THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM MARLBORO COUNTY
Court of General Sessions

Edward B. Cottingham, *Circuit Judge*

Appeal No. 2012-213461

STATE OF SOUTH CAROLINA,

Respondent,

vs.

TYRONE J. KING,

Appellant.

Final Reply Brief of Appellant Tyrone J. King

Howard W. Anderson III
LAW OFFICE OF HOWARD W. ANDERSON III, LLC
PO Box 851
Clemson, SC 29633-0851
(864) 643-5790
Appointed Pursuant to the Appellate Practice Project

-and-

Robert M. Dudek
DIVISION OF APPELLATE DEFENSE
PO Box 11433
Columbia, SC 29211-1433
(803) 734-1343

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ARGUMENT IN REPLY

I. The Circuit Court's Conflicting Evidentiary Rulings on Highly Inflammatory Bad Acts Constitute an Abuse of Discretion.

In his Opening Brief, Mr. King established that the circuit court excluded most, but not all, of the references to Mr. King's prior murder, kidnapping, and armed robbery charges in State's Exhibit 5. The circuit court only admitted the remaining references because it thought—erroneously, as the motion for new trial would show—that the State lacked the technological capability to redact all the references. Nothing in the State's Response Brief changes the fact that the Rules of Evidence prohibited the introduction of any reference to those prior charges, that Mr. King preserved the error for review, and that the error cannot qualify as harmless. Furthermore, contrary to the State's claim, no remand is needed for the circuit court to weigh the Rule 403, SCRE factors.

A. Mr. King Preserved His Argument for Review.

While the State looks to waiver to salvage erroneous evidentiary rulings below, the State's attempt fails. The State concedes that Mr. King timely objected under Rule 404(b), SCRE. Because "trial judges are presumed to know the law," *State v. Ray*, 310 S.C. 431, 437 (1993), Mr. King was not required to say anything more than to cite to Rule 404(b), SCRE, to require the trial judge to apply settled South Carolina law on it. *Cf.* Rule 18(b), SCRCrimP ("No argument shall be made on objections to admissibility of evidence or conduct of trial unless specifically requested by the court."). The circuit court failed to do so, as shown below. Furthermore, because Rule 404(b), SCRE, sets up a default rule of "exclusion, not inclusion," the State bears the burden of demonstrating that evidence falls within an exception. *State v. Tuffour*, 364 S.C. 497, 504 (Ct. App. 2005) (Kittredge, J.,

joined by Hearn, C.J. and Williams, J.), *vacated as moot by* 371 S.C. 511 (2007). Accordingly the blame lays squarely on the State for defects in the procedural and substantive requirements for the evidence's admission under Rule 404(b), SCRE.

B. Lyle *and Its Progeny Prohibit the Bad Acts Evidence.*

In his Opening Brief, Mr. King established, and the State does not dispute, that *State v. Lyle*, 125 S.C. 406 (1923), and its progeny set up an intentionally high hurdle against the admission of bad-acts evidence. The circuit court can only admit the evidence if the evidence (1) is relevant, (2) is supported with a conviction or clear and convincing evidence, (3) has non-propensity value, and (4) the danger of unfair prejudice from the evidence does not substantially outweigh the non-propensity purpose of the bad act. *State v. Clasby*, 385 S.C. 148, 154-56 (2009) (citations omitted); *State v. Fletcher*, 379 S.C. 17, 23 (2008) (citations omitted); *State v. Pagan*, 369 S.C. 201 (2006) (citations omitted). Mr. King identified errors at each step of the required analysis with respect to the McColl robbery and kidnapping charge and to the factually erroneous reference to a prior murder charge. Nothing in the State's Response justifies affirmance.

1. The McColl Robbery and Kidnapping Charges

As Mr. King explained in his Opening Brief, the murder defense below was one of accident, not mistaken identity. It is, therefore, a red herring for the State to argue here that it somehow needed the jury to hear that Mr. King was charged with robbing Aloysius McLaughlin to disprove that potential alibi. Because Mr. King was not contesting identity, the references to the McColl charges were not actually relevant to any issue joined at trial and instead impermissibly left the jury free to draw upon the bad acts for propensity purposes. *See State v. Benton*, 338 S.C. 151, 156 (2000) (holding it improper to admit bad-

acts evidence "to show the accused is a bad person or he acted in conformity with his prior convictions"). Indeed the circuit court itself recognized as much—striking Ms. Graham's testimonial reference to the McColl charges as "totally irrelevant to any issue in this case." [Trial Tr. 311:6-7].

To whatever extent the alleged McColl robbery of Mr. McLaughlin could have had some minimal relevance to proving an issue that was not contested, the danger of unfair prejudice far outweighed any probative value of the pending charges. That is why, in his Opening Brief, Mr. King noted that the trial judge promised a mistrial if anyone referenced the McColl charge in testimony at trial and that South Carolina law presumes all bad acts prejudicial. *See* [R. p. 175:5-12 (ordering Mr. McLaughlin "not to mention that ... the defendant had robbed him two weeks prior....If you do that, I'm going to declare a mistrial....")]; *Lyle*, 125 S.C. at 416. The State's Response fails to address either point.

Rather than addressing Mr. King's arguments head on about the unfair prejudice of the reference to the McColl charges, the State argues that balance of prejudice to probative value tips in its favor because the State did not highlight the McColl charges for the jury during the rest of the trial. [Opp. at Argument I(3)]. But the State is hoist by its own petard: The fact that the State did not emphasize the McColl charges conclusively establishes how little probative value that they had for anything in the case. Because the charges were not important but had an obvious danger of prejudice to Mr. King, the circuit court should have excluded all references to the McColl charges—not just some of them.

As for the requirement that the State come forth with clear and convincing evidence of the bad acts, Mr. King notes that the State seeks to have it both ways with respect to the robbery. The State's theory at trial was that Mr. King was lying throughout State's Exhibit

5, yet here it asks this Court to rely upon that exact same evidence for its truth. As for the McColl kidnapping referenced in Exhibit 5, *see* [R. pp. 293:23 – 294:2 (describing McColl charges)], the State's Response concedes that it cannot meet any burden of proof, heightened or otherwise. *See* [Opp. at Argument I(4) ("Nor did the State present any testimony or evidence that anyone was ever kidnapped by King prior to this incident.")].

2. The Prior Murder Charge

Mr. King's Opening Brief and the State's Response agree that the reference to a prior murder in Exhibit 5 cannot satisfy any of the four parts of Rule 404(b), SCRE. [Opp. at Argument I(4)]. Mr. King, however, parts ways with the State in two regards.

First, our Supreme Court has gone so far as to hold that trial counsel is constitutionally deficient for failing to object on bad-acts grounds to evidence that the defendant "was previously jailed on [other] charges." *Geter v. State*, 305 S.C. 365, 367 (1991). Insofar as the State suggests a reference to a prior murder charge on Mr. King's "record," [State's Exhibit 5 at 5:08:26], is somehow not a prior bad act for the purpose of Rule 404(b), SCRE, [Opp. at Argument I(4)], that claim necessarily fails.

Second, insofar as the State seeks to avoid reversal because it told the circuit court that Mr. King had not ever been charged with murder, the State misses the point. After admitting State's Exhibit 5 into evidence, the State never told the jury that Mr. King did not in fact have a murder charge on his record. The unrebutted (and inadmissible) evidence for the jury was that Mr. King—then actually on trial for murder—had a prior murder on his record, when he really did not.

C. The Erroneous Evidence Cannot Qualify as Harmless.

As Mr. King established in his Opening Brief, our Supreme Court sets a high bar for harmless error: "[T]he 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." *State v. Black*, 400 S.C. 10, 27 (2012) (quotation omitted).

Reasonable doubt exists here; harmless error is not applicable. *Even with* the erroneously admitted evidence, the jury struggled with whether the State had met its burden. Thus the circuit court had to recharge them on the difference between manslaughter and murder, a fact that the State's Response makes absolutely no effort to explain away. [R. p. 332]. Nor does the Response dispute that where, as here, the State can proffer no motive for the murder of a longtime neighbor, the State faces an uphill battle in establishing malice. *See State v. Powell*, 202 S.C. 432, 436 (1943) (ordering judgment of acquittal, in part, because the defendant and victim "were friends and no motive for murder appears in the record"). The jury's struggle would have been all the more difficult—and thus an acquittal may have resulted—had the erroneous evidence been withheld, as it should have been. *See generally State v. Gore*, 283 S.C. 118, 121 (1984) (noting "enhanced" danger of prejudice when bad acts are similar to the crime at issue); *Lyle*, 125 S.C. at 416 ("Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty....").

Most of the State's arguments in support of harmlessness are legally irrelevant. Because the defense was accident, it does not matter that eyewitnesses put Mr. King in the house; identity was not at issue. Likewise the fact that Mr. King brought a gun with him to the

house is a red herring: He was trying to sell the gun to Mr. Galloway, [State's Ex. 4 at 08:38:30-45]. As for Devonte, while he may have seen a pointing of the gun at one time, he testified that he was not looking when the gun went off. [R. p. 119:7-9 ("Q. You heard the noise. Were you looking at him when you heard the noise? A. No.")]. As the jury was deciding what happened after Devonte looked way—accident or malice—the erroneously admitted evidence was a thumb on the scale.

In general, courts should be reluctant to invoke harmless error regarding evidentiary rulings. *United States v. Cerro*, 775 F.2d 908, 915-16 (7th Cir. 1985) ("The lay mind evaluates evidence differently from the legal mind.... This is a reason to be wary about invoking the doctrine of harmless error with regard to evidentiary rulings in jury cases." (citation omitted)). And here in particular, given how close the evidence of malice aforethought was, this Court should hold that the State has not met its burden to prove the harmlessness of the evidentiary errors beyond a reasonable doubt.

D. A Remand for an On-the-Record Analysis Under 403 Is a Waste of Time.

This Court should reject the State's suggestion that it would be appropriate to remand to the circuit court for an on-the-record balancing of the Rule 403, SCRE, factors. The State's proposal would be a complete waste of time. It would be an abuse of discretion, as a matter of law, for the circuit court to find the evidence admissible under the circumstances; this is not a case where circuit judges have latitude to either admit or exclude the evidence. Accordingly, no remand is required. *Cf. Allord v. Barnhart*, 455 F.3d 818, 821 (7th Cir. 2006) (holding that an appellate court need not remand for a factual determination "when a contrary determination [on remand] would have to be set aside as incredible").

II. Because the Circuit Court Only Admitted the Bad-Acts Evidence on the Mistaken Assumption that Redacting the Video Was Impossible, It Should Have Granted a New Trial Once Mr. King Showed that Redactions Were Possible.

In his Opening Brief, Mr. King showed that "the circuit court would have excised the references at 5:01-12 – 5:01:26 and 5:08:08-27 of State's Exhibit 5 if it had known that the State had had the ability to do so." [Open. Br. at 23]. The State does not contend otherwise, conceding the point. *See* [Opp. at Argument III].[1] Thus the State is left in the impossible position of arguing that the circuit court did not err in denying a new trial that would have allowed the circuit court to make the evidentiary rulings that it actually wanted to make.

As even the State concedes, the order denying the motion for new trial "does not provide any specific reasoning as to why the motion was denied." [Opp. at Argument III]. The cryptic statement that the order provides to justify the denial—that the "Court ... ruled upon the admissibility of the video statements ... before the trial began," [Order denying Motion for New Trial]—makes no sense. The State speculates that the order meant that the circuit court did not see a change in circumstances to warrant a different ruling—without addressing the fact that the circuit court learned that the State could make the precise redactions that the circuit court previously thought impossible. The more likely interpretation of the circuit court's written order is that, as it made clear throughout the trial, it would never revisit its prior rulings no matter how incorrect they appeared in hindsight, *see* [R. p. 73:1-2 ("THE COURT: If I ruled that [the evidence is admissible,] I'm not going to beat a dead horse to death.")]. That failure to exercise discretion is reversible error.

[1] That concession necessarily undermines all the State's arguments in support of the admission of the bad acts evidence.

As for the circuit court's oral reasoning, the State's Response does not dispute what Mr. King established in his Opening Brief: Because a written order controls over an oral one, *Rhoad v. State*, 372 S.C. 100, 108 n.3 (Ct. App. 2007), the circuit court's oral reasoning is irrelevant here. Furthermore, the State offers no argument to support the circuit court's erroneous statement that redaction would have taken a week, a claim that Mr. King disproved in his Opening Brief. Nor does the State defend the circuit court's incorrect suggestion that admissions of a party opponent trump the plain language of Rule 404(b), SCRE. As for harmless error, Mr. King has shown above how the errors in admitted the evidence were not harmless.

If this Court finds, on Issue One, that the circuit court was within its discretion to admit the excerpts of State's Exhibit 5 at issue, this Court should hold that the circuit court should have granted Mr. King a new trial for it to make the rulings that it truly wanted. The law should not tolerate imprisoning a man for the rest of his life on the basis of evidence that the judge wanted excluded in the first instance.

III. The Circuit Court Erred When It Failed to Follow Through with Its Promise to Declare a Mistrial If a Witness Revealed Mr. King's Pending Armed Robbery Charge.

In his Opening Brief, Mr. King established that Ms. Graham, in her direct examination, told the jury that Mr. King had robbed her and her boyfriend. That testimony violated the circuit court's "strong" and repeated promises to the solicitor that any "reference to anything that occurred about an alleged robbery" would result in a mistrial. [R. p. 174:14-

300:15]. Yet the circuit court failed to follow through on its promise for a mistrial, choosing instead to strike the testimony as "totally irrelevant" to the case. [R. p. 187:6-7].[2]

While the State argues that the curative instruction sufficed because juries are generally presumed to follow their instructions, that argument cannot work here. "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton v. United States*, 391 U.S. 123, 135-36 (1968) (citations omitted). *Cf. Green v. State*, 338 S.C. 428, 434 (2000) ("The jury, despite limiting instructions, can hardly avoid drawing the inference that the past conviction suggests some probability that defendant committed the similar offense for which he is currently charged. Limiting instructions alone do not make an erroneous admission of prior conviction evidence harmless." (quotation omitted)). This case, involving serious criminal charges including murder, falls within the exception to the general rule that juries are presumed to follow their instructions. Here the jury had already (and illegally) heard of multiple instances of serious prior bad acts—including the erroneous reference to a prior murder. The only proper remedy under the circumstances was the one that the circuit court promised that it would take but ultimately did not: declaring a mistrial.

To the extent that the State argues that the error in not declaring a mistrial was harmless, Mr. King incorporates by reference his arguments set forth in Section I(C) above concerning the closeness of the evidence here.

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[2] The State does not argue that Ms. Graham's testimony should have been allowed. Nor could it. If Ms. Graham's reference to the robbery was improper, so, too, were the references in State's Exhibit 5.

Finally, as for the State's error-preservation arguments, they fail. First, the State cites no case law to support its claim that—after the circuit court has already pronounced its ruling on an objection—that trial counsel can withdraw the motion. Second, the State does not dispute that this Court can reverse even without an objection below where the trial judge has engaged in a "flagrant" abuse of discretion. *Toyota of Florence v. Lunch*, 314 S.C. 257, 263 (1994) (citation omitted). If it is not a flagrant abuse of discretion for a trial judge to fail to declare a mistrial after he has spent four pages of transcript telling counsel that that is exactly what he would do, it is difficult to imagine what could qualify. Finally, the State also concedes, by not disputing, that requiring better error preservation here would not advance any of the policy reasons for the error-preservation rule. When the reasons for the rule do not apply, the rule should not apply.

CONCLUSION

In light of the circuit court's erroneous admission of evidence and its failure to grant the required mistrial, Mr. King respectfully requests that this Court vacate his convictions for murder and for possession of a weapon during a violent crime.

Respectfully submitted this 13th day of June, 2014,

TYRONE J. KING

By: _____
Robert M. Dudek

Howard W. Anderson III
LAW OFFICE OF HOWARD W. ANDERSON III, LLC
PO Box 851
Clemson, SC 29633-0851
(864) 643-5790
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-and-

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DIVISION OF APPELLATE DEFENSE
PO Box 11433
Columbia, SC 29211-1433
(803)734-1343

CERTIFICATE OF COUNSEL

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

Robert M. Dudek

Howard W. Anderson III
LAW OFFICE OF HOWARD W. ANDERSON III, LLC
PO Box 851
Clemson, SC 29633-0851
(864) 643-5790
Appointed Pursuant to the Appellate Practice Project

-and-

Robert M. Dudek
DIVISION OF APPELLATE DEFENSE
PO Box 11433
Columbia, SC 29211-1433
(803)734-1343

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing paper this 13th day of June, 2014 on the following parties:

Hon. Alan M. Wilson
c/o Alphonso Simon, Jr., Esq.
Office of the Attorney General
P.O. Box 11549
Columbia, S.C. 29211

Robert M. Dudek

Subscribed to and sworn before me this 13th day of June, 2014.

Notary Public
My commission expires: October 24, 2021.