the contrary, the record clearly reflects that many members of 41-Curve wanted revenge against Victim. This was expressed throughout the record, including Appellant's co-defendant Nathaniel Douglas' statement to Danyell that he and his fellow 41-Curve members were going to get Victim. (R. 154-55). In fact, this was evident even in the minutes leading up to the shooting where Bethea, Appellant's co-defendant, got into an argument with Irons after Irons suggested the two groups "stop beefing and get money together." (R. 219). In response, Appellant and Bethea, rather than shaking Irons' hand and calling an end to the violence, promptly walked across the street to kill them. (R. 365-66).

CONCLUSION

For the aforementioned reasons, the State respectfully requests this Court affirm the rulings of the trial court as it did not abuse its discretion in admitting the evidence now at issue.

Respectfully Submitted,

ALAN WILSON
Attorney General

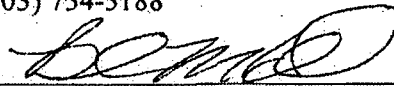
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ATTORNEY(S) FOR RESPONDENTS

September 12, 2011.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRIAN K. SPEARS,

APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR. The undersigned also certifies that the Final Brief is in compliance with the South Carolina Supreme Court's Order of August 13, 2007.

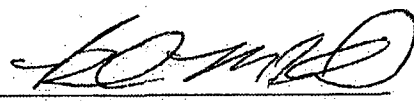
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September 12, 2011.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRIAN K. SPEARS,

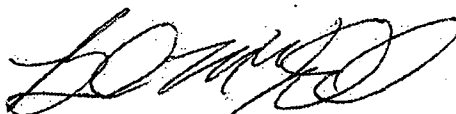
APPELLANT

PROOF OF SERVICE

I, Brendan J. McDonald, Counsel for Respondent, certify that I have this date served the *Final Brief of Respondent*, dated September 12, 2011, on Appellant by depositing two copies of the same in the United States mail, first class postage prepaid, addressed to his attorney of record:

Robert M. Pachak, Assistant Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

This 12th day of September, 2011.



BRENDAN J. McDONALD
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

ATTORNEY FOR RESPONDENT

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Brian K. Spears, Appellant.

Appellate Case No. 2010-162287

Appeal From Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Published Opinion No. 5119
Heard January 17, 2013 – Filed April 17, 2013

REMANDED

Appellate Defender Robert M. Pachak, of Columbia, for
Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney
General John W. McIntosh, Assistant Attorney General
Brendan Jackson McDonald, all of Columbia, and J.
Gregory Hembree, of Conway, for Respondent.

PIEPER, J.: Brian K. Spears appeals his convictions for murder and three counts of assault and battery with intent to kill (ABWIK). On appeal, Spears argues the trial court improperly admitted evidence of a prior shooting incident between Spears and Aaron Hammonds (Victim) that occurred one month before Victim was killed. Spears contends the trial court failed to conduct a balancing test to determine if the probative value of the prior shooting testimony was substantially outweighed by the danger of unfair prejudice to Spears. We remand.

FACTS

On May 27, 2007, Victim was fatally shot on Ocean Boulevard in Myrtle Beach. Upon responding to the scene, Detective Michael Hull interviewed eyewitnesses. Detective Hull created a composite of the suspected shooter that resembled Jeffrey Bethea. After seeing the composite on the news, Bethea turned himself in to the police. Bethea told Detective Hull that Spears and Nathaniel Douglas were responsible for Victim's death. Thereafter, Bethea, Spears, and Douglas were each charged with murder and three counts of ABWIK. As part of an agreement with the State, Bethea pled guilty to voluntary manslaughter. As a result of Bethea's plea, Douglas and Spears became codefendants in the case.

During pretrial motions, the solicitor argued Victim's death was a gang-related revenge killing. The solicitor contended that Victim's death was connected to the murder of Eric Floyd. Prior to his murder, Victim pled guilty to accessory after the fact in connection with Floyd's murder and served a four-year sentence.

Approximately one month after Victim was released from prison, Spears allegedly shot Victim in a Wal-Mart parking lot in North Carolina. Spears argued any introduction of gang evidence would be prejudicial under Rule 403, SCRE. The trial court asked the solicitor "what about the shooting the month before, was, is there some way to connect that with this gang as well. . . I'm just wondering are you going to be able to get that in." The solicitor responded that she would not know if she could lay the foundation for the Wal-Mart shooting until Danyell Hammonds' testimony was proffered. Spears then argued testimony about the Wal-Mart shooting should be excluded because it was hearsay and because there was not clear and convincing evidence of the shooting as required by Rule 404(b), SCRE. Upon completion of the arguments, the trial court found the gang affiliation evidence was relevant and the probative value of the gang affiliation evidence was not substantially outweighed by any danger of unfair prejudice it might have caused. Spears then questioned whether the trial court ruled on the admissibility of the shooting incident at Wal-Mart. The trial court, in response to Spears' question about the Wal-Mart shooting, took the matter under advisement and withheld its ruling pending the presentation of evidence at trial.

After the trial began, the court held an in camera hearing to proffer the testimony of Hammonds, Victim's sister, who intended to testify regarding Victim's statements about the Wal-Mart shooting. Hammonds testified that one month before Victim was fatally shot, Victim told her "Bos" shot him outside of a Wal-

Mart in North Carolina. Hammonds indicated she knew Bos to be Spears.¹ According to Hammonds, Victim and Lemark Irons came to her house and ran to her room where she saw wet blood on Victim's shirt. Hammonds explained that she believed the shooting had just occurred because the blood in Victim's hand was still wet. Hammonds testified that Spears was a member of the 41-Curve gang and Victim was a member of the East Side Blood gang. Hammonds also testified a group of 41-Curve members told her that they were "going to get" Victim.

The trial court expressed its concerns that Hammonds' testimony was hearsay and questioned the solicitor about how she would get Hammonds' testimony regarding the Wal-Mart shooting admitted into evidence. Before the solicitor responded, Spears argued against introducing Hammonds' testimony of the prior shooting incident, stating "it's a 4[04](B) issue. My client has not been convicted of it. It's a prior bad act. It's not clear and convincing evidence of his guilt of it." Spears also argued that the testimony was hearsay and "taking it together with the whole more prejudicial than probative thing and you've got my argument." The solicitor then argued Victim's testimony fell under the excited utterance hearsay exception.

Before adjourning for the night, the trial court discussed with Spears and the solicitor whether Hammonds' testimony was hearsay. The next day, Spears renewed his Rule 403, SCRE, argument. After further discussion on whether Hammonds' testimony was hearsay, the trial court admitted Hammonds' testimony about the Wal-Mart shooting under the excited utterance exception to hearsay. Next, the solicitor proffered the video of the Wal-Mart shooting to introduce Hammonds' testimony as prior bad act evidence pursuant to Rule 404(b), SCRE. The trial court asked the solicitor the purpose for which she was offering the prior shooting evidence under Rule 404(b). The solicitor responded the prior shooting was necessary to show motive, intent, common scheme or plan, and identity. Spears objected and argued the evidence was not clear and convincing. Spears also renewed all of his previous objections. The trial court found clear and convincing evidence existed to support admission of the Wal-Mart shooting testimony and admitted Hammonds' testimony of the Wal-Mart shooting as a prior bad act.

A jury found Spears guilty. The trial court sentenced Spears to thirty years' imprisonment for murder and twenty years' imprisonment for each ABWIK count, to be served concurrently. This appeal followed.

¹ Bos is Spears' street name.

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless the findings are clearly erroneous. *State v. McEachern*, 399 S.C. 125, 135, 731 S.E.2d 604, 609 (Ct. App. 2012).

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011).

LAW/ANALYSIS

Spears' sole issue on appeal is that the trial court erred by failing to conduct an on-the-record balancing test to determine whether the probative value of the prior bad act testimony was substantially outweighed by the danger of unfair prejudice. We agree.

South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged, except to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; or (5) the identity of the perpetrator. Rule 404(b), SCRE. "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." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." *State v. Gilchrist*, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App. 1998). "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. 428, 435, 683 S.E.2d 275, 278 (2009) (emphasis added). The court may exclude the 404(b) evidence if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. *Id.*

This court has held if "an on-the-record Rule 403 analysis is required, [we] will not reverse the conviction if the trial judge's comments concerning the matter indicate he was cognizant of the evidentiary rule when admitting the evidence of [a defendant's] prior bad acts." *State v. King*, 349 S.C. 142, 156, 561 S.E.2d 640, 647

(Ct. App. 2002). In *King*, this court determined the trial court's ruling was "a compressed Rule 403/404(b) analysis" with "some indicia of his consideration of whether admission of the testimony was fair to King (*i.e.*, more probative than prejudicial)." *Id.* at 157, 561 S.E.2d at 647.

Here, the trial court ruled Hammonds could testify as to Victim's statements about the Wal-Mart shooting pursuant to the excited utterance exception to hearsay. Immediately thereafter, the solicitor proffered the video of the Wal-Mart shooting. The trial court indicated it understood the solicitor was offering the evidence of the prior shooting "under 404 or evidence of a prior bad act." The solicitor argued testimony regarding the prior shooting was necessary to show motive, intent, common scheme or plan, and identity. Spears objected, arguing the evidence was not clear and convincing and renewed all of his previous objections, including his earlier objection that the unfair prejudice of the Wal-Mart shooting testimony substantially outweighed its probative value. The trial court found clear and convincing evidence existed to support the prior bad act, but the trial court made no further findings. We recognize the trial court did spend time expressing its concerns and questioned the solicitor on the prior shooting. However, other than finding there was clear and convincing evidence of the prior shooting and Hammonds' testimony was admissible, the trial court made no specific findings on the record as to why the testimony had probative value, the nature of the unfair prejudice, or whether the probative value of the testimony was substantially outweighed by the danger of unfair prejudice.²

Furthermore, we find it is not implicit or apparent from the record that the trial court considered whether the probative value of the Wal-Mart shooting testimony was substantially outweighed by unfair prejudice. Unlike the trial court in *King*, here, the trial court made no indication that it considered Rule 403. Thus, if the trial court did consider the unfair prejudice of the Wal-Mart shooting testimony, it is not readily implicit or apparent from the record. For the foregoing reasons, we find the trial court erred by failing to conduct an on-the-record Rule 403 balancing test.

Having determined that the trial court erred by failing to conduct an on-the-record Rule 403 balancing test, we must next determine the proper remedy. South Carolina has not addressed the procedure for when an appellate court is unable to determine from the record whether the trial court considered Rule 403 in admitting

² Admission under an excited utterance theory would also be subject to a 403 objection and balancing analysis. See Rule 403, SCRE.

a prior bad act under Rule 404(b). However, our courts have discussed the procedure for when the trial court fails to include a Rule 609, SCRE, balancing test on the record. *See State v. Colf*, 337 S.C. 622, 629, 525 S.E.2d 246, 249 (2000). In *Colf*, the court of appeals undertook its own Rule 609(b) balancing test. *Id.* On appeal, the supreme court held that this court should have remanded the question to the trial court instead of conducting the balancing test itself. *Id.* The court reasoned that "[i]t is difficult, if not impossible, for an appellate court to balance the interests at stake when the record does not contain the specific facts and circumstances necessary to a decision." *Id.* Furthermore, the supreme court explained, "[t]he balancing test required by Rule 609(b) must be conducted by the trial court." *Id.* (emphasis added).

Similarly, in *State v. Scriven*, this court was unable to determine whether the trial court "conducted a meaningful analysis to balance the impeachment value of these prior convictions, if any, against the prejudicial impact, as clearly required under Rule 609(a)(1)." 339 S.C. 333, 344, 529 S.E.2d 71, 76 (Ct. App. 2000). Because the court was unable to ascertain whether the error was harmless, we remanded to the trial court with instructions to hold a hearing on the admissibility of the prior convictions and to carefully weigh the probative value of impeachment of the prior convictions against the prejudice to the defendant. *Id.* at 344, 529 S.E.2d at 77. We further instructed that in "the event the State does not carry its burden, or the court determines that the prejudicial impact to Scriven outweighed the probative value for impeachment, the court shall order a new trial. Otherwise, subject to further appellate review, the conviction is affirmed." *Id.*

More recently, this court found that the trial court erred by not conducting a proper Rule 609(b) balancing test because it provided no analysis of the prejudicial impact of admitting the defendant's prior conviction. *State v. Howard*, 384 S.C. 212, 223, 682 S.E.2d 42, 48 (Ct. App. 2009). We followed the procedure set forth in *Scriven*, and remanded for an on-the-record balancing test. *Id.*

We have reviewed other jurisdictions and found that when appellate courts cannot ascertain whether the trial court conducted a Rule 403 balancing test on the record, these courts have either: (1) determined whether the error was harmless; (2) conducted a de novo review and made a balancing decision; or (3) remanded for an on-the-record Rule 403 balancing test.

As indicated, some courts have ascertained whether the trial court's failure to conduct a Rule 403 balancing test is harmless. In *Wardlow v. State*, the Alaska Court of Appeals found the trial court committed error when it failed to conduct a

balancing test under Rule 403 in admitting a witness' testimony as evidence pursuant to Rule 404. 2 P.3d 1238, 1248 (Alaska Ct. App. 2000). However, the court determined the defendant failed to establish he was unfairly prejudiced. *Id.* Therefore, the court held the trial court's error in failing to conduct a Rule 403 balancing test was harmless. *Id.* Similarly, the Mississippi Supreme Court has held the failure to apply a Rule 403 balancing test on the record could be harmless error. *McKee v. State*, 791 So.2d 804, 805 (Miss. 2001). In *McKee*, the trial court admitted testimony regarding the defendant's prior use of crack cocaine over the defendant's objection. *Id.* at 806. The court found the trial court erred by not applying the Rule 403 balancing test on the record. *Id.* at 810. However, the court also found the error was harmless based on the overwhelming evidence of the defendant's guilt. *Id.*

Other courts have found the trial court's failure to conduct an on-the-record Rule 403 balancing test is not reversible error when the appellate court can undertake a de novo review of the record and conduct its own balancing test. The Tenth Circuit held it had authority to "conduct a *de novo* balancing where the trial court failed to make explicit findings to support a Rule 403 ruling" on the admission of Rule 404(b) evidence. *United States v. Lazcano-Villalobos*, 175 F.3d 838, 847 (10th Cir. 1999).³ Additionally, the Ninth Circuit explained that it reviews "for

³ Rule 403 of the Federal Rules of Evidence is worded differently than the South Carolina rule and provides: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Rule 404(b) further provides:

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of

abuse of discretion a district court's decision to exclude evidence at trial." *United States v. Leo Sure Chief*, 438 F.3d 920, 925 (9th Cir. 2006). "However, when the district court excludes evidence under Federal Rule of Evidence 403 but does not engage in explicit balancing, we review such a determination de novo." *Id.* (footnote omitted).

Finally, other courts have determined that remand is appropriate when the appellate court is unable to determine from the record whether the trial court implicitly made a Rule 403 finding. In *State v. Taylor*, the Arizona Supreme Court reversed and remanded for a Rule 403 determination. 817 P.2d 488, 492-93 (Ariz. 1991). The *Taylor* court recognized that even though the trial court did not specifically mention Rule 403 or prejudice in its analysis, "the record indicates that the court *may have been* weighing the prejudice against the probative value." *Id.* at 492. However, the court also found it could not determine whether the trial court excluded the prior conviction because it was irrelevant or because the prejudice outweighed the probative value. *Id.* The court noted that "[a] remand with instructions to conduct a Rule 403 determination may be ordered when uncertainty in a trial court's ruling might be removed." *Id.* (quoting *Shows v. M/V Red Eagle*, 695 F.2d 114, 118 (5th Cir. 1983)). Accordingly, the court remanded this issue with instructions to the trial court "to make an on-the-record finding based on specific facts and circumstances." *Id.* at 493.

Likewise, in *State v. McFarland*, the West Virginia Supreme Court held that because "the factors used by the circuit court in conducting the Rule 403 balancing test do not appear on the record, this Court is unable to effectively review the circuit court's decision to admit" the prior bad act evidence in question. 721 S.E.2d 62, 73 (W. Va. 2011). Therefore, the *McFarland* court held that the circuit court

accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial -- or during trial if the court, for good cause, excuses lack of pretrial notice.

Fed. R. Evid. 404(b).

erred in failing to conduct an on-the-record balancing test required by Rule 403. *Id.* The court reversed and remanded to the trial court for a new trial. *Id.*⁴

Having discussed the options considered by other courts, we decline to conduct a de novo Rule 403 balancing test. This decision is consistent with our supreme court's prior decision that an appellate court should not conduct its own balancing process when the trial court does not perform a Rule 609(b), SCRE, balancing test in admitting a prior conviction. *See Colf*, 337 S.C. at 629, 525 S.E.2d at 249 (noting an appellate court should not undertake the Rule 609(b) balancing test itself, but should remand the question to the trial court).

⁴ In the absence of on-the-record prejudice versus probative value findings as to the admission of a Rule 404(b) evidence, the Fifth Circuit has found it is "obliged to remand unless the factors upon which the probative value/prejudice evaluation were made are readily apparent from the record, and there is no substantial uncertainty about the correctness of the ruling." *United States v. Robinson*, 700 F.2d 205, 213 (5th Cir. 1983). In *Robinson*, the court determined that its review of the record led to uncertainty concerning the admissibility of the extrinsic offense testimony and remanded the case to the trial court for an on-the-record balancing test. *Id.* at 214. Additionally, the Seventh Circuit recognizes the district court's deference in admitting Rule 404(b) evidence, but also recognizes the appellate court's authority to "reverse if the district court failed to consider the prejudicial nature of the Rule 404(b) evidence before allowing it to be admitted." *United States v. Ciesiolka*, 614 F.3d 347, 357 (7th Cir. 2010). "A 'perfunctory' analysis is insufficient." *Id.* In *Ciesiolka*, the court held that:

[T]he district court abused its discretion in failing to propound reasons for its conclusion that the probative value of [defendant's prior bad acts] was not substantially outweighed by the risk of unfair prejudice. We have reviewed the transcript of the district court's Rule 404(b) hearing, but could find no portion within it where the court explained its bare-bones conclusion that "the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."

Id.

We note the potential prejudice to Spears upon the introduction of this evidence. Spears was tried for shooting and killing Victim. The prior bad act testimony involved Spears shooting the Victim a month before the incident herein. Based upon these similarities, the jury could have determined Spears was guilty on an improper basis by relying on the Wal-Mart testimony as propensity evidence. *See State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) ("Unfair prejudice means an undue tendency to suggest decision on an improper basis."); *State v. Johnson*, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987) ("[E]vidence of other crimes or prior bad acts is inadmissible to show criminal propensity."); *State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984) (stating when a "previous alleged bad act is strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced"); *State v. Taylor*, 399 S.C. 51, 61, 731 S.E.2d 596, 601 (Ct. App. 2011) (recognizing the prejudicial effect of admitting "evidence of other crimes, wrongs, or acts based upon the degree of similarity with the charged crime"). Moreover, based upon the record herein, we are unable to say that the admission of the prior bad act testimony was harmless error. *See Black*, 400 S.C. at 27, 732 S.E.2d at 890 ("In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt."); *Scriven*, 339 S.C. at 344, 529 S.E.2d at 77 ("On the basis of this record, we are unable to say that the admission of these prior convictions was harmless error."). Accordingly, we find it appropriate to remand for an on-the-record Rule 403 balancing test.

CONCLUSION

Based on the trial court's failure to conduct a Rule 403 balancing test to determine if the probative value of the prior shooting testimony is substantially outweighed by the danger of unfair prejudice to Spears, we remand with instructions for the trial court to conduct an on-the-record balancing test. If upon remand the trial court determines the probative value of the prior shooting testimony is substantially outweighed by the danger of unfair prejudice to Spears, the court should order a new trial. If the trial court determines the probative value of the prior shooting testimony is not substantially outweighed by the danger of unfair prejudice to Spears, the conviction shall be affirmed subject to the right of appellate review.

REMANDED.

FEW, C.J., and WILLIAMS, J., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

BRIAN K SPEARS,

APPELLANT

APPELLATE CASE NO. 2010-162287

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5119

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, appellant petitions this Court for rehearing on the following points that may have been overlooked or misapprehended. The solicitor in this case failed to specify why the Wal-Mart shooting was admissible under Rule 404(b). Instead, she merely made a rote recitation of all of the exceptions to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Counsel has found in the past when a solicitor can not specify the exception, the real motive is to prejudice the defendant with the prior bad act.

This Court found and concluded that it was “unable to say that the admission of the prior bad act at testimony was harmless error.” If the error was not harmless, remanding the case for a Rule 403, SCRE balancing test would lead only to prejudice and confusion, it is respectfully submitted.

CONCLUSION

Appellant's petition for rehearing should be granted and his convictions should be reversed.

Respectfully submitted,

Robert M. Pachak

Robert M. Pachak
Appellate Defender

This 2nd day of May, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRIAN K SPEARS,

APPELLANT

APPELLATE CASE NO. 2010-162287

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Brendan J. McDonald, Esquire, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 2nd day of May, 2013.

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 2nd day
of May, 2013.

Robert M. Pachak (L.S.)
Notary Public for South Carolina

My Commission Expires: July 24, 2022.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman Jr., Circuit Court Judge

Appellate Case No. 2010-162287

THE STATE,

RESPONDENT,

V.

BRIAN K. SPEARS,

APPELLANT

PETITION FOR REHEARING *EN BANC*

Comes now Respondent, above named, by and through the Attorney General of South Carolina, and pursuant to Rule 221(a), SCACR, hereby respectfully petitions this Court for rehearing *en banc*.

INTRODUCTION

On May 27, 2007, gunfire rang out near the intersection of 11th Ave. North and Ocean Boulevard in Myrtle Beach resulting in the death of Aaron Hammonds ("Victim") and the wounding of Krystal Fowler, Lasheika Felton and Dajuan Monroe. (R. 50, 74-75, 134-45, 89, 107). Appellant, Brian "Bos" Spears ("Appellant") was subsequently indicted on one count of Murder and three counts of Assault and Battery with Intent to Kill ("ABWIK"). (#2007-GS-26-3387, #2007-GS-26-3388, #2007-GS-26-3389, #2007-GS-26-3390). On May 10, 2010, Appellant's case was called to trial before the Honorable Larry B. Hyman, Jr. and a jury. (R. 8).

At trial, Appellant was represented by Barbara Pratt, while the State was represented by Assistant Solicitors Donna Elder and Lawrence Filiberto. (R. 1). Three days later, on May 13, 2010, Appellant was convicted of all charges and sentenced to thirty (30) years on the murder charge along with twenty (20) years concurrent on each ABWIK charge. (R. 571-72, 575).

Following his conviction, Appellant, represented by Robert M. Pachak, sought review in this Court contending “the trial court erred in admitting evidence that appellant shot the victim about a month prior to the shooting death for which appellant was on trial because it was unfairly prejudicial under Rule 403, SCRE[.]” Br. of App. at 3. In response, the State argued: (1) Appellant’s argument was “not preserved for appellate review as trial counsel argued a completely different rationale for exclusion of the evidence at issue during trial,” and (2) even if the argument was preserved, the record demonstrates the evidence was admissible under Rule 403. Br. of Resp. at 11; Br. of Resp. at 14.

Ruling on the issue, the appellate panel issued a published opinion remanding the case to the trial court because of its “*failure to conduct a Rule 403 balancing test* to determine if the probative value of the prior shooting testimony is substantially outweighed by the danger of unfair prejudice to Spears[.]” State v. Spears, Op. No. 5119 (Ct. App. filed April 17, 2013) (emphasis added). The State now seeks rehearing *en banc* as the panel clearly overlooked or misapprehended the State’s preservation argument and in so doing, turned a blind-eye to South Carolina’s preservation rules, ignoring decades of precedent, all of which require, at a minimum, *that an issue be both raised to and ruled upon by the trial court in order to preserve the issue for appellate review*. See Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640 (2011) (“At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge.”); I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724

(2000) (holding South Carolina's preservation rules require "that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments."); Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). The State further seeks rehearing as the appellate panel, after finding error in the trial court's failure to conduct a Rule 403 analysis, overlooked the fact that it was required by the standard of review to determine whether such an error was prejudicial. See State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003) ("A trial judge's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant."); see also Synder's Auto World, Inc. v. George Coleman Motor Co., Inc., 315 S.C. 183, 186, 434 S.E.2d 310, 312 (Ct. App. 1993) ("The burden is on the Appellant to show not only error, but also prejudice.").

BACKGROUND

On May 26, 2007, "Appellant," 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 (R. 213-14, 468-69). Upon arriving in Myrtle Beach that night, Appellant's group, who had not made arrangements for a place to stay, parked their car at a nearby K-Mart and proceeded to Ocean Boulevard. (R. 215). Once they were on Ocean Boulevard, Appellant's group was joined by Jeffrey "Bird" Bethea, who, like Appellant and Nathaniel Douglas, was from Lumberton and was a member of 41-Curve. (R. 289-90). At the time of the incident, Appellant was wearing a red t-shirt along with a black and red New

¹ Ishmael "Ish" Douglas is also known as Wa-Gee. (R. 214).

² Appellant, along with June, was a member of 41-Curve, a Lumberton gang affiliated with Gangster Disciples and Folk Nation. (R. 192-93, 206, 207, 278-79, 283, 357, 486).

York Yankees hat, while fellow gang member Nathaniel Douglas, was wearing a red O.J. Simpson jersey.³ (App. 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. (App. 295-96, 441, 297, 298).

Shortly after Bethea's arrival, a member of Appellant's group stated they observed Victim, a high-ranking member of Lumberton's East Side Bloods who was previously implicated in the murder of fellow 41-Curve member Eric Floyd, walking down Ocean Boulevard.⁴ (App. 365, 273-75, 290-91, 572). After seeing Victim, Appellant's group looked on as Lemark Irons, another East Side Blood, crossed Ocean Boulevard, approached Appellant's group, and complimented them on their clothes and jewelry stating "we need to stop beefing and get money together." (R. 195-96, 197-98, 271, 273, 277, 279-81, 301). Irons, whose right arm was in a sling, then attempted to shake Bethea's hand with his left hand, which Nathaniel Douglas would later explain, was considered a sign of disrespect. (R. 301). In response to Irons' gesture, Bethea slapped Irons' hand and began cursing at him. (R. 219, 230). Irons then left the group and crossed Ocean Boulevard once again joining Victim and others on the opposite side of the street. (R. 219, 115-16).

Immediately after the initial altercation, Bethea, who was a high-ranking 41-Curve member, became angry and began talking to Appellant who was a foot soldier in the gang and did not get along with Victim. (R. 208, 358, 220, 228, 365-67). Specifically, Appellant expressed to Bethea his belief that Irons and his group, which included Victim, were going to kill

³ Danyell Hammonds, who was Victim's younger sister and lived with him, would later testify that her brother was a Blood and that Bloods wear red. (R. 197-98). However, Danyell Hammonds further explained that when gang members would "go to do something" they would wear opposite colors. (R. 279-80). Additionally, Appellant's former cellmate in the detention center, Timothy Smith, testified that Appellant told him he received a phone call saying Victim was in Myrtle Beach for bike week prompting Appellant and his friends to come to Myrtle Beach. (R. 426-27).

⁴ Eric Floyd was also known as "G-Black" or "Turk." (R. 193).

someone in Appellant's group, unless Appellant and Bethea killed someone from Irons and Victim's group first. (R. 365-66). Following this conversation, a shooting occurred resulting in Victim's death. (R. 121-29, 134-36). In addition, three bystanders were wounded. (R. 50, 74-75, 89, 107).

At trial, the State proceeded under the theory that either Appellant or Bethea shot Victim to avenge Eric Floyd's death. (R. 12-15, 43-44). To that end, the State proffered testimony from Victim's sister, Danyell Hammonds ("Danyell") that approximately one month before Victim was fatally shot, Appellant had shot and grazed Victim outside of a Wal-Mart in Lumberton.⁵ (R. 141-43). Specifically, in her proffer, Danyell explained that "around midnight" Victim and Lemark Irons came into the house and went straight to her room where she observed wet blood on Victim's shirt. (R. 146, 142). She then asked Victim what happened. (R. 142). Victim, who Danyell described as "shocked[,]," explained he had just been shot at Wal-Mart. (R. 147, 142). Danyell then asked Victim who had shot him. (R. 142). In response, Victim told Danyell that Appellant had shot him and further informed her that he and Appellant did not get along. (R. 142). Danyell, who was studying to be a nurse at the time, further testified in the proffer that she believed the shooting had just occurred because Victim had blood on his hand and the blood was still wet. (R. 145, 142-43).

Additionally, Danyell testified during the proffer that: (1) Victim was an East Side Blood (R. 143); (2) Appellant was a member of 41-Curve (R. 143); (3) Victim was previously "locked up" for his role in the murder of Eric Floyd (R. 144); (4) Floyd was also a member of 41-Curve

⁵ Prior to trial, defense counsel made a motion *in limine* regarding the Wal-Mart incident arguing it was inadmissible hearsay and the video taken from the Lumberton Wal-Mart "cannot identify that it was my client." (R. 14-15). Notably, defense counsel, in her pre-trial motions, *never argued that the Wal-Mart incident was inadmissible under Rule 403, SCRE*. Rather, the only pre-trial, Rule 403 objection raised by defense counsel was whether the State could refer to the gang element of the crime. (R. 9) ("I believe that any introduction of gang evidence would be more prejudicial than probative under Rule 403."); see also R. at 10-11.

(R. 144); (5) Victim was released from custody approximately one month before the Wal-Mart shooting (R. 144); and (6) a group of 41-Curve members, including Nathaniel Douglas, had recently told her that they were going to get Victim. (R. 154-155).

Following the proffer, the State argued Victim's statement to his sister identifying the shooter was admissible as an excited utterance. (R. 161). Meanwhile defense counsel argued Danyell's testimony regarding the Wal-Mart shooting was inadmissible hearsay. (R. 158). Additionally, defense counsel maintained:

It's a 4(B) (sic) issue; my client has not been convicted of it. It's a prior bad act. It's not clear and convincing evidence of his guilt of it. There is a video, but you can't identify my client in it so I have a lot of problems as far as that, and put those together and taking it together with the whole more prejudicial than probative thing you've got my argument.

(R. 159-60). The State then responded arguing Danyell's testimony regarding the prior shooting was admissible as an excited utterance; the prior bad act was admissible under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) and they would proffer the Wal-Mart video which would show the shooting occurred after midnight on April 17, 2007. (R. 160, 165-66). After continued discussion, the trial court recessed for the day and instructed counsel to research the issue overnight and argument would continue on the objections the next day. (R. 168-69).

The next morning, during additional argument on the issue, defense counsel, when asked by the trial court if she had anything further, stated:

I would just reiterate my 403 argument from yesterday as well with it being a clear and convincing standard if the court looks at that rather than simply a statement, ball statement like what's coming out here and we do not have a conviction and we do not have his face on the video and we don't have a witness that's going to say it was him[.]

(R. 182).

Responding to defense counsel's argument, the State first noted the clear and convincing evidence standard applied only to evidence admitted pursuant to Rule 404(b), SCRE, but maintained that because they were initially seeking admission under an excited utterance theory, Rule 404(b)'s clear and convincing evidence standard did not apply. (R. 182). After the State noted this distinction, the trial court observed that the proffered testimony may also need to be analyzed under Rule 404(b), SCRE. (R. 183). Following this comment, the trial court ruled that the statement made by Victim to his sister regarding the identity of the Wal-Mart shooter was admissible as an excited utterance.⁶ (R. 183-84). Defense counsel again responded stating, "I understand that you've ruled, I would just like to say something that just occurred to me that I just think maybe we need to look at that video before that testimony happens." (R. 184). Continuing, defense counsel noted her belief that the video would show Victim punched the shooter which counsel believed could affect whether the statement was an excited utterance. (R. 184). The trial court then asked the State to play the video from the Wal-Mart shooting. (R. 185).

After reviewing the video, the State proffered additional photographs showing the time stamp on the video and proffered an incident report which noted the date and time at which the incident occurred. (R. 186). The trial court then questioned the State on its' intent in offering the additional proffers. (R. 186). Responding to the trial court's inquiry, the State explained that it was offering the additional proffer as evidence of the prior bad act and stated the entire event went to "motive and intent[.]" (R. 186). Continuing, the State further argued the evidence was "certainly relevant to the charges [Appellant] is facing." (R. 186). Finally, the State noted that

⁶ Appellant did not appeal from the trial court's ruling on this issue thereby making it law of the case. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling, right or wrong, becomes the law of the case).

outside of Lyle, the evidence at issue was admissible pursuant to the excited utterance exception. (R. 187).

Defense counsel then reiterated that under Lyle there must be clear and convincing evidence of the prior bad act. (R. 187). The trial court responded by finding the prior bad act was proven by clear and convincing evidence.⁷ (R. 187). At no point did defense counsel ever argue that *the admission of the prior bad act evidence required a Rule 403, SCRE balancing test*. Likewise, defense counsel *never argued the prejudicial effect of the Wal-Mart incident substantially outweighed its probative value on the basis of being improper propensity evidence*.

ARGUMENTS

- I. The appellate panel overlooked or misapprehended the State's preservation argument, and South Carolina's preservation requirement, when it found the trial court erred in failing to conduct an on-the-record, Rule 403 balancing test

In the statement of issues on appeal, Appellant argued the trial court erred in admitting Danyell's testimony that Appellant shot Victim approximately one month before Victim's murder claiming the testimony was unfairly prejudicial under Rule 403, SCRE. Br. of App. p. 3. Within his brief, Appellant elaborated on this argument reasoning the evidence was unfairly prejudicial because the jury could have concluded, "if appellant shot the victim once, he must also be the one who shot him a second time." Br. of App. p. 6. Near the conclusion of his brief, Appellant changed course noting the trial court "failed to conduct a balancing test to determine whether the probative value of the prior bad act substantially outweighed its prejudicial effect." Br. of App. p. 7.

⁷ Appellant also did not appeal whether evidence of the Wal-Mart incident was admissible under Rule 404(b), SCRE or whether the Wal-Mart incident was proven by clear and convincing evidence meaning these issues, like the excited utterance ruling, are law of the case. See M.L.-Lee Acquisition Fund, L.P., 327 S.C. at 241, 489 S.E.2d at 472 (holding an unappealed ruling, right or wrong, becomes law of the case).

In response, the State argued Appellant's claims that the trial court erred in terms of the application of Rule 403 were not preserved because defense counsel never registered a contemporaneous Rule 403 objection on the basis of propensity (i.e. that the prejudicial effect of the Wal-Mart incident substantially outweighed its probative value because it was improper propensity evidence), and even if it did, the trial court never ruled upon such an objection. Br. of Resp. at 13-14. Similarly, in addressing Appellant's contention that the trial court failed to conduct a Rule 403 analysis, the State noted defense counsel never requested such a ruling, and even if it did, never argued the trial court was *required* to do so after analyzing the issue under Rule 404(b), SCRE, meaning the trial court could not have ruled on such an argument. Br. of Resp. at 12. Accordingly, the State reasoned that because defense counsel failed to present these arguments to the trial court, but instead argued them for the first time on appeal, the issues were not preserved for appellate review. Br. of Resp. at 12-14.

In its ruling, the appellate panel neglected to address the State's preservation argument, further characterized Appellant's argument as a claim that the trial court erred in failing to conduct a Rule 403 analysis, and remanded the case to the trial court to consider the propensity argument that Appellant advanced, for the first time, in his appeal. See State v. Spears, Op. No. 5119 (Ct. App. filed April 17, 2013). In so holding, the State submits the appellate panel, by failing to even address the State's preservation argument, or explain its rationale for doing so, clearly overlooked or misapprehended such an argument, and in reaching the underlying issue, ignored South Carolina precedent requiring an argument to be both raised to and ruled upon by the trial court in order to preserve the question for appellate review.

Applicable Law

In I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000), the Supreme Court of South Carolina explained the rationale supporting its' strict preservation rules stating, the "preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered *all relevant facts, law, and arguments*." 338 S.C. at 422, 526 S.E.2d at 724 (emphasis added). Elaborating, the I'On Court found, "the requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve - intentionally or by chance - in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." Id.

This proposition was reaffirmed in Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011) when the Supreme Court further stated, "[i]ssue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." 395 S.C. at 465, 719 S.E.2d at 642 (quoting Queen's Grant II Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)). In Herron, the South Carolina Supreme Court, on remand from the Supreme Court of the United States, who vacated its' previous decision, declined to reach a federal preemption question because "the matter of preemption was not preserved in the South Carolina proceedings." Id. at 465, 719 S.E.2d at 642. Continuing, the Herron Court wrote, "the question Appellant presented to the United States Supreme Court, namely whether the [Federal Arbitration Act] preempted our state's legislative policy as set forth in the Dealers Act, was raised neither to the trial court nor to our Court." Id. at 469, 719 S.E.2d at 644. Continuing, the Herron Court opined:

We are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner. Yet, because Appellant can point to no instance where preemption was properly raised or ruled upon, to disregard our issue preservation rules under these circumstances would render them

meaningless. As this Court observed, issue preservation rules prevent [] a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via reversal, give him another opportunity to prove his case.

Id. at 470, 719 S.E.2d at 644-45 (internal quotations omitted) (internal citation omitted).

Thus, both I'On and Herron make it clear that South Carolina's preservation requirement exists to serve essentially two functions: (1) to require parties to thoroughly research and prepare their case by contemplating their respective legal positions; I'On, 338 S.C. at 422, 526 S.E.2d at 724, and (2) to ensure trial courts and their respective judgments are not reversed for reasons which were never presented to them. Herron, 395 S.C. at 465, 719 S.E.2d at 642. Implicit in both of these positions is the underlying theme of judicial economy, that is, an appellant should not get a second bite at the apple (i.e. a new trial) when, at trial, he simply failed make the argument that is the basis for a potential reversal on appeal. I'On, 338 S.C. at 422, 526 S.E.2d at 724; Herron, 395 S.C. at 470, 719 S.E.2d at 644-45.

Analysis

Understanding the policy behind South Carolina's preservation requirement, the State submits that if the appellate panel's ruling goes undisturbed, Appellant will have the opportunity to utilize the "ace card" from I'On and Herron—in this case the trial court's failure to conduct an on-the record Rule 403-balancing test, an issue which was never mentioned to the trial court—and, via a remand, receive another opportunity to argue against the admission of evidence on a completely different theory than that which was first advanced at trial. This is clearly at odds with South Carolina law since I'On explains the argument presented on appeal, must be first raised to and ruled upon by the trial court. See I'On, 338 S.C. at 422, 526 S.E.2d at 724 ("[The] preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered *all relevant facts, law, and arguments.*") (emphasis added). Thus, because

both the legal issue which constitutes the basis for the remand along with the issue which is to be considered on remand were not preserved for appellate review, the appellate panel overlooked or misapprehended South Carolina law when it found the trial court erred and remanded the case for further proceedings.

A. Defense Counsel's Failure to Object, and the Trial Court's Failure to Rule on Whether Admission of Rule 404(b) Evidence Requires an on-the Record, Rule 403 Balancing Test

The record, as detailed above, clearly demonstrates the trial court was never asked to consider whether the admission of the Wal-Mart incident under Rule 404(b), required an on the record, Rule 403 balancing test.⁸ Similarly, defense counsel never objected to the trial court's failure to conduct a Rule 403 balancing test. As a result, the trial court obviously never ruled on such a question. This was acknowledged by the appellate panel who found "it is not implicit or apparent from the record that the trial court considered whether the probative value of the Wal-Mart shooting testimony was substantially outweighed by unfair prejudice." Spears, Op. No. 5119 at 5 (emphasis in original). In fact, this argument was not raised until the argument section of Appellant's brief when, for the first time, appellate counsel stated the trial court, "failed to conduct a balancing test to determine whether the probative value of the prior bad act substantially outweighed its prejudicial effect." Br. of App. p. 7. Thus, because the record, and indeed the appellate panel's opinion, reflects that the argument which is now the basis for the

⁸ Furthermore, the State notes this issue, which is now the appellate panel's basis for the remand, was never included in its statement of issues on appeal. See Atlantic Coast Builders and Contractors, LLC v. Lewis, 396 S.C. 323, 331 n.4, 730 S.E.2d 282, 286 n.4 (2012) ("If a question is not presented for our review, we should not answer it no matter how much we may want to do so. For as former Chief Judge Alex Sanders famously wrote, 'appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.'") (quoting Langley v. Boyter, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct.App.1984), quashed on other grounds, 286 S.C. 85, 332 S.E.2d 100 (1985)); see also See Rule 208(b)(1)(B), SCACR, ("[O]rdinarily, no point will be considered which is not set forth in the statement of issues of appeal."); Tobias v. Rice, 379 S.C. 357, 365, 665 S.E.2d 216, 220 (Ct. App. 2008) overruled on other grounds (holding it is error for an appellate court to consider issues not properly raised to it).

remand was never advanced at trial or ruled upon by the trial court, the issue is not preserved.⁹ See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (“It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.”); I’On, 338 S.C. at 422, 526 S.E.2d at 724 (holding an appellant must present both his issues and arguments to the lower court and obtain a ruling before presenting the issues and arguments on appeal); State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) (concluding appellate courts will generally not address an argument unless it was first raised to and ruled upon by the trial court). The State therefore asks this Court to grant rehearing *en banc*, or in the alternative, substitute an opinion affirming Appellant’s conviction and sentence.

B. Defense Counsel’s Failure to Object, and the Trial Court’s Failure to Rule on Whether the Testimony and Evidence Regarding the Wal-Mart Incident was Unfairly Prejudicial Propensity Evidence under Rule 403

Similarly, the record plainly reflects defense counsel never argued the testimony or evidence regarding the Wal-Mart incident constituted unfairly prejudicial propensity evidence under Rule 403. Accordingly, the trial court never ruled on such an issue. In particular, the State notes defense counsel’s rationale for objecting to the admission of the Wal-Mart incident was clearly not related to a concern that the jury would conclude Appellant shot Victim on this occasion, because he had previously shot him a month prior.¹⁰ Rather, the objection was based upon defense counsel’s belief that the prior bad act had not been proven by clear and convincing evidence. Indeed, both opposing counsel and the trial court clearly came away with the same

⁹ The State further notes that because the record is silent as to whether defense counsel was even aware that a Rule 403 balancing test was required pursuant to State v. Wallace, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009) or State v. King, 349 S.C. 142, 156, 561 S.E.2d 640, 647 (Ct. App. 2002) and is further silent as to whether defense counsel thought to object or had a strategic reason for failing to do so, this issue is best resolved in post-conviction relief proceedings.

¹⁰ Such an argument would appear to be more of question regarding improper character evidence under Rule 404(b), SCRE. See e.g., Rule 404(b), SCRE (West 2013) (“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.”).

impression in light of their subsequent responses. Specifically, the State responded to defense counsel's argument stating that the clear and convincing evidence standard only applied to exceptions under Lyle and clarified that the clear and convincing standard did not apply to an excited utterance. (R. 182). Similarly, the trial court indicated, "we may be looking at Lyles (sic) because this is a prior bad act. It may have to come in under that analysis." (R. 183). At no point did the State or the trial court interpret defense counsel's objection as an argument that the prejudicial effect of the Wal-Mart incident substantially outweighed its probative value on the basis of propensity under Rule 403.

Moreover, even if one could argue that defense counsel's "whole more prejudicial than probative thing" objection was an attempt at advancing some sort of Rule 403 concerns, it is abundantly clear defense counsel *never explained why the Wal-Mart incident was unfairly prejudicial* meaning Appellant simply failed to preserve the argument raised in his appellate brief. See I'On, 338 S.C. at 422, 526 S.E.2d at 724 ("[The] preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered *all relevant facts, law, and arguments.*") (emphasis added). In particular, the word "propensity" *never appears in any of defense counsel's objections related to the Wal-Mart incident*. In fact, in order to address the issue under I'On's preservation rules, one would have to assume, "the whole more prejudicial than probative thing" was an argument that the Wal-Mart incident was unfairly prejudicial because it was allegedly improper propensity evidence.¹¹ However, there is simply no support for such an assertion in the record. Therefore, the State submits this issue would be

¹¹ See e.g. State v. Smith, 391 S.C. 353, 362, 705 S.E.2d 491, 496 (Ct. App. 2011) ("Under Rule 403, the trial judge must determine whether the logical connection articulated by the State is sufficiently strong that the probative value found in the connection is not substantially outweighed by the tendency of the evidence to show propensity, or by some other form of unfair prejudice. If the trial judge determines not to exclude the evidence under this Rule 403 analysis, then the State may admit it.").

better resolved in post-conviction relief where defense counsel could explain the purpose of her objection and the legal theory behind it.

Finally, even if one could assume defense counsel's objection of "the whole more prejudicial than probative thing" was an argument that the prejudicial effect of the Wal-Mart incident substantially outweighed its probative value on the basis of being improper propensity evidence, it is clear the trial court failed to rule on such an argument. . Indeed, as described above, the trial court interpreted defense counsel's objection as being premised upon the State's purported failure to prove the Wal-Mart incident by clear and convincing evidence.¹² In fact, the appellate panel actually agreed there was no Rule 403 ruling at all finding, "it is not implicit or apparent from the record that the trial court considered whether the probative value of the Wal-Mart shooting testimony was substantially outweighed by unfair prejudice." Spears, Op. No. 5119 at 5 (emphasis in original). Therefore, because the record clearly shows the argument which was included in Appellant's statement of issues on appeal was never raised to or ruled upon by the trial court, and if not revisited would be the subject considered on remand, the State asks this Court to grant its petition for rehearing *en banc*, or in the alternative, substitute an opinion affirming Appellant's conviction and sentence.

- II. Even if defense counsel somehow preserved the argument that the trial court erred in failing to conduct an on the record, Rule 403 balancing test, and the trial court erred in failing to do so, the appellate panel overlooked the fact that it was required to determine whether such an error was prejudicial, and had it done so, would have determined the admission of the Wal-Mart incident was not prejudicial and therefore, not an abuse of discretion

The State submits the evidence regarding Appellant's prior bad act is admissible pursuant to Rule 403, SCRE and, as a result, even if the trial court's failure to conduct an on the record

¹² See Rule 404(b), SCRE Notes (West 2013) ("The rule does not set forth the burden of proof required for the admission of bad acts not the subject of a conviction and, therefore, case law would control.") (citing State v. Smith, 300 S.C. 216, 387 S.E.2d 245 (1989) (explaining that in criminal cases evidence of other crimes or bad acts must be clear and convincing if the acts are not the subject of a conviction)).

balancing test is error, such an error is not prejudicial meaning the admission of the evidence was not an abuse of discretion.¹³ See State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003) (“A trial judge’s ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant.”); see also Snyder’s Auto World, Inc. v. George Coleman Motor Co., Inc., 315 S.C. 183, 186, 434 S.E.2d 310, 312 (Ct. App. 1993) (“The burden is on the Appellant to show not only error, but also prejudice.”). As explained above, it is not enough to show the trial court erred in admitting evidence, rather, the Appellant must also show that the admission of such evidence is prejudicial and therefore an abuse of discretion. Id. In this case, the appellate panel overlooked the fact Appellant was required to show not just error, but prejudicial error under Adams. Indeed, a review of the appellate panel’s opinion confirms it failed to consider whether the trial court’s purported error was prejudicial as the standard of review requires. See Spears, Op. No. 5119 at 5 (“Having determined that the trial court erred by failing to conduct an on-the-record Rule 403 balancing test, we must next determine the proper remedy.”). Thus, because the record shows the evidence of the Wal-Mart incident was admissible, any error by the trial court in failing to conduct a Rule 403 analysis on the record is not prejudicial. As such, the State now seeks rehearing *en banc*, or in the alternative, asks for a substituted opinion explaining the trial court’s failure to conduct a Rule 403 analysis was not prejudicial.

¹³ While the State recognizes the appellate panel determined a remand was the appropriate remedy for the trial court’s failure to conduct an on the record, Rule 403 analysis, the State questions whether this is consistent with the standard of review. See e.g. State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003) (“A trial judge’s ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant.”); see also Snyder’s Auto World, Inc. v. George Coleman Motor Co., Inc., 315 S.C. 183, 186, 434 S.E.2d 310, 312 (Ct. App. 1993) (“The burden is on the Appellant to show not only error, but also prejudice.”). In particular, because Adams explains the abuse of discretion standard requires that an error be prejudicial and under Snyder’s Auto World, Inc., the Appellant has the burden of demonstrating prejudice, it seems a reviewing court must first determine whether Appellant has shown prejudice prior to contemplating what remedy, if any, is needed. Understanding this, the appellate panel’s determination that a remand is the proper remedy for an error that was never determined to be prejudicial would seem to be at odds with the abuse of discretion standard of review.

Applicable Law

“Evidence is relevant and admissible if it tends to establish or make more or less probable the matter in controversy.” Wiles, 383 S.C. at 157-58, 679 S.E.2d at 175-76. Furthermore, “evidence of other crimes, wrongs, or acts is generally not admissible to prove the character of a person in order to show action in conformity therewith; however, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.” Wiles, 383 S.C. at 158, 679 S.E.2d at 176 (internal quotations omitted) (citing Rule 404(b), SCRE). Additionally, evidence which is “logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused’s guilt of another crime.” Id.

Nevertheless, otherwise admissible evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]” Rule 403, SCRE. Pursuant to Rule 403, SCRE, “the trial judge must determine whether the logical connection articulated by the State is sufficiently strong that the probative value found in the connection is not substantially outweighed by the tendency of the evidence to show propensity, or by some other form of unfair prejudice.” Smith, 391 S.C. at 362, 705 S.E.2d at 496. “Unfair prejudice means an undue tendency to suggest decision on an improper basis” Wiles, 383 S.C. at 158, 679 S.E.2d at 176 and “[t]he determination of the prejudicial effect of the challenged evidence must be based on the entire record, and the result will generally turn on the facts of each case.” State v. Holder, 382 S.C. 278, 293, 676 S.E.2d 690, 698 (2009).

Discussion

- A. Evidence of the Wal-Mart Incident is Extremely Probative as it Establishes Appellant’s Motive for the Shooting in the Present Case as well as his Intent when he Fired the Weapon

Here, because the testimony, along with the supporting video and incident report, all prove the prior shooting by clear and convincing evidence and establish Appellant's motive and intent in the current action—exacting revenge on Victim for his role in Eric Floyd's death, the evidence at issue is extremely probative. See State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (concluding evidence which is logically relevant to establish a material element of the offense charged should not be excluded simply because it reveals that the defendant is guilty of another crime). In fact, in a homicide prosecution, evidence which relates to previous quarrels, ill feelings or hostile acts between the parties is admissible under the common law, a fact which underscores the probative value of evidence relating to motive and intent.¹⁴

In particular, in State v. Clinkscales, 231 S.C. 650, 654-55, 99 S.E.2d 663, 665 (1957) the Supreme Court of South Carolina affirmed the trial court's admission of evidence indicating the appellant had previously shot the victim six or seven weeks prior as it was probative of animus. The same is true in State v. Williams, 321 S.C. 327, 336, 468 S.E.2d 626, 631 (1996) where the Supreme Court of South Carolina explained evidence of marital difficulties, including loud altercations and controversial conversations between the appellant and his wife, who he was accused of murdering, were admissible to show "that animus probably existed at the time of the homicide." Likewise, in State v. Braxton, 343 S.C. 629, 636, 541 S.E.2d 833, 836-37 (2001) the Supreme Court of South Carolina determined that a previous encounter between the victim and

¹⁴ See State v. Braxton, 343 S.C. 629, 636, 541 S.E.2d 833, 836-37 (2001) ("In homicide cases, evidence of previous quarrels and ill feelings or hostile acts between parties is admissible to show that animus probably existed between the parties at the time of the homicide."); State v. Williams, 321 S.C. 327, 336, 468 S.E.2d 626, 631 (1996) ("[E]vidence of previous quarrels and ill feelings or hostile acts between parties is admissible to show that animus probably existed between the parties at the time of the homicide."); State v. Clinkscales, 231 S.C. 650, 654-55, 99 S.E.2d 663, 665 (1957) ("[I]t is well settled that in assault and battery and homicide cases, evidence that the accused and prosecuting witness or the deceased had a previous difficulty is admissible . . ."); State v. Brooks, 79 S.C. 144, - , 60 S.E. 518, 518 (1908); see also Blakely v. State, 360 S.C. 636, 639, 602 S.E.2d 758, 759 (2004) ("It is well-settled that evidence of previous threats by the defendant is admissible to show malice."); State v. Alford, 264, S.C. 26, 33, 212, S.E.2d 252, 254 (1975) (holding previous threats made against the companion of the victim at the time of assault is also admissible as evidence of malice).

the appellant, which demonstrated the victim was scared of the appellant, was admissible as evidence of the relationship between the parties. Thus, it seems clear that evidence regarding Appellant's motive for the shooting and his intent when he fired the weapon—malice—is obviously extremely probative.

B. The Prejudicial Effect of the Wal-Mart Incident does not Substantially Outweigh its Probative Value

Additionally, because evidence of the Wal-Mart Incident was only admitted for the purpose of proving motive and intent (R. 186-87); was only argued as being evidence of motive and intent (R. 43, 44, 533); and the jury, which is presumed to follow the law,¹⁵ was instructed that the evidence was only admissible pursuant to the Rule 404(b) exceptions and could not be used as character evidence (R. 548); the prejudicial effect of the admission of the Wal-Mart incident did not substantially outweigh its probative value.

Specifically, the State never attempted to cast the evidence now at issue as propensity evidence, but instead presented a theory that the shooting was a revenge killing making it unlikely the jury would have utilized the Wal-Mart incident as propensity evidence. This is most apparent in opening and closing arguments where the State emphasized Appellant was seeking revenge for Floyd's death. (R. 43, 44, 533, 534). Therefore, combining this with the fact the jury was instructed that the evidence related to the Wal-Mart incident could only be admitted pursuant to the Rule 404(b) exceptions and not as character evidence, the risk of unfair prejudice is *de minimus*. (R. 548). This is especially true since the jury took an oath to follow the law and, under South Carolina law, are presumed to do so as detailed in Foye.

¹⁵ See State v. Dunlap, 346 S.C. 312, 319, 550 S.E.2d 889, 893 (Ct. App. 2001), aff'd as modified on writ of cert., 353 S.C. 539, 579 S.E.2d 318 (2003) (quoting Foye v. State, 335 S.C. 586, 590 n.1, 518 S.E.2d 265, 267 n. 1 (1999) ("A jury is presumed to [have followed the trial judge's] instructions.")).

Moreover, while Appellant maintains the jury could have concluded, “if appellant shot the victim once, he must also be the one who shot him a second time” both the law and the record refute such a position. In support of this proposition, Appellant cites to State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984). In Gore, the South Carolina Supreme Court reversed a voluntary manslaughter and arson conviction in which appellant burnt down a trailer containing his ex-girlfriend when the State cross-examined appellant on a previous incident which was strikingly similar to the charged offense. 283 S.C. at 119-21, 322 S.E.2d at 12-13. However, despite reversing appellant’s convictions, the Gore Court clearly noted in footnote one, that had the prior bad act been proven, the evidence of the prior misconduct could have been admissible under a Lyle exception. See Gore, 283 S.C. at 121 n.1, 322 S.E.2d at 13 n.1 (“If provable, evidence of this prior misconduct could have been admissible under Lyle to show motive or common scheme or plan. However, the State properly concedes that the proof was insufficient to connect appellant to the setting of the previous trailer fire.”).

In Appellant’s case, unlike Gore, the State indisputably established motive and intent pursuant to Rule 404(b), SCRE, by clear and convincing evidence. (R. 187). Additionally, because Appellant failed to appeal from the 404(b) ruling, it is law of the case. Thus, while it is true the evidence may be prejudicial to Appellant in that it makes it more likely that Appellant shot Victim, such prejudice is not “unfair prejudice” as the prior bad act was proven consistent with the requirements of Rule 404(b), SCRE. (R. 187).

Similarly, any prejudice which may exist as a result of the admission of the prior shooting does not substantially outweigh its probative value. Specifically, the same motive that existed during the prior shooting—revenge—still existed when Appellant fired and fatally shot Victim in Myrtle Beach. The same can be said for Appellant’s intent, he obviously wanted to kill Victim

the first time he shot him and nothing within the record demonstrated that this changed within the month prior to the second shooting. To the contrary, the record clearly reflects that many members of 41-Curve wanted revenge against Victim. This was expressed throughout the record, including Appellant's co-defendant Nathaniel Douglas' statement to Danyell Hammonds that he and his fellow 41-Curve members were going to get Victim. (R. 154-55). In fact, this was evident even in the minutes leading up to the shooting where Bethea, Appellant's co-defendant, got into an argument with Irons after Irons suggested the two groups "stop beefing and get money together." (R. 219). In response, Appellant and Bethea, rather than shaking Irons' hand and calling an end to the violence, promptly walked across the street to kill them. (R. 365-66).

In light of these facts, the State submits that because Appellant is required to prove the trial court's error was prejudicial and under the standard of review, the appellate court is required to make such a determination, the appellate panel, by failing to consider whether the failure to conduct a Rule 403 analysis was prejudicial, clearly erred. Therefore, the appellate panel, by failing to consider the requirements of the standard of review, clearly overlooked or misapprehended South Carolina law. Accordingly, rehearing *en banc* is warranted, especially since the record conclusively shows Appellant was not prejudiced by the trial court's failure to conduct a Rule 403 analysis. Indeed, as detailed above, there is simply no risk the jury would have construed the Wal-Mart incident as propensity evidence when it was not offered as such and the jury was instructed it could not consider the evidence as evidence of Appellant's character.

CONCLUSION

For the aforementioned reasons, the State respectfully requests rehearing *en banc* to: (1) correct the appellate panel's misapprehension of South Carolina's preservation requirement and (2) to address the appellate panel's failure to determine whether the trial court's error in not conducting a Rule 403 analysis was prejudicial as is required under the standard of review. In the alternative, the State asks this Court to substitute an opinion consistent with the concerns addressed above.

Respectfully Submitted,

ALAN WILSON
Attorney General

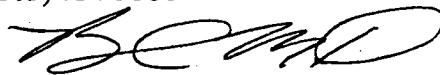
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Brendan J. McDonald
ATTORNEY(S) FOR RESPONDENTS

April 26, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2010-162287

THE STATE,

RESPONDENT,

v.

BRIAN SPEARS,

APPELLANT

PROOF OF SERVICE

I, Brendan McDonald, counsel for the Respondent, certify that I have served the within *Petition for Rehearing*, on Appellant by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record:

Robert M. Pachak, Esq.
SCCID/Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 26th day of April, 2013.


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ATTORNEY FOR RESPONDENT

April 26, 2013.

The South Carolina Court of Appeals

The State, Respondent,

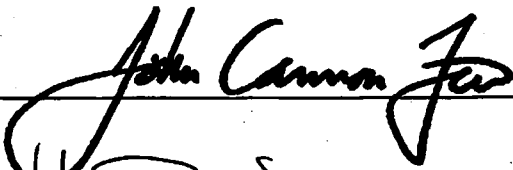
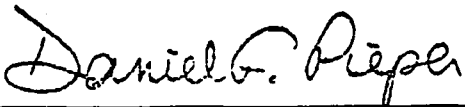
v.

Brian K. Spears, Appellant.

Appellate Case No. 2010-162287

ORDER

Respondent filed a petition for rehearing on April 26, 2013. Appellant filed a petition for rehearing on May 2, 2013. After careful consideration of each party's petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, Appellant's petition for rehearing and Respondent's petition for rehearing are denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:

Brendan Jackson McDonald

Robert M. Pachak

Larry B. Hyman, Jr.

FILED

June 14, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5119 (S.C. Ct. App. filed 4/17/2013)
07-GS-26-3387, 3388, 3389, 3390

THE STATE,

PETITIONER/RESPONDENT,

v.

BRIAN K. SPEARS,

RESPONDENT/PETITIONER

APPELLATE CASE NO. 2010-162287

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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INDEX

INDEX.....	1
CERTIFICATE OF COUNSEL.....	2
QUESTION PRESENTED	3
STATEMENT OF THE CASE.....	4
ARGUMENT	5
CONCLUSION	7

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on June 14, 2013.

QUESTION PRESENTED

Whether the Court of Appeals erred in remanding petitioner's case for the trial court to conduct a balancing test under Rule 403, SCRE on the admissibility of a prior bad act when the Court of Appeals already made a determination that the error was not harmless?

STATEMENT OF THE CASE

Petitioner was convicted of murder and three (3) counts of assault and battery with intent to kill after a jury trial held before the Honorable Larry B. Hyman, Jr., on May 10 – 13, 2010, in Horry County. A sentence of thirty (30) years was imposed for murder and twenty (20) year sentences were imposed on the remaining charges.

Petitioner appealed his convictions and submitted a final brief on September 12, 2011. Respondent submitted its final brief on September 12, 2011. Oral argument was heard in the Court of Appeals on January 17, 2013. On April 17, 2013, the court issued an opinion remanding the case to the trial court for it to conduct an on-the-record balancing test under Rule 403, SCRE to determine whether the probative value of the prior bad act of a shooting was substantially outweighed by the danger of unfair prejudice.

On April 26, 2013, respondent filed a petition for rehearing. On May 2, 2013, petitioner filed a petition for rehearing. Both petitions for rehearing were denied on June 14, 2013.

This petition for writ of certiorari follows.

ARGUMENT

The Court of Appeals erred in remanding petitioner's case for the trial court to conduct a balancing test under Rule 403, SCRE on the admissibility of a prior bad act when the Court of Appeals already made a determination that the error was not harmless.

The argument on direct appeal was that the trial court erred in admitting evidence that appellant shot the victim about a month prior to the shooting death for which appellant was on trial because it was unfairly prejudicial under Rule 403, SCRE. (BOA p. 5).

The victim was shot and killed in Myrtle Beach while he was visiting there with some of the gang members he was with from Lumberton, North Carolina. Appellant, Jeffrey Bethea, and Nathaniel Douglas were in a rival gang also from Lumberton and they, too, were visiting in Myrtle Beach. No one was really quite sure who did the shooting. The police made a composite of the suspected shooter that resembled Jeffrey Bethea. Nathan Douglas testified for the State and implicated Bethea. Bethea testified for the State in exchange for more lenient treatment and implicated appellant. Appellant's defense was the Bethea was the one (1) shooter.

(R. p. 43, line 12 – p. 46, line 21; R. p. 110, line 13 – p. 111, line 11; R. p. 214, lines 2 – 25).

In an effort to prove that appellant was the shooter, the State wanted to put into evidence testimony from the victim's own sister that appellant shot the victim at the Walmart parking lot in Lumberton about a month prior to the shooting in Myrtle Beach. The trial court allowed the solicitor to put on the record that this was evidence of a prior bad act under Rule 404, SCRE. The solicitor failed to specify why the Walmart shooting was admissible under Rule 404(b). Instead, she merely made a rote recitation of all of the exceptions to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) (R. p. 186, line 18 – p. 187, line 14). Counsel has found in the past when a solicitor cannot specify the pertinent exception, the real motive is to prejudice the defendant with the prior bad act.

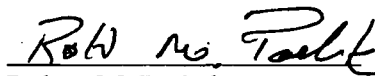
Appellant noted in his brief how the prior bad act was unfairly prejudicial under Rule 403, SCRE as “[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis.” State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146 (1991). A jury in this case could unfairly conclude that if appellant shot the victim once, he must also be the one who shot him a second time. Our case law has taught us that when “the previous alleged bad act is strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced.” State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984).

The Court of Appeals found and concluded that it was “unable to say that the admission of the prior bad act testimony was harmless error.” If the error was not harmless, petitioner’s conviction should be reversed. Remanding the case for a Rule 403, SCRE balancing test would only lead to prejudice and confusion. It makes the trial judge sit in judgment of himself.

CONCLUSION

Petitioner's writ should be granted and his convictions should be reversed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Rob M. Pachak", written over a horizontal line.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR RESPONDENT/PETITIONER.

This 15th day of July, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5119 (S.C. Ct. App. filed 4/17/2013)
07-GS-26-3387, 3388, 3389, 3390

THE STATE,

PETITIONER/RESPONDENT,

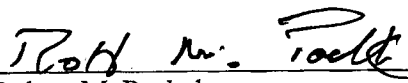
V.

BRIAN K. SPEARS,

RESPONDENT/PETITIONER.

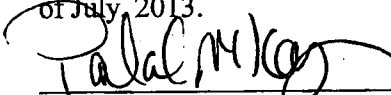
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Brendan J. McDonald, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and the S.C. Court of Appeals, 1015 Sumter Street, Columbia, SC 29201, this 15th day of July, 2013.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR RESPONDENT/ PETITIONER

SWORN TO BEFORE ME this 15th day
of July, 2013.


_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions

Larry B. Hyman Jr., Circuit Court Judge

Opinion No. 5119 (S.C. Ct. App. filed April 17, 2013), Appellate Case No. 2010-162287

THE STATE,

RESPONDENT,

V.

BRIAN K. SPEARS,

PETITIONER.

STATE OF SOUTH CAROLINA'S PETITION FOR WRIT OF CERTIORARI

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ATTORNEY(S) FOR RESPONDENT

INDEX

CERTIFICATE OF COUNSEL.....	ii
TABLE OF AUTHORITIES.....	iii
QUESTIONS PRESENTED.....	iv
STATEMENT OF THE CASE.....	1-2
BACKGROUND.....	3-7
ARGUMENTS.....	7-20
I. <u>The appellate panel erred when it ignored the State's preservation argument, found the trial court erred in failing to conduct an on-the-record, Rule 403 balancing test and then remanded the case to the trial court to rule, for the first time, whether the probative value of evidence indicating Spears shot the victim about a month prior to the shooting death for which he was on trial was substantially outweighed by its risk of unfair prejudice.</u>	7-15
II. <u>Even if defense counsel somehow preserved the argument that the trial court erred in failing to conduct an on the record, Rule 403 balancing test, and the trial court erred in failing to do so, the appellate panel overlooked the fact that it was required to determine whether such an error was prejudicial, and had it done so, would have determined the admission of the Wal-Mart incident was not prejudicial and therefore, not an abuse of discretion.</u>	15-20
CONCLUSION.....	20-21
CERTIFICATE OF SERVICE.....	22

CERTIFICATE OF COUNSEL

Counsel for petitioner, pursuant to Rule 242(d)(1), SCACR, certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals.

TABLE OF AUTHORITIES

Case(s)

<u>Atlantic Coast Builders and Contractors, LLC v. Lewis</u> , 396 S.C. 323, 730 S.E.2d 282 (2012).....	11
<u>Blakely v. State</u> , 360 S.C. 636, 602 S.E.2d 758 (2004).....	17
<u>Foye v. State</u> , 335 S.C. 586, 518 S.E.2d 265 (1999).....	18
<u>Herron v. Century BMW</u> , 395 S.C. 461, 719 S.E.2d 640 (2011).....	2
<u>I'On, L.L.C. v. Town of Mt. Pleasant</u> , 338 S.C. 406, 526 S.E.2d 716 (2000).....	2
<u>Langley v. Boyter</u> , 284 S.C. 162, 325 S.E.2d 550 (Ct. App. 1984).....	11
<u>ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche</u> , 327 S.C. 238, 489 S.E.2d 470 (1997).....	6
<u>Queen's Grant II Prop. Regime v. Greenwood Dev. Corp.</u> , 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006).....	9
<u>Snyder's Auto World, Inc. v. George Coleman Motor Co., Inc.</u> , 315 S.C. 183, 434 S.E.2d 310 (Ct. App. 1993).....	2
<u>State v. Adams</u> , 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003).....	2
<u>State v. Alford</u> , 264, S.C. 26, 212, S.E.2d 252 (1975).....	17
<u>State v. Braxton</u> , 343 S.C. 629, 541 S.E.2d 833 (2001).....	17
<u>State v. Brooks</u> , 79 S.C. 144, 60 S.E. 518 (1908).....	17
<u>State v. Clinkscales</u> , 231 S.C. 650, 99 S.E.2d 663 (1957).....	17
<u>State v. Dunlap</u> , 346 S.C. 312, 550 S.E.2d 889 (Ct. App. 2001), <u>aff'd as</u> <u>modified on writ of cert.</u> , 353 S.C. 539, 579 S.E.2d 318 (2003).....	18
<u>State v. Gore</u> , 283 S.C. 118, 322 S.E.2d 12 (1984).....	13
<u>State v. Holder</u> , 382 S.C. 278, 676 S.E.2d 690 (2009).....	17
<u>State v. King</u> , 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002).....	3
<u>State v. Lyle</u> , 125 S.C. 406, 118 S.E. 803 (1923).....	5
<u>State v. Smith</u> , 300 S.C. 216, 387 S.E.2d 245 (1989).....	14

<u>State v. Smith</u> , 391 S.C. 353, 705 S.E.2d 491 (Ct. App. 2011).....	14
<u>State v. Wallace</u> , 384 S.C. 428, 683 S.E.2d 275 (2009).....	12
<u>State v. Wiles</u> , 383 S.C. 151, 679 S.E.2d 172 (2009).....	16
<u>State v. Williams</u> , 303 S.C. 410, 401 S.E.2d 168 (1991).....	12
<u>State v. Williams</u> , 321 S.C. 327, 468 S.E.2d 626 (1996).....	17
<u>Staubes v. City of Folly Beach</u> , 339 S.C. 406, 529 S.E.2d 543 (2000).....	12
<u>Tobias v. Rice</u> , 379 S.C. 357, 665 S.E.2d 216 (Ct. App. 2008).....	11
<u>Wilder Corp. v. Wilke</u> , 330 S.C. 71, 497 S.E.2d 731 (1998).....	2
Rule(s)	
Rule 208(b)(1)(B), SCACR.....	11
Rule 403, SCRE.....	1
Rule 404(b), SCRE.....	6

QUESTIONS PRESENTED

- I. Whether the appellate panel erred when it ignored the State's preservation argument, found the trial court erred in failing to conduct an on-the-record, Rule 403 balancing test and then remanded the case to the trial court to rule, for the first time, whether the probative value of evidence indicating Spears shot the victim about a month prior to the shooting death for which he was on trial was substantially outweighed by its risk of unfair prejudice.
- II. Whether the appellate panel erred when it declined to determine whether the trial court's failure to conduct an on the record Rule 403 balancing test was prejudicial.

STATEMENT OF THE CASE

On May 27, 2007, gunfire rang out near the intersection of 11th Ave. North and Ocean Boulevard in Myrtle Beach resulting in the death of Aaron Hammonds ("Victim") and the wounding of Krystal Fowler, Lasheika Felton and Dajuan Monroe. (R. 50, 74-75, 134-45, 89, 107). Brian "Bos" Spears was subsequently indicted on one count of Murder and three counts of Assault and Battery with Intent to Kill ("ABWIK"). (#2007-GS-26-3387, #2007-GS-26-3388, #2007-GS-26-3389, #2007-GS-26-3390). On May 10, 2010, Spear's case was called to trial before the Honorable Larry B. Hyman, Jr. and a jury. (R. 8). At trial, Spears was represented by Barbara Pratt, while the State was represented by Assistant Solicitors Donna Elder and Lawrence Filiberto. (R. 1). Three days later, on May 13, 2010, Spears was convicted of all charges and sentenced to thirty (30) years on the murder charge along with twenty (20) years concurrent on each ABWIK charge. (R. 571-72, 575).

Following his conviction, Spears, represented by Robert M. Pachak, sought review in the South Carolina Court of Appeals contending, "the trial court erred in admitting evidence that appellant shot the victim about a month prior to the shooting death for which appellant was on trial because it was unfairly prejudicial under Rule 403, SCRE[.]" (App. 6). In response, the State argued: (1) Appellant's argument was "not preserved for appellate review as trial counsel argued a completely different rationale for exclusion of the evidence at issue during trial;" and (2) even if the argument was preserved, the record demonstrates the evidence was admissible under Rule 403. (App. 23, 26).

Ruling on the issue, the appellate panel issued a published opinion remanding the case to the trial court because of its "*failure to conduct a Rule 403 balancing test to determine if the probative value of the prior shooting testimony is substantially outweighed by the danger of*

unfair prejudice to Spears[.]” (App. 43). The State now seeks certiorari as the panel erred in ignoring the State’s preservation argument and in so doing, turned a blind-eye to South Carolina’s preservation rules, ignoring decades of precedent, all of which require, at a minimum, *that an issue be both raised to and ruled upon by the trial court in order to preserve the issue for appellate review.* See Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640 (2011) (“At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge.”); On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000) (holding South Carolina’s preservation rules require “that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.”); Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”). The State further seeks certiorari as the appellate panel, after finding error in the trial court’s failure to conduct a Rule 403 analysis, overlooked the fact that it was required by the standard of review to determine whether such an error was prejudicial. See State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003) (“A trial judge’s ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant.”); see also Snyder’s Auto World, Inc. v. George Coleman Motor Co., Inc., 315 S.C. 183, 186, 434 S.E.2d 310, 312 (Ct. App. 1993) (“The burden is on the Appellant to show not only error, but also prejudice.”).

BACKGROUND

On May 26, 2007, Spears, Nathaniel "June" Douglas, Ishmael "Ish" Douglas,¹ and Thomas "T.C." Shaw (collectively Spears' group) left Lumberton, North Carolina and headed to Myrtle Beach over bike weekend.² (R. 213-14, 468-69). Upon arriving in Myrtle Beach that night, Spears' group, who had not made arrangements for a place to stay, parked their car at a nearby K-Mart and proceeded to Ocean Boulevard. (R. 215). Once they were on Ocean Boulevard, Spears' group was joined by Jeffrey "Bird" Bethea, who, like Spears and Nathaniel Douglas, was from Lumberton and was a member of 41-Curve. (R. 289-90). At the time of the incident, Spears was wearing 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 (R. 288-89, 299). Bethea, who did not know Spears' group was coming to Myrtle Beach, wore a black shirt with colorful combination locks on it, a black hat, and blue jean shorts. (R. 295-96, 441, 297, 298).

Shortly after Bethea's arrival, a member of Spears' group stated they observed Victim, a high-ranking member of Lumberton's East Side Bloods who was previously implicated in the murder of fellow 41-Curve member Eric Floyd, walking down Ocean Boulevard.⁴ (R. 365, 273-75, 290-91, 572). After seeing Victim, Spears' group looked on as Lemark Irons, another East Side Blood, crossed Ocean Boulevard, approached the group, and complimented them on their clothes and jewelry stating "we need to stop beefing and get money together." (R. 195-96, 197-

¹ Ishmael "Ish" Douglas is also known as Wa-Gee. (R. 214).

² Spears, along with June, was a member of 41-Curve, a Lumberton gang affiliated with Gangster Disciples and Folk Nation. (R. 192-93, 206, 207, 278-79, 283, 357, 486).

³ Danyell Hammonds, who was Victim's younger sister and lived with him, would later testify that her brother was a Blood and that Bloods wear red. (R. 197-98). However, Danyell Hammonds further explained that when gang members would "go to do something" they would wear opposite colors. (R. 279-80). Additionally, Spears' former cellmate in the detention center, Timothy Smith, testified that Spears told him he received a phone call saying Victim was in Myrtle Beach for bike week prompting Spears and his friends to come to Myrtle Beach. (R. 426-27).

⁴ Eric Floyd was also known as "G-Black" or "Turk." (R. 193).

98, 271, 273, 277, 279-81, 301). Irons, whose right arm was in a sling, then attempted to shake Bethea's hand with his left hand, which Nathaniel Douglas would later explain, was considered a sign of disrespect. (R. 301). In response to Irons' gesture, Bethea slapped Irons' hand and began cursing at him. (R. 219, 230). Irons then left the group and crossed Ocean Boulevard once again joining Victim and others on the opposite side of the street. (R. 219, 115-16).

Immediately after the initial altercation, Bethea, who was a high-ranking 41-Curve member, became angry and began talking to Spears who was a foot soldier in the gang and did not get along with Victim. (R. 208, 358, 220, 228, 365-67). During the course of their conversation, Spears expressed to Bethea his belief that Irons and his group, which included Victim, were going to kill someone in Spears' group, unless he and Bethea killed someone from Irons and Victim's group first. (R. 365-66). Following this conversation, a shooting occurred resulting in Victim's death. (R. 121-29, 134-36). In addition, three bystanders were wounded. (R. 50, 74-75, 89, 107).

At trial, the State proceeded under the theory that either Spears or Bethea shot Victim to avenge Eric Floyd's death. (R. 12-15, 43-44). To that end, the State proffered testimony from Victim's sister, Danyell Hammonds ("Danyell") that approximately one month before Victim was fatally shot, Spears had shot and grazed Victim outside of a Wal-Mart in Lumberton.⁵ (R. 141-43). Specifically, in her proffer, Danyell explained that "around midnight" Victim and Lemark Irons came into the house and went straight to her room where she observed wet blood on Victim's shirt. (R. 146, 142). She then asked Victim what happened. (R. 142). Victim, who

⁵ Prior to trial, defense counsel made a motion *in limine* regarding the Wal-Mart incident arguing it was inadmissible hearsay and the video taken from the Lumberton Wal-Mart "cannot identify that it was my client." (R. 14-15). Notably, defense counsel, in her pre-trial motions, *never argued that the Wal-Mart incident was inadmissible under Rule 403, SCRE*. Rather, the only pre-trial, Rule 403 objection raised by defense counsel was whether the State could refer to the gang element of the crime. (R. 9) ("I believe that any introduction of gang evidence would be more prejudicial than probative under Rule 403."); see also (R. 10-11).

Danyell described as “shocked[,]” explained he had just been shot at Wal-Mart. (R. 147, 142). Danyell then asked Victim who had shot him. (R. 142). In response, Victim told Danyell that Spears had shot him and further informed her that he and Spears did not get along. (R. 142). Danyell, who was studying to be a nurse at the time, further testified in the proffer that she believed the shooting had just occurred because Victim had blood on his hand and the blood was still wet. (R. 145, 142-43).

Additionally, Danyell testified during the proffer that: (1) Victim was an East Side Blood (R. 143); (2) Spears was a member of 41-Curve (R. 143); (3) Victim was previously “locked up” for his role in the murder of Eric Floyd (R. 144); (4) Floyd was also a member of 41-Curve (R. 144); (5) Victim was released from custody approximately one month before the Wal-Mart shooting (R. 144); and (6) a group of 41-Curve members, including Nathaniel Douglas, had recently told her that they were going to get Victim. (R. 154-155).

Following the proffer, the State argued Victim’s statement to his sister identifying the shooter was admissible as an excited utterance. (R. 161). Meanwhile defense counsel argued Danyell’s testimony regarding the Wal-Mart shooting was inadmissible hearsay. (R. 158). Additionally, defense counsel maintained:

It’s a 4(B) (sic) issue; my client has not been convicted of it. It’s a prior bad act. It’s not clear and convincing evidence of his guilt of it. There is a video, but you can’t identify my client in it so I have a lot of problems as far as that, and put those together and taking it together with the whole more prejudicial than probative thing you’ve got my argument.

(R. 159-60). The State then responded arguing Danyell’s testimony regarding the prior shooting was admissible as an excited utterance; the prior bad act was admissible under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) and they would proffer the Wal-Mart video which would show the shooting occurred after midnight on April 17, 2007. (R. 160, 165-66). After continued

discussion, the trial court recessed for the day and instructed counsel to research the issue overnight and argument would continue on the objections the next day. (R. 168-69).

The next morning, during additional argument on the issue, defense counsel, when asked by the trial court if she had anything further, stated:

I would just reiterate my 403 argument from yesterday as well with it being a clear and convincing standard if the court looks at that rather than simply a statement, ball statement like what's coming out here and we do not have a conviction and we do not have his face on the video and we don't have a witness that's going to say it was him[.]

(R. 182).

Responding to defense counsel' argument, the State first noted the clear and convincing evidence standard applied only to evidence admitted pursuant to Rule 404(b), SCRE, but maintained that because they were initially seeking admission under an excited utterance theory, Rule 404(b)'s clear and convincing evidence standard did not apply. (R. 182). After the State noted this distinction, the trial court observed that the proffered testimony may also need to be analyzed under Rule 404(b), SCRE. (R. 183). Following this comment, the trial court ruled that the statement made by Victim to his sister regarding the identity of the Wal-Mart shooter was admissible as an excited utterance.⁶ (R. 183-84). Defense counsel again responded stating, "I understand that you've ruled, I would just like to say something that just occurred to me that I just think maybe we need to look at that video before that testimony happens." (R. 184). Continuing, defense counsel noted her belief that the video would show Victim punched the shooter which counsel believed could affect whether the statement was an excited utterance. (R. 184). The trial court then asked the State to play the video from the Wal-Mart shooting. (R. 185).

⁶ Spears did not appeal from the trial court's ruling on this issue thereby making it law of the case. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling, right or wrong, becomes the law of the case).

After reviewing the video, the State proffered additional photographs showing the time stamp on the video and proffered an incident report which noted the date and time at which the incident occurred. (R. 186). The trial court then questioned the State on its' intent in offering the additional proffers. (R. 186). Responding to the trial court's inquiry, the State explained that it was offering the additional proffer as evidence of the prior bad act and stated the entire event went to "motive and intent[.]" (R. 186). Continuing, the State further argued the evidence was "certainly relevant to the charges [Spears] is facing." (R. 186). Finally, the State noted that outside of Lyle, the evidence at issue was admissible pursuant to the excited utterance exception. (R. 187).

Defense counsel then reiterated that under Lyle there must be clear and convincing evidence of the prior bad act. (R. 187). The trial court responded by finding the prior bad act was proven by clear and convincing evidence.⁷ (R. 187). At no point did defense counsel ever argue that *the admission of the prior bad act evidence required a Rule 403, SCRE balancing test*. Likewise, defense counsel *never argued the prejudicial effect of the Wal-Mart incident substantially outweighed its probative value on the basis of being improper propensity evidence*.

ARGUMENTS

- I. The appellate panel erred when it ignored the State's preservation argument, found the trial court erred in failing to conduct an on-the-record, Rule 403 balancing test and then remanded the case to the trial court to rule, for the first time, whether the probative value of evidence indicating Spears shot the victim about a month prior to the shooting death for which he was on trial was substantially outweighed by its risk of unfair prejudice

In the statement of issues on appeal, Spears argued the trial court erred in admitting Danyell's testimony that he shot Victim approximately one month before Victim's murder

⁷ Spears also did not appeal whether evidence of the Wal-Mart incident was admissible under Rule 404(b), SCRE or whether the Wal-Mart incident was proven by clear and convincing evidence meaning these issues, like the excited utterance ruling, are law of the case. See M.L.-Lee Acquisition Fund, L.P., 327 S.C. at 241, 489 S.E.2d at 472 (holding an unappealed ruling, right or wrong, becomes law of the case).

claiming the testimony was unfairly prejudicial under Rule 403, SCRE. (App. 6). Within his brief, Spears elaborated on this argument reasoning the evidence was unfairly prejudicial because the jury could have concluded, "if appellant shot the victim once, he must also be the one who shot him a second time." (App. 7). Near the conclusion of his brief, Spears changed course noting the trial court "failed to conduct a balancing test to determine whether the probative value of the prior bad act substantially outweighed its prejudicial effect." (App. 8).

In response, the State argued Spears' claims that the trial court erred in terms of the application of Rule 403 were not preserved because defense counsel never registered a contemporaneous Rule 403 objection on the basis of propensity (i.e. that the prejudicial effect of the Wal-Mart incident substantially outweighed its probative value because it was improper propensity evidence), and even if it did, the trial court never ruled upon such an objection. (App. 23-25). Similarly, in addressing Spears' contention that the trial court failed to conduct a Rule 403 analysis, the State noted defense counsel never requested such a ruling, and even if it did, never argued the trial court was *required* to do so after analyzing the issue under Rule 404(b), SCRE, meaning the trial court could not have ruled on such an argument. (App. 23-26). Accordingly, the State reasoned that because defense counsel failed to present these arguments to the trial court, but instead argued them for the first time on appeal, the issues were not preserved for appellate review. (App. 26).

In its ruling, the appellate panel neglected to address the State's preservation argument, further characterized Spear's argument as a claim that the trial court erred in failing to conduct a Rule 403 analysis, and remanded the case to the trial court to consider the propensity argument that Spears advanced, for the first time, in his appeal. (App. 34). In so holding, the State submits the appellate panel, by failing to even address the State's preservation argument, or

explain its rationale for doing so, erred and in reaching the underlying issue, ignored South Carolina precedent requiring an argument to be both raised to and ruled upon by the trial court in order to preserve the question for appellate review.

Applicable Law

In I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000), this Court explained the rationale supporting its' strict preservation rules stating, the "preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered *all relevant facts, law, and arguments*." 338 S.C. at 422, 526 S.E.2d at 724 (emphasis added). Elaborating, the I'On Court found, "the requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve - intentionally or by chance - in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." Id.

This proposition was reaffirmed in Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011) when the Court further stated, "[i]ssue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." 395 S.C. at 465, 719 S.E.2d at 642 (quoting Queen's Grant II Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)). In Herron, this Court, on remand from the Supreme Court of the United States, who vacated its' previous decision, declined to reach a federal preemption question because "the matter of preemption was not preserved in the South Carolina proceedings." Id. at 465, 719 S.E.2d at 642. Continuing, the Herron Court wrote, "the question Appellant presented to the United States Supreme Court, namely whether the [Federal Arbitration Act] preempted our state's legislative policy as set forth

in the Dealers Act, was raised neither to the trial court nor to our Court.” Id. at 469, 719 S.E.2d at 644. Continuing, the Herron Court opined:

We are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner. Yet, because Appellant can point to no instance where preemption was properly raised or ruled upon, to disregard our issue preservation rules under these circumstances would render them meaningless. As this Court observed, issue preservation rules prevent [] a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via reversal, give him another opportunity to prove his case.

Id. at 470, 719 S.E.2d at 644-45 (internal quotations omitted) (internal citation omitted).

Thus, both I’On and Herron make it clear that South Carolina’s preservation requirement exists to serve essentially two functions: (1) to require parties to thoroughly research and prepare their case by contemplating their respective legal positions; I’On, 338 S.C. at 422, 526 S.E.2d at 724, and (2) to ensure trial courts and their respective judgments are not reversed for reasons which were never presented to them. Herron, 395 S.C. at 465, 719 S.E.2d at 642. Implicit in both of these positions is the underlying theme of judicial economy, that is, an appellant should not get a second bite at the apple (i.e. a new proceeding) when, at trial, he simply failed to make the argument that is the basis for a potential reversal on appeal. I’On, 338 S.C. at 422, 526 S.E.2d at 724; Herron, 395 S.C. at 470, 719 S.E.2d at 644-45.

Analysis

Understanding the policy behind South Carolina’s preservation requirement, the State submits that if the appellate panel’s ruling goes undisturbed, Spears will have the opportunity to utilize the “ace card” from I’On and Herron—in this case the trial court’s failure to conduct an on-the record Rule 403-balancing test, an issue which was never mentioned to the trial court—and, via a remand, receive another opportunity to argue against the admission of evidence on a completely different theory than that which was first advanced at trial. This is clearly at odds

with South Carolina law since I'On explains the argument presented on appeal, must be first raised to and ruled upon by the trial court. See I'On, 338 S.C. at 422, 526 S.E.2d at 724 (“[The] preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered *all relevant facts, law, and arguments.*”) (emphasis added). Thus, because both the legal issue which constitutes the basis for the remand along with the issue which is to be considered on remand were not preserved for appellate review, the appellate panel erred when it remanded the case to the trial court to consider a question which was never ruled upon in Spears trial. Accordingly, the State asks this Court to grant certiorari.

A. Defense Counsel’s Failure to Object, and the Trial Court’s Failure to Rule on Whether Admission of Rule 404(b) Evidence Requires an on-the Record, Rule 403 Balancing Test

The record, as detailed above, clearly demonstrates the trial court was never asked to consider whether the admission of the Wal-Mart incident under Rule 404(b), required an on the record, Rule 403 balancing test.⁸ Likewise, defense counsel never objected to the trial court’s failure to conduct a Rule 403 balancing test. As a result, the trial court obviously never ruled on such a question. This was acknowledged by the appellate panel who found “it is not implicit or apparent from the record that the trial court considered whether the probative value of the Wal-Mart shooting testimony was substantially outweighed by unfair prejudice.” (App. 38). (emphasis in original). In fact, this argument was not raised until the argument section of Appellant’s brief when, for the first time, appellate counsel stated the trial court, “failed to

⁸ Furthermore, the State notes this issue, which is now the appellate panel’s basis for the remand, was never included in Spears’ statement of issues on appeal. See Atlantic Coast Builders and Contractors, LLC v. Lewis, 396 S.C. 323, 331 n.4, 730 S.E.2d 282, 286 n.4 (2012) (“If a question is not presented for our review, we should not answer it no matter how much we may want to do so. For as former Chief Judge Alex Sanders famously wrote, ‘appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.’”) (quoting Langley v. Boyter, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct. App. 1984), quashed on other grounds, 286 S.C. 85, 332 S.E.2d 100 (1985)); see also See Rule 208(b)(1)(B), SCACR, (“[O]rdinarily, no point will be considered which is not set forth in the statement of issues of appeal.”); Tobias v. Rice, 379 S.C. 357, 365, 665 S.E.2d 216, 220 (Ct. App. 2008) overruled on other grounds (holding it is error for an appellate court to consider issues not properly raised to it).

conduct a balancing test to determine whether the probative value of the prior bad act substantially outweighed its prejudicial effect.” (App. 8). Thus, because the record, and indeed the appellate panel’s opinion, reflects that the argument which is now the basis for the remand was never advanced at trial or ruled upon by the trial court, the issue is not preserved.⁹ See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (“It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.”); I’On, 338 S.C. at 422, 526 S.E.2d at 724 (holding an appellant must present both his issues and arguments to the lower court and obtain a ruling before presenting the issues and arguments on appeal); State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) (concluding appellate courts will generally not address an argument unless it was first raised to and ruled upon by the trial court).

B. Defense Counsel’s Failure to Object, and the Trial Court’s Failure to Rule on Whether the Testimony and Evidence Regarding the Wal-Mart Incident was Unfairly Prejudicial Propensity Evidence under Rule 403

Similarly, the record plainly reflects defense counsel never argued the testimony or evidence regarding the Wal-Mart incident constituted unfairly prejudicial propensity evidence under Rule 403. Accordingly, the trial court never ruled on such an issue. In particular, the State notes defense counsel’s rationale for objecting to the admission of the Wal-Mart incident was clearly not related to a concern that the jury would conclude Spears shot Victim on this occasion, because he had previously shot him a month prior.¹⁰ Rather, the objection was based upon defense counsel’s belief that the prior bad act had not been proven by clear and convincing

⁹ The State further notes that because the record is silent as to whether defense counsel was even aware that a Rule 403 balancing test was required pursuant to State v. Wallace, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009) or State v. King, 349 S.C. 142, 156, 561 S.E.2d 640, 647 (Ct. App. 2002) and is further silent as to whether defense counsel thought to object or had a strategic reason for failing to do so, this issue is best resolved in post-conviction relief proceedings.

¹⁰ Such an argument would appear to be more of question regarding improper character evidence under Rule 404(b), SCRE. See e.g. Rule 404(b), SCRE (West 2013) (“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.”).

evidence.¹¹ Indeed, both opposing counsel and the trial court clearly came away with the same impression in light of their subsequent responses. Specifically, the State responded to defense counsel's argument stating that the clear and convincing evidence standard only applied to exceptions under Lyle and clarified that the clear and convincing standard did not apply to an excited utterance. (R. 182). Similarly, the trial court indicated, "we may be looking at Lyles (sic) because this is a prior bad act. It may have to come in under that analysis." (R. 183). At no point did the State or the trial court interpret defense counsel's objection as an argument that the prejudicial effect of the Wal-Mart incident substantially outweighed its probative value on the basis of propensity under Rule 403.

Moreover, even if one could argue that defense counsel's "whole more prejudicial than probative thing" objection was an attempt at advancing some sort of Rule 403 concerns, it is abundantly clear defense counsel *never explained why the Wal-Mart incident was unfairly prejudicial* meaning Appellant simply failed to preserve the argument raised in his appellate brief. See I'On, 338 S.C. at 422, 526 S.E.2d at 724 ("[The] preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered *all relevant facts, law, and arguments.*") (emphasis added). In particular, the word "propensity" *never appears in any of defense counsel's objections related to the Wal-Mart incident*. In fact, in order to address the issue under I'On's preservation rules, one would have to assume, "the whole more prejudicial than probative thing" was an argument that the Wal-Mart incident was unfairly prejudicial because it was allegedly improper propensity evidence.¹² However, there is simply

¹¹ See e.g. State v. Gore, 283 S.C. 118, 119-21, 322 S.E.2d 12 (1984) (reversing a defendant's voluntary manslaughter and arson conviction where the State elicited testimony on cross-examination regarding a strikingly similar incident, but failed to prove the incident by clear and convincing evidence pursuant to Rule 404(b), SCRE).

¹² See e.g. State v. Smith, 391 S.C. 353, 362, 705 S.E.2d 491, 496 (Ct. App. 2011) ("Under Rule 403, the trial judge must determine whether the logical connection articulated by the State is sufficiently strong that the probative value found in the connection is not substantially outweighed by the tendency of the evidence to show propensity, or by

no support for such an assertion in the record. Therefore, the State submits this issue would be better resolved in post-conviction relief where defense counsel could explain the purpose of her objection and the legal theory behind it.

Finally, even if one could assume defense counsel's objection of "the whole more prejudicial than probative thing" was an argument that the prejudicial effect of the Wal-Mart incident substantially outweighed its probative value on the basis of being improper propensity evidence, it is clear the trial court failed to rule on such an argument. Indeed, as described above, the trial court interpreted defense counsel's objection as being premised upon the State's purported failure to prove the Wal-Mart incident by clear and convincing evidence.¹³ In fact, the appellate panel actually agreed there was no Rule 403 ruling at all finding, "it is not implicit or apparent from the record that the trial court considered whether the probative value of the Wal-Mart shooting testimony was substantially outweighed by unfair prejudice." (App. 38) (emphasis in original). Therefore, because the record clearly shows the argument which was included in Appellant's statement of issues on appeal was never raised to or ruled upon by the trial court, and if not revisited would be the subject considered on remand, the State asks this Court to grant certiorari.

- II. Even if defense counsel somehow preserved the argument that the trial court erred in failing to conduct an on the record, Rule 403 balancing test, and the trial court erred in failing to do so, the appellate panel overlooked the fact that it was required to determine whether such an error was prejudicial, and had it done so, would have determined the admission of the Wal-Mart incident was not prejudicial and therefore, not an abuse of discretion

some other form of unfair prejudice. If the trial judge determines not to exclude the evidence under this Rule 403 analysis, then the State may admit it.").

¹³ See Rule 404(b), SCRE Notes (West 2013) ("The rule does not set forth the burden of proof required for the admission of bad acts not the subject of a conviction and, therefore, case law would control.") (citing *State v. Smith*, 300 S.C. 216, 387 S.E.2d 245 (1989) (explaining that in criminal cases evidence of other crimes or bad acts must be clear and convincing if the acts are not the subject of a conviction)).

The State submits the evidence regarding Spears' prior bad act is admissible pursuant to Rule 403, SCRE and, as a result, even if the trial court's failure to conduct an on the record balancing test is error, such an error is not prejudicial meaning the admission of the evidence was not an abuse of discretion.¹⁴ See State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003) ("A trial judge's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant."); see also Snyder's Auto World, Inc. v. George Coleman Motor Co., Inc., 315 S.C. 183, 186, 434 S.E.2d 310, 312 (Ct. App. 1993) ("The burden is on the Appellant to show not only error, but also prejudice."). As explained above, it is not enough to show the trial court erred in admitting evidence, rather, an appellant must also show that the admission of such evidence is prejudicial and therefore an abuse of discretion. Id. In this case, the appellate panel overlooked the fact Spears was required to show not just error, but prejudicial error under Adams. Indeed, a review of the appellate panel's opinion confirms it failed to consider whether the trial court's purported error was prejudicial as the standard of review requires. See App. at 38 ("Having determined that the trial court erred by failing to conduct an on-the-record Rule 403 balancing test, we must next determine the proper remedy."). Thus, because the record shows the evidence of the Wal-Mart incident was admissible, any error by the trial court in failing to

¹⁴ While the State recognizes the appellate panel determined a remand was the appropriate remedy for the trial court's failure to conduct an on the record, Rule 403 analysis, the State questions whether this is consistent with the standard of review. See e.g. State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003) ("A trial judge's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant."); see also Snyder's Auto World, Inc. v. George Coleman Motor Co., Inc., 315 S.C. 183, 186, 434 S.E.2d 310, 312 (Ct. App. 1993) ("The burden is on the Appellant to show not only error, but also prejudice."). In particular, because Adams explains the abuse of discretion standard requires that an error be prejudicial and under Snyder's Auto World, Inc., Spears, as the appellant has the burden of demonstrating prejudice, it seems a reviewing court must first determine whether Spears has shown prejudice prior to contemplating what remedy, if any, is needed. Understanding this, the appellate panel's determination that a remand is the proper remedy for an error that was never determined to be prejudicial would seem to be at odds with the abuse of discretion standard of review.

conduct a Rule 403 analysis on the record is not prejudicial. As such, the State now seeks certiorari on this issue.

Applicable Law

“Evidence is relevant and admissible if it tends to establish or make more or less probable the matter in controversy.” State v. Wiles, 383 S.C. 151, 157-58, 679 S.E.2d 172, 175-76 (2009). Furthermore, “evidence of other crimes, wrongs, or acts is generally not admissible to prove the character of a person in order to show action in conformity therewith; however, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.” Wiles, 383 S.C. at 158, 679 S.E.2d at 176 (internal quotations omitted) (citing Rule 404(b), SCRE). Additionally, evidence which is “logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused’s guilt of another crime.” Id.

Nevertheless, otherwise admissible evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]” Rule 403, SCRE. Pursuant to Rule 403, SCRE, “the trial judge must determine whether the logical connection articulated by the State is sufficiently strong that the probative value found in the connection is not substantially outweighed by the tendency of the evidence to show propensity, or by some other form of unfair prejudice.” Smith, 391 S.C. at 362, 705 S.E.2d at 496. “Unfair prejudice means an undue tendency to suggest decision on an improper basis” Wiles, 383 S.C. at 158, 679 S.E.2d at 176 and “[t]he determination of the prejudicial effect of the challenged evidence must be based on the entire record, and the result will generally turn on the facts of each case.” State v. Holder, 382 S.C. 278, 293, 676 S.E.2d 690, 698 (2009).

Discussion

A. Evidence of the Wal-Mart Incident is Extremely Probative as it Establishes Spears' Motive for the Shooting in the Present Case as well as his Intent when he Fired the Weapon

Here, because the testimony, along with the supporting video and incident report, all prove the prior shooting by clear and convincing evidence and establish Spears' motive and intent in the current action—exacting revenge on Victim for his role in Eric Floyd's death, the evidence at issue is extremely probative. See State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (concluding evidence which is logically relevant to establish a material element of the offense charged should not be excluded simply because it reveals that the defendant is guilty of another crime). In fact, in a homicide prosecution, evidence which relates to previous quarrels, ill feelings or hostile acts between the parties is admissible under the common law, a fact which underscores the probative value of evidence relating to motive and intent.¹⁵

In particular, in State v. Clinkscales, 231 S.C. 650, 654-55, 99 S.E.2d 663, 665 (1957) this Court affirmed the trial court's admission of evidence indicating the appellant had previously shot the victim six or seven weeks prior as it was probative of animus. The same is true in State v. Williams, 321 S.C. 327, 336, 468 S.E.2d 626, 631 (1996) where the Court explained evidence of marital difficulties, including loud altercations and controversial conversations between the appellant and his wife, who he was accused of murdering, were admissible to show "that animus probably existed at the time of the homicide." Likewise, in

¹⁵ See State v. Braxton, 343 S.C. 629, 636, 541 S.E.2d 833, 836-37 (2001) ("In homicide cases, evidence of previous quarrels and ill feelings or hostile acts between parties is admissible to show that animus probably existed between the parties at the time of the homicide."); State v. Williams, 321 S.C. 327, 336, 468 S.E.2d 626, 631 (1996) ("[E]vidence of previous quarrels and ill feelings or hostile acts between parties is admissible to show that animus probably existed between the parties at the time of the homicide."); State v. Clinkscales, 231 S.C. 650, 654-55, 99 S.E.2d 663, 665 (1957) ("[I]t is well settled that in assault and battery and homicide cases, evidence that the accused and prosecuting witness or the deceased had a previous difficulty is admissible . . ."); State v. Brooks, 79 S.C. 144, - , 60 S.E. 518, 518 (1908); see also Blakely v. State, 360 S.C. 636, 639, 602 S.E.2d 758, 759 (2004) ("It is well-settled that evidence of previous threats by the defendant is admissible to show malice."); State v. Alford, 264, S.C. 26, 33, 212, S.E.2d 252, 254 (1975) (holding previous threats made against the companion of the victim at the time of assault is also admissible as evidence of malice).

State v. Braxton, 343 S.C. 629, 636, 541 S.E.2d 833, 836-37 (2001) this Court determined that a previous encounter between the victim and the appellant, which demonstrated the victim was scared of the appellant, was admissible as evidence of the relationship between the parties. Thus, it seems clear that evidence regarding Appellant's motive for the shooting and his intent when he fired the weapon—malice—is obviously extremely probative.

B. The Prejudicial Effect of the Wal-Mart Incident does not Substantially Outweigh its Probative Value

Additionally, because evidence of the Wal-Mart Incident was only admitted for the purpose of proving motive and intent (R. 186-87); was only argued as being evidence of motive and intent (R. 43, 44, 533); and the jury, which is presumed to follow the law,¹⁶ was instructed that the evidence was only admissible pursuant to the Rule 404(b) exceptions and could not be used as character evidence (R. 548); the prejudicial effect of the admission of the Wal-Mart incident did not substantially outweigh its probative value.

Specifically, the State never attempted to cast the evidence now at issue as propensity evidence, but instead presented a theory that the shooting was a revenge killing making it unlikely the jury would have utilized the Wal-Mart incident as propensity evidence. This is most apparent in opening and closing arguments where the State emphasized Spears was seeking revenge for Floyd's death. (R. 43, 44, 533, 534). Therefore, combining this with the fact the jury was instructed that the evidence related to the Wal-Mart incident could only be admitted pursuant to the Rule 404(b) exceptions and not as character evidence, the risk of unfair prejudice is *de minimus*. (R. 548). This is especially true since the jury took an oath to follow the law and, under South Carolina law, are presumed to do so as detailed in Foye.

¹⁶ See State v. Dunlap, 346 S.C. 312, 319, 550 S.E.2d 889, 893 (Ct. App. 2001), aff'd as modified on writ of cert., 353 S.C. 539, 579 S.E.2d 318 (2003) (quoting Foye v. State, 335 S.C. 586, 590 n.1, 518 S.E.2d 265, 267 n. 1 (1999) ("A jury is presumed to [have followed the trial judge's] instructions.")).

Moreover, while Spears maintains the jury could have concluded, “if appellant shot the victim once, he must also be the one who shot him a second time” both the law and the record refute such a position. In support of this proposition, Spears cites to State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984). In Gore, this Court reversed a voluntary manslaughter and arson conviction in which appellant burnt down a trailer containing his ex-girlfriend when the State cross-examined appellant on a previous incident which was strikingly similar to the charged offense. 283 S.C. at 119-21, 322 S.E.2d at 12-13. However, despite reversing appellant’s convictions, the Gore Court clearly noted in footnote one, that had the prior bad act been proven, the evidence of the prior misconduct could have been admissible under a Lyle exception. See Gore, 283 S.C. at 121 n.1, 322 S.E.2d at 13 n.1 (“If provable, evidence of this prior misconduct could have been admissible under Lyle to show motive or common scheme or plan. However, the State properly concedes that the proof was insufficient to connect appellant to the setting of the previous trailer fire.”).

In Spears’ case, unlike Gore, the State indisputably established motive and intent pursuant to Rule 404(b), SCRE, by clear and convincing evidence. (R. 187). Additionally, because Spears’ failed to appeal from the 404(b) ruling, it is law of the case. Thus, while it is true the evidence may be prejudicial to Spears in that it makes it more likely he shot Victim, such prejudice is not “unfair prejudice” as the prior bad act was proven consistent with the requirements of Rule 404(b), SCRE. (R. 187).

Similarly, any prejudice which may exist as a result of the admission of the prior shooting does not substantially outweigh its probative value. Specifically, the same motive that existed during the prior shooting—revenge—still existed when Spears fired and fatally shot Victim in Myrtle Beach. The same can be said for Spears’ intent, he obviously wanted to kill Victim the

first time he shot him and nothing within the record demonstrated that this changed within the month prior to the second shooting. To the contrary, the record clearly reflects that many members of 41-Curve wanted revenge against Victim. This was expressed throughout the record, including Spears' co-defendant Nathaniel Douglas' statement to Danyell Hammonds that he and his fellow 41-Curve members were going to get Victim. (R. 154-55). In fact, this was evident even in the minutes leading up to the shooting where Bethea, Spears' co-defendant, got into an argument with Irons after Irons suggested the two groups "stop beefing and get money together." (R. 219). In response, Spears and Bethea, rather than shaking Irons' hand and calling an end to the violence, promptly walked across the street to kill them. (R. 365-66).

In light of these facts, the State submits that because Spears is required to prove the trial court's error was prejudicial and under the standard of review, the appellate court is required to make such a determination, the appellate panel, by failing to consider whether the failure to conduct a Rule 403 analysis was prejudicial, clearly erred. Accordingly, granting certiorari is warranted, especially since the record conclusively shows Spears was not prejudiced by the trial court's failure to conduct a Rule 403 analysis. Indeed, as detailed above, there is simply no risk the jury would have construed the Wal-Mart incident as propensity evidence when it was not offered as such and the jury was instructed it could not consider the evidence as evidence of Spears' character.

CONCLUSION

For the aforementioned reasons, the State respectfully asks this Court to grant certiorari in order to: (1) correct the appellate panel's misapprehension of South Carolina's preservation requirement and (2) address the appellate panel's failure to determine whether the trial court's

error in not conducting a Rule 403 analysis was prejudicial as is required under the standard of review.

Respectfully Submitted,

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Brendan J. McDonald
ATTORNEY(S) FOR RESPONDENT

July 12, 2013.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions

Larry B. Hyman Jr., Circuit Court Judge

Opinion No. 5119 (S.C. Ct. App. filed April 17, 1013), Appellate Case No. 2010-162287

THE STATE,

RESPONDENT,

V.

BRIAN K. SPEARS,

PETITIONER.

CERTIFICATE OF SERVICE

I, Brendan McDonald, counsel for the Respondent, certify that I have served the within *State of South Carolina's Petition for Writ of Certiorari*, on opposing counsel by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney:

Robert M. Pachak, Esq.,
SCCID/Division of Appellate Defense
P.O. Box 11589
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I further certify that all parties required by Rule to be served have been served on this 12th day of July, 2013.



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July 12, 2013.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5119 (S.C. Ct. App. filed 4/17/2013)
07-GS-26-3387, 3388, 3389, 3390

THE STATE,

PETITIONER/RESPONDENT,

V.

BRIAN K. SPEARS,

RESPONDENT/PETITIONER

APPELLATE CASE NO. 2010-162287

RETURN TO PETITION FOR WRIT OF CERTIORARI
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INDEX

INDEX.....1

STATEMENT OF THE CASE.....2

BACKGROUND.....3

ARGUMENT I.....5

ARGUMENT II.....6

CONCLUSION 7

STATEMENT OF THE CASE

Respondent was convicted of murder and three (3) counts of assault and battery with intent to kill after a jury trial held before the Honorable Larry B. Hyman, Jr., on May 10 – 13, 2010, in Horry County. A sentence of thirty (30) years was imposed for murder and twenty (20) year sentences were imposed on the remaining charges.

Respondent appealed his convictions and submitted a final brief on September 12, 2011. Petitioner submitted its final brief on September 12, 2011. Oral argument was heard in the Court of Appeals on January 17, 2013. On April 17, 2013, the court issued an opinion remanding the case to the trial court for it to conduct an on-the-record balancing test under Rule 403, SCRE to determine whether the probative value of the prior bad act of a shooting was substantially outweighed by the danger of unfair prejudice.

On April 26, 2013, petitioner filed a petition for rehearing. On May 2, 2013, respondent filed a petition for rehearing. Both petitions for rehearing were denied on June 14, 2013. Respondent filed a petition for writ of certiorari on July 15, 2013. Petitioner filed a writ of certiorari on July 12, 2013.

This return follows.

BACKGROUND

The victim was shot and killed in Myrtle Beach while he was visiting there with some of the gang members he was with from Lumberton, North Carolina. Appellant, Jeffrey Bethea, and Nathaniel Douglas were in a rival gang also from Lumberton and they, too, were visiting in Myrtle Beach. No one was really quite sure who did the shooting. The police made a composite of the suspected shooter that resembled Jeffrey Bethea. Nathan Douglas testified for the State and implicated Bethea. Bethea testified for the State in exchange for more lenient treatment and implicated appellant. Appellant's defense was the Bethea was the one (1) shooter.

(R. p. 43, line 12 – p. 46, line 21; R. p. 110, line 13 – p. 111, line 11; R. p. 214, lines 2 – 25).

In an effort to prove that appellant was the shooter, the State wanted to put into evidence testimony from the victim's own sister that appellant shot the victim at the Walmart parking lot in Lumberton about a month prior to the shooting in Myrtle Beach. The trial court allowed the solicitor to put on the record that this was evidence of a prior bad act under Rule 404, SCRE. The solicitor failed to specify why the Walmart shooting was admissible under Rule 404(b). Instead, she merely made a rote recitation of all of the exceptions to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) (R. p. 186, line 18 – p. 187, line 14). Counsel has found in the past when a solicitor cannot specify the pertinent exception, the real motive is to prejudice the defendant with the prior bad act.

Appellant noted in his brief how the prior bad act was unfairly prejudicial under Rule 403, SCRE as “[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis.” State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146 (1991). A jury in this case could unfairly conclude that if appellant shot the victim once, he must also be the one who shot him a second time. Our case law has taught us that when “the previous alleged bad act is strikingly

similar to the one for which the appellant is being tried, the danger of prejudice is enhanced.” State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984):

ARGUMENT I

The issue of the prior bad act, a shooting allegedly by respondent at petitioner at a Walmart, was properly preserved for appellate review.

The argument on direct appeal was that the trial court erred in admitting evidence that respondent shot the victim about a month prior to the shooting death for which respondent was on trial because it was unfairly prejudicial under Rule 403, SCRE. (Petitioner's app. p. 6).

At the trial level, defense counsel argued that respondent had not been convicted of the shooting. It was a prior bad act. There was no clear and convincing evidence of respondent's guilt. There was a video of the shooting, but respondent could not be identified. And, it was more prejudicial than probative. (R. p. 159, line 20 – p. 160, line 1). The next day at trial, defense counsel reiterated her Rule 403, SCRE argument. (R. p. 182, lines 7 – 14). Appellate counsel does not know how the issue could have been better preserved. The panel at the Court of Appeals had no problem with the issue being preserved for appellate review. Neither did the Court sitting *en banc*.

ARGUMENT II

The Court of Appeals erred in remanding respondent's case for the trial court to conduct a balancing test under Rule 403, SCRE on the admissibility of a prior bad act when the Court of Appeals already made a determination that the error was not harmless.

In the opinion remanding this case to the trial court to conduct a balancing test under Rule 403, SCRE, the Court of Appeals found and concluded that it was "unable to say that the admission of the prior bad act testimony was harmless error." (State's app. p. 43). If the error was not harmless, respondent's conviction should be reversed. Remanding the case for a Rule 403 balancing test would only lead to prejudice and confusion. The trial judge should not have to sit in judgment of himself.

CONCLUSION

Petitioner's writ should be denied and respondent should be given a new trial.

Respectfully submitted,



Robert M. Pachak
Appellate Defender

ATTORNEY FOR RESPONDENT/PETITIONER.

This 1st day of August, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5119 (S.C. Ct. App. filed 4/17/2013)
07-GS-26-3387, 3388, 3389, 3390

THE STATE,

PETITIONER/RESPONDENT,

V.

BRIAN K. SPEARS,

RESPONDENT/PETITIONER.

CERTIFICATE OF SERVICE

I certify that a true copy of the return to petition for writ of certiorari in this case has been served on Brendan J. McDonald, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and the S.C. Court of Appeals, 1015 Sumter Street, Columbia, SC 29201, this 1st day of August, 2013.

Robert M. Pachak

Robert M. Pachak
Appellate Defender

ATTORNEY FOR RESPONDENT/ PETITIONER

SWORN TO BEFORE ME this 1st day
of August, 2013.

Paula May (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

AUG 14 2013

APPEAL FROM HORRY COUNTY
Court of General Sessions

S.C. Supreme Court

Larry B. Hyman Jr., Circuit Court Judge

Opinion No. 5119 (S.C. Ct. App. filed April 17, 2013), Appellate Case No. 2010-162287

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INDEX

TABLE OF AUTHORITIES.....	ii
SPEARS' QUESTION PRESENTED.....	iii
STATEMENT OF THE CASE.....	1-2
BACKGROUND.....	3-7
ARGUMENT.....	7-9
I. <u>The Court of Appeals was not Required to Reverse Spears' Conviction as it did not Rule that the Trial Court Erred in Applying Rule 403, but Instead Found the Trial Court Erred in Failing to Conduct a Rule 403 Balancing Test, and as a Result, the Court of Appeals Language Regarding Harmless Error was only Related to Whether a Remand was Necessary for a Rule 403 Analysis</u>	
A. The Harmless Error Analysis was Clearly Limited to the Discussion of Whether the Court Needed to Remand the Matter to the Trial Court.....	8-9
B. Understanding the Basis for the Appellate Panel's Ruling there is Simply No Basis for the Reversal of Spears' Conviction and Sentence.....	9
CONCLUSION.....	10
CERTIFICATE OF SERVICE.....	11

TABLE OF AUTHORITIES

Case(s)

<u>Atlantic Coast Builders and Contractors, LLC v. Lewis</u> , 396 S.C. 323, 730 S.E.2d 282 (2012)...	1
<u>Langley v. Boyter</u> , 284 S.C. 162, 325 S.E.2d 550 (Ct. App. 1984).....	2
<u>ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche</u> , 327 S.C. 238, 489 S.E.2d 470 (1997).....	6
<u>State v. Colf</u> , 337 S.C. 622, 525 S.E.2d 246 (2000).....	2
<u>State v. King</u> , 349 S.C. 142, 561 S.E.2d 640 (Ct. App. 2002).....	8
<u>State v. Lyle</u> , 125 S.C. 406, 118 S.E. 803 (1923).....	5
<u>Tobias v. Rice</u> , 379 S.C. 357, 665 S.E.2d 216 (Ct. App. 2008).....	2

Rules

Rule 208(b)(1)(B), SCACR.....	2
Rule 403, SCORE.....	1
Rule 404(b), SCORE.....	6

SPEARS' QUESTION PRESENTED

- I. Whether the Court of Appeals erred in remanding petitioner's case for the trial court to conduct a balancing test under Rule 403, SCRE on the admissibility of a prior bad act when the Court of Appeals already made a determination that the error was not harmless?

STATEMENT OF THE CASE

On May 27, 2007, gunfire rang out near the intersection of 11th Avenue North and Ocean Boulevard in Myrtle Beach resulting in the death of Aaron Hammonds (“Victim”) and the wounding of Krystal Fowler, Lasheika Felton and Dajuan Monroe. (R. 50, 74-75, 134-45, 89, 107). Brian “Bos” Spears was subsequently indicted on one count of Murder and three counts of Assault and Battery with Intent to Kill (“ABWIK”). (#2007-GS-26-3387, #2007-GS-26-3388, #2007-GS-26-3389, #2007-GS-26-3390). On May 10, 2010, Spear’s case was called to trial before the Honorable Larry B. Hyman, Jr. and a jury. (R. 8). At trial, Spears was represented by Barbara Pratt, while the State was represented by Assistant Solicitors Donna Elder and Lawrence Filiberto. (R. 1). Three days later, on May 13, 2010, Spears was convicted of all charges and sentenced to thirty (30) years on the murder charge along with twenty (20) years concurrent on each ABWIK charge. (R. 571-72, 575).

Following his conviction, Spears, represented by Robert M. Pachak, sought review in the South Carolina Court of Appeals contending, “the trial court erred in admitting evidence that appellant shot the victim about a month prior to the shooting death for which appellant was on trial because it was unfairly prejudicial under Rule 403, SCRE[.]” (App. 6). In response, the State argued: (1) Appellant’s argument was “not preserved for appellate review as trial counsel argued a completely different rationale for exclusion of the evidence at issue during trial;” and (2) even if the argument was preserved, the record demonstrates the evidence was admissible under Rule 403. (App. 23, 26).

On April 17, 2013, the appellate panel neglected the issue Spears had actually raised on appeal¹ and instead issued a published opinion finding the trial court erred in failing “to conduct

¹ See Atlantic Coast Builders and Contractors, LLC v. Lewis, 396 S.C. 323, 331 n.4, 730 S.E.2d 282, 286 n.4 (2012) (“If a question is not presented for our review, we should not answer it no matter how much we may want to do so.”)

a Rule 403 balancing test to determine if the probative value of the prior shooting testimony is substantially outweighed by the danger of unfair prejudice to Spears[.]” (App. 43). The panel then mulled over the remedy for the perceived error explaining that other courts “have either: (1) determined whether the error was harmless; (2) conducted a *de novo* review and made a balancing decision; or (3) remanded for an on-the-record Rule 403 balancing test.” (App. 39). Thereafter, the appellate panel declined to conduct, a *de novo* Rule 403 review citing to State v. Colf, 337 S.C. 622, 629, 525 S.E.2d 246, 249 (2000) (App. 42), further said the record was incomplete as to whether the trial court’s perceived error was harmless (App. 43), and elected to remand the issue to the trial court instructing it to perform an on-the-record Rule 403 balancing test. (App. 43). Both parties unsuccessfully sought rehearing and thereafter, sought certiorari in this Court. (App. 44-66, 67-70, 71).

BACKGROUND

On May 26, 2007, Spears, Nathaniel “June” Douglas, Ishmael “Ish” Douglas,² and Thomas “T.C.” Shaw (collectively Spears’ group) left Lumberton, North Carolina and headed to Myrtle Beach over bike weekend.³ (R. 213-14, 468-69). Upon arriving in Myrtle Beach that night, Spears’ group, who had not made arrangements for a place to stay, parked their car at a nearby K-Mart and proceeded to Ocean Boulevard. (R. 215). Once they were on Ocean Boulevard, Spears’ group was joined by Jeffrey “Bird” Bethea, who, like Spears and Nathaniel Douglas, was from Lumberton and was a member of 41-Curve. (R. 289-90). At the time of the

For as former Chief Judge Alex Sanders famously wrote, ‘appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.’ ” (quoting Langley v. Boyter, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct. App. 1984); quashed on other grounds, 286 S.C. 85, 332 S.E.2d 100 (1985)); see also See Rule 208(b)(1)(B), SCACR, (“[O]rdinarily, no point will be considered which is not set forth in the statement of issues of appeal.”); Tobias v. Rice, 379 S.C. 357, 365, 665 S.E.2d 216, 220 (Ct. App. 2008) overruled on other grounds (holding it is error for an appellate court to consider issues not properly raised to it).

² Ishmael “Ish” Douglas is also known as Wa-Gee. (R. 214).

³ Spears, along with June, was a member of 41-Curve, a Lumberton gang affiliated with Gangster Disciples and Folk Nation. (R. 192-93, 206, 207, 278-79, 283, 357, 486).

incident, Spears was wearing 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.⁴ (R. 288-89, 299). Bethea, who did not know Spears' group was coming to Myrtle Beach, wore a black shirt with colorful combination locks on it, a black hat, and blue jean shorts. (R. 295-96, 441, 297, 298).

Shortly after Bethea's arrival, a member of Spears' group stated they observed Victim, a high-ranking member of Lumberton's East Side Bloods who was previously implicated in the murder of fellow 41-Curve member Eric Floyd, walking down Ocean Boulevard.⁵ (R. 365, 273-75, 290-91, 572). After seeing Victim, Spears' group looked on as Lemark Irons, another East Side Blood, crossed Ocean Boulevard, approached the group, and complimented them on their clothes and jewelry stating "we need to stop beefing and get money together." (R. 195-96, 197-98, 271, 273, 277, 279-81, 301). Irons, whose right arm was in a sling, then attempted to shake Bethea's hand with his left hand, which Nathaniel Douglas would later explain, was considered a sign of disrespect. (R. 301). In response to Irons' gesture, Bethea slapped Irons' hand and began cursing at him. (R. 219, 230). Irons then left the group and crossed Ocean Boulevard once again joining Victim and others on the opposite side of the street. (R. 219, 115-16).

Immediately after the initial altercation, Bethea, who was a high-ranking 41-Curve member, became angry and began talking to Spears who was a foot soldier in the gang and did not get along with Victim. (R. 208, 358, 220, 228, 365-67). During the course of their conversation, Spears expressed to Bethea his belief that Irons and his group, which included

⁴ Danyell Hammonds, who was Victim's younger sister and lived with him, would later testify that her brother was a Blood and that Bloods wear red. (R. 197-98). However, Danyell Hammonds further explained that when gang members would "go to do something" they would wear opposite colors. (R. 279-80). Additionally, Spears' former cellmate in the detention center, Timothy Smith, testified that Spears told him he received a phone call saying Victim was in Myrtle Beach for bike week prompting Spears and his friends to come to Myrtle Beach. (R. 426-27).

⁵ Eric Floyd was also known as "G-Black" or "Turk." (R. 193).

Victim, were going to kill someone in Spears' group, unless he and Bethea killed someone from Irons and Victim's group first. (R. 365-66). Following this conversation, a shooting occurred resulting in Victim's death. (R. 121-29, 134-36). In addition, three bystanders were wounded. (R. 50, 74-75, 89, 107).

At trial, the State proceeded under the theory that either Spears or Bethea shot Victim to avenge Eric Floyd's death. (R. 12-15, 43-44). To that end, the State proffered testimony from Victim's sister, Danyell Hammonds ("Danyell") that approximately one month before Victim was fatally shot, Spears had shot and grazed Victim outside of a Wal-Mart in Lumberton.⁶ (R. 141-43). Specifically, in her proffer, Danyell explained that "around midnight" Victim and Lemark Irons came into the house and went straight to her room where she observed wet blood on Victim's shirt. (R. 146, 142). She then asked Victim what happened. (R. 142). Victim, who Danyell described as "shocked[,]," explained he had just been shot at Wal-Mart. (R. 147, 142). Danyell then asked Victim who had shot him. (R. 142). In response, Victim told Danyell that Spears had shot him and further informed her that he and Spears did not get along. (R. 142). Danyell, who was studying to be a nurse at the time, further testified in the proffer that she believed the shooting had just occurred because Victim had blood on his hand and the blood was still wet. (R. 145, 142-43).

Additionally, Danyell testified during the proffer that: (1) Victim was an East Side Blood (R. 143); (2) Spears was a member of 41-Curve (R. 143); (3) Victim was previously "locked up" for his role in the murder of Eric Floyd (R. 144); (4) Floyd was also a member of 41-Curve (R.

⁶ Prior to trial, defense counsel made a motion *in limine* regarding the Wal-Mart incident arguing it was inadmissible hearsay and the video taken from the Lumberton Wal-Mart "cannot identify that it was my client." (R. 14-15). Notably, defense counsel, in her pre-trial motions, *never argued that the Wal-Mart incident was inadmissible under Rule 403, SCRE*. Rather, the only pre-trial, Rule 403 objection raised by defense counsel was whether the State could refer to the gang element of the crime. (R. 9) ("I believe that any introduction of gang evidence would be more prejudicial than probative under Rule 403."); see also (R. 10-11).

144); (5) Victim was released from custody approximately one month before the Wal-Mart shooting (R. 144); and (6) a group of 41-Curve members, including Nathaniel Douglas, had recently told her that they were going to get Victim. (R. 154-155).

Following the proffer, the State argued Victim's statement to his sister identifying the shooter was admissible as an excited utterance. (R. 161). Meanwhile defense counsel argued Danyell's testimony regarding the Wal-Mart shooting was inadmissible hearsay. (R. 158). Additionally, defense counsel maintained:

It's a 4(B) (sic) issue; my client has not been convicted of it. It's a prior bad act. It's not clear and convincing evidence of his guilt of it. There is a video, but you can't identify my client in it so I have a lot of problems as far as that, and put those together and taking it together with the whole more prejudicial than probative thing you've got my argument.

(R. 159-60). The State then responded arguing Danyell's testimony regarding the prior shooting was admissible as an excited utterance; the prior bad act was admissible under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) and they would proffer the Wal-Mart video which would show the shooting occurred after midnight on April 17, 2007. (R. 160, 165-66). After continued discussion, the trial court recessed for the day and instructed counsel to research the issue overnight and argument would continue on the objections the next day. (R. 168-69).

The next morning, during additional argument on the issue, defense counsel, when asked by the trial court if she had anything further, stated:

I would just reiterate my 403 argument from yesterday as well with it being a clear and convincing standard if the court looks at that rather than simply a statement, ball statement like what's coming out here and we do not have a conviction and we do not have his face on the video and we don't have a witness that's going to say it was him[.]

(R. 182).

Responding to defense counsel' argument, the State first noted the clear and convincing evidence standard applied only to evidence admitted pursuant to Rule 404(b), SCRE, but maintained that because they were initially seeking admission under an excited utterance theory, Rule 404(b)'s clear and convincing evidence standard did not apply. (R. 182). After the State noted this distinction, the trial court observed that the proffered testimony may also need to be analyzed under Rule 404(b), SCRE. (R. 183). Following this comment, the trial court ruled that the statement made by Victim to his sister regarding the identity of the Wal-Mart shooter was admissible as an excited utterance.⁷ (R. 183-84). Defense counsel again responded stating, "I understand that you've ruled, I would just like to say something that just occurred to me that I just think maybe we need to look at that video before that testimony happens." (R. 184). Continuing, defense counsel noted her belief that the video would show Victim punched the shooter which counsel believed could affect whether the statement was an excited utterance. (R. 184). The trial court then asked the State to play the video from the Wal-Mart shooting. (R. 185).

After reviewing the video, the State proffered additional photographs showing the time stamp on the video and proffered an incident report which noted the date and time at which the incident occurred. (R. 186). The trial court then questioned the State on its' intent in offering the additional proffers. (R. 186). Responding to the trial court's inquiry, the State explained that it was offering the additional proffer as evidence of the prior bad act and stated the entire event went to "motive and intent[.]" (R. 186). Continuing, the State further argued the evidence was "certainly relevant to the charges [Spears] is facing." (R. 186). Finally, the State noted that

⁷ Spears did not appeal from the trial court's ruling on this issue thereby making it law of the case. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling, right or wrong, becomes the law of the case).

outside of Lyle, the evidence at issue was admissible pursuant to the excited utterance exception. (R. 187).

Defense counsel then reiterated that under Lyle there must be clear and convincing evidence of the prior bad act. (R. 187). The trial court responded by finding the prior bad act was proven by clear and convincing evidence.⁸ (R. 187). At no point did defense counsel ever argue that the admission of the prior bad act evidence required a Rule 403, SCRE balancing test. Likewise, defense counsel never argued the prejudicial effect of the Wal-Mart incident substantially outweighed its probative value on the basis of being improper propensity evidence.

ARGUMENT

- I. The Court of Appeals was not Required to Reverse Spears' Conviction as it did not Rule that the Trial Court Erred in Applying Rule 403, but Instead Found the Trial Court Erred in Failing to Conduct a Rule 403 Balancing Test, and as a Result, the Court of Appeals Language Regarding Harmless Error was only Related to Whether a Remand was Necessary for a Rule 403 Analysis

Spears maintains the appellate panel erred in remanding his case to conduct a Rule 403 balancing test contending the appellate panel ruled on his argument that the prior shooting was inadmissible under Rule 403 and therefore, upon stating that it could not determine whether the error was harmless, was required to reverse his conviction.⁹ Spears Pet. for Writ of Cert. at 5-6. The State disagrees.

⁸ Spears also did not appeal whether evidence of the Wal-Mart incident was admissible under Rule 404(b), SCRE or whether the Wal-Mart incident was proven by clear and convincing evidence meaning these issues, like the excited utterance ruling, are law of the case. See M.L.-Lee Acquisition Fund, L.P., 327 S.C. at 241, 489 S.E.2d at 472 (holding an unappealed ruling, right or wrong, becomes law of the case).

⁹ For the sake of argument, the State will address the merits of Spears's argument, but by doing so is not conceding the position taken in its' petition for writ of certiorari that: (1) the Court of Appeals should have declined to rule on the issue of whether the trial court erred in failing to perform a Rule 403 balancing test since Spears did not raise the issue at trial and failed to include such an argument in his statement of issues on appeal; and (2) even assuming the issue was properly preserved and presented, the Court of Appeals erred by failing to determine whether the trial court's failure to rule on the Rule 403 issue was prejudicial.

First, the State notes that Spears' argument lies on a faulty assumption. Specifically, that the appellate panel ruled on the argument contained within his brief. Quite simply it did not. Indeed, rather than ruling on the question presented on appeal, whether the trial court erred in applying Rule 403, the appellate panel instead elected to create its own issue—whether the trial court was required to conduct a Rule 403 analysis. The appellate panel then elected to answer its' own question, relied on facts noted in the State's procedural bar argument, that the trial court never ruled on a Rule 403 question, and thus found the trial court erred in failing to conduct a Rule 403 analysis.¹⁰ Having found its' perceived error, the appellate panel then set to work on crafting an appropriate remedy, and within this context, it performed, among other things a harmless error analysis. Thus it seems clear, the harmless error analysis contained within the opinion was utilized for only one purpose, to determine whether a remand was necessary or if the issue could be affirmed on harmless error alone.

A. The Harmless Error Analysis was Clearly Limited to the Discussion of Whether the Court Needed to Remand the Matter to the Trial Court

The appellate panel's opinion itself is perhaps the best evidence of the issue that was actually ruled upon and is therefore most helpful in determining the reason the panel performed a harmless error analysis. Specifically, the harmless error discussion occurred only after the trial court determined, pursuant to State v. King, 349 S.C. 142, 156, 561 S.E.2d 640, 647 (Ct. App. 2002), that the trial court was required to conduct a Rule 403 analysis, which it admittedly failed to do in this case.¹¹ (App. 37-38). Understanding this was the trial court's purported error, the appellate panel reviewed the law from various jurisdictions to fashion the appropriate remedy.

¹⁰ This was of course one of the State's reasons for arguing the issue was not preserved on appeal.

¹¹ The State notes this argument was also never raised at trial, or included in the statement of issues on appeal, and as such the appellate panel erred in addressing such a question under this Court's preservation rules as well as Atlantic Coast Builders and Contractors, LLC v. Lewis, Langley v. Boyter, Rule 208(b)(1)(B), SCACR and Tobias v. Rice.

(App. 38-42). Summarizing the law from other jurisdictions, the panel went on to explain that other courts have either: “(1) determined whether the error was harmless; (2) conducted a *de novo* review and made a balancing decision; or (3) remanded for an on-the-record Rule 403 balancing test.” (App. 39). After detailing the applicable law, the appellate panel declined to conduct a *de novo* Rule 403 review maintaining this was prohibited pursuant to State v. Colf, 337 S.C. 622, 629, 525 S.E.2d 246, 249 (2000). (App. 42). It was only then that the appellate panel engaged in its harmless error analysis and after determining the record was incomplete as to whether the trial court’s perceived error was harmless (App. 43), elected to remand the issue to the trial court with instructions that the trial court perform an on-the-record Rule 403 balancing test. (App. 43). Thus, it cannot be said that the harmless error analysis performed by the appellate panel was based upon a finding that the trial court erred in applying Rule 403.

B. Understanding the Basis for the Appellate Panel’s Ruling there is Simply No Basis for the Reversal of Spears’ Conviction and Sentence

Understanding the basis for the appellate panel’s ruling, it is clear Spears is not entitled to a reversal of his conviction and sentence. Indeed, under Spears’ logic, his conviction should be reversed despite the fact that the trial court’s only ruling on the prior shooting was that it was admissible both as an excited utterance and under Rule 404(b), SCRE, both rulings that Spears never appealed. In other words, Spears wants his murder conviction and sentence reversed by this Court based solely on the trial court’s failure to perform a *sua sponte* Rule 403 analysis, without regard as to whether the evidence would have been admissible under Rule 403. Quite simply, this cannot be the law as Spears would receive what amounts to a legal windfall since a he would theoretically be receiving a new trial despite the fact that no court would have found the prior shooting was inadmissible evidence.

CONCLUSION

In light of the fact the appellate panel did not rule on Spears' question presented, but instead ruled on a question of its' own making, the harmless error analysis contained within the panel's opinion clearly does not mandate reversal since there was no error in the application of Rule 403. As a result, the State respectfully asks this Court to deny Spears' petition for writ of certiorari.

Respectfully Submitted,

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Brendan J. McDonald
ATTORNEY(S) FOR RESPONDENT

August 14, 2013.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions

Larry B. Hyman Jr., Circuit Court Judge

Opinion No. 5119 (S.C. Ct. App. filed April 17, 1013), Appellate Case No. 2010-162287

THE STATE,

PETITIONER/RESPONDENT,

V.

BRIAN K. SPEARS,

RESPONDENT/PETITIONER.

CERTIFICATE OF SERVICE

I, Brendan McDonald, counsel for the Petitioner/Respondent, certify that I have served the within *Return to Spears' Petition for Writ of Certiorari*, on opposing counsel by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney:

Robert M. Pachak, Esq.,
SCCID/Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served on this 14th day of August, 2013.



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ATTORNEY FOR RESPONDENT

August 14, 2013.

The Supreme Court of South Carolina

The State, Petitioner/Respondent,

v.

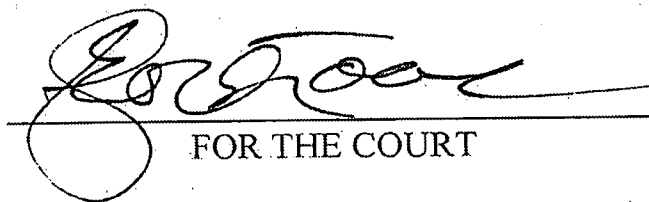
Brian K. Spears, Respondent/Petitioner.

Appellate Case No. 2013-001504

Lower Court No's. 2007-GS-26-3387, 3388, 3389, 3390

ORDER

Petitioners seek a writ of certiorari to review the Court of Appeals' decision in *State v. Brian Spears*, 403 S.C. 247, 742 S.E. 2d 878 (Ct. App. 2013). The petitions are denied.



C.J.
FOR THE COURT

Kaye G. Hearn, J., not participating.

Columbia, South Carolina

September 11, 2014

cc:

Robert M. Pachak, Esquire

Alan McCrory Wilson, Esquire

John W. McIntosh, Esquire

Donald J. Zelenka, Esquire

Brendan Jackson McDonald, Esquire

Jimmy A. Richardson, II, Esquire

The Honorable Melanie Huggins-Ward

The Honorable Jenny Abbott Kitchings

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CLERK OF THE COURT

1 State of South Carolina) Court of General Sessions
2 County of Horry) 2007-GS-26-03387
3 2007-GS-26-03388
4 2007-GS-26-03389
5 2007-GS-26-03390

6 State of South Carolina)
7 vs.) Transcript of Record
8 Brian Kendrick Spears)

9 December 8th, 2016
10 Conway, South Carolina

11 BEFORE:

12 Honorable Larry B. Hyman, Judge.

13 APPEARANCES:

14 Thomas Terrell, Esq.
15 Attorney for the State

16 Barbara Pratt, Esq.
17 Attorney for the Defendant

18
19
20
21 Teresa J. F. Bautz, RPR
22 Official Court Reporter
23
24
25

E X H I B I T S

NO.	DESCRIPTION	ID	EV
Court's-1	Defense Brief	4	--

Exhibits retained by Clerk of Court.

1 (The hearing commenced at approximately 2:59 p.m.)

2 BRIAN KENDRICK SPEARS, after being duly sworn,
3 testified as follows:

4 MR. TERRELL: Your Honor, this is State of South
5 Carolina versus Brian Kendrick Spears. Your Honor, if
6 you'll remember Mr. Spears, this was a trial from back
7 in 2010. He was charged, tried and convicted on
8 indictments 2007-GS-26-3387, 3388, 3389 and 3390.
9 Those are three counts of assault and battery with
10 intent to kill and one count of murder, Your Honor. He
11 was convicted on all three.

12 Your Honor, sentenced him to three years on the
13 murder and 20 years on the assault charges to run
14 concurrent. Your Honor, this case --

15 THE COURT: Three years on the murder?

16 MS. PRATT: 30 years.

17 MR. TERRELL: 30 on the murder.

18 THE COURT: 30, yes.

19 MR. TERRELL: And 20 on the assault.

20 THE COURT: Yes.

21 MR. TERRELL: This case was appealed by the
22 Defendant. The argument on appeal went up to the Court
23 of Appeals. The Court of Appeals found that a
24 balancing test, 403(b) balancing test, on a prior bad
25 act and then testimony of that prior bad act is

1 necessary on the record. And then any further action
2 will be based on the outcome of that hearing, Your
3 Honor. That's the purpose we're in front of you today.

4 THE COURT: All right. Let me hear from you,
5 Ms. Pratt.

6 MS. PRATT: Your Honor, the first thing I'd like
7 to do is make a copy of the brief that I gave to you
8 and the solicitor this morning as a Court's Exhibit if
9 that's acceptable.

10 THE COURT: It certainly is. Thank you.

11 (WHEREUPON, Court's Exhibit No. 1 was marked for
12 identification.)

13 THE COURT: Yes, ma'am.

14 MS. PRATT: Thank you, Your Honor. Your Honor, as
15 I'm sure you are aware, and you may remember this
16 trial --

17 THE COURT: I do.

18 MS. PRATT: -- it was a hotly contested case that
19 we had. My client was accused of coming here from
20 Lumberton with a couple of his friends and engaging in
21 a shooting incident against some other people from
22 Lumberton who were part of an opposing gang. There was
23 a lot of gang testimony and gang affiliation
24 information that came in in the trial.

25 The issue that the Court of Appeals focused on was

1 about a shooting incident that had happened at the
2 Wal-Mart approximately a month earlier. And if you
3 have read through the transcript, I'm sure you remember
4 that there was a lot of argument between Ms. Elder and
5 I as to whether or not that information should come in.

6 You, yourself on the first day of motions when we
7 were talking about it identified probably the biggest
8 problem that they had which was how were they going to
9 get that shooting incident in. Ms. Elder suggested
10 that it was an excited utterance. You sent us home to
11 do some research.

12 But at this night before we broke for the night,
13 one of the things that I said was that there was a
14 problem with a prejudicial versus probative argument in
15 regards to this particular testimony. The next day the
16 solicitor and I again argued the case.

17 She actually told you, and I have the pages in the
18 transcript, that there were going to be -- there was
19 going to be testimony from LaMark Irons or perhaps from
20 Tim Smith who was the jailhouse snitch. Most notably
21 Tim Smith was the person that she mentioned, and that
22 he was going to say that my client had admitted to him
23 that he was involved in that Wal-Mart shooting.

24 Up until then, from the way I read the transcript,
25 I feel that you were concerned about whether or not

1 there was strong enough evidence and a way to tie my
2 client to it. You may remember that there was a video.

3 THE COURT: I couldn't tell who was on the video.

4 MS. PRATT: Not at all. And it wasn't something
5 that could be copied, we couldn't exchange it. I think
6 that there were --

7 THE COURT: As I recall --

8 MS. PRATT: -- some pictures put in.

9 THE COURT: -- what we actually heard was the
10 victim's sister said that the victim appeared at her
11 home, timeframe shortly after the shooting at Wal-Mart.
12 And he still had wet blood on his shirt and all and
13 said that the Defendant, Boz, whatever, shot him.

14 And that was admitted under an excited utterance
15 theory; right?

16 MS. PRATT: Yes, Your Honor. You started with
17 excited utterance, and there was argument about excited
18 utterance and the cases, Staton and some other cases
19 that the solicitor cited. But then under questioning
20 from you, you asked her questions about whether or not
21 this was going to be coming in as a prior bad act under
22 Lyles and 404(b).

23 THE COURT: Lyles.

24 MS. PRATT: And she said that, yes, she would also
25 be arguing that it belonged under 404(b) based on

1 motive, intent, identity and a common scheme or plan.

2 THE COURT: You know, it was really a hybrid
3 issue. First was, was there enough evidence to tie it
4 to this Defendant, and that issue involved the
5 admission of an excited utterance for that proof. And
6 then beyond that there was the issue of was it
7 admissible -- even if it came in under excited
8 utterance, was it admissible as evidence of a prior bad
9 act, common scheme, design, motive, that sort of stuff,
10 which was a Lyle issue. So it was a two-tiered thing.

11 MS. PRATT: Yes, Your Honor.

12 THE COURT: I had ruled that it came in as an
13 excited utterance. Now, was that addressed in the
14 Court of Appeals, was that appealed, was that ruling
15 appealed? Was it addressed at all in the Court of
16 Appeals opinion?

17 MS. PRATT: The Court of Appeals opinion did not
18 discuss the excited utterance issue at all.

19 THE COURT: Okay.

20 MS. PRATT: The only issue that they discussed was
21 the prior bad acts.

22 THE COURT: So we get to the second tier. So is
23 the excited utterance ruling at issue at all?

24 MR. TERRELL: No, sir. No, sir. The way I
25 understand the opinion taken in conjunction with the

1 transcript is the statement has to come in first, we
2 have to figure out a way to get the statement in. That
3 came in as a hearsay exception as an excited utterance.
4 The Court of Appeals apparently was fine with that
5 because they did not address that issue. The next is
6 was --

7 THE COURT: Well, that's where I want to be.

8 MS. PRATT: Well, I would object to that
9 characterization. We don't know that they are fine
10 with it, because they may have addressed the 404(b) and
11 reached their remand conclusion without deciding about
12 the excited utterance.

13 THE COURT: But we never even got -- would have
14 never even gotten to a 403(b) analysis if they had
15 first said, no, it's not admissible, under excited
16 utterance is an exception to hearsay. I'm not clear as
17 to whether or not that ruling is at issue or not.

18 MS. PRATT: Well, what the Court says in its
19 opinion, it -- and I'm looking at page, I think, it's
20 page six, here the trial Court ruled Hammonds could
21 testify as to the victim's statement about the Wal-Mart
22 shooting pursuant to the excited utterance exception to
23 hearsay.

24 Immediately thereafter, the solicitor proffered
25 the video of the Wal-Mart shooting. The trial Court

1 indicated it understood the solicitor was offering the
2 evidence of the prior shooting under 404 or evidence of
3 a prior bad act. And then they went forward from
4 there.

5 So they did not specifically say that you couldn't
6 have admitted it under excited utterance, but they
7 moved straight to the 404.

8 THE COURT: Well, my point is, am I asked to
9 revisit or address that at this hearing? I think not.
10 I don't think that's what the remand was for.

11 MR. TERRELL: No, sir, Your Honor.

12 THE COURT: I think the remand was for a 403
13 analysis.

14 MS. PRATT: It is, Your Honor. And that's what
15 they've asked you to do is a 403 balancing test to
16 determine if the probative value of the prior shooting
17 testimony is substantially outweighed by the danger of
18 unfair prejudice to Spears.

19 My point would be that you would do that
20 prejudicial versus probative balancing test on the
21 evidence coming in as excited utterance or the evidence
22 coming in under 404(b). I think that you still, no
23 matter what, you have to look at the evidence in --

24 THE COURT: But isn't there two tiers here? You
25 know, we've got to get past excited utterance before we

1 get to -- I mean, it's two different things.

2 MS. PRATT: I agree.

3 THE COURT: She's saying he came in and said that
4 he was shot by the Defendant who was known as Bob, I
5 think, or --

6 MS. PRATT: Boz, Boss.

7 THE COURT: -- Boggs or some street name, okay,
8 that she took to be the Defendant and that's how she
9 knew the Defendant. So we've got that issue here,
10 okay. Here is this piece of evidence, this shooting.
11 Here is this lady who's testifying that that piece of
12 evidence, not that it should come in but it is the
13 evidence itself. Because you see some people getting
14 shot, but you don't have any idea who it is except for
15 the declaration of the victim on that night, which was
16 admitted, okay.

17 Okay. Once it's admitted, we've got evidence of a
18 shooting between the victim and the Defendant at the
19 Wal-Mart. Does the shooting, not the statement, does
20 the shooting come in? That's what's the 403 issue,
21 does this shooting, does the fact that there was a
22 shooting between these parties, does it come in
23 under -- does it meet the 403 test, is it
24 substantially -- does the probative value substantially
25 outweigh the prejudicial value of the act?

1 You know, it's two different things --

2 MS. PRATT: I agree.

3 THE COURT: -- as I see it. It's two different
4 things. Number one, this statement up here which is
5 evidence of this act that happens down here. On one
6 hand, you could talk about the statement, should Judge
7 Hyman have admitted the statement to identify the
8 people that were in this video, okay.

9 And then you've got the issue of even if she has
10 identified them, should the video come in. And I think
11 it's two separate issues, but I don't know that the
12 Court has left it as two separate issues.

13 On the one hand what if the video had been crystal
14 clear and you could be identified, we wouldn't even
15 have needed that statement, we wouldn't have to worry
16 about that first tier. It would have come right in on
17 its face. But now we've got that, the statement.

18 MR. TERRELL: Right.

19 THE COURT: Now, was the statement, was the
20 statement -- my finding that the statement should come
21 in as an excited utterance, was that challenged?

22 MR. TERRELL: That's not on issue here today, no,
23 sir.

24 MS. PRATT: Well, I don't know that you can say
25 that, Mr. Terrell. I understand --

1 THE COURT: Okay. Well, tell me how that comes
2 in.

3 MS. PRATT: Here's the point that I would say
4 about that. And I agree with you that they are two
5 different issues. Because I remember very clearly that
6 you started with excited utterance, and then we
7 progressed to the whole piece, which is the statement
8 plus the shooting information. Because that's the only
9 testimony about the shooting, there's no other person
10 that testifies about the shooting throughout the entire
11 trial except for Danielle Hammonds, the sister of the
12 victim.

13 And it's -- only testimony that she's able to do
14 is the statement that her brother said to her, Boss
15 shot me at the Wal-Mart. And she didn't remember -- if
16 you remember, she didn't know exactly the time,
17 although we knew it was after midnight, and she didn't
18 remember the date.

19 The way that the Court of Appeals states their
20 conclusion, they say, based on the trial Court's
21 failure to conduct a Rule 403 balancing test to
22 determine if the probative value of the prior shooting
23 testimony is substantially outweighed by the unfair
24 prejudice.

25 That leads me to believe that they're talking

1 about the testimony which is Ms. Hammonds because
2 that's the only way it came in.

3 THE COURT: Right. What we have here is two prior
4 findings before we ever get to 403.

5 MS. PRATT: I agree.

6 THE COURT: First, I had to find that her
7 testimony was admissible as excited utterance. Then I
8 had to find that the fact that there was an altercation
9 between them normally would not be admissible but for
10 my finding that it went to show motive or intent, okay.

11 MS. PRATT: I agree.

12 THE COURT: So I've got a ruling on admissibility,
13 I've got a ruling as to the statement. I've got a
14 ruling under that as to whether or not it should come
15 in under a Lyle type exception of a bad act. And I've
16 made a finding that it went to show motive and intent.
17 So we got that.

18 And the Court says, you didn't put on the record a
19 final third tier where you have to decide, well, I'm
20 going to admit it, it's all okay, it comes in normally,
21 but does the probative value substantially outweigh the
22 prejudicial value.

23 So is that third tier what we're arguing about, or
24 are we arguing about whether or not it was proof of
25 motive, intent? Are we arguing about whether or not I

1 should have made a ruling that this was an excited
2 utterance?

3 MR. TERRELL: If I could address --

4 MS. PRATT: Your Honor, I --

5 MR. TERRELL: If I could address that briefly,
6 first, I'd like to draw your attention to the
7 conclusion of the Court of Appeals opinion. And it
8 speaks solely to the balancing test to determine if the
9 probative value of the prior shooting is substantially
10 outweighed by the danger of unfair prejudice.

11 MS. PRATT: Prior shooting testimony, Mr. Terrell,
12 you left out a word.

13 MR. TERRELL: Prior shooting testimony.

14 MS. PRATT: Thank you.

15 MR. TERRELL: Is substantially outweighed by the
16 danger of unfair prejudice to Spears, we remand with
17 instructions for the trial Court to conduct an
18 on-the-record balancing test. That seems very clear to
19 me that the only thing we're here for today to
20 determine is the on-the-record balancing test.

21 THE COURT: The balancing test is a 403 test.

22 MS. PRATT: I agree.

23 MR. TERRELL: Correct. And if I may, Your Honor,
24 I believe, has just misspoken a couple times. The
25 standard is whether the probative value is

1 substantially outweighed by the prejudicial value.

2 THE COURT: I'm sorry, I didn't --

3 MR. TERRELL: And it winds up making a difference.

4 THE COURT: I always do that, but --

5 MR. TERRELL: Yes, sir, yes, sir. I know what you
6 mean.

7 THE COURT: I know what I'm talking about.

8 MR. TERRELL: But for it not -- for Your Honor to
9 rule that it doesn't come in, that testimony, you would
10 have to find that the prejudicial value substantially
11 outweighs the probative value.

12 If I could continue from there, the State's
13 contention in this instance is that this testimony of
14 the prior shooting is incredibly probative which would
15 require the prejudicial value to be that much higher.

16 THE COURT: Okay. Let's go to the basics.

17 MR. TERRELL: Yes, sir.

18 THE COURT: Tell me how it's probative.

19 MR. TERRELL: Your Honor, the testimony of the
20 prior bad act is probative in a number of ways.

21 THE COURT: I thought it was probative to show
22 motive and intent.

23 MR. TERRELL: It's probative to show motive, it's
24 probative to show intent, it's probative to show
25 absence of mistake. It's probative to show common plan

1 or scheme and the continuing plan or scheme. Since
2 it's taken in a broad picture, it's all part of the
3 retaliation having, I'm not sure, also identity of the
4 Defendant and of the parties in this.

5 It speaks directly to all of those factors, which
6 are listed for reasons for a prior bad act to come in.
7 It's not cumulative, it's highly probative of many of
8 the key issues in this case. And because of that --
9 especially in light that the jury never saw the actual
10 video of the Wal-Mart shooting.

11 THE COURT: As I recall, weren't there bystanders
12 also struck in this shootout? It occurred down on the
13 boulevard?

14 MS. PRATT: Yes, Your Honor. Three.

15 MR. TERRELL: Yes, Your Honor. Those are the
16 other three issues of assault with intent to kill.

17 THE COURT: Would intent, identity, that sort of
18 thing, absence of mistake -- the only person actually
19 killed was the victim; right?

20 MR. TERRELL: That's correct.

21 THE COURT: And this was murder, and we're talking
22 about the intentional taking of his life with malice.
23 Isn't it important that we know that this just wasn't a
24 random shootout, isn't it important that the State
25 prove that he went there with a purpose to shoot this

1 victim?

2 MR. TERRELL: Absolutely.

3 MS. PRATT: Well, and Your Honor, I understand, if
4 I may?

5 THE COURT: Yes, ma'am.

6 MS. PRATT: That that is the question that you
7 raised when we were doing the argument back at trial,
8 that you felt that this went to motive and intent to
9 show that this was a vendetta, I think was the word you
10 actually used in the transcript.

11 But in this particular case, this evidence of the
12 shooting is unnecessary to show that there was a
13 vendetta. There was ample testimony from other people
14 that testified, the codefendant, Mr. Bethea Byrd, other
15 people that were State's witnesses, that there had been
16 a vendetta because Eric had been killed -- Floyd, Eric
17 Floyd, had been killed in Lumberton.

18 Mr. Hammonds had gone to prison for four years as
19 an accessory. And then this happened about the
20 shooting at Wal-Mart was about a month after he got
21 out, and then this shooting happened about a month
22 later. This was not necessary. And I think the point
23 about the probative value of this --

24 THE COURT: But doesn't the shooting actually add
25 much to that. I remember that the victim had gone to

1 prison because of some involvement in someone else
2 getting killed. That happens everyday. The fact that
3 this Defendant -- or evidence that this Defendant
4 actually one month earlier sought him out and shot him,
5 doesn't that take it to the level of where this
6 Defendant intended to murder him, he had previously
7 attempted it.

8 MS. PRATT: Well, I'm sure that would be the
9 State's argument. Our position is that while that is
10 certainly probative, is it necessary, and does that
11 value, is that outweighed by the prejudicial effect.

12 THE COURT: Okay.

13 MS. PRATT: Because your prejudicial problem that
14 you have here is that it's exactly the same type of
15 incident, shooting at the guy, then shooting at the guy
16 a month later. So is there not, because of the
17 identity of the style of the action, unfair prejudice,
18 as the Court actually says, because it's the same type
19 of incident.

20 And my argument in the brief and one of the things
21 that I say when I use the word cumulative that the
22 State mentioned, is they didn't need it. They could
23 have done it with Mr. Bethea's testimony which was very
24 clear on that, the gang affiliation, the rap lyrics.
25 You remember the rap situation there?

1 THE COURT: Um-hum.

2 MS. PRATT: You know, all of that was all they had
3 to have for this. To bring this piece of evidence in
4 to add to it simply opens the door for the prejudicial
5 effect problem.

6 THE COURT: Okay, all right. Let's talk about
7 that. How, then, if all that was already there, how
8 then does this -- is the admission of this prejudicial?

9 MS. PRATT: It's prejudicial because of the same
10 facts that --

11 THE COURT: Or unfair prejudice.

12 MS. PRATT: Unfairly prejudice. Because
13 everything is prejudicial. As Judge Floyd told me one
14 time, if it weren't prejudicial, we wouldn't be trying
15 to get it in.

16 THE COURT: They wouldn't even offer it.

17 MS. PRATT: That's right, they wouldn't want it.
18 It's unfairly prejudicial because it is exactly the
19 same pattern of incident. Goes to a location, shoots
20 at him, goes to a location, shoots at him, between the
21 two different incidents. And it would be possible for
22 the jury to say, well, if he shot at him once, then he
23 probably shot at him this time too.

24 And if you remember --

25 THE COURT: That makes it very probative; doesn't

1 it?

2 MS. PRATT: It can make it probative, but it also
3 has the prejudicial component.

4 THE COURT: And how so, how so is it unfairly
5 prejudicial?

6 MS. PRATT: Well, I can quote State v. Alexander,
7 303 South Carolina 377 at 382, 401 S.E.2d 146, a 1991
8 South Carolina case which is attached to my brief.
9 Evidence is unfairly prejudicial if it has an undue
10 tendency to suggest a decision on an improper basis.

11 THE COURT: Improper basis, right.

12 MS. PRATT: Okay. So just because he shot him
13 before doesn't mean that he shot at him this time. And
14 if you remember one of the questions in the case was
15 did Byrd who actually matched the composite, that's
16 Jeffrey Bethea, was he the shooter, or was Mr. Spears,
17 known as Boss, the shooter.

18 And so you've got an improper basis there if they
19 are going to simply believe that the -- because he is
20 accused of doing it once through a hearsay exception,
21 then he did it this time too. This evidence is more
22 than just than undue tendency to suggest a decision on
23 an improper basis.

24 The State went ahead and made this argument in
25 closing. If you look at Donna's closing argument on

1 page 631, Boss went to Wal-Mart in Lumberton, tries to
2 take Aaron Hammonds out there, he does hit him, shoots
3 him but he doesn't kill him. And he gets his
4 opportunity a month later on the boulevard. So she
5 makes it as if it's all one piece, which is the idea of
6 the common scheme and plan or, you know, and also the
7 motive and intent.

8 My problem if I can go back to something right
9 quick, Your Honor, and...

10 THE COURT: How else would you prove it if the
11 State's theory is that it was a common scheme, he was
12 going to get him, and he stalked him for it and he was
13 going to kill him, how else would they prove that?

14 MS. PRATT: The testimony was given by Jeffrey
15 Bethea that -- to all of that. This particular
16 incident didn't have to be in this case at all in order
17 for the State to make their case. And their case
18 wasn't weak when you consider Jeffrey Bethea's
19 testimony.

20 The problem for Jeffrey Bethea was the reason he
21 was testifying, under our theory, is the defense was he
22 matched the composite. Oh, dear, I better turn myself
23 in and pin it on somebody else. And the State had
24 already agreed to give him 20 years on voluntary
25 manslaughter before he even testified. So I guess in

1 their minds, maybe they had to do something to overcome
2 what he testified to.

3 But what he testified to was extremely clear as to
4 the fact that Boss had ordered this to be done because
5 of the incident with Mr. Floyd.

6 THE COURT: But you challenged that, you
7 challenged that.

8 MS. PRATT: Of course I did.

9 THE COURT: Okay.

10 MS. PRATT: But that doesn't mean that they have
11 to put in something else because I challenged this.
12 And they opened the door to this prejudicial issue.

13 I do want to raise one thing that I think's
14 important, and I know you may not want to hear it, but
15 I wanted to have it on the record. In order to have a
16 404(b) Lyles piece of evidence come in, it has to be
17 clear and convincing. You ruled that it was clear and
18 convincing in your argument, at least in your
19 statements in the transcript -- where did you do it.
20 Page 269, lines 17 and 18.

21 But did you that based on something that you said
22 to Donna Elder, I'm going to hold you to this,
23 solicitor, when she said Mr. Irons said certain things,
24 and then also that Tim Smith who was the jailhouse
25 snitch would testify that Boss or Brian had told him he

1 was involved in the Wal-Mart shooting.

2 Your exact words as I remember them and that are
3 in the transcript is something along the lines of,
4 well, if you've got a witness, then clearly it's going
5 to come in. But Mr. Smith never testified to that, and
6 LaMark Irons never testified. So the only evidence
7 that you had of this incident were the excited
8 utterance statement and a video that nobody could read.

9 My argument has to be that that's not clear and
10 convincing evidence, and so you should never even get
11 to Lyles. But if you do, then I think, you know, the
12 403 balancing test that the Court of Appeals wants, you
13 know, also has to be addressed.

14 THE COURT: Okay.

15 MS. PRATT: I just want that clear.

16 THE COURT: All right, okay.

17 MR. TERRELL: I don't think that's properly before
18 the Court at this point. I think it's just for the
19 balancing test is the purpose we're here today on.

20 THE COURT: Okay. All right, I'm going to take it
21 under advisement.

22 MR. TERRELL: If I could also add briefly, Your
23 Honor?

24 THE COURT: Oh, yes.

25 MR. TERRELL: There was a limiting instruction, of

1 course, that you gave to the jury which would limit the
2 prejudicial value. Also, the jury never saw the video
3 which would limit the danger of unfair prejudice.

4 Having the victim's sister come in and say, Boss
5 shot me, would undoubtedly be less prejudicial than
6 having the jury see the actual prior bad act take
7 place. I think both of those in combination with the
8 extremely high probative, extremely probative value of
9 the statement, I think should lead the Court to a
10 conclusion that it was not -- the probative value was
11 not substantially outweighed by the danger of unfair
12 prejudice which is the standard, as Your Honor is
13 aware.

14 THE COURT: Okay. All right, I'm going to take it
15 under advisement. I'll advise you of my ruling. I
16 don't know if I'll get it before the first of the year,
17 but I will try to, okay.

18 MS. PRATT: Thank you very much for hearing from
19 us, Your Honor.

20 (The hearing concluded at approximately 3:28 p.m.)

21 (End of Transcript of Record.)
22
23
24
25

1 CERTIFICATE OF REPORTER

2

3 STATE OF SOUTH CAROLINA)
4 COUNTY OF HORRY)

5

6 I, TERESA J.F. BAUTZ, Official Court

7 Reporter for the Fifteenth Judicial Circuit of the

8 State of South Carolina, do hereby certify that the

9 foregoing is a true, accurate and complete Transcript

10 of Record of the proceedings had and evidence

11 introduced in the trial of the captioned case, relative

12 to appeal, in the Court of General Sessions for Horry

13 County, South Carolina, on the 13th day of June, 2017.

14

15 I FURTHER CERTIFY that I am neither of

16 kin, counsel nor interest to any party hereto.

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19

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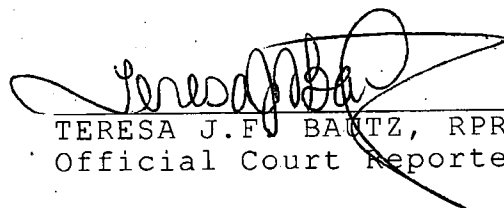
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TERESA J.F. BAUTZ, RPR
Official Court Reporter

STATE OF SOUTH CAROLINA
COURT OF HORRY

STATE OF SOUTH CAROLINA

VS.

BRIAN SPEARS,
DEFENDANT

COURT OF GENERAL SESSIONS
Warrant: J735111, J735112, J735113, J735114
Indictment: 2007GS2603387, 2007GS2603388,
2007GS2603389, 2007GS2603390

AMENDED ORDER ON REMAND FOR
RULE 403 HEARING
(Correcting error on page 4)

2017 FEB -9 AM

FILED

This matter came before the court on December 8, 2016. It was remanded by the South Carolina Court of Appeals for an on-the-record 403 Balancing Test regarding testimony of a prior bad act. For the following reasons, the Court finds the probative value of the testimony is not substantially outweighed by the danger of unfair prejudice.

FACTS

On May 27, 2007, Brian Spears (Defendant) allegedly shot and killed Aaron Hammonds (Victim) on Ocean Boulevard in Myrtle Beach. Police arrived at the scene and, after speaking to witnesses, were able to create a composite sketch of Co-defendant Jeffery Bethea. Upon seeing the sketch on a news broadcast, Bethea turned himself into the police and began to cooperate. Bethea told police Defendant and Nathaniel Douglas were responsible for Victim's death. Both were subsequently arrested.

Evidence presented during pretrial motions and at trial established that Victim was a member of East Side Bloods, a gang in North Carolina. Defendant, codenamed Bos, was a member of another gang variously called 41-Curve, G.D. Folk Nation, and The Growth Development Gangster Site (hereinafter 41-Curve). Prior to his murder, Victim had recently been released from prison after serving a four year sentence. Victim pled guilty to accessory after the fact in connection with the murder of Eric Floyd. Before his murder Eric Floyd had been a high-ranking member of 41-Curve, Defendant's gang. The State argued Victim's death was a gang-related revenge killing for the death of Eric Floyd.

During pretrial motions, the State introduced evidence that on April 17, 2007, approximately one month after Victim was released from prison, Defendant shot Victim in a Walmart parking lot in Lumberton, North Carolina (Walmart shooting). Defendant argued the

prior shooting is not admissible under the South Carolina Rules of Evidence, Rules 403, 404(b), and 801. The Court took the matter under advisement and withheld its ruling pending the presentation of evidence at trial.

At trial, the State called Victim's sister, Danyell Hammonds (Hammonds) to the stand. She testified that one month before Victim's murder, Victim told her "Bos" shot him outside of a Walmart. Hammonds stated she knew Bos to be Defendant. According to Hammonds, Victim and Lemark Irons, a friend of Victim who was also with him when Victim was murdered, came to her house and ran to her room where she saw wet blood on Victim's shirt. Hammonds explained she believed the shooting had just occurred because the blood in the Victim's hand was still wet. She testified in an in camera hearing that before Victim was released from prison, a group of 41-Curve members told her that they were "going to get" Victim. This particular testimony was not presented to the jury.

Video of the Walmart shooting was shown to the court, however, the video was not published to the jury. The time stamp on the video showed the shooting took place at approximately 12:10 am. Hammonds testified Victim and Irons came running into the house shortly after midnight. While Irons was not with Victim at the time of the shooting, Irons was with Victim when they arrived at Hammonds' house. Hammonds stated, "He just, he just come in, they run to my room cause I'm pretty sure if anybody get shot they're going, you know, panic or whatever, they came to the room and everything and I was like 'what's wrong' and they was like 'I got shot at at Walmart.'" A few questions later she stated, "He told me, all he told me he came in the house, he was like I got shot at at Walmart, I had a little problem, he said I got shot at at Walmart. I was like what happened at Walmart, he was like I got shot at, man, and he was like, I was like well Aaron, who did it. He was like come on, man, you know who did it. I was like who and he was like Bos, man, Bos." Defendant objected to this testimony first as hearsay under Rule 801, then as a prior bad act under Rule 404. S.C. R. Evid. 404 and 801.

In order for hearsay to be admissible it must fit into an exception. The State argued that the testimony fit the excited utterance exception. An excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. S.C. R. Evid. 803(2). To fit under the exception for an excited utterance, the statement must be contemporaneous while the declarant was still under the stress and

excitement of the event. The times in which the event took place and the statement was made do not have to be contemporaneous, like a present sense impression exception. S.C. Evid. 803(1). Therefore, to be an excited utterance the statement can be made while the event is still affecting the speaker and the speaker is still under the stress of the event, without having had sufficient time to calm down. (*See State v. Burroughs*, 328 S.C. 489, 492 S.E.2d 408, (SC App. 1997). "The mere fact that a statement was made some time after the incident occurred, as opposed to immediately thereafter, does not mean the statement cannot qualify as an excited utterance, provided the circumstances surrounding the statement indicate its reliability.")

Here, the Court determined Victim was still acting under stress when he made the statement. He ran into the house with fresh blood on his shirt and still bleeding from the gunshot wound. The shooting took place at approximately 12:10 am and Hammonds testified Victim ran into the house near midnight, putting the statement close to the time of the shooting. Considering the totality of the circumstances, the Court found these statements fall under the excited utterance exception to hearsay and are admissible.

Although the Court ruled the statement was admissible under a hearsay exception, the statement described a prior bad act. Therefore, to be admissible a second tier of analysis had to be done under Rule 404. The Court had to determine whether the Walmart shooting, a prior bad act described in the statement, was admissible under a 404(b) and under a 403 balancing tests.

South Carolina Rules of Evidence Rule 404(b) states: 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. S.C. R. Evid. 404. This rule is designed to prevent "propensity" arguments and bias amongst the jury. Evidence of a prior bad act under Rule 404(b) is relevant only to establish the motive, identity of the perpetrator, common plan or scheme, absence of mistake or accident, and intent. *Id.* A prior bad act that has not resulted in a conviction must be established by clear and convincing evidence. *State v. Holder*, 382 S.C. 278, 676 S.E.2d 690. In other words, to be admissible under a *Lyles* exception, a bad act must logically relate to the crime with which the defendant has been charged; if the defendant was not convicted of the prior crime, the prior bad act must be proven by clear and convincing evidence.

As previously noted, the State's theory of the case was that the murder of Victim was not a random gang shooting, but that there was a vendetta against Victim for his involvement in the

murder of Eric Floyd. The State argued it was an intentional taking of Victim's life with malice. Victim was released from prison for only one month before Floyd's fellow gang members shot Victim in the Walmart parking lot. Victim was shot in the arm and drove home where he told Hammonds that Defendant had shot him. A month later, Victim was murdered by members of Floyd's gang in Myrtle Beach. The Court found that these two acts were related. The Walmart shooting and the Boulevard shooting demonstrated there was a common scheme or plan. The prior bad act is admissible to show the intent of Defendant to kill Victim, as well as Defendant's motive, revenge. Hammonds' testimony corroborated this theory as she testified about her personal knowledge that members of 41-Curve wanted to kill Victim for his involvement with Floyd's death.

The Court found Victim's murder was not a random act. Regardless of whether the killing was planned for the night it occurred, there was a hit placed on Victim, and there was a common scheme or plan for his murder. The Court found the prior bad act indicates the absence of mistake – Defendant was targeting Victim in a gang-related revenge killing.

Additionally, the Court found the evidence of the prior bad act was clear and convincing. While there was no police report connecting Defendant to the Walmart shooting, not was Defendant identified in the video of the shooting, Hammonds testified Defendant was involved in the shooting. Victim's statement naming Defendant as his shooter is clear and convincing evidence that Defendant was involved in the Walmart shooting.

Once deemed admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent, such evidence of prior bad acts may be excluded by the Court pursuant to Rule 403 if the danger of unfair prejudice to the defendant substantially outweighs the probative value of the relevant evidence. The Court ruled the statement was admissible in full and allowed the prior bad act to come in without doing a Rule 403 balancing test on the record.

Defendant was found guilty of Murder and three counts of Assault and Battery with Intent to Kill. The Court sentenced Defendant to thirty years' imprisonment for murder and twenty years' imprisonment for each count of Assault and Battery with Intent to Kill count to be served concurrently. An appeal followed.

The South Carolina Court of Appeals stated, "other than finding there was clear and convincing evidence of the prior shooting and Hammonds' testimony was admissible, the trial court made no specific findings on the record as to why the testimony had probative value, the nature of the unfair prejudice, or whether the probative value of the testimony was substantially outweighed by the danger of unfair prejudice." State v. Spears, 403 S.C. 247, 742, S.E.2d 878 (Ct. App. 2013). The Court of Appeals declined to conduct a de novo Rule 403 balancing test. Thus, the issue was remanded back to the trial court for an on-the-record balancing test pursuant to Rule 403, SCRE, to determine if the probative value of the prior shooting was substantially outweighed by the danger of unfair prejudice to Defendant. A writ of certiorari was denied by Order of the Supreme Court on September 11, 2014. Remittitur was issued September 23, 2014.

At issue on remand is Hammonds' testimony that Victim told her Defendant shot him at Walmart. The sole issue concerning this prior bad act testimony is whether the probative value is substantially outweighed by the unfair prejudice (SCRE 403). The South Carolina Court of Appeals remanded the matter in order for the trial court to do an on-the-record 403 balancing test. Consistent with the Supreme Court's ruling that an appellate court should not conduct its own balancing process, the Court of Appeals declined to conduct a de novo Rule 403 balancing test. State v. Spears, 403 S.C. 247, 742, S.E.2d 878 (Ct. App. 2013) (quoting State v. Colf, 337 S.C. 622, 629, 525 S.E.2d 246, 249 (2000)) ("It is difficult, if not impossible, for an appellate court to balance the interests at stake when the record does not contain the specific facts and circumstances necessary to a decision."). Therefore, the Court of Appeals remanded the matter for the trial court to conduct a 403 hearing.

Analysis

Rule 403 of the South Carolina Rules of Evidence states: "[a]lthough 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." S.C. R. Evid. 403. All relevant evidence will be prejudicial to some effect; however, the test is whether the probative value is substantially outweighed by the danger of unfair prejudice. Unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Stokes, 381 S.C. 390, 673 S.E.2d 434 (2009).

A prior bad act has the potential to cause unfair prejudice to the defendant and bias the jury. The danger is substantially enhanced when the prior bad act is strikingly similar to the one which the defendant is being tried. It is clear the evidence of the Walmart shooting is prejudicial to Defendant. However, the rule does not state that any testimony which brings a danger of prejudice should be excluded, the rule states that the danger of unfair prejudice must substantially outweigh the probative value for the evidence to be excluded.

Defendant was not convicted of the Walmart shooting. The only evidence presented to the jury about the Walmart shooting was from Hammonds, stating that Victim told her Defendant had shot him. The jurors were not shown the video of the Walmart shooting. The jury is able to judge the credibility of each witness, they are free to believe all, some, or none of the testimony of any witness presented. Defendant argues the State is making a propensity argument, suggesting the evidence is being used simply to show he shot him once so it must have been Defendant who shot him again. It is well-settled law that a propensity argument is inadmissible. However, in State v. Dennis the South Carolina Court of Appeals held, "One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so intimately connected with the explanatory of the crime charge 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, and where evidence is admissible to provide this full presentation of the offense, there is no reason to fragmentize the event under inquiry by suppressing parts of the res gestae." 402 S.C. 627, 742 S.E.2d 21 (S.C. Ct. App., 2013). The State's theory behind the murder was that the shooting was a gang related revenge-killing. Victim's murder was not a random act of gang violence, instead, the murder was a planned hit on Victim's life. The State did not use the evidence of the Walmart shooting to identify Defendant in the Myrtle Beach shooting. The State was not making the argument that the perpetrator was necessarily Defendant because he shot at Victim in a prior instance. The Walmart shooting was admitted because it was a part of a common scheme or plan to kill Victim, and it went to the motive and intent of Defendant.

Additionally, the danger of unfair prejudice is substantially decreased by other evidence presented at trial. There were multiple eye witnesses and testimony to identify defendant as the shooter in the Myrtle Beach shooting. Tim Smith, a cell mate of Defendant in jail, testified

Defendant admitted to killing Victim. Smith testified Defendant told him of the plan to kill Victim—Defendant was upset because Victim had killed his friend and that when he learned Victim was in Myrtle Beach for Bike week, Defendant and several friends loaded up to "take care of [Victim]." Smith testified, "[Defendant] said that, that they had got up with the guy and this fellow who used to be his partner named Bird said that he was supposed to take care of the guy and he couldn't do it. So he said he run back to the car and said he was parked at the K-Mart parking lot. Said he run back to his car and got his gun come back; and, you know, he said they was going down Ocean Boulevard and said that he was running through the crowd and passed his buddies and caught up with the guy that they had been arguing with, the guy that killed his friend; and he said he did what they called wetting him up, he said he wet him up and evidently, you know, he shot three other people at the time you know."

Co-defendant Jeffrey Bethea testified he was there the night of the shooting. He claimed he and Defendant "hyped" each other up to take out a member of the rival gang. After seeing Victim and speaking to Lemark Irons they decided to attack the East Side Bloods and kill Victim. Bethea testified, "I pulled out a knife. I was, I was looking for Lemark [Irons] and as we walked up, when we was coming up [Defendant] pulled out his gun." Bethea testified Defendant pulled out his small caliber pistol from his right side waistband, which is consistent with other testimony, and shot Victim.

Brittney Maynor, Victim's girlfriend, was at the Boulevard with Victim when he was murdered. She testified that a man dressed in a red shirt and a red hat shot her boyfriend. Bethea said Defendant was wearing a red shirt. Nathaniel Douglas testified Defendant was dressed in three shirts, with a red shirt worn on the outside and a black and red New York Yankees hat. There was over-whelming evidence presented at trial that Defendant was the shooter. The prejudicial effect of the Walmart shooting is thus diminished in light of this evidence. The danger of unfair prejudice and the undue tendency to suggest decision on an improper basis is nullified by the fact that the jury could have found Defendant guilty from the testimony of multiple witnesses stating either the Defendant was the shooter or Defendant admitted to the shooting, even without the introduction of the Walmart shooting.

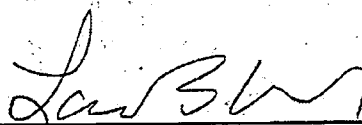
At the hearing, Defendant brought up for the first time his objection under Rule 403 that the testimony, besides being unfairly prejudicial, was cumulative. Defendant admits there is

evidence against him, however, he argues that the introduction of the Walmart shooting is a needless presentation of cumulative evidence. But, in order to exclude the introduction of evidence because it is cumulative, the evidence must be needless. S.C. R. Evid. 403. Again, the testimony of the prior shooting goes to the theory that it was a gang-related revenge killing. It shows that there was an intent and plan to kill Victim. The prior shooting shows the full picture of the theory of the case. Although Defendant could have been convicted without the evidence, the rules of evidence do not prevent a party from presenting other pieces of evidence to bolster its case.

The Court finds the evidence of the Walmart shooting is overwhelmingly probative. It was a necessary part of the evidence to tell the whole story of the events that took place and led up to the killing of Victim. The probative value goes to the motive, intent, common scheme and plan, and the absence of a mistake or accident. The fact that this was a revenge-killing rather than a random act of gang violence is the difference between Murder and Voluntary Manslaughter. The evidence of the prior shooting reveals Defendant's intent was not to scare or inflict injury, but to kill Victim. Moreover, it clarifies that the Boulevard shooting was neither an accident nor mistake. The shooting was a deliberate, planned, and calculated murder of Victim.

I find and conclude the danger of unfair prejudice does not substantially outweigh the probative value of the evidence. Nor, in light of the evidence presented, is there the undue tendency to suggest a decision on an improper basis brought on by a propensity argument. For the foregoing reasons, the Court finds the evidence of the Walmart shooting to be highly probative and the danger of unfair prejudice to be minimal in light of the circumstances.

IT IS SO ORDERED!



The Honorable Larry B. Hyman

Presiding Judge
Fifteenth Judicial Circuit

February 9, 2017

Conway, South Carolina

2017 FEB -9 AM 11:55

FILED

HULL/MBPD

CERTIFIED COPY
WITNESSES

2010 MAY 20 AM 9:04

*Melanie Huggins-Ward*CLERK OF COURT
HORRY COUNTY

ARREST WARRANT NO. _____

J-735111

CDR: 0014 16-03-0620

CDR: _____

DOA: 07/08/2007

ACTION OF GRAND JURY

THIS BILL

AUG 23 2007

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury Date: _____

DOCKET NO. 2007-GS-26-3387

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY

85959-3

DEE

COURT OF GENERAL SESSIONS

AUGUST

TERM 2007

THE STATE

vs.

BRIAN FREDERICK SPEARS B/M

DOB

SSN: _____

ATTORNEY: BARBARA WILSON PRATT

INDICTMENT FOR:
ASSAULT AND BATTERY WITH INTENT TO KILL

ORIGINAL

J. GREGORY HEMBREE, SOLICITOR

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

INDICTMENT FOR:

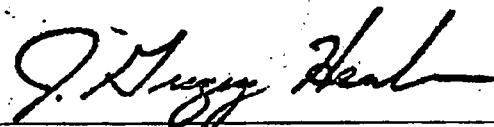
ASSAULT AND BATTERY WITH INTENT TO KILL

At a Court of General Sessions, convened on August 23, 2007, the Grand Jurors of Horry County present upon their oath:

ASSAULT AND BATTERY WITH INTENT TO KILL
(CDR: 0014 16-03-0620)

That BRIAN FREDERICK SPEARS along with codefendants did in Horry County on or about May 27, 2007, commit an unlawful act of violent injury to the victim, Krystal Fowler, with malice, by shooting said victim, thus committing the crime of Assault and Battery with Intent to Kill, in violation of Section 16-3-620, Code of Laws of South Carolina, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


SOLICITOR

CERTIFIED COPY

2010 MAY 20 AM 9:04

Melanie M. H. H. H.
CLERK OF COURT
HORRY COUNTY

HULL/MBPD
WITNESSES

DOCKET NO. 2007-GS-26- 3388

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY
85959-3 DEE

COURT OF GENERAL SESSIONS

AUGUST TERM 2007

THE STATE

vs.

BRIAN KENDRICK SPEARS B/M

DOB:
SSN:

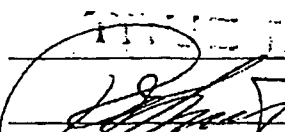
ARREST WARRANT NO. _____

J-735112
CDR: 0116 16-03-0010,0020

CDR:

DOA: 07/08/2007

ACTION OF GRAND JURY


Foreman of Grand Jury

AUG 2-3 2007

VERDICT

Foreman of Petit Jury Date:

ATTORNEY: BARBARA WILSON PRATT

INDICTMENT FOR:
MURDER

ORIGINAL

J. GREGORY HEMBREE, SOLICITOR

CLERK OF COURT
HORRY COUNTY

2010 MAY 20 AM 9:04

CERTIFIED COPY

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

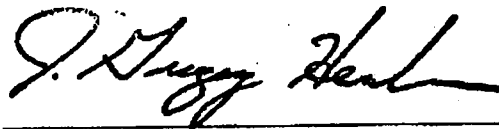
INDICTMENT FOR:
MURDER

At a Court of General Sessions, convened on August 23, 2007, the Grand Jurors of Horry County present upon their oath:

MURDER
CDR: 0116 16-03-0010,0020

That BRIAN KENDRICK SPEARS along with codefendants did in Horry County, on or about May 27, 2007, willfully, feloniously, and intentionally kill the victim, Aaron Hammonds, with malice aforethought, either express or implied, by means of shooting the victim, and the victim did die as a proximate result thereof on or about May 27, 2007 in Horry County, in violation of Section 16-3-10, S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



SOLICITOR

CERTIFIED COPY

2010 MAY 20 AM 9:04

Melanie
CLERK OF COURT
HORRY COUNTY

HULL/MBPD
WITNESSES

ARREST WARRANT NO. _____

I-735113
CDR: 0014 16-03-0620

CDR: _____

DOA: 07/08/2007

ACTION OF GRAND JURY

[Signature]
AUG 23 2007
Foreman of Grand Jury

VERDICT

Foreman of Petit Jury Date: _____

DOCKET NO. 2007-GS-26- 3389

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY
85959-3 DEE

COURT OF GENERAL SESSIONS

AUGUST TERM 2007

THE STATE

vs.

BRIAN FREDERICK SPEARS B/M

DOB: _____
SSN: _____

ATTORNEY: BARBARA WILSON PRATT

INDICTMENT FOR:
ASSAULT AND BATTERY WITH INTENT TO KILL

J. GREGORY HEMBREE, SOLICITOR

CERTIFIED COPY
2010 MAY 20 AM 9:04
Horry County Clerk of Court
Horry County

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

INDICTMENT FOR:

ASSAULT AND BATTERY WITH INTENT TO KILL

At a Court of General Sessions, convened on August 23, 2007, the Grand Jurors of Horry County present upon their oath:

ASSAULT AND BATTERY WITH INTENT TO KILL
(CDR: 0014 16-03-0620)

That BRIAN FREDERICK SPEARS along with codefendants did in Horry County on or about May 27, 2007, commit an unlawful act of violent injury to the victim, Dijaun Quintell Monroe, with malice, by shooting said victim, thus committing the crime of Assault and Battery with Intent to Kill, in violation of Section 16-3-620, Code of Laws of South Carolina, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

SOLICITOR

CERTIFIED COPY

2010 MAY 20 AM 9:04

Melanie
CLERK OF COURT
HORRY COUNTY

771
HULL/MBPD
WITNESSES

DOCKET NO. 2007-GS-26- 3390

THE STATE OF SOUTH CAROLINA

COUNTY OF Horry
85959-3 DEE

COURT OF GENERAL SESSIONS

AUGUST TERM 2007

THE STATE

vs.

ARREST WARRANT NO. _____

J-735114
CDR: 0014 16-03-0620

CDR:

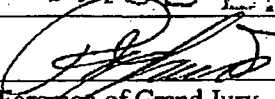
DOA: 07/08/2007

BRIAN FREDERICK SPEARS B/M

DOB:
SSN:

ACTION OF GRAND JURY

TRUE BILL


Foreman of Grand Jury

AUG 2-3 2007

ATTORNEY: BARBARA WILSON PRATT

VERDICT

INDICTMENT FOR:
ASSAULT AND BATTERY WITH INTENT TO KILL

Foreman of Petit Jury Date:

J. GREGORY HEMBREE, SOLICITOR

CLERK OF COURT
HORRY COUNTY
2010 MAY 20 AM 9:04
CERTIFIED COPY

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

INDICTMENT FOR:**ASSAULT AND BATTERY WITH INTENT TO KILL**

At a Court of General Sessions, convened on August 23, 2007, the Grand Jurors of Horry County present upon their oath:

ASSAULT AND BATTERY WITH INTENT TO KILL
(CDR: 0014 16-03-0620)

That BRIAN FREDERICK SPEARS along with codefendants did in Horry County on or about May 27, 2007, commit an unlawful act of violent injury to the victim, Lasheika Felton, with malice, by shooting said victim, thus committing the crime of Assault and Battery with Intent to Kill, in violation of Section 16-3-620, Code of Laws of South Carolina, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

 SOLICITOR

CERTIFIED COPY

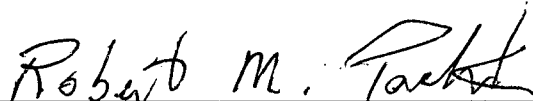
2010 MAY 20 AM 9:04

Melanie H. Williams
 CLERK OF COURT
 HORRY COUNTY

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with 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."

Respectfully Submitted,


Robert M. Pachak
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589

ATTORNEY FOR APPELLANT

This 2nd day of March, 2018.

RECEIVED

MAR 02 2018

SC Court of Appeals

