STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2018-000448

THE STATE,

Respondent,

vs.

NICK RUSSELL EVANGELISTA,

Appellant.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Rules

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I. The judge erred by ruling the testimony of Dr. Lois Veronen was not "appropriate" testimony for the pre-trial immunity hearing as to the battered person's syndrome and appellant's state of mind, since Dr. Veronen's expert testimony was relevant at the immunity hearing in the same manner as it was in appellant's self-defense case later before the jury.

II. The court erred by excluding evidence the decedent operated a financial scam to "return" merchandise she never purchased for refund money, and that she had appellant take over or participate in the scam once she was discovered, since this evidence was relevant to appellant's battered person's self-defense case, since it was probative of the level of manipulation and control the decedent exercised over appellant?

RESPONDENT'S STATEMENT OF THE ISSUES ON APPEAL

I. Was Appellant's issue concerning the admission of battered person's syndrome testimony during the PPPA immunity hearing not properly preserved, as counsel (1) failed to call the witness, as instructed by the court, so as to permit the court to rule contemporaneously on the issue, (2) never offered supporting case law prior to the conclusion of the hear, as was requested by the court, and (3) did not obtain an explicit ruling on the matter before concluding the immunity hearing?

In the alternative, was the trial court's ruling that Appellant failed to carry his burden of proof for immunity proper given that testimony and evidence presented at the PPPA hearing created multiple "quintessential jury issues" of fact that correlate to other elements of self-defense, irrespective of expert testimony concerning battered persons syndrome and its effect on the reasonable fear of Appellant?

II. Did the trial court err in excluding evidence of Victim's alleged merchandise return scam, where such admissibility of evidence required a showing of clear and convincing evidence, and Appellant's only evidence included his own self-serving testimony, store receipts, and an alleged "to-do" list from Victim that lack any indication of illegality?

BRIEF ARGUMENT

Appellant's issue claiming the court erred in excluding battered persons syndrome testimony from Dr. Veronen at the PPPA immunity hearing is not preserved for review, as there was no final ruling from the court on the matter, and counsel failed to follow two explicit instructions from the court that would have led to a rendered decision. First, despite the extensive discussion, the trial court made clear that she would not rule in a vacuum on the matter and insisted that counsel call the witness so that a contemporaneous objection could be made and ruled upon. Dr. Veronen was never called to testify. Secondly, after considerable discussion the trial court explicitly requested case law demonstrating that a therapist could testify as to the state of mind of a defendant. Defense counsel asserted that she would provide such case law, but she failed to provide the court with any precedent prior to the conclusion of testimony and the court's denial of immunity under the PPPA. Moreover, the statute does not provide for the consideration of battered persons syndrome.

The trial court properly found that the evidence presented at the immunity hearing failed to satisfy the preponderance of the evidence standard for any of the elements of self-defense, noting the evidence may still present quintessential questions of fact best for the jury. As such, the ruling of the court in denying immunity under the Act was proper, as the evidence is substantially lacking and contradictive to main issues such as whether or not the Victim had any

object in her hand at all and whether Victim was in a physical condition sufficient to pose a threat to Appellant.

Lastly, the trial court did not err in excluding testimony of an alleged merchandise return scam perpetuated by Victim, as it lacked sufficient evidence to satisfy the clear and convincing standard of proof for evidence of bad acts lacking conviction. Moreover, the court found that the evidence would be more prejudicial than probative, as it bore no relation to whether Appellant acted in self-defense, and would constitute nothing more than bad character evidence against the deceased victim.

STATEMENT OF THE CASE

Appellant was indicted by a Beaufort County Grand Jury for murder of his live-in girlfriend, Rebecca Melton. (2014-GS-07-1787). Appellant proceeded to trial on December 11-14, 2014, before the Honorable Deadra L. Jefferson, and a jury. (Tr. p. 1). The State was represented at trial by Assistant Solicitors Hunter Swanson and Mary Coppage Jones. (Tr. p. 1). Attorneys Trasi Campbell and James Bell represented Appellant. (Tr. p. 1). At the conclusion of trial on December 14, 2014, the jury found Appellant guilty as indicted. (Tr. p. 649, lines 5-8). Appellant was sentenced to forty-five (45) years in prison with credit for time served. (Tr. p. 661, lines 7-12). This appeal now follows.

STANDARD OF REVIEW

A claim of immunity under the PPPA requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard. *State v. Curry*, 406 S.C. 364, 370–71, 752 S.E.2d 263, 266 (2013) (citing *State v. Duncan,* 392 S.C. 404, 709 S.E.2d 662 (2011)). An abuse of discretion results when a ruling is based on an error of law, or when it is grounded in a factual conclusion that is without evidentiary support. *State v. Cervantes-Pavon*, 426 S.C. 442, 449, 827 S.E.2d 564, 567 (2019),

reh'g denied (May 30, 2019). "Section 16-11-450 provides immunity from prosecution if a person is found to be justified in using deadly force under the Act." *State v. Curry*, 406 S.C. 364, 371, 752 S.E.2d 263, 266 (2013). "To warrant immunity, a movant must show he was without fault in bringing on the difficulty, he actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, and a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. He may also show that he actually was in imminent danger and the circumstances would have warranted a man of ordinary firmness and courage to strike the fatal blow to save himself from serious harm or death." *State v. Cervantes-Pavon*, 426 S.C. 442, 449, 827 S.E.2d 564, 568 (2019), reh'g denied (May 30, 2019) (citations omitted). "When a party raises the question of statutory immunity prior to trial, the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence." *State v. Duncan*, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011).

An appellate court does not exercise *de novo* review of a trial judge's ruling on the admissibility of evidence of bad acts not subject of a conviction; if there is any evidence to support the trial court's ruling, the ruling will not be disturbed. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The admissibility of evidence of bad acts not subject of a conviction requires clear and convincing evidence. *Id.*

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." *State v. King*, 424 S.C. 188, 198–99, 818 S.E.2d 204, 209 (2018), reh'g denied (Sept. 21, 2018) (*State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003)). "A ruling in limine is not a final ruling on the admissibility of evidence." *State v. Simpson*, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996). The only exception to this rule is when the motion in limine is

made "immediately prior to the introduction of the evidence in question." *State v. Atieh*, 397 S.C. 641, 646, 725 S.E.2d 730, 733 (Ct. App. 2012) (citing *State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001)).

FACTS

The Crime

Rebecca Melton (hereinafter "Victim") and Nick Evangelista (hereinafter "Appellant") lived together and participated in a tumultuous relationship with one another. The relationship led to repeated domestic disturbances and alleged abuses on the part of both individuals, but none of which resulted in serious injury. However, in the early morning hours of August 26, 2014, Appellant, by his own admission, smothered the unarmed Victim with bubble-wrap until she died from asphyxiation. Appellant then packed a bag of belongings and fled the scene using Victim's Jeep Wrangler. He was identified during a traffic stop and arrested on October 1, 2014.

Facts presented during the Protections of Persons and Property Act Immunity Hearing

Prior to the beginning of trial, counsel for Appellant made a motion for an immunity hearing under the Protections of Person's and Property Act (PPPA) so as to avoid prosecution for Victim's death. During the hearing, the following evidence and testimony was presented:

Nick Evangelista

Appellant testified extensively during the PPPA hearing and provided detailed accountings of his relationship with Victim. He and Victim began dating and after six months, he invited her to move in with him. (Tr. p. 87-89). He described that at this stage of the relationship he became aware of Victim's depression issues, which involved threats of suicide. (Tr. p. 89). He also testified that Victim would verbally abuse him, typically as a result of drinking, and also possibly brought on as a result of mixed medications with alcohol. (Tr. p. 91, lines 13-20). Appellant further described the issue as "she just – she would go back and forth from tearful to

angry at me, you know, verbally abusing me and telling me my job was worthless, you know, those kinds of things." (Tr. p. 91, lines 20-23). He recounted a specific such event occurring on St. Patrick's Day in 2013. He first describes Victim as "verbally abusing me, you know, telling me she wants to die again, being tearful." In response Appellant called Victim's daughter out of concern. According to Petitioner Victim was angry that he contacted her daughter and noted that on this occasion Victim destroyed furniture, pulled his hair, scratched his face, and stormed out. (Tr. p. 92, line 2 through p. 93, line 8). Appellant did not call the police after this incident, and described his feelings as "shocked". (Tr. p. 93, lines 9-11).

On Memorial Day, Victim and Appellant were leaving dinner. He testified that Victim was drunk and wanted to go dancing. He declined and said they should go home. He testified that Victim became belligerent and verbally abusive, and started to "make a public scene," so he left her outside the restaurant. When she returned home after him, he claims she was threatening to harm him and to harm his family, claiming that her father had ties to organized crime. (Tr. p. 93, line 23 through p. 95, line 7).[1] Appellant then conceded that there were numerous lies that Victim would tell, but he claimed that he believed Victim could kill him or his family, and described her as "very persuasive, very angry." He recounts that on this night she again scratched him and pulled his hair. (Tr. p. 95, lines 8-24). Appellant testified that he called the police that night, which changed Victim's tune to begging and apologetic. (Tr. p. 96, lines 1-7). Appellant explained that "we had calmed down" when the police arrived, and described that his injuries included a swollen ear and scratches. (Tr. p. 96, line 5 through p. 97, line 5).

[1] Appellant admitted that he had never met Victim's father, but was told he lived in either in Canada or Michigan. (Tr. p. 124, lines 18-25). Appellant insisted that Victim was very angry and very convincing as to threats involving her father. (Tr. p. 125, lines 1-6).

In response to such episodes, Appellant testified that he would often just leave her to calm down, had done so on half a dozen occasions, and would either stay at a hotel or at his friends and family. (Tr. p. 98, lines 17-25; p. 100 line 22 through p. 101, line 4). The worst injury sustained from any such fit by Victim involved an instance where Appellant requested the car keys so he could leave. Victim then jabbed him the arm with the key. Appellant claims that when she did so she hit a vein (not an artery) and had difficulty getting the injury to stop bleeding, so he drove himself to his surgical office to treat his own wound. (Tr. p. 100, lines 15-21; p. 109, lines 2-8). Counsel for Appellant attempted to describe the wound as "potentially bleeding out" and Appellant disagreed, saying "No, I wouldn't say it was that serious. But it was enough that I couldn't care for it at home." (Tr. p. 108, line 23 through p. 109, line 3). Appellant also testified that he gave excuses for the scratches at work as being a result of mountain biking, and claimed that he was isolated from friends and family because of Victim. (Tr. p. 111, lines 2-5).

On a later occasion, Appellant testified that Victim was dealing with the death of her mother, and was again very depressed. (Tr. p. 112, line 17 through p. 113, line 11). On the night of the murder, Appellant testified that he did not initially recall the argument with Victim. He testified:

> I didn't recall right away until I had some time to think and speak with other folks that had some evidence, but I learned late that the thermostat was all the way down to 60 when I left the house. She was very fixed on keeping certain temperature. I think it was 71, 72 – I'm sorry, 68, colder than I liked it. I was cold that night. We had been outside most of the night drinking. We skipped dinner. It was about 11:30. I got ready for bed. I had work the next day early. Again, I was woken from the sleep violently she grabbed the car keys that were on my night table for the jeep, ran into the bedroom yelling and screaming, slapping and hitting, punching, or scratching I should say. And started to pack up my clothes and told me to get out. I had nothing but jeans, and no shirt, no shoes, anything.

(Tr. p. 114, lines 3-17). Appellant testified that that he was trying to leave, and that Victim was attacking him by pulling his hair and by scratching him with keys, and scratching his throat. (Tr. p. 115, line 2-6).

Appellant then testified "I had to backhand her at that time to get her off of me," and that "she fell to the ground". (Tr. p. 115, lines 13-16). He then explained that "she was screaming so loudly at 1 or 1:30 at night, whatever it was, that I was afraid the neighbors again – because one other occasion in that place, the neighbors called the police. I didn't want that for her. Didn't want it for us." (Tr. p. 115, lines 20-24). When asked what was going on in his mind at that point, Appellant testified "*At that point, I don't remember detail other than grabbing some bubble wrap to try and make her stay quiet.*" (Tr. p. 116, lines 4-9). Only after leading questioning from defense counsel did Appellant express recollection of fear. The testimony reads as follows:

> Q. The night that Rebecca died, and you are on the ground with her, and you tell the deputy, you know, you put – do you remember it clearly? What is going on in your mind?
> A. At that point, I don't remember detail other than grabbing some bubble wrap to try to make her stay quiet.
> Q. So to be clear, you are afraid for your life?
> A. Yes.
> Q. Afraid she may stab you again, maybe?
> A. Worse, Yes.
> Q. And when you were told to leave and you were trying to leave, she attacks you and stops you from leaving?
> A. She wouldn't let me take anything I needed to leave, anything, clothing included.

(Tr. p. 116, lines 4-17).

On cross-examination, Appellant concedes that Victim had also called the police on him as well, and that on a prior occasion the neighbors had called the police after hearing a woman screaming for help. (Tr. p. 117, lines 3-8). Appellant confirmed that he had been arrested for

domestic violence against Victim in the past, and that when things got bad, he would hit Victim; he argued he only hit Victim after being provoked. (Tr. p. 126, lines 14-16; p. 118, line 24 through p. 119, line 1). He also conceded that he once called 911 and informed the operator that "My girlfriend is threatening me continuously." When asked where he was, he told the operator he was still with her in the same place, and only chose not to leave because he did not have a vehicle. (Tr. p. 117, lines 9-24). Appellant agreed that he had on previous occasions gotten away from his alleged abuser and had stayed at hotels, his office, or his ex-wife's home. (Tr. p. 127, lines 6-12).

On cross-examination Appellant was asked if he had ever received any medical treatment for injuries Victim had caused. Appellant responded by stating, "They were scratches." He testified that he treated himself for the injury from the car keys, and that there are no medical records, and no witnesses to the injury. (Tr. p. 119, lines 11-22). He then confirmed on cross-examination that Victim had osteoporosis, had recently suffered a shoulder injury, was 5'4", weighed 120 pounds, and was completely naked at the time. (Tr. p. 120, lines 12-20; p. 129, lines 2-3). In contrast, Appellant described himself as being 5'8", 165 pounds, and physically fit. He confirmed that he told investigators that he would ride his bike up to 200 miles a week. (Tr. p. 120, lines 12-20). He testified that he had played in a band, worked outside the home, and held down a job without difficulty. (Tr. p. 120, line 24 through p. 121, line 8). In contrast, he agreed that Victim was by choice homebound, and did not work. He testified that she could not find employment because she had been fired three times in that year. They agreed that he would support them financially, and she would take care of the home. (Tr. p. 121, lines 9-16). He agreed that they moved multiple times during their relationship as a result of evictions, that he

wanted to support her, and that he voluntarily participated in his relationship with Victim. (Tr. p. 126, line 17 through p. 127, line 2).

On cross, Appellant conceded, contrary to his direct testimony, that he did not hide his alleged abuse by Victim; he confirmed that his ex-wife, band-mate Mike Malvasio, and the police were all aware. (Tr. p. 121, line 17 through p. 122, line 9). Likewise, Appellant claimed that he was isolated from his family and that Victim would not allow him to contact his family members. However, he conceded that she did not go to work with him and excused not contacting his family with his cell phone because he "never used it at work. That wasn't allowed in the clinic." (Tr. p. 123, lines 2-14). Appellant conceded that he had taken some of Victim's medications in the past, had prescribed Victim medications, that both he and Victim were "drinkers", and both had been drinking the night Victim was murder. (Tr. p. 123, line 17 through p. 124, line 10).

On further cross-examination, Appellant admitted various entries in a journal that he wrote in after killing Victim. He confirmed the following entries were written in his own hand following the murder.

- "Fought drug and alcohol addiction [my] whole life and still do. So after every event, meaning any sort of relationship loss or problem in a relationship, I would just ramp up my drinking to a level that would kill most people." (Tr. 124, lines 11-17).
- "[I] took the life of a good and beautiful person." (Tr. p. 125, lines 7-10).
- "She didn't deserve to die." (Tr. p. 125, lines 11-12).
- "She never deserved to be hit, slapped or abused either, no matter how many time she initiated it, which was very often." (Tr. p. 125, line 13-18).
- "There are two sides to every story, the truth is somewhere in between. I say that not to defend my action, because it's indefensible."

(Tr. p. 125, lines 20-23). The Solicitor also asked him about stating, "In the end, [I] became something [I] couldn't control." Appellant could not recall writing that entry, but did not dispute that it was in the journal. (Tr. p. 127, lines 13-17). Likewise, Appellant did not recall stating to

police that he "just wanted her to stop breathing", but did not otherwise dispute the statement. (Tr. p. 129, lines 13-17). Appellant agreed that between his journal and the two recorded interviews with law enforcement he never once alleged he was threatened with car keys the night of the murder. (Tr. p. 127, lines 18-22). ***Additional testimony shows that Appellant was not confident that the car keys were even in Victim's hand at the time he killed her.*** (Tr. p. 128, lines 7-13). ***Redirect examination refocused on this point, wherein Appellant was asked which hand the keys were in. His response was "I don't know if they were in her hand, but she brought them to the room."*** *(Tr. p. 131, lines 12-23).*

On further cross-examination, Appellant did not dispute the Solicitor's description of the murder, noting that he "kneeled on her arms" and "covered her entire face with bubble wrap and pressed down until she stopped breathing." (Tr. p. 128, line 7-11). Appellant likewise agreed that once he finished suffocating Victim he checked her pulse, but he did not use his medical training to try and revive Victim, nor did he dial 911. (Tr. p. 129, lines 4-11). He made sure she was dead, took her phone, left their small Yorkie dog locked in the apartment, stole her Jeep, threw her phone into the swamp, and then sold his iPhone for cash to pay for hotels, escort services, and prescription pills. (Tr. p. 129, line 18 through p. 130, line 12).

Investigator Jon Adams

Investigator Adams testified that he responded to the 20 Queens Folly Road address on September 4, 2015, where victim's death had been reported. (Tr. p. 132, line 21 through p. 133, line 7). Victim's body was found naked, with her right hand underneath her hip and her left hand by her head, which he testified could demonstrate a defensive position. (Tr. p. 133, lines 5-13). DNA testing from underneath Victim's fingernails came back as a match for Appellant. (Tr. p. 133, lines 14-19). An interview of one of Victim's friends, Lynn Bridges, revealed a history of

violence between Victim and Appellant, bruises on Victim that she personally photographed caused by Appellant, and an isolation of Victim from her family and friends that began after she met Appellant. (Tr. p. 135, lines 14-17). His interviews with Ms. Bridges and a Mr. Earley revealed complaints from Victim that she was suffering from a broken rib, being struck, and being choked at the hands of Appellant. (Tr. p. 147, line 13 through p. 148, line 16).

Investigator Adams confirmed that there was no documentation of any type of injuries to Appellant other than scratches. (Tr. p. 136, lines 5-7). Investigator Adams also testified that the scratches in question could potentially be defensive wounds. (Tr. p. 136, lines 11-13). He testified that Appellant never alleged that Victim was trying to kill him, and Victim was not found with a weapon. (Tr. p. 136, lines 21-23; p. 137, lines 3-4). Investigator Adams testified that Appellant's journal was recovered from Victim's Jeep Wrangler that he was driving; also recovered was a Samsung phone that showed search and text history for solicitation of prostitution and drugs. (Tr. p. 137, line 23 through p. 138, line 25).

On cross-examination, counsel attempted to have Investigator Adams describe Appellants scratches and ear "as a severe injury." He remarked, "Ma'am, he has a red mark – on his neck" and a red ear, that he acknowledged as "inflamed." (Tr. p. 144, lines 6-17). On cross-examination, Investigator Adams does confirm that a 911 call recorded Appellant stating:

- "My girlfriend hit me. It's over. I've had enough. You are going to jail"
- "I'm not going to be afraid any more",
- "Go away. You should have thought about that when you fucking beat me up."
- "Yes, I'm bleeding. She hit me in the face."
- "She hit me with her fists."
- She threw a bottle at me and my face is bleeding."

(Tr. p. 145, line 5 through p. 146, line 4). During redirect, Investigator Adams commented that there were no witnesses to Victim's alleged attacks on Appellant, and that Appellant's 911 phone call was given "very calmly" despite the content of what was being reported. (Tr. p. 156, lines 3-

18). Investigator Adams also confirmed that law enforcement was in possession of an email dated July 5, 2013 (over a year before Victim's death) from Appellant to his friend Mike Malvasio. The email indicated that he had press charges against Victim, and that Victim had made threats against his life and the lives of his family from her father's money and power. The email also indicated that Appellant had a restraining order against Victim. (Tr. p. 151, line 19 through p. 152, line 23).

ISSUE I: Admissibility of expert testimony concerning "battered persons syndrome" during PPPA immunity hearing

The issue as it was presented at trial

Prior to the admission of evidence or the eliciting of testimony, counsel for appellant submitted a motion to have expert witness Dr. Lois Veronen testify at the immunity hearing. (Tr. p. 46, lines 3-6). Counsel for Appellant characterized the hearing as relating to the Castle Doctrine and informed the court that Dr. Veronen should be able to testify at the immunity hearing because she can speak to the specific elements of the statute.[2] (Tr. p. 46, lines 3-19.)

The Court responded by asking how, from an ethical standpoint, a psychologist can testify about something they did not witness. The court expressed its doubt that an expert could testify to someone's state of mind under the circumstances, and believed based on his experience that they could only talk in generalities. (Tr. p. 46, line 20 through p. 47, line 5). Counsel argued that Dr. Veronen would testify as to Appellant's fear, and "the element that he reasonably believed that he must use deadly force and meet her attack with sufficient force in order to prevent his death or his serious bodily injury. So, yes, state of mind, and what he perceived the events to be unfolding in that tense, rapid succession of events on that night, it's extremely

[2] Dr. Veronen was permitted to testify at trial in full. Appellant's claim concerns only the immunity hearing stage of litigation.

relevant evidence." (Tr. p. 48, lines 17-23). Counsel then commented about her desire to enter Dr. Veronen's Report into the record as a Court's exhibit. The trial court expressed concern for this as well as it would not permit the State to cross-examine the witness. Counsel corrected the court that she was seeking to admit the Report in addition to the Dr. Veronen's testimony. The court considered that doing so would be cumulative and likely hearsay. (Tr. p. 48, lines 1-12).

The court then backtracked and recognized that the entire discussion was "putting the cart before the horse." (Tr. p. 48, lines 24-25). The trial court then commented as follows:

> ***You need to call your witness. They need to make a contemporaneous objection. I am not ruling in a vacuum about whether testimony is admissible. So you need to call your witness.*** I am not aware of anything in the rules that allows [you] to call a report without them being able to cross-examine it. So you are going to need to call your witness.
> And I've also never had a stand-your-ground where the person who says they felt they had the right to act in self-defense didn't testify. So I don't know how you are going to get over that hurdle either strategically. It's one you will have to cross and make an assessment.
> Likewise, I think this akin to when you have a sexual – or what the word I'm looking for? When you have delayed reporting and you have experts in the area of sexual abuse testify, they never testify about the person in particular. They testify in generalities about certain quality, certain circumstances. They usually testify about the elements of delayed reporting and otherwise. But I've never had a psychological expert testify specifically about what somebody thought who wasn't there. And I don't think it's admissible.
> I'm going to do some research over the lunch recess, but unless you have a case for me to review – I'm willing to consider what you can show me, but I've never had an expert testify. Even a battered – a person who specializes in battered spouse syndrome or battered – I don't want to say partner. That's not the word I'm really looking for. But, ethically, they are quick to tell the Court that we can't talk about specific things, we can only talk in generality. It would be a violation of our code of ethics to go beyond that. So it would be surprising to me to have an expert come into court and say, I can opine about this particular person and this particular situation and what they would or would not have done, or what their state of mind was. I just think it would run

> afoul of so many of the rules of evidence. Because the State can't cross-examine – I mean, they can cross-examine it. But I think there's so many variables. One is that the jury – run the risk of the jury giving it too much weight, which would make it more prejudicial than probative.
> I don't know anybody else that can talk about his state of mind except him. And she can talk in generalities about what battered people generally do in certain circumstances. But I don't think she can say what he would have done in this circumstance.
> ...
> Now, as far as the State's position, I need to hear – and I eclipsed some of it, because I heard y'all on the telephone Friday. So I kind of know what your posture has been on it. But, first, what would the State's position be on a report without a live witness?

(Tr. p. 28, line 25 through p. 51, line 12).

The State argued that it would object to the report being introduced without the opportunity to cross-examine Dr. Veronen. She likewise moved to not allow Dr. Veronen to testify at the immunity hearing on the basis that the immunity hearing is a bar to prosecution to prove he acted in self-defense without obligation to retreat, not a defense. Assistant Solicitor Swanson argued that battered spouse falls under self-defense. (Tr. p. 51, lines 13-25). She further argued that Appellant had already given statements regarding what happened, and putting for Dr. Veronen's testimony to "expound on his ever-evolving story of what happened the night of the murder" does not seem appropriate, given the substantial evidence to the contrary that Appellant was in fear. Such would constitute a factual issue, not a matter of law for the Court to rule upon. (Tr. p. 51, line 23 through p. 52, line 9).

Defense counsel argued further that the court would have to interpret the statute and make factual findings for the immunity hearing about whether or not his fear was reasonable that night; Dr. Veronen's testimony is critical to proof that his fear was reasonable. (Tr. p. 52, lines 10-21). *In response, the court requested explicitly for supporting case law.* Judge Jefferson stated, "**You need to give me a case that says a therapist can tell me about somebody's state**

of mind and for that to carry the weight of finding of fact in court, other than to speak in generalities. And if you can get me that, I will be glad to review it. But I think otherwise, it would be inappropriate." (Tr. p. 52, line 22 through p. 53, line 2). Defense counsel responded that they would do so. (Tr. p. 53, line 3).

Defense counsel and the trial court continued their discussion of the topic. In doing so counsel for defense stated that she did not believe Dr. Veronen would testify to what Appellant thought at the time of the killing, but instead would inform the court that Appellant was a victim of domestic violence, and suffers from post-traumatic stress and trauma as a result. (Tr. p. 53, lines 4-21). The court responded that such would be a finding of fact, and requires her to assume everything Appellant told her was truthful, and as such would seek to have the court to "give it the bearing of the weight of a finding of fact. That's why we got 12 folk to listen to the facts and determine what they are." (Tr. p. 54, line 2-6). The court then noted the need for various other forms of evidence, the need to satisfy the higher preponderance of evidence standard, and the fact that the court has yet to be informed of any of the facts concerning the case. (Tr. p. 54, line 7 through p. 55, line 5).

The discussion ended with the court sending the jury home for the day at approximately 1:00pm, breaking for lunch, and returning to the hearing with *Jackson v. Denno* testimony offered from Sergeant Nix, Investigator Greene, a hearing for unconstitutionality of the Appellant bearing the burden to prove immunity, PPPA immunity testimony from Appellant and Investigator Adams, and arguments for and against immunity. (Tr. p. 55, line 20 through p. 164, line 10). *Immediately prior to the beginning of the stand-your-ground PPPA immunity hearing, defense counsel informed the court that she would return to the discussion of Dr. Veronen's potential testimony after conducting Appellant's examination. At the conclusion of Appellant's*

examination, defense counsel declined to provide anything further to its case for immunity, and the solicitor called its witness, Investigator Adams. (Tr. p. 132, lines 1-10). *Additionally, at the conclusion of Investigator Adams testimony, defense counsel again declined to offer anything further for the hearing or call Dr. Veronen; arguments for and against immunity were then heard and the court issued its ruling.* (Tr. p. 158, lines 1- 9). The matter of admissibility of Dr. Veronen at the immunity hearing was not further discussed in any fashion.

The trial court ruled that in order to prevail under "stand your ground", the defendant seeking immunity must meet the elements of self-defense, save the duty to retreat. (Tr. p. 164, lines 13-25). The Court specifically articulated that Appellant failed to meet his burden for immunity. The court found that there is a factual dispute as to the events on August 26, 2014, and though he did not carry his burden for immunity, the dispute would constitute a jury issue. (Tr. p. 165, line 25 through p. 166, line 11). The Court commented that Appellant himself testified that he had no independent recollection of what happened, and therefore she cannot make a rational decision based on what he can't remember. (Tr. p. 166, lines 11-13). Moreover, the court acknowledged that there is convincing evidence in the record, by a preponderance of the evidence, that deadly force may not have been necessary. (Tr. p. 166, lines 14-16). Specifically, there is no evidence that victim was armed, no evidence that she had any ordinary object that could be utilized with deadly force, and no evidence of imminent danger. (Tr. p. 166, lines 16-24). The court found that:

> [T]he independent and empirical proof tends to show that the victim in this case was naked, that she was defenseless, that there was a disproportion in their size and in their strength and ages, that she had had a recent injury to her shoulder that would negate, to some extent, any indication that she could have used an ordinary object to have proposed deadly force to him.
> If a gun was involved, that might well be different. But in this instance, we would have to look to see if there were any ordinary

> objects that could have been used for the purpose of deadly force, which we know is factually dependent.
> But there's – the record is devoid of that. And I'm at a loss as to how past scratches or a swollen ear would rise to the level of deadly force being necessary to preserve one's life. And I do not find that convincing or persuasive, nor do I find the 911 calls or the recitation of the 911 calls to be particularly persuasive. At best, they are self-serving and bolstering.

(Tr. p. 166, line 25 through p. 167, line 18).

ARGUMENT

I. Appellant's issue concerning the admissibility and alleged exclusion of battered persons syndrome testimony is not preserved for appellate review.

The trial court did not give a final ruling on the admissibility of Dr. Veronen's battered persons syndrome testimony. Defense counsel did not properly preserve for appellate review the matter by demanding a final ruling from the court, did not following the explicit instructions of the court that would have compelled the court to rule, and specifically, did not call the witness. As such the matter is not preserved for appellate review and the denial of immunity under the PPPA should be affirmed.

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." *State v. King*, 424 S.C. 188, 198–99, 818 S.E.2d 204, 209 (2018), reh'g denied (Sept. 21, 2018) (*State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003)). "A ruling in limine is not a final ruling on the admissibility of evidence." *State v. Simpson*, 325 S.C. 37, 42, 479 S.E.2d 57, 60 (1996). The only exception to this rule is when the motion in limine is made "immediately prior to the introduction of the evidence in question." *State v. Atieh*, 397 S.C. 641, 646, 725 S.E.2d 730, 733 (Ct. App. 2012) (citing *State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001)).

In the case at hand the parties took up *pre-trial and pre-hearing* motions as the first order of business before the court. Defense counsel raised *as a motion in limine* prior to the PPPA hearing that Dr. Veronen a be allowed to testify as an expert concerning battered persons syndrome as it relates to Appellant. (Tr. p. 46, lines 3-6). Defense counsel and the trial court engaged in a lengthy discussion of the matter concerning Dr. Veronen's testimony, and much confusion arose from the motion, as it is would seem the trial court was under the impression that *only Dr. Veronen* would be testifying for the defense. (Tr. p. 49, lines 1-12). This confusion can be laid at the feet of defense counsel as she informed the court at the outset of her motion that Dr. Veronen's would be her only witness. (Tr. p. 46, lines 3-8).[3]

Moreover, the trial court made two explicit instructions to defense counsel that would demonstrate a clear lack of ruling on this matter. First, the trial court instructed defense counsel explicitly that she needed to call her witness and draw a contemporaneous objection; she refused to rule in a vacuum. As the PPPA hearing had not begun, and no testimony of any kind had been elicited, this instruction highlights the significance that a motion in limine cannot serve as a final ruling on the admissibility of evidence. *Simpson*, 479 S.E.2d at 60. While no ruling on the motion in limine was ever provided either, the court's instruction made clear that she needed to move on from the motion, have the witness called to testify, and elicit a contemporaneous objection so as to properly rule on the issue. Second, the trial court specifically instructed defense counsel to provide case law in support of the argument that a therapist can offer testimony in support of a defendant's state of mind; defense counsel assured the court she would

[3] Some additional confusion in this record exists by the fact that the parties first discussed the motion to admit testimony from Dr. Veronen. They then moved on to testimony from Sergeant Nix and Investigator Greene pertinent to the *Jackson v. Denno* hearing. The parties then addressed defense counsel's motion that the PPPA unconstitutionally shifts the burden of proof upon the defense. Finally, the parties circled back around to conduct the PPPA hearing. (Tr. p. 54-59; p. 59-85; p. 85-167).

do so, but no case law was ever discussed on the record for purposes of the immunity hearing. (Tr. p. 52, line 17 through p. 53, line 3).

Regardless of confusion, while the court expressed its skepticism as to the admissibility of such testimony with the understanding that Dr. Veronen would be the only witness presented for stand-your-ground immunity, *she never actually gave a ruling on the matter.* The transcript reads as follows:

> THE COURT: Which one do you want to do first? I would think the *Jackson v. Denno* might be quicker. What do you all want to do?
> MS. SWANSON: May be quicker, but I suppose depending on the Court's ruling, we wouldn't be able to proceed after the immunity motion, so . . .
> THE COURT: Doesn't mean that I'm going to rule right this minute and not going to think about it.
> MS. SWANSON: The State doesn't believe that the immunity hearing will be dispositive, but that would be the one that would logically make most sense to take up.
> THE COURT: Well, I don't know that I'm going to rule contemporaneously. I may think about it overnight. So up to y'all, whichever one you want to proceed with first.
> MS. SWANSON: We can go ahead and go through the *Jackson v. Denno*. The State calls Philip Nix.

(Tr. p. 59, lines 6-21). At the very beginning of the immunity hearing defense counsel comments, "I am not going to address the issue with Dr. Veronen until after Mr. Evangelista testifies." (Tr. p. 85, lines 17-18). The Court instructs her, "Call your witness. They need to make an objection." (Tr. p. 85, line 19-20). Defense counsel called Appellant to testify, and he proceeded to testify extensively for purposes of stand-your-ground immunity under PPPA. (Tr. p. 85-158). Following Appellant's testimony counsel did not return back to arguments for admission of Dr. Veronen's testimony, nor did she call her as a witness. (Tr. p. 132, lines 1-10). At the conclusion of Investigator Adams testimony, offered by the state in its case against immunity, defense counsel again informed the court that she have nothing further to add for the hearing. The trial

court moved on to arguments as to the merits of the immunity hearing and denied immunity under the PPPA. (Tr. p. 158, lines 1- 9; p. 164, line 11 through p.167, line 19). There is no further mention or discussion of the issue at all by defense counsel, and there is no ruling on the matter by the court.

As such, the matter is essentially abandoned, as counsel informed the court she would return to the matter, but then forwent any further argument or discussion at the appropriate time. There is no decision on the matter for which appellate review can be conducted. The matter is therefore unpreserved for appellate review and the trial court's ruling denying immunity under the PPPA should be affirmed.

In the alternative to Respondent's arguments that the issue concerning the admissibility of Dr. Veronen's testimony is unpreserved for appellate review, the trial court correctly ruled that Appellant failed to meet his burden by a preponderance of the evidence in light of the testimony provided by Appellant and Investigator Adams and noted that the testimony of these witnesses raised questions of fact that should be heard and decided by the jury.

The Protection of Persons and Property Act is not a defense, but instead provides immunity from prosecution. *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 265 (2013). "[I]mmunity under the [PPPA] is predicated on an accused demonstrating the elements of self-defense to the satisfaction of the trial court by the preponderance of the evidence, save the duty to retreat." *Pettigrew v. Stephen*, No. 217CV02894BHHMGB, 2018 WL 4957401, at *8 (D.S.C. July 30, 2018), report and recommendation adopted, No. 2:17-CV-2894-BHH, 2018 WL 4677712 (D.S.C. Sept. 28, 2018) (citing *State v. Douglas*, 411 S.C. 307, 318, 768 S.E.2d 232, 238 (Ct. App. 2014), reh'g denied (Feb. 19, 2015) (quotations and citations omitted)). A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence

standard, which this court reviews under an abuse of discretion standard of review. *Curry*, 752 S.E.2d at 266. When a defendant's claim of self-defense presents a "quintessential jury question," such a claim for self-defense should be submitted to the jury for consideration is not a situation warranting immunity from prosecution. See *Id.* at 267. '[W]hile the trial court's pretrial immunity ruling and the jury's verdict on a claim of self-defense may apply the same statutory justification standard, the court's ruling must be based solely on the evidence presented at a pretrial hearing, while the jury's verdict must be based solely on the evidence presented at trial, which may be considerably different.' *Cervantes-Pavon*, 827 S.E.2d at 569 (quoting *Sifuentes v. State*, 293 Ga. 441, 444, 746 S.E.2d 127, 131 n.3 (2013)). In the event appellate review discovers reversible error attributable only to the trial court's ruling during an immunity hearing under the PPPA, a remand strictly for a new immunity is satisfactory relief. See *Id.*

In a PPPA stand-your-ground immunity hearing, a defendant must prove by a preponderance of the evidence the elements of self-defense, with exception to the duty to retreat, which the Act explicitly removes from consideration, *under certain circumstances where one of the individuals has no rightful presence*. See S.C. Code Ann. § 16-11-440(B). The remaining elements of self-defense require defendant to show that (1) the defendant must be without fault in bringing on the difficulty, (2) the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger, and (3) if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from

serious bodily harm or losing his own life. *State v. Jones*, 416 S.C. 283, 301, 786 S.E.2d 132, 142 (2016).

Appellant's desire to admit testimony concerning Dr. Veronen's battered persons syndrome expertise may well have addressed the Appellant's state-of-mind. However, that testimony would not address major factual disputes presented by the testimonies of Appellant and Investigator Adams that would address the first and third elements of self-defense.

In particular, and of most import, Appellant himself offered conflicting testimony as to whether Victim had keys in her hand or not during the alleged assault. His testimony leaves no confident resolution of that question, and Investigator Adams testimony demonstrates that there was no weapon found with or near Victim. The inconsistent testimony draws into question both the first and third elements of self-defense, as having no weapon at all would result in Appellant bringing about the deadly conflict, and the reasonableness of any individual finding imminent danger is substantially insufficient for the preponderance of evidence standard. The record also demonstrates evidence that Appellant was able to repel Victim's *alleged* attack by backhanding her to the ground, which would indicate that no deadly force was needed, as non-deadly force had already proven successful. Again the testimony raised dispute as to whether Appellant was responsible for bringing about the deadly altercation by acting further and whether such interpretation of peril would be shared by a reasonable and prudent man of ordinary courage. This same issue is compounded by the fact that Victim's body was found with one arm pinned underneath her own body, the other in a suggestively defensive posture, and by the very nature in which she was killed – suffocation. Lastly, there are statements from Appellant himself which suggest that his actions were out of a desire to keep Victim quiet, and not at all related to a belief of imminent danger.

The trial court ruled that Appellant failed to meet his burden by a preponderance of the evidence. (Tr. p. 166, lines 3-4). The trial court likewise found that the testimony and evidence presented a "factual dispute as to the events on August 26, 2014, and it represents a jury issue." (Tr. p. 166, lines 9-11). The trial court correctly recognized that Appellant's testimony included comments that he could not recall the crime; specifically, he testified he could not recall the exact moments during the attack, or the location of the keys he claims he was attacked with. (Tr. p. 166, lines 11-12; p. 116, lines 4-8; p. 131, line 12-23). The court properly concluded that for purposes of an immunity hearing she could not rule of matters of fact that Appellant himself could not remember. (Tr. p. 166, lines 12-13). Despite those limitations in the evidence, the trial court was aware of the convincing evidence, rising to a level that would refute Appellant's preponderance of the evidence standard, "that deadly force may not well have been necessary." The court noted the lack of evidence that the Victim was armed, the lack of evidence that she possessed ordinary objects that would have posed a threat of deadly force, and no evidence of imminent danger (recounting again Appellant's inability to recall specifically the moments during the deadly altercation). (Tr. p. 166, lines 14-24). The trial court also recognized that the empirical evidence weighed heavily against immunity, given that Victim was naked, and that she was disproportionate in size, strength, and health to Appellant such that a threat of deadly force would not have existed. (Tr. p. 166, line 25 through p. 167, line 6). The trial court's review of the record and her ruling that Appellant was not entitled to immunity was sound, irrespective of matters concerning battered persons syndrome and the second element of self-defense.

Moreover, "error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." *State v. Fletcher*, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008) (citing *Arnold v. State,* 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)). "An insubstantial error

not affecting the result of the trial is harmless where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.' " *Fletcher*, 664 S.E.2d at 484 (quoting *State v. Bailey,* 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989)). As the ruling on immunity was reached by the court outside the context of perceived fear under element two, any impropriety as to the admission of Dr. Veronen's testimony would be rendered harmless. The facts of this case are so substantially insufficient that a preponderance of the evidence standard could not be met by Appellant as to any of the elements in question.

The PPPA does no more than grant presumptive fear of imminent peril to those using deadly force while in a place they have a rightful expectation of safety, against intrusion by those who do not have rightful presence. Absent a clear legislative intent to the contrary, which is unquestionably absent in S.C. Code Ann. § 16-11-420-420-450, other "justification" defenses cannot be incorporated into the application of the statute, as such is not a defense to criminal prosecution, but an immunity from prosecution.

The ruling denying immunity should therefore be affirmed.

ISSUE II: Exclusion of testimony concerning Victim's alleged merchandise scam

The issue as it was presented at trial

During Appellant's case-in-chief, defense counsel sought to elicit testimony from Appellant that Victim participated in a merchandise return scam. The alleged testimony would have informed the jury that Victim would buy clothing and merchandise, remove the tags using a special tool, and then attach those tags on old or thrift shop garments in order to claim a return of the money she used to purchase the actual item. Appellant testified that she did this regularly, believes she had her daughter assist on one occasion, and when Victim's scheme was discovered by retail stores, she had Appellant go in her place to perpetuate the scheme. The court conducted this portion of the Appellant's examination in-camera. (Tr. p. 428, line 1 through p. 429, line 13).

The court, on more than one occasion, informed defense counsel that testimony such as this must be established by clear and convincing evidence, satisfy the indicia of admissibility, and noted that it would require some relevance to Appellant's allegation that he killed victim in self-defense. (Tr. p. 399, lines 4-12; p. 427, lines 1--17). Defense counsel argued that this testimony provides the "full-throated illustration of the relationship between [Victim] and [Appellant], in terms of her level of manipulation over him, this is relevant to the level of manipulation that she could bring him to." (Tr. p. 429, lines 19-23). Defense counsel further argued that it demonstrated he committed a crime on her behalf. (Tr. p. 429, lines 24-25).

The court further questioned counsel, noting that such evidence constitutes prior bad acts that were not the subject of a conviction, and as such, would require clear and convincing evidence. The court noted that Appellant's sole testimony to this matter is markedly inadequate. (Tr. p. 430, lines 2-7). In response, defense counsel informs the court that she also has store receipts that are in evidence and the alleged hand-written notes (not in evidence) which indicate that she was conducting returns. (Tr. p. 430, lines 8-9; p. 431, lines 5-16). The State argued that this testimony was not relevant, was unsupported by any evidence other than Appellant's testimony, and had no connection to a homicide case or prior acts of aggression toward Appellant. It simply went against Victim's character. (Tr. p. 430, line 21 through p. 431, line 4).

The court commented that the receipts do not indicate illegality, and the only conceivable purpose for introducing the evidence in question "would be to bring into question the character of the deceased and to have the jury believe that she's a thief and, therefore, a bad person and should be looked upon unfavorably." (Tr. p. 430, lines 10-16; p. 432, lines 7-11). The court went on to state:

> I do not find the defense's argument regarding threats, connivance or manipulation persuasive, nor do I find the defendant's testimony

regarding that persuasive. In addition to that, there's a lack of foundation regarding his knowledge of these events. There's no testimony that he was present when Ms. – when the decedent's daughter is alleged to have returned items. So that's hearsay on top of hearsay. And in addition, he was not present when items were returned. It is only his speculation and conjecture as to what he believed was taking place.

There are many other ways this evidence could be looked upon. I don't know if she was a compulsive shopper. I have no idea. Many people have buyer's remorse and return items.

...

But going back to what case law requires, you are alleging a prior bad act, not the subject of a conviction. You failed to prove for this record by clear and convincing evidence that that is what, in fact, was taking place.

And having not met that bar, the Court really doesn't have to look at any of the other elements, but I am, because I think, clearly, this is evidence of her character in violation of Rule 608. And, again, it is introduced to have the jury believe she's a bad person.

And, therefore – you know, my perspective would be the same if it were the defendant. You don't just get to say bad things about somebody and say, therefore, ergo, they are a bad person. And then the next irrational thought from that is that they deserved what happened. It's not relevant. And it's certainly not relevant to any alleged prior acts of aggression.

And when you look at the elements of self-defense, which is why I took a few moments to look back through, just to make sure they didn't fit within any of the subcategories that would be relevant to the defendant and the deceased, it certainly doesn't involve contemptuous language or mutual combat. It doesn't fit within any of the elements of battered syndrome. And, certainly, it's not the type of threat contemplated by case law.

The type of threats contemplated by case law are such that would rise to the level provoking an ordinary person of reason and courage to strike the first blow to preserve their own life. So none of that rises to that level.

So the proffer will be preserved for the record. The State's objection is sustained. The evidence is excluded based on hearsay, character, relevancy, and the failure to meet proof by clear and convincing evidence.

In addition to that, the Court finds any probative value is outweighed by its potential prejudice.

(Tr. p. 432, line 12 through p. 434, line 16)

ARGUMENT

II. The trial court did not err in excluding evidence of Victim's alleged merchandise return scam, where the admissibility of such evidence required a showing of clear and convincing evidence, and Appellant's only evidence included his own self-serving testimony, store receipts, and an alleged "to-do" list from Victim that lack any indication of illegality.

The trial court did not err in excluding the evidence pertaining to Victim's alleged merchandise return scheme. The court correctly noted the clear and convincing evidence standard of proof for admissibility of bad acts not the subject of a conviction. *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001).

In the case at hand, the only evidence that defense counsel could offer was Appellant's own testimony, which the court noted was littered with speculation as to Victim's actions and the actions of Victim's daughter. The trial court was also correct in noting that the to-do list and receipts do not indicate any illegal intent.

The trial court's review was extensive and her explanation of why evidence of Victim's merchandise scheme was inadmissible was detailed. The evidence lacked any correlation to Victim's prior aggression against Appellant or whether Appellant acted in self-defense against Victim at the time of her death. As such it is not relevant and the court correctly excluded it. The court specifically noted that she was not convinced by Appellant's arguments that such evidence demonstrated manipulation as it relates to Appellant's state of mind. Even if relevant, the court correctly concluded the evidence failed to satisfy the clear and convincing evidence standard necessary for admissibility of bad acts not the subject of conviction. *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009); SCRE 404(b). (Tr. p. 432, line 12 through p. 434, line 16). Lastly, the court was likewise correct in concluding that the probative value of the evidence

would be outweighed by the potential undue prejudice. SCRE 403; (Tr. p. 432, line 12 through p. 434, line 16).

The court did not err in excluding the Appellant's testimony and evidence allegedly demonstrating an illegal merchandise scheme of Victim. Appellant's conviction and sentence should therefore be affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County
The Honorable Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2018-000448

THE STATE,

Respondent,

vs.

NICK RUSSELL EVANGELISTA,

Appellant.

CERTIFICATE OF SERVICE

I, W. Joseph Maye,, counsel for the Respondent, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two (2) copies of the same in the United States mail, addressed to his attorney of record: Robert M. Dudek, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, South Carolina 29201.

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

This 24th day of July, 2019.

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ATTORNEY FOR RESPONDENT

ALAN WILSON
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July 24, 2019

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

Re: The State vs. Nick Russell Evangelista
Appeal from Beaufort County
Appellate Case No. 2018-000448

Dear Ms. Kitchings:

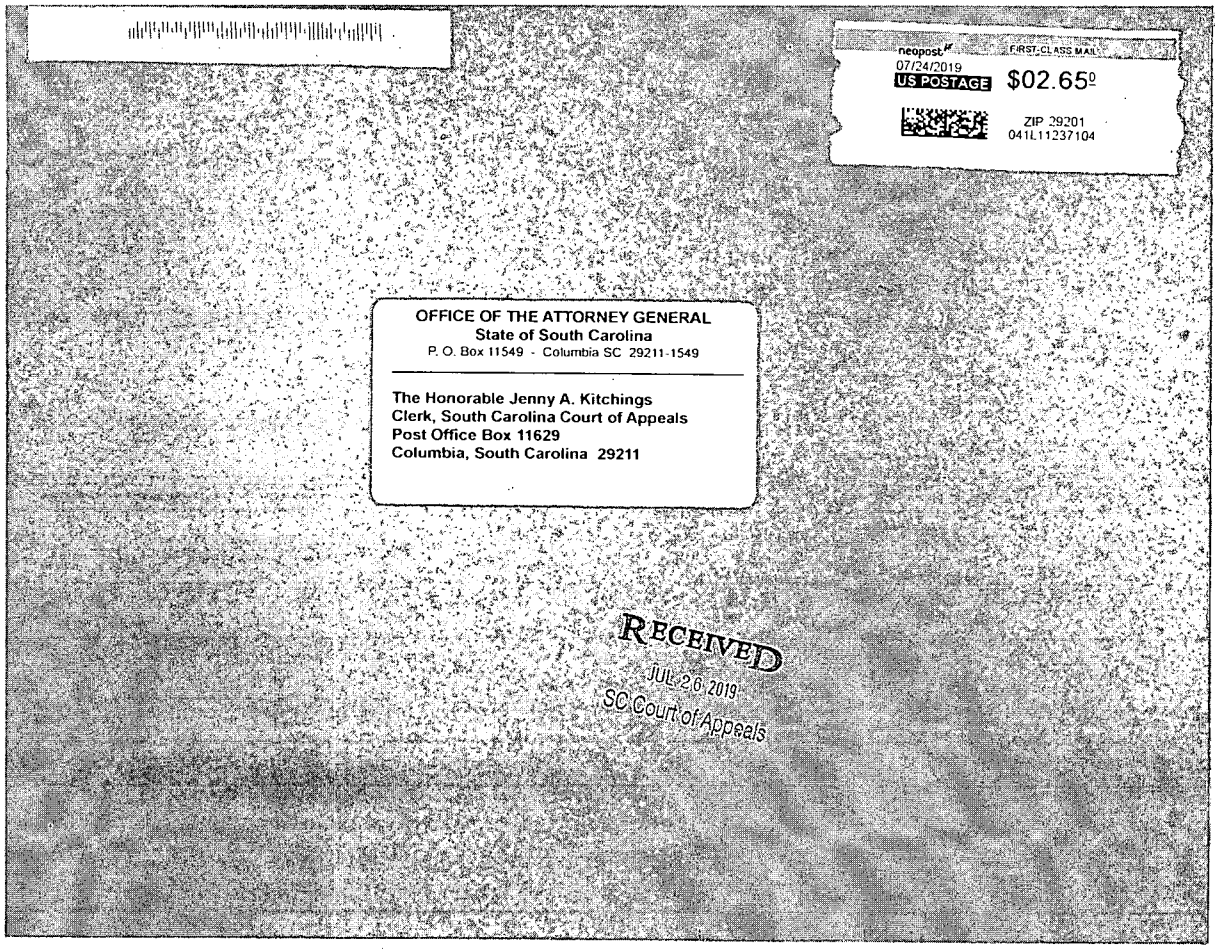
Enclosed for filing in your office is an original Initial Brief of Respondent, Designation of Matter and Certificate of Service in the above-captioned matter.

Thank you for your assistance in this matter.

Sincerely,

W. Joseph Maye
Assistant Attorney General

WJM:dmd
Enclosures
cc: Robert M. Dudek, Esq. (w/two copies of encls.)
The Honorable Isaac McDuffie Stone, Solicitor, 14th Judicial Circuit (w/copy of encls.)
Trisha Allen, Victim Advocacy Division (w/copy of encls.)



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