STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Eugene Griffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSHUA CW REHER,

APPELLANT

APPELLATE CASE NO 2018-002254

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the judge erred in allowing the state to introduce videotapes and photographs of a firearm experiment that was conducted by an investigator with the solicitor's office where the gun used in the experiment was not the gun used in the shooting, the results of the experiment were inconclusive and therefore, the probative value was substantially outweighed by the danger of unfair prejudice?

2.

Whether the judge erred in allowing an eyewitness to testify that, immediately after the shooting, Appellant allegedly pointed the gun at his stepson and threatened him where such evidence constituted impermissible bad character evidence and was therefore inadmissible under Rule 404(b), SCRE, and the judge further erred by ruling it was admissible pursuant to Rule 403, SCRE?

STATEMENT OF THE CASE

Appellant was indicted by the Lexington County grand jury for attempted murder and possession of a weapon during the commission of a violent crime. R. *. Appellant's trial was held before the Honorable Eugene Griffith, Jr. and a jury from December 10 – 13, 2018. Tr. 1. Appellant was represented by Lir Derieg and the state was represented by Robert McNair, III and Bradley Pogue. Tr. 1.

The jury found Appellant not guilty of attempted murder, but convicted him of the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN) and the weapons charge. Tr. 746. The judge sentenced Appellant to nine years imprisonment for the ABHAN and a concurrent five years imprisonment for the weapons charge. Tr. 754, l. 24 – 755, l. 3.

This appeal follows.

STANDARD OF REVIEW

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Whitner, 399 S.C. at 557, 732 S.E.2d at 866.

STATEMENT OF FACTS

Appellant was accused of attempted murder for shooting Joseph Myers in the abdomen with a .22 caliber rifle on August 21, 2015. Appellant and Myers worked together at Agnew Lake Service as welders. Tr. 217, l. 24 – 218, l. 5. The shooting happened at Appellant's house on a Friday evening after they got off work. Several eyewitnesses testified, including both Appellant and Myers, and gave significantly different accounts of what happened.

Myers testified that, on the day of the shooting, he and Appellant worked together "[l]ike any other day," and they had a company meeting around noon which lasted a few hours. Tr. 220, ll. 11 – 24. Alcohol was served at the meeting and Appellant and Myers were both drinking. Tr. 220, l. 25 – 221, l. 10. After the meeting, Myers and Appellant went to do a "side job" together to make some extra money. Tr. 221, ll. 18 – 22. Myers then recalled: "We were headed back to the house. Then we decided to go have a beer at Hemingway's and shoot a few games of pool." Tr. 223, ll. 21 – 25. Myers was drinking beer at Hemingway's and Appellant was drinking mixed drinks. Tr. 224, ll. 1 – 16.

Appellant and Myers left Hemingway's around 7:30 or 8:00 p.m. and went back to Appellant's house. Tr. 224, l. 8 – 225, l. 6. When they arrived at Appellant's house, there were "[k]ids out in front of the house" which had long been a sore subject for Appellant.[1] Tr. 225, ll. 7 – 14. Myers said: "[Appellant] got out yelling at them, and they really didn't take him too serious. I got out, yelled at them, with a little bass in my voice, and they pretty much took off." Tr. 226, l. 16 – 227, l. 20.

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1 Appellant lived with his girlfriend, Brooke, and her two sons, Jacob and Johnny. Jacob, a seventeen-year-old, would frequently have friends over to Appellant's house and Brooke would let them drink alcohol there. This frustrated Appellant because he was the only person in the household who worked and paid the bills.

After the "kids" left, the facts of exactly what occurred became disputed. Myers claimed that Appellant went inside the house and yelled at his girlfriend, Brooke, for allowing the teenagers to "hang out" at his house. Tr. 227, l. 21 – 228, l. 22. Myers said: "Brooke came out all upset and crying. And I apologized for bringing Josh home drunk. And she left and Ian left with her." Tr. 228, l. 24 – 229, l. 3. Ian was one of Jacob's friends and was supposedly Brooke's "pill connection." Tr. 229, ll. 7 – 13. For this reason, Myers claimed that Appellant did not like Brooke associating with Ian and Appellant was upset that they left together. Tr. 229, l. 14 – 230, l. 13. Myers then began making fun of Appellant for enabling Brooke's pill habit while still complaining about it. Tr. 230, l. 15 – 231, l. 4.

Myers claimed that after he started making fun of Appellant for enabling Brooke's drug addiction, Appellant "went ballistic and tackled me off the chair." Tr. 231, ll. 4 – 6. The two of them then started fighting and Myers asserted:

> [I]t started in the garage and it escalated out into the driveway. We were rolling around, hitting each other. I rolled [Appellant] over and I hit him with my elbow. He said, [Myers], let me up, and I let him up. And he ran in the house. I went to start getting my stuff together.
>
> Next thing I know, I heard a bang, and I turned around. And everything is dark from there . . .

Tr. 231, ll. 6 – 14.

Appellant gave a significantly different version of events after the teenagers left the house. According to Appellant, it was Myers who went inside the house and yelled at Brooke about the teenagers hanging out over at the house. Tr. 532, ll. 11 – 23. Appellant then recalled:

> That's when Brooke and Ian come out, and [Myers] followed them outside. And that's when Brooke went and got into the car. And she was sitting there crying. And that's when I walk over to the car and she asked me for money to go to the gas station because she was wanting to get cigarettes. . . .

> That's when Ian pops his head out of the car and tells me that I let it happen and it's my fault. And that's when [Myers] turns his head at me and insinuates that it's my fault that I let the kids be there and that I give Brooke money to go get pills. So he sits there and he says that I'm an enabler.

Tr. 533, l. 20 – 534, l. 9. Appellant recalled that Myers began to get aggressive and hit him in the face. Tr. 538, l. 8 – 539, l. 1. Myers and Appellant began rolling around on the ground while Myers was choking Appellant and Appellant was trying to get away. Tr. 539, ll. 2 – 6. Myers was on top of Appellant who was lying on his back and Myers punched Appellant in the face multiple times while Appellant was on the ground. Tr. 539, l. 10 – 540, l. 3.

Appellant never hit Myers back and he was finally able to break free from Myers. Appellant got to the front of Myers' truck which was parked in Appellant's driveway. Tr. 541, l. 18 – 542, l. 18. Myers then attacked Appellant a second time, tackling him to the ground and punching him in the face. Tr. 542, l. 19 – 543, l. 23. Appellant testified that while Myers was attacking him, Appellant was calling out for help and for someone to call 911. Tr. 544, ll. 10 – 20.

Appellant got away from Myers a second time and was able to run inside of his house to the kitchen where he saw Michael All.[2] Tr. 544, l. 21 – 545, l. 19. Appellant testified that after he got inside the house, Myers opened the cooler in his truck and started drinking beer instead of leaving Appellant's residence. Appellant had repeatedly asked Myers to leave by that point. Tr. 546, ll. 3 – 22. Because Myers was refusing to leave after being told to by Appellant, Appellant retrieved his .22 caliber rifle and fired four warning shots into his toolbox.[3] Tr. 546, l. 23 – 549,

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2 Michael All was a friend of Jacob's who testified for the state.

3 Michael All maintained that Appellant fired his gun at Myers five times in succession from the threshold of the doorway which connected the kitchen to the carport. Tr. 334, l. 4 – 335, l. 11. Keith Sprinkle, a crime scene investigator with the Lexington County Sheriff's Department,

l. 21. At that point Myers charged at Appellant's door and Appellant slammed the door shut. Myers was trying to push through the door to get inside the house. Tr. 550, l. 24 – 551, l. 8.

Appellant recalled:

> That's when he pushes on it [the door] for probably maybe a minute or two. And then the pushing stops. And that's when I cracked the door open to see if he's still there, and that's when he turns around and pushes the door through. He was still standing on the step. . . .
>
> That's when he turns around and comes through the door. . . .
>
> I started taking my steps back. And I raised my hand to stop him from connecting to me, and that's when I raised my gun and I shoot one time into [Myer's] stomach.

Tr. 551, l. 11 – 552, l. 2. Appellant maintained that the final shot happened while Appellant was about two steps backwards into his kitchen.[4] Tr. 552, ll. 18 – 22. After Appellant shot Myers, Appellant recalled: "That's when the gun drops and [Myers] falls on top of me and we kind of have a tussle right there. Eventually, I get him off of me and he gets up and he goes towards the door. And that's when I pushed him out the door and he goes to his truck." Tr. 552, l. 24 – 553, l. 3.

After Myers went back outside to his truck, Michael All awakened Jacob who then went outside to give Myers some water and find the keys to his truck. Tr. 553, ll. 4 – 9. Appellant laid down on the floor and was hyperventilating with the gun on the floor next to him. Tr. 553, l.

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found four spent .22 caliber shell casings in the garage. Tr. 171, ll. 12 – 16. He also found four metal fragments consistent with bullets that were all near the toolbox. Tr. 174, l. 13 – 177, l. 7.

[4] Sprinkle also found one spent .22 caliber shell casing inside of the residence on the floor of the kitchen. Tr. 183, l. 21 – 184, l. 8.

17 – 554, l. 3. Appellant cleared the weapon, including ejecting a live round from the chamber onto the kitchen floor.[5] Tr. 554, l. 18 – 555, l. 7.

Brooke's sons, Johnny and Jacob,[6] both testified for the defense and Jacob's friend Michael All testified for the state. Johnny testified that Myers came inside and was screaming at Brooke about letting the teenagers hang out at the house. Tr. 449, ll. 4 – 24. After this, Brooke left to go to the store and Johnny recalled: "[F]irst I heard screaming outside, and then all of a sudden I heard [Appellant] scream somebody help me; Mike, call the cops." Tr. 450, l. 11 – 451, l. 12. Johnny looked out the window and saw Myers on top of Appellant hitting him in the face. Tr. 451, ll. 13 – 24. Johnny also heard Appellant tell Myers to leave. Tr. 453, ll. 11 – 25. Johnny testified that Appellant broke free from Myers and got inside. Tr. 456, ll. 3 – 22. Appellant was holding the door shut and Myers was trying to force his way in; when Myers finally got through the door and started coming into the kitchen, that was when Appellant shot Myers. Tr. 456, l. 23 – 457, l. 7.

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5 Sprinkle found an unspent .22 caliber round of ammunition on the floor of the kitchen. Tr. 184, ll. 9 – 15.

6 Jacob testified that he was asleep through the incident and did not wake up until after the shots had been fired. Tr. 498, l. 22 – 499, l. 1.

ARGUMENT

1.

The judge erred in allowing the state to introduce videotapes and photographs of a firearm experiment that was conducted by an investigator with the solicitor's office because the gun used in the experiment was not the gun used in the shooting, the results of the experiment were inconclusive and therefore, the probative value was substantially outweighed by the danger of unfair prejudice.

Relevant Facts

Defense counsel made a pretrial motion to suppress videotapes and photographs of a firearm experiment that was done by James Sullivan, who was an investigator with the Lexington County Solicitor's Office. Tr. 101, ll. 21 – 24. The firearm experiment in dispute was allegedly designed to show the manner in which shell casings were ejected from a .22 caliber semi-automatic rifle. State's Exhibits 73 and 74 (videotapes of Sullivan's experiment on file with this Court); State's Exhibits 75 and 76 (photographs of Sullivan's experiment on file with this Court). Counsel argued that the probative value of this experiment was substantially outweighed by the danger of unfair prejudice and that the testimony could confuse the jury. Tr. 103, ll. 15 – 20. Specifically, counsel pointed out that the gun used by Sullivan during his experiment was not the actual gun used by Appellant, and also that Sullivan's experiment only showed that the shells did not eject in any discernable pattern. Tr. 102, ll. 1 – 18. The judge did not rule on the motion at that time.

Prior to Sullivan's testimony, defense counsel again raised the objection. Counsel argued that while the gun used in the experiment was the same make and model gun that was used by Appellant, it was not the exact gun used by Appellant. Furthermore, Sullivan could not testify

whether the gun used by Appellant would have a similar ejection pattern as the gun used by Sullivan during the experiment. Tr. 322, l. 19 – 323, l. 1. The judge nonetheless ruled that he would allow the firearm experiment under Rule 403, SCRE. Tr. 323, ll. 15 – 25.

During Sullivan's testimony, the state introduced two videotapes of Sullivan firing a .22 caliber rifle and also photographs of the locations of the shell casings that were ejected during the experiment. Tr. 359, l. 5 – 360, l. 6. All of these exhibits were admitted over defense counsel's objection. See State's Exhibits 73 – 76. Sullivan then testified that it would be unlikely, based on his experiment, that a shell casing would end up exactly where the shooter was standing if they were standing in the kitchen when they fired the shot. Tr. 362, l. 25 – 363, l. 4.

Sullivan admitted that he had never test fired the gun used by Appellant. He further admitted that "there is no pattern except for it ejects to the right, brass hits the ground, and goes where it goes." Tr. 363, ll. 13 – 21. Sullivan also acknowledged that he did not know whether the gun used by Appellant in the shooting would have the same lack of a discernable ejection pattern as the gun test fired by Sullivan. Tr. 364, ll. 8 – 11.

The assistant solicitor used Sullivan's experiment in his closing argument to the jury:

> You saw the pictures where Investigator Sullivan was shooting. Most of those shell casings ejected behind the line of fire. When he shot against this wall right here, he was standing at the end of this tape measurer. Those casings end up behind where he was standing. That shell casing just hit off either the door frame or the cabinets where that door was and just kicked behind him.
>
> If that didn't happen, I don't know what he'd hang his defense on. That cabinet, that's right by the door right where he was standing, right where the ejection portal on the weapon would have shot the casing out. Are we really to believe that if he did shoot in his kitchen, that shell casing would land in the exact place where he says the shooting happened? No. That's unbelievable.

Tr. 679, l. 21 – 680, l. 11.

Discussion

The judge erred in admitting the videos and pictures of the firearm experiment that was done by Sullivan. Rule 403, SCRE, permits relevant evidence to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, [or] confusion of the issues." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013). In State v. Kahan, 268 S.C. 240, 246, 233 S.E.2d 293, 294 (1977), the Supreme Court noted in regard to the admissibility of out of court experiments that "substantial similarity" is required between the conditions of the experiment and the conditions existing at the time of the incident in dispute.

Sullivan's experiment had very little probative value because Sullivan was only able to "determine," through his experiment, that "brass hits the ground, and goes where it goes." Tr. 363, ll. 13 – 21. Furthermore, Sullivan admitted that he did not know if the "results" from his experiment would have been the same had he used Appellant's gun, i.e. the actual gun that was used to shoot Myers.

Introducing such a seemingly meaningless piece of evidence begs the question of why the state would want such evidence before the jury. The location of Appellant when he fired the shots was in significant dispute. According to the state's theory, Appellant fired all five shots from the same location, the threshold of the door leading from the kitchen to the carport. Tr. 334, l. 4 – 335, l. 11. According to Appellant, the first four warning shots were fired from the doorway leading to the carport, but the final shot was fired from two steps back into the kitchen. Tr. 546, l. 23 – 549, l. 21; tr. 552, ll. 18 – 22.

As was noted above, crime scene investigator Sprinkle found four spent shell casings in the carport along with metal fragments near the toolbox. Tr. 171, ll. 12 – 16; tr. 174, l. 13 – 177, l. 7. This physical evidence corroborated Appellant's version of events which was that he fired four warning shots at the toolbox. Sprinkle also found one spent shell casing inside the residence on the floor of the kitchen which was also consistent with Appellant's version of events that the final shot was fired from inside the kitchen while Myers was forcing entry and attempting to attack Appellant. Tr. 183, l. 21 – 184, l. 8.

In an effort to combat the fact that Appellant's version of events was corroborated by the physical evidence collected from the scene, the state sought to "explain" this by using Sullivan's extremely misleading and confusing experiment. In other words, the prejudice from this evidence came in its misleading attempt to discredit Appellant's testimony. The problem, of course, was that there was nothing conclusively shown by Sullivan's experiment other than the fact that "brass hits the ground, and it goes where it goes." This was only Sullivan's conclusion drawn as to the gun that he test fired, and it was not even the gun that was used by Appellant. Therefore, the probative value of this experiment was extremely low.

The prejudice from the introduction of this evidence was tied closely to its confusion of the issues. Because videotapes and pictures of the experiment were entered into evidence, the jury was likely to believe that the experiment showed the manner in which shells might have ejected from Appellant's gun when he fired it on the day of this incident. The experiment, however, did not show this for two reasons: (1) the experiment did not show any particular manner or pattern of ejection; and (2) the gun used in the experiment was not the gun used in the shooting. Even though Sullivan conceded these facts in his testimony, the assistant solicitor attempted to capitalize on the confusion by suggesting in his closing argument that Sullivan's

experiment disproved Appellant's version of events. Tr. 679, l. 21 – 680, l. 11. This was a disingenuous and intentionally misleading argument.

In Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000), the Supreme Court dealt with the admissibility of a videotaped animation of a car crash in a civil case that was sought to be used as demonstrative evidence by the defendant. The trial judge refused to admit Cantrell's videotaped animation of the accident which she sought to admit through her expert witness. Specifically, the plaintiffs objected to the video arguing that it did not accurately reflect the witness testimony. The trial court agreed and determined that the inaccuracies in the video would mislead and confuse the jury. Id. at 382, 529 S.E.2d at 535.

The Court affirmed the trial judge's refusal to admit the evidence and noted potential problems with computer animations: "[T]he potential to mislead by an inaccurate portrayal of the facts, the potential to create lasting impressions that unduly override other testimony or evidence . . ." Id. at 384, 529 S.E.2d at 536. The Court then established a new rule regarding the admissibility of computer animations:

> We hold that a computer-generated video animation is admissible as demonstrative evidence when the proponent shows that the animation is (1) authentic under Rule 901, SCRE; (2) relevant under Rules 401 and 402, SCRE; (3) a fair and accurate representation of the evidence to which it relates, and (4) its probative value substantially outweighs the danger of unfair prejudice, confusing the issues, or misleading the jury under Rule 403, SCRE.

Id.

While the case at bar does not deal with computer-generated animation, Cantrell is still instructive as to the importance of subjecting demonstrative recreations of events that are in dispute to the requirements of Rule 403, SCRE. Sullivan's experiment was not performed under conditions that were substantially similar to those conditions which existed at the time of the

shooting, contrary to the requirement of State v. Kahan, 268 S.C. 240, 233 S.E.2d 293 (1977). Unlike the actual conditions present at the time Appellant fired his weapon, Sullivan's experiment took place in the controlled environment of an indoor shooting range. Furthermore, the experiment performed by Sullivan was not a fair and accurate representation of the evidence to which it related; and therefore, it should have been excluded.

The trial judge erred in allowing such misleading and confusing evidence to be introduced before the jury. The videotapes, photographs, and testimony from Sullivan regarding his experiment should not have been admitted because they had no probative value and posed extreme danger of unfair prejudice and confusion of the issues in violation of Rule 403, SCRE. Appellant's convictions should be reversed. See Rule 403, SCRE; Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000).

2.

The judge erred in allowing an eyewitness to testify that, immediately after the shooting, Appellant allegedly pointed the gun at his stepson and threatened him because such evidence constituted impermissible bad character evidence and was therefore inadmissible under Rule 404(b), SCRE, and the judge further erred by ruling it was admissible pursuant to Rule 403, SCRE.

Relevant Facts

Jacob's friend, Michael All, who was present inside Appellant's house at the time of the shooting testified for the state. Michael testified that immediately after Appellant fired his gun at Myers, Jacob woke up and came out of his bedroom. He started walking towards the door. Tr. 337, ll. 7 – 16. Michael said that Appellant then pointed the gun "in Jacob's direction." Tr. ll. 16 – 20.

Defense counsel objected under Rule 404(b), SCRE to which the assistant solicitor responded: "Res gestae, goes towards intent." Tr. 337, l. 21 – 338, l. 6. After a sidebar, Michael continued his testimony:

> Jacob came out of the back bedroom, asked what was going on; after a second, Jacob started walking towards the back door; [Appellant] pointed the gun in Jacob's direction and said, you're on his side aren't you? And Jacob said, no, I'm not on no one's side. And Jacob started walking out the back door. And [Appellant] said, if you go out that door, you better lock it behind you.

Tr. 338, ll. 12 – 21.

After Michael's testimony, defense counsel again put his objection on the record. Counsel said his objection was pursuant to Rule 404(b), SCRE because this was a prior bad act that did not fall within an exception to the rule. Tr. 366, l. 21 – 367, l. 3. Counsel further argued

that Appellant was charged with pointing and presenting a firearm against Jacob but that the state was not going forward on that charge during this trial. Tr. 367, ll. 4 – 9. The judge then overruled counsel's objection stating that there was no mention of the fact that Appellant was charged with pointing and presenting in front of the jury and that "under 403, that's not unduly prejudicial." Tr. 367, ll. 16 – 24.

Discussion

Rule 404(b), SCRE, provides: "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." "It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual." State v. Gillian, 360 S.C. 433, 443, 602 S.E.2d 62, 67 (Ct. App. 2004). Furthermore, in order to be admissible, "[t]he bad act must logically relate to the crime with which the defendant has been charged." Id.

If the prior bad act which the state seeks to introduce against the defendant is not the subject of a criminal conviction, then "evidence of the bad act must be clear and convincing." State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009). However, even if there is clear and convincing evidence of the prior bad act, admission of the evidence is still subject to a Rule 403, SCRE analysis. Id. Rule 403, SCRE, permits relevant evidence to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013).

Here, the assistant solicitor maintained that Michael's claim that Appellant pointed a gun in the direction of Jacob was proper because it showed Appellant's intent and was part of the res gestae of the case. However, there was no dispute that Appellant intentionally shot Myers. Appellant's defense at trial was that of self-defense in which he admitted that he intentionally shot Myers. Therefore, the improper bad character testimony that Appellant allegedly pointed a gun at his stepson and threatened him was not necessary to show his intent. See State v. Lyle, 125 S.C. 406, 118 S.E. 803, 810 (1923) (holding, among other things, that evidence of the defendant's prior criminal acts, similar to the crime he was on trial for, were inadmissible to show intent where the defendant conceded criminal intent before the jury and raised the defense of alibi).

Furthermore, the alleged threat made towards Jacob was completely irrelevant to Appellant's intentions towards Myers. There is no indication in the record that Appellant harbored the same intentions towards Myers that he did towards Jacob. Even if the alleged threat towards Jacob, coupled with pointing a gun in Jacob's general direction, were true, it still had very little probative value as to his intentions towards Myers. This is especially true since, at the time of the alleged threat towards Jacob, the shooting was over. Appellant had already fired five shots prior to Jacob entering the room where Appellant was standing.

The trial judge erred in allowing this bad character testimony over defense counsel's Rule 404(b), SCRE objection because the testimony did not fall within one of the recognized exceptions. See State v. Braxton, 343 S.C. 629, 635, 541 S.E.2d 833, 836 (2001) (holding evidence that murder defendant had gotten into an argument with his brother the night before the murder and drawn his pistol was inadmissible character evidence).

In State v. Douglas, 302 S.C. 508, 397 S.E.2d 98 (1990), the defendant, who was on trial for murder, was alleged to have pointed a gun at, and threatened to kill, an associate of his the night before the murder while he and the associate were "horseplaying." The Supreme Court found that this bad character evidence was not admissible to show intent on the part of the defendant because the state showed no logical relation between the two incidents. Much like in Douglas, here, the alleged bad act was directed at a person different from the alleged victim. Therefore, in this case, the bad character evidence that Appellant pointed a gun at, and threatened, his stepson was not probative of his intentions towards Myers, and evidence Appellant allegedly pointed a gun at a teenager was very prejudicial.

Furthermore, the testimony was not admissible under the theory of res gestae as enunciated in State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-371 (1996). Evidence of Appellant's alleged conduct directed at Jacob, who was not the alleged victim in the case for which Appellant was on trial, was not necessary in order to give a full presentation of the case against Appellant. While the incidents were in close temporal proximity to one another, the act for which Appellant was on trial was finished at the time he made the alleged threat towards Jacob. This improper bad character testimony only served to confuse the real issue by allowing the jury the opportunity to make the impermissible inference that because Appellant pointed a gun in the general direction of his stepson and also threatened him, that Appellant was generally a bad person deserving of punishment.

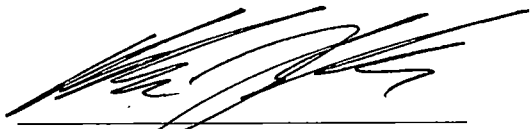
Even if this Court finds that the trial judge did not abuse his discretion in allowing this testimony under Rule 404(b), SCRE or the res gestae, the testimony was still improper under Rule 403, SCRE. The trial judge cited to Rule 403, SCRE in finding that the testimony of the alleged threat towards Jacob was not unfairly prejudicial. However, evidence that an adult

pointed a gun at a minor is extremely prejudicial and bothersome to a normal juror. In alleging that Appellant pointed and presented a firearm at Jacob, and made a threat towards him while doing so, Appellant was unfairly prejudiced because the jury could well make a decision on an improper basis, e.g. an emotional one. See State v. Saltz, 346 S.C. 114, 127, 551 S.E.2d 240, 247-248 (2001) (holding that testimony that defendant was absent from school without an excuse several days after the disappearance of the victim was inadmissible because it unfairly prejudiced the defendant, confused the issues, and misled the jury).

The allegation that Appellant pointed a gun at Jacob also had minimal probative value because it was not necessary to prove a material fact in issue. This testimony did not make Appellant's guilt for the attempted murder or ABHAN of Myers more or less probable than self-defense because his intentions towards Jacob and Myers were wholly independent of one another. Therefore, the judge erred in allowing this improper bad character evidence over defense counsel's objection. See Rule 403, SCRE; Rule 404(b), SCRE; State v. Braxton, 343 S.C. 629, 635, 541 S.E.2d 833, 836 (2001); State v. Douglas, 302 S.C. 508, 397 S.E.2d 98 (1990).

CONCLUSION

By reason of the foregoing argument, Appellant's convictions should be reversed, and this case remanded to the Lexington County Court of General Sessions for a new trial.



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 2nd day of December, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Eugene Griffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSHUA CW REHER,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Joshua Cw Reher, #378523, at Goodman Correctional Institution, 4556 Broad River Road, Columbia, SC 29210, this 2nd day of December, 2019.

Adam Sinclair Ruffin
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 2nd day of December, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.