STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROGER D. GRATE,

APPELLANT

APPELLATE CASE NO. 2019-000472

INITIAL BRIEF OF APPELLANT

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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Did the trial judge err in allowing the state to call a witness to testify that approximately one year prior to the shooting for which Appellant stood trial, Appellant was angry at another individual with whom he was playing cards and as a result of that anger, Appellant drew his gun and pointed it at the individual where the evidence was not admissible to prove habit and it did not fall within any of the exceptions to the prohibition on character evidence?

STATEMENT OF THE CASE

On February 23, 2017, a Horry County grand jury indicted Appellant for murder (2017-GS-26-930) and possession of a weapon during the commission of a violent crime (2017-GS-26-931). R. *(indictments). The state, represented by Christopher D. Helms and Catherine D. Owens, called the case to trial before the Honorable Steven John and a jury on March 11-14, 2019. Tr. 1. Kia T. Wilson and DeShantell R. Singleton represented Appellant. At the conclusion of the presentation of evidence, Judge John instructed the jury as to murder, voluntary manslaughter, involuntary manslaughter, self-defense, and accident. Tr. 524, l. 18 – Tr. 531, l. 21. While deliberating, the jury requested to be re-instructed on murder, voluntary manslaughter, and involuntary manslaughter. Tr. 538, ll. 4-7; Tr. 540, ll. 17-21. The judge instructed them accordingly. Tr. 538, l. 13 – Tr. 541, l. 21. Ultimately, the jury found Appellant guilty as charged. Tr. 544, ll. 9-17. Judge John sentenced Appellant to thirty-five years imprisonment for murder and five years imprisonment for the weapon. Tr. 556, ll. 5-19; R. *(sentence sheets). He ordered the sentences to be served concurrently. Tr. 556, ll. 17-19; R. *(sentence sheets).

On March 18, 2019, Appellant served his notice of appeal. This brief of appellant follows.

STATEMENT OF THE FACTS

On December 25, 2016, people gathered at Appellant's house to celebrate Christmas. Tr. 416, ll. 20-25. When Appellant learned that his stepson, Gregory Grate, had not given Appellant's wife, who was Gregory's biological mother, a Christmas present, Appellant walked outside to discuss the matter with Gregory. Tr. 389, ll. 7-8; Tr. 390, ll. 8-22; Tr. 417, ll. 3-18. The two argued, and at times, the argument was loud and heated. Tr. 417, ll. 15-24.

Darrell Doctor, who was Gregory's cousin, walked up to the two men to ask what was going on. Tr. 391, ll. 5-16; Tr. 418, ll. 8-14. Gregory and Appellant told Doctor that it was none of his business. Tr. 391, ll. 17-24; Tr. 418, ll. 13-14. Gregory tried to convince Doctor to leave with him, but Doctor refused. Tr. 392, ll. 2-10; Tr. 394, ll. 22-25; Tr. 395, ll. 7-16. Appellant repeatedly told Doctor to leave, but Doctor refused. Tr. 418, ll. 14. When Doctor turned toward Appellant, placed his hand in his pocket, and began walking aggressively toward Appellant, Appellant shot him once. Tr. 395, ll. 1-25; Tr. 418, ll. 21; Tr. 419, l. 20 – Tr. 421, l. 14; Tr. 423, ll. 5-6. Appellant feared Doctor had a gun in his pocket. Tr. 420, l. 18 – Tr. 421, l. 11. Appellant did not intend to shoot Doctor; instead, he intended to shoot his gun in the air to scare Doctor. Tr. 422, ll. 15-25. Doctor fell to the ground and ultimately died from the gunshot wound. Tr. 179, ll. 19-23; Tr. 285, l. 23 – Tr. Tr. 286, l. 6; Tr. 289, ll. 5-8; Tr. 313, ll. 10-13.

Several individuals picked up Doctor and tried to put him into the car of Roger Grate, Doctor's cousin, but Roger refused to allow the individuals to place Doctor into his car. Tr. 346, l. 23 – Tr. 347, l. 4; Tr. 303, ll. 5-14; Tr. 312, ll. 8-20. Instead, a neighbor attempted to perform CPR. Tr. 168, ll. 20-21; Tr. 347, ll. 8-11. Shortly thereafter, the police arrived. Tr. 167, ll. 9-25; Tr. 423, ll. 24-25. Appellant, who had remained outside to wait for the police, told the responding officer that he had shot Doctor. Tr. 170, l. 18 – Tr. 171, l. 3; Tr. 175, ll. 14-18; Tr. 422, ll. 12-14;

Tr. 423, ll. 15-25. Additionally, Appellant provided the officer with his gun and his identification. Tr. 176, ll. 4-13Tr. 424, ll. 1-9. Further, Appellant fully cooperated with police by providing them with a statement regarding what transpired before, during, and after the shooting. Tr. 424, l. 13 – Tr. 425, l. 18; State's Exhibit #43.

STANDARD OF REVIEW

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

ARGUMENT

The trial judge erred in allowing the state to call a witness to testify that approximately one year prior to the shooting for which Appellant stood trial, Appellant was angry at another individual with whom he was playing cards and as a result of that anger, Appellant drew his gun and pointed it at the individual where the evidence was not admissible to prove habit and it did not fall within any of the exceptions to the prohibition on character evidence.

Relevant facts

The state proposed calling multiple witnesses to testify to what it characterized as Appellant's "habit" of pulling a gun whenever he was angry. The judge required the state proffer the proposed testimony.

State's proffer

Terri Doctor was the first cousin of the deceased. Tr. 223, ll. 10-13. Terri was also familiar with Appellant because Appellant was married to Terri's aunt. Tr. 223, ll. 18-20. Terri claimed she knew Appellant to carry a gun. Tr. 223, ll. 23-25. Terri claimed that she was at Appellant's house playing cards with a group of people whom she could no longer remember. Tr. 224, ll. 5-13. Terri alleged that Appellant was angry because he was losing at the card game. Tr. 224, ll. 15-18. Appellant and anther cousin allegedly argued. Tr. 224, ll. 19-21. Then, according to Terri, Appellant pulled out his gun and pointed it at the cousin, telling the cousin to leave. Tr. 224, ll. 21-24. When the cousin left, the confrontation ended. Tr. 224, l. 25 – Tr. 225, l. 5. On cross-examination, Terri finally revealed that the cousin who argued with Appellant was Kentrez Hilton. Tr. 225, ll. 13-14. Terri alleged the card game occurred the year before the shooting – in October or November of 2015. Tr. 227, l. 20 – Tr. 228, l. 5.

Next, the state proffered the testimony of Veronica Doctor, another first cousin of the deceased. Tr. 228, l. 25 – Tr. 229, l. 2. Veronica alleged that ten years ago, when she was at her grandmother's house, Appellant and one of her uncles got into an altercation. Tr. 230, ll. 1-3; Tr. 231, l. 25 – Tr. 232, l. 1. Veronica claimed Appellant left, but returned with a gun, which he pointed at the uncle. Tr. 230, ll. 3-5. When Appellant's wife intervened, the altercation stopped. Tr. 230, ll. 5-7.

Finally, the state called, Romana Parker, Appellant's neighbor. Tr. 232, ll. 17-20. Parker alleged that three years prior, she and Appellant exchanged words one day due to a disagreement over their dogs. Tr. 233, ll. 1-11; Tr. 233, ll. 18-21. After the argument, Parker and Appellant went into their respective homes. Tr. 233, ll. 11-13. Shortly thereafter, Appellant walked out of his front door with a gun. Tr. 233, ll. 13-17.

After proffering the evidence, the state argued the evidence was admissible as "conduct and conformity with habit." Tr. 236, ll. 18-20. The "habit" the state sought to prove was that "if [Appellant] gets in an argument, he pulls a gun." Tr. 236, ll. 20-21; Tr. 237, ll. 13-14. According to the state, Appellant acted in conformity with this habit on the night of the shooting. Tr. 237, ll. 13-15. Further, the state argued, the evidence countered a claim of mistake and negated self-defense. Tr. 237, ll. 1-8.

Defense counsel objected to the evidence, explaining the state's proposed witnesses were not present for the shooting and could not draw any analogies between Appellant's alleged prior conduct and his conduct related to the shooting. Tr. 238, ll. 1-6; Tr. 238, l. 11. Defense counsel explained that the state was offering impermissible character evidence. Tr. 238, ll. 15-16; Tr. 241, ll. 1-9. Further, defense counsel noted the instances offered by the state allegedly occurred ten years, three years, and one year prior to the shooting. Tr. 238, ll. 16-20. The prior instances were

markedly different from what the state alleged happened during the shooting as well. Tr. 238, ll. 21-23; Tr. 241, ll. 15-22.

Court's ruling

The trial judge noted some tension between Rule 404, SCRE, which prohibits the introduction of character evidence in order to show action in conformity with that character, and Rule 406, SCRE, which allows introduction of evidence of the habit of a person to prove the conduct of that person on a particular occasion was in conformity with the habit. Tr. 240, ll. 5-13; Tr. 241, l. 25 – Tr. 243, l. 1. Relying upon State v. Brown, 344 S.C. 70, 543 S.E.2d 552 (2001), the judge explained he had to determine whether the incidents described the the state's proposed witnesses were "so similar" and "so fact specific that would show the defendant's actions in conformity there with and then potentially to alleviate any argument about mistake." Tr. 243, ll. 1-7. Thereafter, the judge found the incidents described by Veronica and Parker were "not so similar occurrences or conditions that the court could find to admit them, because they don't show a substantial identity of circumstances, nor are they reasonably proximate in time." Tr. 243, l. 24 – Tr. 244, l. 4.

However, the judge determined the alleged incident described by Terri was "similar, closeness in proximity of time and similar of occurrence" to show that Appellant's response to an argument "is to pull out a gun and order somebody to leave." Tr. 244, ll. 5-9. The judge found "a similar act that show[ed] substantial identity of circumstances and [was] reasonably close in time and proximity." Tr. 244, ll. 9-11. In sum, he found the "specific nature of the incident described" by Terri" was "proper under 406, habit, routine, and practice." Tr. 244, ll. 12-15. Further, he found the evidence "also could be used under 404 to show the actions [*sic*] of mistake and accident." Tr. 244, ll. 15-18.

State's case-in-chief

Later, the state called Terri as a witness pursuant to the judge's ruling. Terri claimed that she had been to Appellant's house "[p]lenty of times," that she had seen him get mad, and she knew him to carry a gun. Tr. 275, ll. 1-10. Further, Terri claims she had seen Appellant pull a gun and point it at someone. Tr. 275, ll. 11-15. Thereafter, Terri told the jurors that in October or November 2015, she attended a card game at Appellant's house. Tr. 275, ll. 16-21. Kentrez Hilton was winning the card game. Tr. 276, ll. 1-2. According to Terri, Appellant was mad because he was not losing. Tr. 276, ll. 2-7. Terri claimed Appellant and Hilton argued, and then, Appellant alleged pulled out a gun. Tr. 276, ll. 9-12. Hilton then left. Tr. 276, ll. 12-15.

Appellant's case-in-chief

In his case-in-chief, Appellant called Kentrez Hilton as a witness to rebut Terri Doctor's testimony. Hilton explained that Terri was his cousin. Tr. 381, ll. 14-20. Hilton visited Appellant's home numerous times to "hang out and play cards." Tr. 382, ll. 4-7. Hilton denied ever having an argument with Appellant while at his house playing cards. Tr. 382, ll. 8-11. He further denied that Appellant ever pulled a gun out and pointed it at him. Tr. 382, ll. 12-17.

State's closing argument

During his closing argument, the solicitor told the jury that Appellant's testimony differed from that of a state's witness because "he's got to put some holes in this somewhere." Tr. 483, ll. 16-20. He emphasized "they've got to put some holes in this somewhere. They've got to muddy the waters." Tr. 483, ll. 23-24. According to the solicitor, it was defense counsel's "job" to muddy the waters and put holes in the state's case. Tr. 483, ll. 23-25. When the state replied to the defense's closing, he again told the jurors that the defense has "to muddy the waters." Tr. 515, ll. 13-14. He claimed the defense wanted the jurors "to be confused," and that the jury instructions

on "self-defense, involuntary manslaughter, [and] voluntary manslaughter" were to muddy the waters. Tr. 515, ll. 17-22.

Turning to the impermissible evidence, the state recounted that Terri Doctor "said she [had] seen him pull a gun on somebody before." Tr. 486, ll. 17-18. Thereafter, the state argued Terri's version "either happened or it didn't. It can't be both ways. Either Mr. Hilton is lying or Terri is lying." Tr. 486, ll. 18-20. After explaining that the state "contend[ed] it happened," the state asked why Hilton would lie. Tr. 486, l. 22. With no evidence to support his contention, the state told the jurors that Hilton lied because he feared Appellant: "He's proven that he's willing to shoot somebody. We know he is; that's undisputed. Why would Mr. Hilton lie? Because he's afraid of him, and rightfully so." Tr. 486, ll. 22-25. Later, the state returned to this theme. Tr. 490, ll. 3-7.

Jury instructions

The judge instructed the jurors on "[e]vidence of a prior bad act." Tr. 522, l. 20. In sum, the judge told the jurors as follows:

> If you conclude it was true, it may only be considered by you on the question of credibility and believe ability and for no other purpose. You may give this evidence, if you have found it to be true, the weight and value, if any, you find it should have, only on the issue of credibility. You must not, you may not consider evidence of any prior bad act as proof of the defendant's guilt of the crime for which he is charged today.

Tr. 522, l. 20 – Tr. 523, l. 2.

Discussion

The trial judge erred in permitting the state to present evidence of an alleged prior incident where Appellant was angry with a fellow card player, argued with the fellow card player, and drew his weapon on the fellow card player. The evidence was inadmissible character evidence because it did not fit within any of the exceptions. Further, the judge's admission of the evidence pursuant to Rule 406, SCRE, as evidence of the habit of a person too broadly construed the Rule.

Character evidence

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion. Rule 404(a), SCRE. In essence, evidence of other bad acts is not admissible to prove a person's guilt; however, such evidence may be admissible to show motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent. Rule 404(b), SCRE; see also State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). In addition, evidence of prior bad acts not subject to a conviction must be proven by clear and convincing evidence. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001).

As explained by the Supreme Court, the process of analyzing bad act evidence starts with Rule 401, SCRE. State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). Thus, the first step is determining whether the evidence is relevant. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Generally, "[a]ll relevant evidence is admissible." Rule 402, SCRE. "Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986) (citing Toole v. Salter, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967)). "Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears, and it is not required that the inference sought should necessarily follow from the fact proved." State v. Sweat, 362 S.C. 117, 126, 606 S.E.2d 508, 513 (Ct. App. 2004).

According to this Court, "evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." State v. Lyles, 379 S.C. 328, 337, 665 S.E.2d 201, 206 (Ct. App. 2008). Stated another way, "[e]vidence is relevant if it tends to

establish or to make more or less probable some matter in issue upon which it directly or indirectly bears." Schmidt, 288 S.C. at 303, 342 S.E.2d at 403.

In Lyles, supra, this Court explained the analysis for determining the relevancy and admissibility of evidence. The state made a motion *in limine* to exclude any comments regarding drug use or the existence of drugs at the alleged victim's apartment. Lyles, 379 S.C. at 335, 665 S.E.2d at 205. Following a proffer, "[t]he state objected and the trial judge conducted an inquiry to determine the relevance of the testimony." Id. at 336, 665 S.E.2d at 205. Thereafter, the judge excluded the testimony finding it was not "'relevant in any fashion in this case.'" Id. According to this Court, "the testimony [did] not serve as a defense to any of the offenses charged in this case nor [did] it excuse or mitigate [the defendants'] actions. It was not probative of any issue material to reaching a verdict. This absence of a logical connection to the facts in debate ma[de] the evidence irrelevant and inadmissible." Id.

The South Carolina Supreme Court held the introduction of evidence of a vendetta to establish motive, bias, and prejudice on the part of the alleged victim and her family by a criminal defendant "was clearly relevant and should have been admitted." Schmidt, 288 S.C. at 303, 342 S.E.2d at 403. The defendant's "entire defense at trial was that he did not commit the alleged act and that the child's story was concocted by her parents because of a 'vendetta' against him." Id. at 303-304, 342 S.E.2d at 403. The Court held "the trial court's ruling on the motion to limit the testimony and its refusal to allow [the defendant]'s proffer of testimony effectively denied [the defendant] a fair and impartial trial because he was not allowed to present his defense." Id. at 304, 342 S.E.2d at 403.

The Supreme Court dealt with multiple pieces of erroneously admitted irrelevant evidence in State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). The deceased, Joseph Barefoot, disappeared

on May 25, 1997. Id. at 119, 551 S.E.2d at 243. Barefoot's body was found on September 16, 1997. Id. at 120, 551 S.E.2d at 243. Three of Saltz's friends provided statements implicating Saltz in Barefoot's death. Id. Appellant gave "seven consecutive statements" that were "highly contradictory" and one of which was "factually improbable." Id. at 120, 551 S.E.2d at 243-244.

The Court held the trial judge erred in admitting Saltz's attendance record showing he was absent from school on May 29, 1997. Id. at 127-128, 551 S.E.2d at 247-248. According to the Court, the fact Saltz "was absent from school on Thursday, May 29, 1997, did not tend to make 'the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.'" Id. at 127, 551 S.E.2d at 247 (citing Rule 401, SCRE). The Court rejected the state's argument that the evidence showed Saltz's "whereabouts on that date were [as] unknown as" the Barefoot's. Id. at 127-128, 551 S.E.2d at 247 (alterations in original). "[T]he state presented no evidence Thursday, May 29, 1997, had any consequence to this case." Id. at 128, 551 S.E.2d at 247. Rather, "introduction of this irrelevant evidence encouraged the jury to speculate that Thursday, May 29, 1997, must be significant to the case in some way unknown to them." Id. at 128, 551 S.E.2d at 248. Also, "admission of this irrelevant evidence served to portray [Saltz] as a delinquent." Id.

This Court reversed a trial judge's decision to exclude testimony from a witness as irrelevant. State v. Page, 406 S.C. 272, 750 S.E.2d 623 (Ct. App. 2013). Page was charged with criminal sexual conduct when a woman alleged he raped her. Id. at 280, 750 S.E.2d at 627. Page wanted to call the woman's boyfriend as a witness to examine the boyfriend about a voicemail he left for the woman in which he claimed the woman told him she fabricated the allegations against Page and that the sexual encounter was consensual as it involved a trade of sex for drugs, which was what Page told the police. Id. at 281, 750 S.E.2d at 628. The state objected, arguing the

boyfriend's testimony was not relevant because he told police the voicemail was not true. Id. The judge excluded the testimony, finding "not a scintilla of relevancy" in the testimony to Page's trial. Id. at 281-282, 750 S.E.2d at 628.

This Court found the boyfriend's testimony was relevant to whether Page's encounter with the woman involved consensual sex, which was what Page maintained and the boyfriend's voicemail supported. Id. at 288, 750 S.E.2d at 632. This Court was not persuaded that the boyfriend's claim that the voicemail was a "pure fabrication" rendered his testimony irrelevant. Id. According to this Court, testimony about whether the woman told her boyfriend that she engaged in sexual acts in exchange for drugs would certainly assist the jury in arriving at the truth of the issue because, if the jury believed the boyfriend was telling the truth in his voicemail, then the boyfriend's testimony "undoubtedly would have tended to make a determination that [Page] engaged in consensual sex with [the woman] more probable." Id. at 288-289, 750 S.E.2d at 632. Additionally, this Court held boyfriend's testimony was relevant to the credibility of the woman because her testimony conflicted with what she allegedly told the boyfriend. Id. at 289, 750 S.E.2d at 632.

Here, the evidence offered by Terri – that Appellant allegedly previously pulled a gun on Hilton during an argument over a card game – was not relevant because it had no tendency to make the existence of any fact of consequence more or less probable. There was no dispute that Appellant pulled his gun and shot the deceased. There was no dispute the deceased interjected himself into the argument between Appellant and Appellant's stepson, Gregory Grate. There was no dispute that as a result of the deceased interjecting himself into the argument that Appellant was angry with the deceased and wanted the deceased to leave his home. Thus, the evidence presented through Terri Doctor had no tendency to make the existence of any fact more or less

probable; instead, the evidence could only serve to inflame the passions and prejudices of the jurors and encourage them to base their verdict on Appellant's character.

In addition, if the defendant were not convicted of the prior bad act, evidence of the conduct must be clear and convincing. Id. "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. "Such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal." State v. Fletcher, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008).

If the evidence is relevant, the next step is determining whether the evidence fits within one of the exceptions of Rule 404(b). Wallace, 384 S.C. at 433, 683 S.E.2d at 277. Evidence of other prior bad acts may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. Rule 404(b), SCRE. "To be admissible, the bad act must logically relate to the crime with which the defendant has been charged." State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008). "Whether evidence of other distinct crimes properly falls within any of the recognized exceptions noted is often a difficult matter to determine." Lyle, 125 S.C. at 406, 118 S.E. at 807. "The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be included." Id. "[T]he dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by the courts to rigid scrutiny." Id. Judges must resolve the question of admissibility "in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors." Id. Therefore, "if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical

relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected." Id.

According to the trial judge, Terri's testimony was admissible as an exception to the prohibition on character evidence because it fit within the exception of absence of mistake or accident. When the South Carolina appellate courts have approved the admission of evidence as falling within the exception of absence of mistake or accident, the evidence has shown clearly how the prior bad acts related to an inability of the criminal conduct to be the product of an accident or mistake. See e.g., State v. Martucci, 380 S.C. 232, 252-253, 669 S.E.2d 598, 609 (Ct. App. 2008) (holding evidence of prior child abuse was admissible to show absence of accident in light of the criminal intent element for homicide by child abuse for which Martucci stood trial). On the other hand, the appellate courts of this state have made clear that unless the prior bad act meets the strict test of logical and temporal relevancy, the evidence is not admissible. See e.g., State v. Brooks, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000) (holding a prior forgery conviction was not admissible under the absence of mistake exception where the prior conviction was not logically relevant to the current charge of forgery against Brooks because it did not disprove Brooks' defense or prove that Brooks forged the check or knew it was forged).

The incident described by Terri of Appellant allegedly growing angry with Hilton during a card game, arguing with Hilton, and then drawing his gun on Hilton was not logically relevant to the shooting death of the deceased. The prior act occurred with different individuals in an entirely different setting. Further, the prior act occurred over a year preceding the shooting. While the state argued the prior incident showed Appellant knew how to handle a gun, the state failed to show that the gun allegedly used during the prior incident was the same gun used to shoot the deceased. To the extent the state wanted to show generally that Appellant was familiar with handling guns, the state

established that Appellant carried a gun on his person frequently and that Appellant had a concealed weapons permit, which required him to complete a course in handling a gun. Therefore, the state's desire to present the prior bad act was for the purpose of establishing Appellant's bad character – not the stated purpose of showing his familiarity with the functionality of guns.

Finally, even if the evidence fit within one of the enumerated exceptions and was proven by clear and convincing evidence, the trial court erred in admitting it as "its probative value was substantially outweighed by the danger of unfair prejudice." See Rule 403, SCRE. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE; see also State v. Orozco, 392 S.C. 212, 218, 708 S.E.2d 227, 230 (Ct. App. 2011). The first step requires a determination of the probative value of the evidence. The second step requires an evaluation of the danger of unfair prejudice resulting from the introduction of the evidence. The third step requires balancing of the probative value and unfair prejudice. "When juxtaposing the prejudicial effect against the probative value, the determination must be based on the entire record and will turn on the facts of each case." Lyles, 379 S.C. at 338, 665 S.E.2d at 206. Unfair prejudice means an undue tendency to suggestion a decision on an improper basis, commonly, but not necessarily, an emotional one. Orozco, 392 S.C. at 218, 708 S.E.2d at 230 (citing State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001)); see also State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991) (providing that "[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one").

The starting point for analyzing evidence under Rule 403 is determining the probative value of the evidence offered. "'Probative' means '[t]ending to prove or disprove.'" State v. Gray, 408 S.C. 601, 609, 759 S.E.2d 160, 165 (Ct. App. 2014). According to this Court, "'[p]robative value' is the measure of the importance of that tendency to the outcome of a case." Id. at 610, 759 S.E.2d at

165. The probative value of evidence is directly related to the how important that evidence is in assisting the jury in rendering a verdict. Id. Thus, when analyzing the probative value of evidence, the court must consider the importance of the evidence as it relates to the issues presented in the case. State v. Lee, 399 S.C. 521, 528, 732 S.E.2d 225, 228 (Ct. App. 2012).

After determining the probative value of the evidence, the court must next evaluate the danger of unfair prejudice presented by the evidence. "The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case." State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). "'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.'" State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993)). According to the United States Supreme Court, "[t]he term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172, 180 (1997). "Rule 403 only requires suppression of evidence that results in unfair prejudice – prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion." United States v. Mohr, 318 F.3d 613, 619-620 (4th Cir. 2003). Unfair prejudice means an undue tendency to suggestion a decision on an improper basis, commonly, but not necessarily, an emotional one. Orozco, 392 S.C. at 218, 708 S.E.2d at 230 (citing State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001)); see also State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991) (providing that "[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one").

Once a court has determined the probative value and the danger of unfair prejudice of the evidence, the court must balance the two. State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App. 2013). Only after balancing the probative value and the danger of unfair prejudice may the court determine if the danger of unfair prejudice outweighs the probative value of the proffered evidence as required by Rule 403, SCRE.

The probative value of the alleged incident involving Kentrez Hilton at the card game was of low probative value. Appellant's alleged pulling a gun on Hilton during an argument over a card game over a year prior to the shooting failed to prove or disprove any fact necessary for the trial related to the shooting death of the deceased. Whether Appellant pulled the gun on Hilton did not assist the jury in rendering its verdict based purely on the evidence against Appellant in the shooting. Instead, the evidence presented a very high danger of unfair prejudice. Terri Doctor's testimony allowed the state to paint Appellant as a danger to society because he was a man who solved his minor conflicts with a gun. The evidence permitted the jury to base its verdict on emotions – fear – rather than the direct and circumstantial evidence against Appellant. Any attempt to balance the low probative value of Terri's testimony against the very high danger of unfair prejudice requires exclusion of the evidence.

Appellant respectfully requests this Court reverse his convictions in light of the trial judge's erroneous admission of prior bad acts where (1) the evidence was not relevant, (2) the evidence was unfairly prejudicial, and (3) the state failed to show the acts fell within one of the exceptions to Rule 404(b), SCRE.

Evidence of habit

"[H]abit or pattern of conduct is never to be lightly established, and evidence of examples, for purpose of establishing such habit, is to be carefully scrutinized before admission." Wilson v.

Volkswagen of America, Inc., 561 F.2d 494, 511 (4th Cir. 1977). "The reason for such an attitude toward evidence of habit is the obvious danger of abuse in such evidence resulting form the confusion of issues, collateral inquiry, prejudice and the like." Id. "It is only when the examples offered to establish such pattern of conduct or habit are numerous enough to base an inference of systematic conduct and to establish one's regular response to a repeated specific situation or ... where they are sufficiently regular or the circumstances sufficiently similar to outweigh the danger, if any of prejudice and confusion, that they are admissible to establish pattern or habit." Id. (internal quotations omitted). "In determining whether the examples are numerous enough and sufficiently regular, the key criteria are adequacy of sampling and uniformity of response." Id. (internal quotations omitted). "Proof of something done in a single occasion is hardly proof of a habit." Utility Control Corp. v. Prince William Const. Co., Inc., 558 F.2d 716, 721 (4th Cir. 1977).

The South Carolina Supreme Court "recognized the tension between Rule 406 (habit) and Rule 404 (character) and noted the difficulty in distinguishing between admissible evidence of habit and inadmissible character evidence." State v. Brown, 344 S.C. 70, 74, 543 S.E.2d 552, 554 (2001). "[T]he distinguishing feature of habit is its degree of specificity." Id. Habit is "situation-specific or specific, particularized conduct capable of almost identical repetition." Id. (internal quotations omitted). On the other hand, character is "a generalized description of a person's disposition or a general trait such as honesty, temperance, or peacefulness." Id. (internal quotation omitted).

The Court held evidence that Brown usually carried a gun was properly admitted as habit evidence. Id. at 75-76, 543 S.E.2d at 555. According to the Court, "this evidence describe[d] a pattern of specific, particularized conduct." Id. at 76, 543 S.E.2d at 555. Thus, "[u]nder Rule 406, this evidence was properly admitted to show [Brown] acted in conformity with this pattern of

behavior on the night in question." Id. The Court contrasted evidence that Brown habitually carried a gun from evidence that when Brown was angry, he would act violently. Id. The Court explain that the testimony that Brown acted violently when agreed was evidence of his "general predisposition to violence," and inadmissible character evidence. Id.

Contrary to the trial judge's ruling, Terri Doctor's testimony that approximately one year prior to the shooting for which Appellant stood trial, Appellant pulled a gun on Kentrez Hilton during a card game was not evidence of Appellant's habit. As the Fourth Circuit explained, evidence of something occurring a single time is not proof of a habit. The evidence presented by the state was far from the evidence presented in Brown, supra, that Brown carried a gun on his person. Rather, the state presented evidence of Appellant's character masked as habit evidence, which is prohibited.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of December, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROGER D. GRATE,

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 Melody J. Brown, 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 Roger D. Grate, #379507, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 16th day of December, 2019.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of December, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 30, 2029