

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Greenville County

Honorable John C. Hayes, Circuit Court Judge  
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**RECEIVED**

OCT 21 2019

SC Court of Appeals

Opinion No. 2019-MO-012 (S.C. Sup. Ct. Filed February 27, 2019)

Opinion No. 2019-UP-256 (S.C. Ct. App. Filed July 17, 2019)

2013-GS-23-004567, -004568  
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DEMETRIUS SIMMONS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-000057  
\_\_\_\_\_

PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS  
\_\_\_\_\_

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**CERTIFICATE OF COUNSEL**

Counsel for petitioner certifies that pursuant to the South Carolina Court of Appeals' Opinion issued in the case on July 17, 2019, a Petition for Rehearing was filed on August 1, 2019, which was denied by the South Carolina Court of Appeals on September 19, 2019.

### **QUESTION PRESENTED**

The Court of Appeals erred in holding that the trial judge did not err in allowing the jury to hear prejudicial prior bad acts evidence in the form of a statement where the homeowner stated on a 911 call that “the same guy came back” because petitioner was being tried on two burglary charges that occurred at the same residence and on the same date within a few hours apart as this suggested petitioner’s guilt on both burglary charges.

## STATEMENT OF THE CASE

Petitioner Demetrius Simmons was tried in his absence and convicted of petit larceny, resisting arrest, breaking and entering into a motor vehicle and two counts of first degree burglary per a jury trial held during the December 2013 term of the Greenville County General Sessions Court before Judge C. Victor Pyle. Attorneys Joseph Maxwell and Sarah Henry represented petitioner at trial, and Assistant Solicitor Jennifer Tessitore appeared on behalf of the state. Judge Pyle's sealed sentence was published by him (Judge Pyle) on October 16, 2014, at the sentencing hearing held in the case. Petitioner, Joseph Maxwell, Esquire, and Assistant Solicitor Jennifer Tessitore were present at the sentencing hearing. Petitioner was sentenced to imprisonment for an aggregate period of fifteen years. Petitioner did not enjoy the benefit of a direct appeal in the case.

On September 17, 2015, petitioner filed a PCR application with the Greenville County Office of the Clerk of Court. The respondent filed a return dated July 7, 2016, requesting that a hearing be held in response to petitioner's PCR action. A PCR hearing was convened on December 9, 2016, at the Greenville County Courthouse before Judge John C. Hayes, III. On December 20, 2016, Judge Hayes signed an Order of Dismissal denying PCR relief to petitioner.

Petitioner appealed Judge Hayes' Order and a Johnson Petition for Writ of Certiorari was filed on his behalf. On November 27, 2017, this Court issued an Order requiring briefing pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), after which time a direct appeal brief of appellant was filed on January 26, 2018. App. 1-2. This Court then transferred the belated direct appeal to the South Carolina Court of Appeals for review. See Simmons v. State, Opinion No. 2019-MO-012 (S.C. Sup Ct. filed February 27, 2019). On July 17, 2019, the South Carolina Court of Appeals issued an Opinion affirming petitioner's convictions and sentences.

See Simmons v. State, Unpublished Opinion No. 2019-UP-256 (S.C. Ct. App. filed July 17, 2019). App. 3-5. On August 1, 2019, a Petition for Rehearing was filed. App. 6-11. On September 19, 2019, the South Carolina Court of Appeals denied the Petition for Rehearing. App.12. This petition requesting review of the Court of Appeals' decision in this belated direct appeal follows.

### ARGUMENT

The Court of Appeals erred in holding that the trial judge did not err in allowing the jury to hear prejudicial prior bad acts evidence in the form of a statement where the homeowner stated on a 911 call that "the same guy came back" because petitioner was being tried on two burglary charges that occurred at the same residence and on the same date within a few hours apart as this suggested petitioner's guilt on both burglary charges.

Prior to trial, the agreement was reached by all parties to have the following words/phrases muted (redacted) from the 911 tape (see Tr. 27, l. 24 – Tr. 28, l. 18) as follows:

- 1.) The portion where the 911 dispatcher that said "the same guy's back" presumably when Mr. Tintinger called to report the second break in; and
- 2.) The portion where the 911 call includes a statement about a "streak of break-ins" apparently in the area.

However, when the 911 tape was played and there was a statement made on the 911 tape (allegedly by Mr. Tintinger) to the effect that the "same guy came back," the defense objected, but the trial judge overruled the objection. Tr. 95, l. 11 – p. 98, l. 3. The issue on appeal follows:

The trial judge erred in allowing a prior crime 911 recording into evidence at trial that suggested that [petitioner], who was being tried on two burglary charges from the same residence and had been seen when the second break-in occurred at the homeowner's garage, [which created the presumption that he broke into that garage hours earlier...when the first break-in occurred], because this prejudicial information likely led to the jury to hand down their guilty findings based on an improper basis.

The Court of Appeals held as follows on the issue:

Petitioner was convicted of committing two burglaries that took place within hours of each other at the same residence. During the second burglary, the victim saw Petitioner enter his garage and gave police a physical description of Petitioner. Soon after, Petitioner, who matched the description given by the victim, was found in the area in possession of a bicycle stolen during the first burglary. Petitioner argues the trial court erred by admitting into evidence a portion of the 911 call made by the victim during the second burglary in which he stated “the same guy came back.” Petitioner contends the statement should have been excluded as improper prior bad act evidence. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) (“In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court].”); *id.* At 142, 587 S.E.2d at 693-94 (“Issues not raised and ruled upon in the trial court will not be considered on appeal.”); *id.* at 142, 587, S.E.2d at 694 (“A party may not argue one ground at trial and an alternate ground on appeal.”); Rule 404(b), SCRE (Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.”); *State v. King*, 424 S.C. 188, 200, 818 S.E.2d 204, 210 (2018) (“If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing.” (quoting *State v. Fletcher*, 379 S.C. 17, 23, 664, S.E.2d 204, 210 (2018) (“If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing.” (quoting *State v. Fletcher*, 379, S.C. 17, 23, 664 S.E.2d 480, 483 (2008))); *State v. Kirton*, 381 S.C. 7, 27, 671 S.E.2d 107, 117, (Ct. App. 2008) (“A close degree of similarity or connection between the prior bad act and the crime for which the defendant is on trial is required to support admissibility under the common scheme or plan exception.” (quoting *State v. Cheeseboro*, 346 S.C. 526, 546, 552 S.E.2d 300, 311 (2001))); *King*, 424 S.C. at 200, 818 S.E.2d at 210 (“Nevertheless, this other bad act evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant.”)

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<sup>1</sup> 263 S.C. 110, 208 S.E.2d 35 (1974).

To the contrary, there was overwhelming prejudice of the prior bad acts evidence heard by the jury at trial that clearly outweighed any possible probative value because the prior was used to bootstrap petitioner as guilty on both burglary charges. Petitioner was tried in absentia on two burglary charges and other related charges emanating from a break-in that occurred within hours or each other on the same date at the Tintinger residence located in Greenville, South Carolina. Only three witnesses testified at trial on behalf of the state: Mr. Tintinger, Mrs. Tintinger, and the arresting police officer.

Susanne Tintinger testified that on the morning of January 31, 2013, she entered her car parked in the garage of her home and noticed that it had been rummaged through (“trashed”) and that after she saw that the console and glove compartment had been opened up and that her garage door opener was missing, she then saw also that the right garage door (which had not been operating properly) was partially opened from the bottom. Also, their mountain bike that was parked in the garage was missing. Mrs. Tintinger stated that she called the police and reported this while driving to work on that morning. App. 38, l. 9 – p. 69, l. 11.

Kenneth Tintinger (husband) testified that he stayed home on that morning, but shortly thereafter he heard the garage door go up and looked out to see a male wearing a green hooded sweat top pulling a box out of their garage. He called 911 and within minutes, the perpetrator, who was later identified as petitioner, was apprehended in the neighborhood and arrested. App. 70, l. 22 – p. 108, l. 6; App. 110, l. 4 – p. 121, l. 5.

In this case, police received two 911 calls: one call from Mrs. Tintinger and one call from Mr. Tintinger. Mrs. Tintinger called 911 while commuting to work on the morning of January 31, 2013, to report the break-in while Mr. Tintinger stayed at home; but while he was home, he called 911 just hours later on the same morning when the second garage break in occurred.

Generally, prior crimes or bad acts cannot be presented to show that the defendant had the propensity to commit the crime charged, i.e., that he is a bad person. State v. Peake, 302 S.C. 378, 396 S.E.2d 362 (1990). State v. Smith, 309 S.C. 409, 419 S.E.2d 816 (1992); State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (2008). Also, even if prior crimes are considered under the Lyle<sup>1</sup> exceptions, nonetheless, the value of the priors must outweigh the prejudicial value. State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008). Moreover, there is a heightened prejudice

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<sup>1</sup> Prior crimes can only be used in order to show motive, intent, identity, absence of mistake or accident or common scheme or plan. State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923).

in admitting a prior crime that is strikingly similar to the one for which the accused on trial because it suggests that defendant had the propensity to commit the similar crime charged. State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000). Prior crime evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. State v. Spears, 403 S.C. 247, 742 S.E.2d 878 (2013). Unfair prejudice results when there is an undue tendency to make a decision on improper basis, and also prejudice comes into play when jury's verdict influenced by the challenged evidence. State v. Martucci, *supra*.

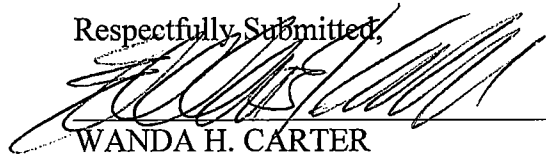
In the case at bar, the prior bad acts evidence made it seem as though petitioner, who was arrested based on the description given from the second Tintinger break-in, was guilty of the first break in as well, in addition to other burglaries in the neighborhood. As a result, petitioner was portrayed as having the criminal disposition and propensity to commit burglaries and the prejudice came into play, again, because the jury was presented with the assumption that petitioner was guilty of the first Tintinger burglary based on the prior bad acts evidence, and that he was guilty as charged on the second Tintinger burglary, and all of the other offenses charged against him combined. Although Mr. Tintinger witnessed a perpetrator (not identified as petitioner at that time) committing the second burglary, there were no eyewitnesses to the first Tintinger burglary, but nonetheless, the prior bad acts evidence on the second burglary was used to link petitioner to the first burglary. This error violated petitioner's right to a fair trial via the Fourteenth Amendment because there was no probative value in the prior crime evidence, and even if probative value existed (arguably), the prejudicial value outweighed any probative value, especially since it was highly likely that the prior bad acts evidence contributed to the jury's guilty verdicts, which meant that the admission of the same cannot be considered harmless error.

See State v. Charping, 313 S.C. 147, 437 S.E.2d 88 (1991), citing to Chapman v. California, 386 U.S. 18 (1967). Also, the issue was preserved via objections at trial for appellate review.

**CONCLUSION**

Based on the foregoing argument, counsel for petitioner requests that this Court grant the petition and allow full briefing on the above raised points.

Respectfully Submitted,



WANDA H. CARTER  
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 21<sup>st</sup> day October, 2019

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**RECEIVED**

OCT 21 2019

Certiorari to Greenville County  
Honorable John C. Hayes, Circuit Court Judge **SC Court of Appeals**

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DEMETRIUS SIMMONS,

PETITIONER

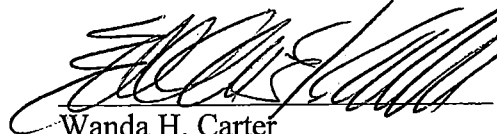
V.

STATE OF SOUTH CAROLINA,

RESPONDENT


CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Taylor Z. Smith, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Demetrius Simmons, ##283195, at Trenton Correctional Institution, 84 Greenhouse Road, Trenton, SC 29847; and the Court of Appeals, at 1220 Senate Street, Columbia, SC 29201, this 21st day of October, 2019.



Wanda H. Carter  
Deputy Chief Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE  
ME this 21st day of October, 2019.

 (L.S)  
Notary Public for South Carolina

My Commission Expires: September 27, 2028.