THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Kristi L. Harrington, Circuit Court Judge
Appellate Case No.: 2010-165126

THE STATE,

RESPONDENT,

v.

JUSTIN RYAN HILLERBY,

APPELLANT.

FINAL BRIEF OF APPELLANT

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III. WHETHER THE TRIAL COURT ERRED BY ADMITTING THE TESTIMONY OF MS. GEORGOULIS OVER COUNSEL'S OBJECTIONS THAT THE TESTIMONY WAS NOT RELEVANT.

STATEMENT OF THE CASE

During the December 2008 term of the Berkeley County Grand Jury, Appellant was indicted for Homicide by Child Abuse (Indictment No.: 2008-GS-08-2594). On October 21, 2009, a pre-trial motion hearing was held in front of the Honorable Kristi L. Harrington at the Berkeley County Courthouse. Appellant was present and represented by J. Michael Bosnak, Esquire.[1] The State was represented by Anne Williams, Assistant Solicitor for Berkeley County.

On February 22-25, 2010, a jury trial was held in front of the Honorable Kristi L. Harrington and a jury at the Berkeley County Courthouse. Appellant was represented by J. Michael Bosnak, Esquire. The State was represented by Anne Williams, Assistant Solicitor. At the close of the trial, the jury found Appellant guilty as indicted for Homicide by Child Abuse (Indictment No.: 2008-GS-08-2594). The Honorable Kristi L. Harrington sentenced Appellant to life pursuant to S.C. Code § 16-3-85(A)(1)(2010).

On February 26, 2010, Appellant, through counsel, filed a timely Motion for Reconsideration of Sentence. The State filed a response and a hearing was conducted on April 29, 2010 in front of the Honorable Kristi L. Harrington at the Berkeley County Courthouse. Appellant was represented by J. Michael Bosnak, Esquire. The State was represented by Anne Williams, Assistant Solicitor. By written order dated April 29, 2010, the Honorable Kristi L. Harrington affirmed Appellant's sentence.

A timely Notice of Intent to Appeal was submitted and Appellant's case was transferred to the South Carolina Commission on Indigent Defense. On June 2, 2011, Tricia A. Blanchette, undersigned counsel, filed a Motion for Substitution of Counsel. By Order dated June 8, 2011,

[1] In an attempt to locate additional pre-trial motion hearing transcripts, Appellant's counsel did the following: 1) reviewed the Berkeley County Clerk of Court's file and consulted with the Clerk assigned to the case, 2) contacted South Carolina Court Administration, Anne Williams, Assistant Solicitor, and J. Michael Bosnak, Esquire, and 3) contacted several court reporters involved in the case. No additional transcripts were located in connection with Appellant's case in the Court of General Sessions.

Tricia A. Blanchette, Esquire, was substituted in as counsel and Tristan Shaffer, Appellate Defender, was relieved as counsel. This Brief follows.

ARGUMENT

I. The Trial Court Erred By Failing to Suppress the Statements Attributed to Appellant.

A. How the Issue Was Raised at Trial

At the beginning of trial, defense counsel requested a ruling on three statements attributed to Appellant, and the trial court conducted a Jackson v. Denno hearing. R. p. 9. The State clarified that there were three statements attributed to Appellant, which were dated September 15, 2008, September 17, 2008, and September 18, 2008, and a verbal statement given to Officer Raymond Dixson on September 18, 2008. R. p. 102. During the Jackson v. Denno hearing, the State called Detective Shannon Sharp, Officer Richard Darling, and Detective Raymond Dixson, and their testimony is summarized as follows:

Detective Shannon Sharp explained that he had been trained in the REID technique for interviews and interrogation, and he obtained three statements from Appellant dated September 15th, 17th and 18th. R. pp. 11-12, 23. He explained that he gave Appellant his Miranda rights and had him execute a written Miranda and waiver of rights form on each occasion, but it was not policy to video or audio record interviews. R. pp. 12-13, 18-19. He also explained that Appellant wanted to talk with him and did not want an attorney. R. pp. 20-1.

Regarding their first meeting on September 15, 2008, he testified that Appellant was present voluntarily. R. pp. 28. He recalled smelling alcohol on Appellant, but he concluded that Appellant was not intoxicated. R. pp. 31. As the interview was concluding, he had to call emergency services since Appellant was suffering from chest pains and dizziness. R. pp. 29-30, 55-6.

On September 17, 2008, he met with Appellant again since a polygraph had been set up for Appellant with Detective Dixson. R. p. 33. Detective Sharp explained that Appellant backed

out of the polygraph exam but asked to talk to him. R. pp. 33-4. When they talked, Appellant was not in custody but was arrested due to the written statement Appellant gave Detective Sharp. R. pp. 35-6, 53. He acknowledged that Appellant only had a ninth grade education and the statement was written in one continual sentence. R. pp. 39-40. On cross-examination, he admitted that he may have informed Appellant that the victim's death was possibly an accident, and he confirmed that it was possible that he told Appellant no one would get in trouble for an accident. R. pp. 54-5.

Detective Dixson testified that he set up a polygraph interview with Appellant for September 17, 2008 and Appellant was not under arrest when he arrived. R. pp. 84-6. He acknowledged that Detective Sharp was present in the room. R. pp. 95. Prior to the administration of the test, Appellant admitted that he had some beers and had taken sleeping pills, but he was not feeling the effects of the drugs or alcohol. R. p. 88. After completing the Miranda waiver, he asked several preliminary questions, but Appellant withdrew from the test before answering the first question about the victim's death. He explained Appellant terminated the test, but he did not terminate the interview. R. p. 96. He recounted several admissions supposedly made by Appellant, and he stated that Appellant never asked for an attorney. R. pp. 98-9.

Officer Darling recalled transporting Appellant to and from his bond hearing on September 18, 2008. R. pp. 63, 78. He explained that he did not induce Appellant to talk, and the video was not working in his patrol car. R. pp. 64, 81. He further explained that Appellant started asking him about why he was not charged with a lesser offense. R. pp. 64. He recalled warning him about his right to remain silent, but he admitted that he told Appellant the following: 1) The truth would be revealed in the autopsy and it would show if Appellant was not

telling the truth; 2) He spoke with him about the media coverage and told him that the truth would set him free; and 3) He told him that God helps those that helps themselves. R. 67, 72-7. Thereafter, Appellant asked to be transported to talk with Detective Sharp. R. p. 77. He recounted taking Appellant to speak with Detective Sharp and being informed that Appellant had spoken with a female public defender while waiting to meet with the detective, which was confirmed by the detention sergeant at Berkeley County Detention Center. R. pp. 66, 79. On the return trip, Appellant told him that he could finally sleep. R. p. 68.

During the testimony of Officer Darling, the State introduced a copy of the bond proceedings, Appellant's request for an attorney dated September 23, 2008, notice of appointment of counsel on October 3, 2008, and substitution of attorney dated October 23, 2008. R. p. 69. The State argued that the three written and one oral statement were admissible and that Applicant never asked for counsel nor was counsel appointed until September 23, 2008. R. pp. 102-4. The State did acknowledge that Appellant met with a public defender but argued that Appellant willingly talked to the transport officer and detectives. R. pp. 103-4. Regarding Officer Darling, the State concluded: "And even if the Court were to think he was trying to trick him, which we contend he wasn't, there is case law that says even if police officers make misrepresentations, that it doesn't necessarily make the statement inadmissible." R.. 112-13, lns. 23-25,

In response, defense counsel argued that the court must apply a four part test when determining the admissibility of the statements attributed to Appellant. R. pp. 107-8. Defense counsel explained the first question was whether Appellant made the statements, and he stated: "And of course he made the statements." R. pp. 107-8, lns. 1-2. He said the second question dealt with Miranda warnings, and he acknowledged that Appellant was given his Miranda

warnings. R. p. 108, lns. 3-5. He continued that the third question looked at whether Appellant understood his Miranda rights, and he concluded: "And I would say under the circumstances, having a GED, ninth grade, telling the officers that he did understand those, that he did understand his Miranda rights." R. p. 108, lns. 6-12. Yet, counsel acknowledged that it was for the trial court to rule on that issue. R. p. 108, lns. 12-13. Counsel further explained that the problem was in the fourth question of whether the statements were freely and voluntarily given under the totality of the circumstances. R. p. 108. Counsel concluded that the statement given on September 15th was not incriminating, but the statements given on September 17th and 18th were both incriminating and coerced. R. pp. 108-9, 111, 113-114. Regarding the statement on September 17th, counsel highlighted the officers' awareness that Appellant had drank alcohol and taken sleeping pills and argued that the State had no probable cause until the statement was given. R. pp. 110, 113. Additionally, counsel argued that the officers made promises to Appellant in order to convince him that they were "buddy-buddy" and going to help him. R. p. 113. Counsel concluded that the statements should be suppressed under the totality of the circumstances. R. pp. 110-11.

After hearing the arguments, the trial court acknowledged that he must consider the totality of the circumstances and he concluded that under the totality of the circumstances the statements were voluntarily, knowingly and intelligently given. R. pp. 114-15. The court further held, as follows:

> The Court finds that there was no coercion by any of the officers in any of the statements given by Mr. Hillerby.. The Court considered whether Mr. Hillerby had been drinking. The odor of alcohol, but none of the officers indicated that impacted Mr. Hillderby's understanding of the right.

R. pp. 115-16, lns. 25, 1-5.

During the trial, the State admitted Appellant's three written statements through Detective Sharp. R. pp. 471, 478, 484-492. The State also called Officer Dixson in reply and he recounted the verbal admissions attributed to Appellant. R. p. 740.

B. Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006), State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001), State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000), State v. Amerson, 311 S.C. 316, 428 S.E.2d 871 (1993).

The trial judge determines the admissibility of a statement upon proof of its voluntariness by a preponderance of the evidence. State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007). If admitted, the jury must then determine whether the statement was given freely and voluntarily beyond a reasonable doubt. State v. Washington, 296 S.C. 54, 55-6, 370 S.E.2d 611, 612 (1988).

Factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless such conclusions are erroneous and amount to an abuse of discretion." Baccus, 367 S.C. at 48, 625 S.E.2d at 220, State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001), State v. Kennedy, 333 S.C. 426, 429, 510 S.E.2d 714, 715 (1998), State v. Von Dohlen, 322 S.C. 234, 242, 471 S.E.2d 689, 695 (1996). "When reviewing a trial court's ruling concerning voluntariness, this Court does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence." Saltz, 346 S.C at 136, 551 S.E.2d at 252.

C. Argument

A criminal defendant is deprived of due process if his conviction is founded, in whole or in part, upon an involuntary confession." State v. Pittman, 373 S.C. 527, 565, 647 S.E.2d 144, 164 (2007) (citing Jackson v. Denno, 378 U.S. 368, 377, 84 S.Ct. 1774 (1964)). Questioning suspects "is often indispensable to crime detection. Its compelling necessity has been judicially recognized as its sufficient justification, even in a society which, like ours, stands strongly and constitutionally committed to the principle that persons accused of crime cannot be made to convict themselves out of their own mouths." Culombe v. Connecticut, 367 U.S. 568, 571, 81 S.Ct. 1860 (1961).

Under Jackson v. Denno, a defendant is entitled to a "reliable determination as to the voluntariness of his [statement] by a tribunal other than the jury charged with deciding his guilt or innocence." State v. Fortner, 266 S.C. 223, 226, 222 S.E.2d 508, 510 (1976); See Miller, 375 S.C. at 381, 652 S.E.2d at 450. "In South Carolina, the judge makes this initial determination of voluntariness required by Jackson v. Denno." Fortner, 266 S.C. at 226, 222 S.E.2d at 510.

In determining whether a statement was given "voluntarily," the court must consider the totality of the circumstances surrounding the statement. Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S. Ct. 2041 (1973). See also Arizona v. Fulminante, 499 U.S. 279, 279, 111 S. Ct. 1246 (1991) (applying totality of the circumstances test to determine confession's voluntariness), State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987) ("The test for determining the admissibility of a statement is whether it was knowingly, intelligently, and voluntarily given under the totality of the circumstances.") (citing State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980)). Multiple factors are considered when deciding whether a

statement was made voluntarily. In South Carolina, the courts have recognized that appropriate factors to consider in the totality of circumstances analysis include: background, experience, conduct of the accused, age, length of custody, police misrepresentations, isolation of a minor from his or her parent, threats of violence, and promises of leniency. See State v. Childs, 299 S.C. 471, 475, 385 S.E.2d 839, 842 (1989) (background, experience, and conduct of the accused), In re Williams, 265 S.C. 295, 217 S.E.2d 719 (1975) (age), State v. Jennings, 280 S.C. 62, 309 S.E.2d 759 (1983) (length of custody), State v. Rabon, 275 S.C. 459, 461, 272 S.E.2d 634, 635 (1980) (police misrepresentations), State v. Smith, 268 S.C. 349, 355, 234 S.E.2d 19, 21 (1977) (isolation of minor), State v. Rochester, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990) (threats of violence and promises of leniency), State v. Cannon, 260 S.C. 537, 544, 197 S.E.2d 678, 680-81 (1973) (age, education level, manner of police questioning).

In the instant case, Appellant submits that the incriminating statements obtained on September 17th and 18th were obtained through misrepresentations and coercion by law enforcement, while he was admittedly under the influence of alcohol and sleeping pills, and after he had invoked his right to counsel; thus, rendering the statements inadmissible. In State v. Parker, 381 S.C. 68, 77-8, 671 S.E.2d 619, 623-4 (Ct. App. 2008), defense counsel extensively questioned the agent regarding his use of the Reid technique of interrogation, which this Court summarized feigned sympathy and rationalization. The agent would not concede that he used the Reid technique, and this Court was not convinced that the statement was inadmissible due to the agent's alleged minimization of Parker's sense of responsibility in getting him to confess. Id. at 78, 88, 671 S.E.2d 619 at 623-4, 629. Here, Detective Sharp admitted to the use of the Reid technique while obtaining Appellant's three written statements. R. pp. 11-12, 23. He testified that it was not policy to video or audio interviews, so the lower court was unable to view his

techniques. R. pp. 12-13, 18-19. He acknowledged that Appellant received emergency medical care after giving a non-incriminatory statement on September 15th. R. pp. 29-30, 55-6. He also admitted that prior to obtaining Appellant's statement on September 17th he may have told Appellant that the victim's death was possibly an accident and that no one would get in trouble for an accident. R. pp. 54-5.

Additionally, Officer Dixson admitted that as he transported Appellant to speak with detectives he told him that the truth would be revealed in the autopsy and it would show if Appellant was not telling the truth about the situation. R. pp. 67, 72-7. He also spoke with him about the media coverage and told him that the truth would set him free. R. pp. 67, 72-7. He told Appellant that God helps those that help themselves. R. pp. 67, 72-7.

In Miller v. Fenton, 796 F.2d 598, 604-05 (3d Cir. 1986), the Third Circuit Court of Appeals reasoned:

> Few criminals feel impelled to confess to the police purely of their own accord without any questioning at all . . . . Thus, it can almost always be said that the interrogation caused the confession . . . . It is generally recognized that the police may use some psychological tactics in eliciting a statement from a suspect . . . . These ploys may play a part in the suspect's decision to confess, but so long as that decision is a product of the suspect's own balancing of competing considerations, the confession is voluntary.

The Court further reasoned:

> Excessive friendliness on the part of an interrogator can be deceptive. In some instances, in combination with other tactics, it might create an atmosphere in which a suspect forgets that his questioner is in an adversarial role, and thereby prompt admissions that the suspect would ordinarily only make to a friend, not to the police."

Id. at 604. Ultimately, the lower court must determine if the defendant's will was overborne by law enforcement. Here, Appellant gave a non-incriminating statement on September 15th, which ended in emergency care for chest pains and dizziness. Cleary, his physical will was

overborne and broken down by law enforcement. Thereafter, Appellant appeared voluntarily for a polygraph exam attended by Detective Sharpe, where he candidly admitted that he had drank alcohol and had taken sleeping pills. Despite Appellant's clear admissions and refusal to continue with the polygraph exam, Detective Sharpe convinced Appellant to speak with him and assured Appellant with his comments about it being an accident and that no one would get in trouble for an accident. As a result, the Appellant gave the statement on September 17th that resulted in his arrest. In continuation of the coercion and misrepresentations by law enforcement, Officer Dixson again made assurances to Appellant that led to a second incriminating statement. Clearly, from the time of his physical breakdown following his first statement to the procurement of the third statement, Appellant's will was overborne by law enforcement, he was unable to consider his options and voluntarily waive his Miranda rights before deciding to give an incriminating statement to law enforcement that resulted in his arrest.

Furthermore, defense counsel argued and law enforcement testified that Appellant had been to bond proceeding and spoken with a public defender prior to his uncounseled statement on September 18, 2008. The Fifth Amendment's privilege against self-incrimination provides an individual who has been accused of a crime the right to consult with an attorney and to have an attorney present during custodial interrogation. Miranda v. Arizona, 384 U.S. 436, 478-79, 86 S.Ct. 1602 (1966). This privilege has been extended to the States via the Fourteenth Amendment. Malloy v. Hogan, 378 U.S. 1, 6, 84 S.Ct. 1489 (1964) ("[T]he Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States."). Once an accused has invoked his right to have an attorney present during custodial interrogation, he may not be subjected to further police interrogation "unless the

accused himself initiates further communication, exchanges, or conversations with the police." Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S.Ct. 1880 (1981).

In contrast, "[t]he Sixth Amendment right to counsel 'attaches only at or after the initiation of adversary judicial proceedings against the defendant.'" State v. Stahlnecker, 386 S.C. 609, 620, 690 S.E.2d 565, 571 (2010) (quoting United States v. Gouveia, 467 U.S. 180, 187, 104 S.Ct. 2292 (1984)). "[A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." Stahlnecker, 386 S.C. at 620, 690 S.E.2d at 571 (quoting Rothgery v. Gillespie Cnty., 554 U.S. 191, 128 S.Ct. 2578, 2592 (2008)).

Here, the State argued that law enforcement's conduct complied with Montejo v. Louisiana, 556 U.S. 778, 129 S.Ct. 2079 (2009), but the fact remains that law enforcement was fully aware that judicial proceedings had been initiated against Appellant and that he had spoken with a public defender. Transcript, Vol. 1, pp. 102-3. Yet, no one protected Appellant's right to have an attorney present during law enforcement's interrogations that resulted in incriminating statements. Instead of being present with counsel, Appellant, who was under the influence of drugs and alcohol, was subjected to unrecorded interrogations that were the result of coercion and clear misrepresentation by law enforcement. Therefore, Appellant urges this Court to find that the incriminating statements obtained on September 17th and 18th were the product of misrepresentations and coercion by law enforcement, while he was admittedly under the influence of alcohol and sleeping pills, and after he had invoked his right to counsel; thus, rendering the statements inadmissible.

II. The Lower Court Erred by Admitting the Testimony of Two Witnesses over Counsel's Objection that the Testimony was Inadmissible Prior Bad Act Testimony Pursuant to Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

A. How the Issue was Raised at Trial

On February 18, 2010, defense counsel filed a Motion to Reveal Rule 404(b), State v. Lyle Evidence. During pre-trial motions, defense counsel informed the court:

> Just one last thing, and I don't know if the prosecution plants to use it or not. Prior to the death of this child, noon until about six o'clock, they were at a swimming pool. Mr. Hillerby, the victim's mother, her two children, and a group of people were at a swimming pool. There were some complaints and statements made at the pool about drinking, Mr. Hillerby and Ms. Spoerl, the victim's mother, drinking, cursing – not fighting, but using bad language –the children not being looked after properly. I would like to be addressed on that issue, Your Honor. I don't think that it is relevant to bring up the issue.

R. p. 7, lns. 9-21. At the conclusion of the Jackson v. Denno hearing, the court took up defense counsel's motion in limine.

When asked for the basis for his motion in limine, defense counsel responded that he was not sure if the evidence at issue was prior bad act or character evidence. R.p. 117. He surmised that the State would be going into it to "show my client was doing a bad act, which clearly the statute in State v. Lyle prohibits." R. pp. 117, lns. 25, 118, lns. 1-2 Thereafter, defense counsel mentioned the exceptions to the general prohibition and concluded that none of the exceptions were present in the instant case. R. p. 118.

After the trial court inquired about witnesses or evidence in support of the motion, defense counsel informed the court that he had not been provided the state's witness list. R. p. 118. He explained that the State likely had witnesses and statements on the issue, but he was not aware of what they had or intended to use. R. p. 118. Therefore, he was raising the motion to determine what or who the State intended to use regarding the pool incident. R. p. 118.

The State responded that they intended to call two brief witnesses from the pool, and their testimony "goes to the theory of the State's case." R. p. 119. The State further explained: "And these are just two witnesses that are going to testify to things they observed directly, behavior by the defendant toward the victim that day." R. p. 119, lns. 22-25.

In response, trial counsel argued that the testimony was clearly bad act evidence and an attempt by the State to make the Appellant "look like a bad guy." R. p. 120, lns. 2-4. Trial counsel also argued that it was "far reaching" to interpret the alleged conduct at the pool as "some type of intent or some type of motive." R. p. 120, lns. 14-17.

The State explained:

> Your Honor, what these witnesses observed goes to motive, goes to intent. It just goes to the demeanor of the defendant that day. And, you know, they're fact witnesses. What they're –what they observed is that the child was falling into the pool repeatedly and aggravating the defendant. And the things that he says to the child just hours before the child's death are highly relevant. They're more probative than they are prejudicial. It goes to lack of accident. Because in one of the statements the defendant says himself that he bumped his head at the pool, indicating it could have happened at the pool. So, that's already out there.
>
> In addition to that, it's his demeanor toward this child. And we would just argue that it's res gestae and it goes to motive, intent, and it's highly probative evidence. And we would limit it to two witnesses. There's eight witnesses that came forward about the way that he treated this kid at the pool. And I think it's highly probative of the motive and frame of mind that his defendant was in just hours before he killed this child.

R. p. 121, lns. 17-25, p. 122, lns. 1-15. When asked, trial counsel explained that the defense did not intend to argue that an injury or accident occurred at the pool that contributed to the victim's death. R. pp. 120-1. Trial counsel also argued that no report was made to law enforcement, that considering the timing and the potential testimony it was tenuous to allege intent, and that the testimony was being used to simply show that Appellant was "a bad guy". R. pp. 122-3.

After hearing argument from both sides, the trial court ruled:

> I find based upon what the State has indicated that the two witnesses will testify to, I do find that will be admissible to prove intent in the absence of accident. Based upon what has been presented here today in the context, I am denying the motion in limine. I do find that the evidence of the actions of Mr. Hillerby is more probative than prejudicial to Mr. Hillerby.

R. p. 123, lns. 19-25, 124, lns. 1-2.

During trial, defense counsel renewed his objection when the State called Brandon H. to the stand. R. p. 229. Brandon H. recalled being at Weatherstone neighborhood pool with Courtney T. and two other teenagers on September 14, 2008. R. pp. 229-30. He further recalled that someone in the group knew Jennifer Spoerl (victim's mother), and he recalled seeing Appellant, Ms. Spoerl and the victim. R. p. 230. He remembered the victim acting "like a normal little kid would act." R. p. 231. He testified that he did not see Appellant or Ms. Spoerl drinking. R. p. 234. Specifically, he remembered Ms. Spoerl running towards him as he was exiting the pool yelling: "No, my baby." R. p. 231, lns. 11-13. He turned around, saw the victim's head under water, pulled him out and gave him to his mother. R. p. 231. When asked about Appellant's response, he testified that Appellant stated: "You should have left him in the pool." R. p. 232, lns. 3-4. He recalled Appellant being loud with the victim and telling him to go stand in the corner "because no one cares about you." R. p. 232, lns. 13-18. He also recalled Appellant yanking the victim's arm a couple of times. R. p. 234. He explained that he was bothered "a little bit" by the treatment of the victim but he would have called the police if something really bad had happened. R. pp. 232-5. On cross-examination, he explained that Ms. Spoerl was not looking after either of her children. R. pp. 233-4.

After Brandon H.'s testimony, the State called Courtney T. to the stand. R. p. 235. Courtney T. recalled being at the pool in her neighborhood (Weatherstone) with Brandon H. and two other friends on September 14, 2008. R. p. 237. She indicated that Ms. Spoerl introduced

herself, Appellant and the victim when she asked her to babysit sometime. R. p. 238. She remembered pulling the victim out of the pool when he kept jumping in the deep end without his swim floats. R. p. 239. After several jumps, she remembered Appellant and Ms. Spoerl coming over and getting the victim. R. p. 239. She testified that Appellant called the victim a "pussy" and Appellant told the victim "to go ahead and cry because no one wanted him." Transcript, R. 239, lns. 15-19. She explained that Ms. Spoerl was not watching the children and she was in the corner drinking and listening to loud music with Appellant. R. p. 241. She acknowledged that she did not make any comments towards Ms. Spoerl or Appellant regarding their conduct with the children. R. p. 242.

B. Standard of Review

In State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001), the South Carolina Supreme Court articulated the appropriate standard of review on appeal in determining the admissibility of bad act evidence, which is the appellate court sits to review errors of law only. State v. Cutter, 261 S.C. 140, 199 S.E.2d 61 (1973). Additionally, the South Carolina Supreme Court explained that a circuit court's determination regarding whether evidence offered pursuant to Rule 404(b) is clear and convincing is reviewed under the "any evidence" standard. Wilson, 345 S.C. at 5-6, 545 S.E.2d at 829 (reversing the court of appeals for not applying the any evidence standard in reviewing a circuit court's determination that Rule 404(b) evidence was clear and convincing).

C. Argument

Appellant submits that the testimony of Brandon H. and Courtney T. was inadmissible prior bad act testimony and was improperly admitted pursuant to Rule 404(b), SCRE, and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Under Rule 404(b), SCRE, evidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged. Such evidence is, however, admissible to show motive, identity, the existence of a

common scheme or plan, the absence of mistake or accident, or intent. State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006), Lyle, 125 S.C. 406, 118 S.E. 803.

To be admissible, the 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, evidence of the prior bad act must be clear and convincing. State v. Beck, 342 S.C. 129, 135-36, 536 S.E.2d 679, 682-83 (2000). Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal. Peeler v. Spartan Radiocasting, 324 S.C. 261, 478 S.E.2d 282, 283 (1996).

Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rules 403 and 404(b), SCRE (although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice); State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001). "Unfair prejudice means an undue tendency to suggest decision on an improper basis." State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000). Finally, the determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007), State v. Bell, 302 S.C. 18, 30, 393 S.E.2d 364, 371 (1990).

Recently, in State v. Smith, 391 S.C. 353, 705 S.E.2d 491 (Ct. App. 2011), this Court upheld the defendant's conviction for aiding and abetting homicide by child abuse. This Court examined the lower court's admission of evidence of an injury to the victim on the grounds of

motive and absence of an accident. This Court addressed the exceptions under rule 404(b), SCRCE, and explained:

> In order to introduce evidence of some other act of the defendant under one of these exceptions, the State must lay the proper foundation. First, unless the act is the subject of a criminal conviction, the State must prove by clear and convincing evidence that the defendant committed the act. Fletcher, 379 S.C. at 23, 664 S.E.2d at 483.
>
> The second element of the foundation requires the State to articulate the logical connection between the other act and at least one of the five purposes listed as exceptions in the rule. State v. Pagan, 369 S.C. 201, 211, 631 S.E.2d 262, 267 (2006). In order to meet this element, the State must explain how evidence of the other act will assist the judge or the jury in understanding some material issue in the case related to one or more of the Rule 404(b) exceptions. When the State adequately explains how the evidence of the other act logically connects to an issue in the case, it demonstrates how the judge or jury can use the evidence without using it for the prohibited purpose of inferring guilt from the defendant's propensity to commit the crime. See State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) ("Stated differently, 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." (internal citations omitted)).
>
> If the trial judge finds the State has met the first two elements, the judge must consider Rule 403, SCRE. State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009). 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.

Id. at 361-3, 709 S.E.2d 491, 495-6.

In the instant case, the State failed to lay the proper foundation and establish by clear and convincing evidence that Appellant committed the act in question. As is detailed above, the State informed the court: "And these are just two witnesses that are going to testify to things they observed directly, behavior by the defendant toward the victim that day." R. p. 119, lns. 22-25. The State's description of the alleged prior bad act, first calls into question what was the act.

Also, the State readily admits that they are calling witnesses to go into Appellant's behavior, and it is apparent that the purported "things" and "observations" fall short of a specific act. Despite the clear requirement that the State establish a proper foundation, the record is void of the trial court's analysis on whether the act or in this case "things" were proven by clear and convincing evidence since such "things" were not the subject of a prior conviction. The lower court did not conduct an in camera hearing nor did he make a specific ruling that the State had established the degree of proof which produced in his mind a firm belief as to the allegations sought to be established. Essentially, the State only informed the court that they intended to call two witnesses about "things" at the pool. When the witnesses were later called in front of the jury, their testimony was inconsistent and vague at best.

Appellant submits that the lower court erred by failing to properly examine the foundation of the evidence and merely accepting the State's assertion that that the witnesses testimony would establish "things." Additionally, the lower court erred by failing to make a ruling that the State had established by clear and convincing evidence the act or in this case behavior. It is apparent that the lower court committed a reversible error of law by admitting the testimony of Brandon H. and Courtney T. without conducting the proper analysis under the above detailed case law.

Appellant also submits that that the lower court committed reversible error in admitting the testimony of Brandon H. and Courtney T. since the State failed to establish a logical connection between the testimony about their observations at the pool and the charge of homicide by child abuse. As argued above, the lower court did not conduct an in camera hearing to evaluate the testimony but accepted the State's assertions regarding what the testimony would

establish. As stated in Smith, the State must adequately explain "how the evidence of the other act logically connects to an issue in the case." 391 S.C. at 361-2, 705 S.E.2d at 495.

Here, the State never clarified what the act was let alone established a logical connection. The State merely informed the lower court that the observations made at the pool would show "the demeanor of the defendant that day" and "things he says to the child just hours before the child's death." R. pp. 121-2. The State also submitted that the testimony went to lack of accident, res gestae, motive and intent but did not offer the testimony or demonstrate to the court how the evidence logically connected to any exception under Rule 404(b), SCRCE. The State only informed the court that the evidence would show "motive and frame of mind that this defendant was in just hours before he killed this child". Despite this assertion, the court did not hear the testimony of the witnesses until trial when both admitted they observed Appellant and victim at the pool for approximately one hour on the day before his death. As was argued by trial counsel, Appellant submits that any logical connection between the observations made at the pool and victim's death are tenuous at best. Unfortunately, the lower court failed to conduct the proper analysis and failed to ensure that the evidence was logically related to an issue in the case.

Furthermore, in the court's limited ruling, he held that the evidence was admissible to show "absence of an accident." Interestingly, defense counsel readily admitted that the defense intended to make no argument regarding the possibility of an accident at the pool. Based upon the limited information considered by the court before making his ruling, defense counsel negated the possibility of the evidence having any logical connection to the exception cited by the court.

After the court's finding that the evidence was admissible to show "absence of an accident," the court further found that the evidence was "more probative than prejudicial." R.

pp. 123-4. Again, the lower court made this ruling based upon the State's limited explanation of what the testimony would be since the court failed to conduct an in camera hearing to evaluate the testimony of the witnesses. The court also failed to provide the basis for his ruling. Appellant submits that the lower court's ruling to admit the testimony was in error since he suffered unfair prejudice which was not outweighed by the limited probative value.

Since the lower court failed to examine the testimony in camera, the trial testimony of the witnesses must be examined to consider the probative versus prejudicial value. Brandon H.'s testimony is detailed above and summarized as follows: 1) He saw Appellant, Ms. Spoerl and the victim at a neighborhood pool for approximately one hour the day before the victim's death; 2) He did not see Ms. Spoerl or Appellant drinking and the victim was acting "normal"; 3) He pulled the victim out of the water for Ms. Spoerl; 4) He recalled Appellant making two comments to the victim and placing him in the corner; 5) He saw Appellant yank victim's arm; and 6) Ms. Spoerl was not watching either of her children. R. pp. 230-34. Courtney T.'s testimony is also detailed above and summarized as follows: 1) She saw Appellant, Ms. Spoerl and the victim at a neighborhood pool for approximately one hour the day before the victim's death; 2) She pulled victim out of the deep end when he repeatedly jumped in; 3) She heard Appellant call the victim a name and heard him speak negatively towards the victim; 4) Ms. Spoerl was not watching her children and was in the corner drinking and listening to loud music with Appellant. R. pp. 237-42.

Even though the witnesses were at the pool together, they provided testimony regarding two separate incidents and were inconsistent when asked if Appellant and Ms. Spoerl were drinking and acting unruly. The one detail they both testified to was that Ms. Spoerl was negligent in her care for her children and that the conduct they witnessed did not rise to the level

that needed to be reported. Interestingly, the very conduct the lower court found to be more probative than prejudicial was not even deemed important enough to report by the eyewitnesses. Appellant submits that the lower court's acceptance of the State's explanation of the testimony failed to take into account the limited probative value and the resulting unfair prejudice. "Unfair prejudice means an undue tendency to suggest decision on an improper basis." State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000), and unfair prejudice is all that could have resulted from the testimony of Brandon H. and Courtney T., which was clearly elicited to show that Appellant was a "bad guy." Therefore, Appellant submits that the lower court erred by admitting the testimony of these witnesses since it was not established by clear and convincing evidence nor was it logically connected to an issue in the case. Furthermore, even after examining the testimony offered to the jury it is far reaching to find any evidence in the record to support the lower court's ruling that the evidence was more probative than prejudicial.

III. The Lower Court Erred by Admitting the Testimony of Ms. Georgoulis over Counsel's Objections that the Testimony was not Relevant.

A. How the Issue Was Raised at Trial

During trial, the State called Melissa Georgoulis to the stand. R. p. 330. Ms. Georgoulis explained that Appellant is the father of her son. R. p. 330. After admitting that she saw Appellant the evening of September 13, 2008, defense counsel interjected:

Defense counsel:	I'm going to object, on relevancy, any further line of questioning about what happened the day before.
Court:	I overrule your objection. I'm going to allow it.

R. p. 331, lns. 3-7. After counsel's objection, Ms. Georgoulis testified that Appellant spent the night on September 13th and left the following morning around 10:00 a.m. R. p. 331.

When she was asked about Appellant's mood when he left, defense counsel objected. Defense counsel argued: "Again, I don't see any relevance of what his mood was at ten o'clock the day before." R. p. 331, lns. 22-23. The court overruled defense counsel's objection, and Ms. Georgoulis responded that Appellant was upset.[2] R. p. 331, ln. 24-25. The State repeatedly asked her why Appellant was upset and she responded that she did not recall. R. pp. 332-5. After being provided her statement to refresh her memory, Ms. Georgoulis explained that Appellant was upset because a friend had come over and accused her of sleeping with her husband. R. pp. 332-34. The State also asked if Appellant had attempted to "get back together" with her that morning. R. p. 334, lns. 14-15. After reviewing her statement again, Ms. Georgoulis answered "yes." R. p. 334, lns. 16-22.

On direct, the State also asked Ms. Georgoulis who was staying with her in her home or if she had any houseguests. R. p. 332. Before she gave a clear answer, defense counsel objected on the basis of relevance. R. p. 332, lns. 20-21. The State responded that the question went to

[2] This answer was repeated three times by the witness. R. pp. 331-2.

bias and the court conducted a bench conference off the record. R. p. 332, ln. 22. Thereafter, the State proceeded with their question, and Ms. Georgoulis testified that Appellant's mother was staying in her home. On cross-examination, she explained that Appellant's mother had only stayed at her house for one night since she was in for Appellant's trial from Guantanamo Bay, where she was currently stationed. R. p. 336. She also agreed that Appellant's mother was staying with her, so she could see her grandchild. R. p. 337.

During cross-examination, Ms. Georgoulis admitted that she was mad with Appellant that morning. R. p. 337. She explained that she was mad because he was leaving that morning to be with Ms. Spoerl. R. pp. 337-8.

At the conclusion of Appellant's case, the State called Ms. Georgoulis as a reply witness. R. p. 715. On direct, the State asked her the following about her son with Appellant:

State:	And has he ever called (minor) any names?
Witness:	He never called him a name like pussy. No, he didn't.
State:	Okay. Would it refresh your memory to look at your statement?
Witness:	I know what my statement says.
State:	Would it refresh your memory to see what you said in your statement?
Witness:	If you will.

R. p. 716, lns. 15-25. While insisting that she was telling the truth, the State repeatedly attempted to get her to acknowledge that her statement indicated that Appellant had called their son a pussy and attempted to get her to admit that he called their son names and hit him. R. pp. 717-20. After continually being questioned by the State, Ms. Georgoulis unequivocally stated: "He didn't call him a pussy." R. p. 719, ln. 17. She also stated: "He has never hit my children. He never laid a hand on my thirteen-year or my ten-year old. He never beat my son like the first time we spoke

in here with his bond reduction. He never beat (minor)." R. p. 720, lns. 7-10. Following further questioning on the subject, Ms. Georgoulis stated: "He hit him on his bottom... I wouldn't call it a hit." R. p. 721, lns. 19-21. On cross examination, she explained that she spanked her children if they got out of line, but Appellant did not spank them. R. p. 722, lns. 15-20.

B. Standard of Review

"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. Williams, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010). "An abuse of discretion occurs when the trial court's ruling is based on an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). To warrant reversal based on the wrongful admission of evidence, the complaining party must prove resulting prejudice. Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005). Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict. Id.

C. Argument

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE; State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); State v. Horton, 359 S.C. 555, 598 S.E.2d 279 (Ct. App. 2004). Relevant evidence is defined as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE; State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct. App. 2004). Under Rule 401, SCRE, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. In

re Corley, 353 S.C. 202, 577 S.E.2d 451 (2003), State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003); See also State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991) ("Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears."). Yet, even 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 under delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

During the testimony of Ms. Georgoulis, trial counsel made three objections on the grounds of relevancy. First, counsel objected to "any further line of questioning about what happened the day before." In response, the lower court did not provide any analysis and simply stated, "I'm going to allow it." R. p. 331, lns. 3-7. Secondly, defense counsel objected when Ms. Georgoulis was asked about Appellant's mood the day before. R. p. 331, lns. 22-23. Again, the court overruled defense counsel's objection without any form of analysis or reasoning. R. p. 331, ln. 24-25. Finally, defense counsel objected when Ms. Georgoulis was asked about Appellant's mother staying with her, and the court allowed the State to proceed with the line of questioning.

Pursuant to South Carolina Code § 16-3-85 (2010), the offense of homicide by child abuse is defined as follows: "A person is guilty of homicide by child abuse if the person: (1) causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life; or (2) knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven. Specifically, Appellant was indicted under S.C. Code § 16-35-85(A)(1) (2010) for causing the death of the victim, between

the dates of September 14-15, 2008. On September 15, 2008, Appellant called 911 and reported that the victim was found in his crib, stiff and with blood on his face. Upon arrival, emergency services pronounced the victim deceased. At trial, the State alleged that Appellant inflicted life ending blunt force trauma to the victim between the time when Ms. Spoerl left to go out with friends at 6:00 p.m. on September 14th and returned at 2:00 a.m. on September 15th. The State also qualified Dr. Batalis as an expert in forensic pathology and he testified about his participation in the autopsy of the victim on September 16, 2008. R. p. 521. As far as providing an exact time of death, the best Dr. Batalis could conclude was that it was "within hours of when he was found." R. p. 523, lns. 4-8.

As detailed above, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. Rule 401, SCRE. Here, the matter in controversy was the death of the twenty-two month old victim on September 15, 2008 due to blunt force trauma. Without explanation, the lower court found relevant the testimony of Ms. Georgoulis regarding Appellant's mood the day before when a friend came over and accused her of sleeping with her friend's husband. R. pp. 332-4. Additionally, the court allowed, over objection, testimony that Appellant's mother was staying with Ms. Georgoulis during the trial. Interestingly, the State provided no argument after counsel made his objections on the ground of relevancy nor did the lower court provide any reasoning, so the record is void regarding how this testimony made more or less probable the matter in controversy. Upon review of the testimony and its bearing on the allegations in the case, Appellant urges this Court to find that the testimony is absolutely irrelevant and counsel's objection should have been sustained.

Even if this Court finds that the lower court's ruling on relevance was not in error, the testimony was clearly more prejudicial than probative. It is well established that the lower court

is to conduct a balancing test to determine if the testimony, even if relevant, is more probative than prejudicial. Pursuant to Rule 403, SCRE, 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 under delay, waste of time, or needless presentation of cumulative evidence." Looking at the testimony of Ms. Georgoulis, it established that Appellant spent the night at her home on September 13th, Appellant wanted to "get back together" with her, Appellant was upset about her friend's accusations and Ms. Georgoulis was upset when Appellant left. The question the State was not required to answer nor did the lower court address was what probative value this testimony had to the death of the victim the following day in a home in which Ms. Georgoulis was not an occupant. Furthermore, the only viable purpose of the State eliciting this testimony was a character assault on Appellant since the testimony established that Appellant was in a relationship with two women at the same time and stayed with one on September 13th and the other on September 14th. The prejudicial impact on the jury is simply undeniable; whereas, the probative value is questionable at best. Therefore, Appellant submits that the lower court was in error for failing to conduct a balancing test and for admitting the highly prejudicial testimony of Ms. Georgoulis.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the above-mentioned findings of the lower court and remand the case for a new trial.

Respectfully submitted,

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February 18, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Kristi L. Harrington, Circuit Court Judge
Appellate Case No.: 2010-165126

THE STATE,

RESPONDENT,

v.

JUSTIN RYAN HILLERBY,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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CERTIFICATION OF REDACTION
OF PERSONAL IDENTIFIERS
AND PERSONAL INFORMATION

The undersigned hereby certifies that personal identifiers and sensitive information have been redacted in the Final Brief of Appellant and the Record on Appeal pursuant to the South Carolina Supreme Court's Order dated August 13, 2007.

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February 22, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Kristi L. Harrington, Circuit Court Judge
Appellate Case No.: 2010-165126

THE STATE,

RESPONDENT,

v.

JUSTIN R. HILLERBY,

APPELLANT.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Appellant, hereby certify that I hand delivered this 22nd day of February 2013, a copy of the Final Brief of Appellant and Record on Appeal, to Mark R. Farthing of the Attorney General's Office, at:

Office of the Attorney General
ATT: Mark A. Farthing, Assistant Attorney General
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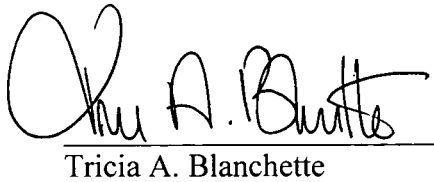

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