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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Cherokee County
J. Mark Hayes, II, Circuit Court Judge

THE STATE,

Respondent,

v.

WILLIAM D. PENNINGTON,

Appellant.

Appellate Case No. 2018-001619

FINAL BRIEF OF RESPONDENT

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II. Whether the court erred in allowing Rocky Pennington to testify that Appellant threatened to kill Rita prior to her death where the probative value of this testimony was substantially outweighed by the danger of unfair prejudice?

III. Whether the court erred in allowing Rita's daughter-in-law, Lynn Swofford, to testify that Appellant made indirect threats to kill Rita on two separate occasions prior to her death where the probative value of this testimony was substantially outweighed by the danger of unfair prejudice?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Whether Appellant's prior "shots fired" incident concerning his wife made the existence of malice more or less probable depending on the jury's assessment of the testimony, and did so in a manner not substantially outweighed by the danger of unfair prejudice.

II. Whether Appellant's prior threats to kill his wife made the existence of malice more or less probable depending on the jury's assessment of the witnesses' testimonies, and did so in a manner not substantially outweighed by the danger of unfair prejudice.

III. Whether any error in the admission of Appellant's prior gunfire and threats was harmless beyond a reasonable doubt where there is other competent evidence establishing Appellant acted with malice aforethought.

STATEMENT OF THE CASE

In September 2014, the Cherokee County Grand Jury issued a two-count indictment charging Appellant William Dean Pennington for the June 24, 2014, murder of his wife Rita Pennington and for possession of a weapon during the commission of a violent crime. (R. pp. 538-39).

Attorneys Trent Pruett and Dean Cook represented Appellant at a jury trial beginning August 27, 2018. Deputy Solicitor Kim Leskanic and Assistant Solicitor Matt Kendall prosecuted the case on behalf of the Seventh Circuit Solicitor's Office. The Honorable J. Mark Hayes, II, presided over the trial. (R. p. 1).

On August 30, 2018, the jury convicted Appellant of each charge. (R. p. 527, line 20 – p. 528, line 1). Judge Hayes sentenced Appellant to 30 years for murder and to a concurrent five years for the weapons charge. Appellant received credit for time served. (R. p. 533, lines 11-14).

This appeal follows, with notice being served August 31, 2018.

STATEMENT OF FACTS

William Dean Pennington and his wife Rita were married for 37 years. One morning, Rita brought her husband a cup of coffee and left it on the table by the bed. He was watching Pastor Chapel on TV. After talking with Rita, Pennington picked up his gun to clean it, having shot it one recent evening. He ejected the shells, counting six, and loosened the screw from the front of the gun to remove the barrel. Later that morning, he told officers his gun fired as he oiled it down. He said that when it fired, the barrel was loose and the stock rested on his leg with the barrel up at an angle. He heard his wife fall and saw blood on the floor. He said he tried to stop her bleeding with a towel, but could not. He pulled her away from the wall and scooted her legs out from under the bed. He ran to a camper in the front yard to see if his adult son was there. No one answered. Then he came back inside and called 911. (R. pp. 535-37; R. p. 191, line 20 – p. 192, line 22). This is what a confident, level-headed William Pennington told investigator Tracy Fowler about three hours after he called 911 on June 14, 2014. (R. p. 188, lines 6-24).

In that 911 call, Pennington said his wife was dying, that he was cleaning his gun, that it went off, that it hit her in the top of the head, and that he could not stop the bleeding. He did not stay on the line to answer the operator's questions. (State's Ex. 1). A couple of years later, Pennington told his son Rocky that "he had dropped the gun and she went to grab it and it went off." (R. p. 343, lines 14-23).

According to his adult children, Pennington always carried a gun on his person around the house, using them at various times and regularly pulling them out to look at and clean them. (R. p. 340, lines 1-11; R. p. 434, line 24 – p. 435, line 6; R. p. 443, lines 4-6; R. p. 450, lines 14-22). Pennington frequently fired the guns around the outside of his house. (R. p. 390, lines 4-16). Pennington kept the guns in his bedroom, which is where he spent much of his time. (R. p. 346,

lines 6-20; R. p. 440, lines 12-17; R. p. 446, lines 12-18). He cleaned them with a kit containing rods and small cloths. (R. p. 340, lines 12-21). Two of his sons felt that their aging father carelessly handled his loaded guns. (R. p. 345, line 22 – p. 346, line 2; R. p. 446, line 23 – p. 447, line 9; R. p. 450, lines 1-5).

In November of 2013, Pennington walked into his daughter-in-law's house with a gun on his side, put his arm up on the fireplace, and said he was going to kill Rita. He also said that he could kill his daughter-in-law too. He said Rita was being stupid. (R. p. 366, lines 6-21). Around the same timeframe, Pennington told his daughter-in-law that he just sits in his house and points his gun at Rita. That "he had laid there in the bed at night and he had a gun pointed to her head, and he said while she was sleeping she would never know it, he could blow her head right off her shoulders and she would never know it." (R. p. 368, lines 2-21). Pennington was also known to fire his weapon into the ground in Rita's general direction. (R. p. 342, line 12 – p. 343, line 2). It happened frequently. (R. p. 388, line 24 – p. 389, line 4).

Pennington was also known to appear at Rita's workplace. He would sit in the parking lot, search through her car, lurk around side entrances to watch her work, question her supervisors and co-workers about when she was supposed to get off work, and return even after being ordered to leave. (R. p. 361, line 1 – p. 363, line 23; R. p. 371, line 7 – p. 372, line 12; R. p. 375, line 23 – p. 376, line 5; R. p. 383, lines 2 – p. 384, line 9).

Rita was fired from one job in January 2014 for inappropriately touching a co-worker who did not have any romantic feelings for her. (R. p. 375, lines 3-21; R. p. 382, lines 2-23). Pennington went to Rita's former workplace two or three weeks later to find out why. Despite his anger, workplace supervisors explained that he could not have that confidential information. (R. p. 372, line 13 – p. 373, line 17; R. p. 376, lines 6-23). Pennington asked one of his

daughters-in-law to accompany Rita to her former workplace to pick up her last paycheck, and asked the daughter-in-law to bring back a note for written proof of the reason for Rita's termination. (R. p. 386, lines 8-23). This daughter-in-law described Rita as fearful during this time in her life. (R. p. 386, lines 1-7; R. p. 388, lines 6-15). The women did not collect the note Pennington had requested, and did not tell him the reason that Rita had been fired. Instead, the daughter-in-law told Pennington that Rita got fired because she bumped into someone at work and called him a bad name. She knew this was a lie. (R. p. 387, line 12 – p. 388, line 7). At some point, Pennington hired a private investigator who discovered and informed Pennington that Rita had been fired for sexual harassment. (R. p. 339, lines 4-7).

In March, Pennington met with a local funeral home director to make pre-arrangements for his and Rita's funerals. (R. p. 355, line 17 – p. 356, line 25). Rita was not present. (R. p. 357, lines 2-22). During the meeting, Pennington stated he and his wife were like roommates and that though he still loved her, there were rumors that she cheated on him. (R. p. 356, lines 19-25). Pennington and the funeral home worker had never met before. (R. p. 358, line 7).

Rita secured another job. She had to call home at the end of every single shift and would leave "faster than anybody" to get back to the house. (R. p. 396, lines 5-22). Rita acted nervous, down and out, and depressed during this time. (R. p. 397, lines 3-5). Pennington called Rita's new job to tell them that Rita "was basically trash" and other "ugly names." (R. p. 400, lines 2-22). On May 21, 2014, Pennington arrived and offered the security supervisor twenty dollars to tell him if somebody came to pick up or drop Rita off. "He said that she was a whore and prostitute on the streets, he took her in and fed her, but you just couldn't turn a whore into a housewife." (R. p. 409, line 7 – p. 411, line 1). "He thought she was cheating on him." (R. p. 411, line 6). The supervisor told Pennington she could not do that, and posted a note at the

guardhouse banning Pennington from the premises. (R. p. 411, lines 8-13).

In the weeks leading up to the shooting, Pennington was consumed with thoughts that Rita was having an affair. He increasingly talked about and questioned their son Rocky about the supposed affair. (R. p. 338, line 10 – p. 339, line 22). Two weeks before the June 2014 shooting, Pennington threatened Rita with a gun in hand. (R. p. 341, line 3 – p. 342, line 11).

The day before she was killed, June 20, 2014, Rita drove a little red truck to work rather than her Camry. (R. p. 399, lines 13-23; R. p. 414, lines 3-13). Another co-worker noticed her Camry pull into the guard gate after the little red truck entered and parked. The Camry never made it inside the premises and the co-worker saw Rita run into work. (R. p. 414, line 14 – p. 416, line 13). At the end of the shift Rita left a few minutes later than usual. (R. p. 416, line 17 – p. 417, line 4).

When law enforcement responded to Pennington's 911 call the next morning, nobody answered the door and not a single sound emanated from the house. (R. p. 122, line 6 – p. 123, line 9). It was not until officers entered the home and began clearing the living room that a wailing began. Pennington approached them from the back of the house. He made a loud noise. (Rr. p. 123, lines 10-25; State's Ex. 15 at 0:15 to 0:35 and 1:29 to 1:47). An officer described the "whining screeching type noise" as a "really loud . . . almost like what we call a fake cry." (R. p. 124, lines 10-19). Pennington led them to the bedroom where Rita, partially dressed, lay on the floor at the foot of the bed. A disassembled shotgun laid on the bed along with a pair of woman's pants, a woman's purse and keys. (R. p. 125, line 24 – p. 126, line 4; R. p. 136, lines 5-11; R. p. 138, lines 19-24). There were no coffee cups in the bedroom. (R. p. 247, lines 1-4).

Also on the bed: seven shotgun shells. One had been fired. Six remained unfired. (R. p. 235, lines 21-25; R. p. 237, line 12). Fully loaded, the gun held no more than six shells: five in

the tube and one in the chamber. (R. p. 193, lines 9-16; R. p. 236, line 25 – p. 237, line 8). The spent shell casing, a double-aught buck round, sat face-up between the parts of the disassembled shotgun. (R. p. 237, lines 12-20; R. p. 316, line 9). Investigators located the wadding on the bedroom floor near the victim's head. (R. p. 259, line 21 – p. 260, line 1). Pellets had struck a bookcase in the room, lodging in some of the books and also in the ceiling above. (R. p. 261, line 9 – p. 270, line 1). The remainder struck the top of Rita's head. (R. p. 316, lines 3-25). Of the unfired shells, four were of a smaller nine-shot pellet size, one was a slightly larger six-shot, and one was another double-aught buck. (R. p. 236, lines 4-16).

The shotgun was a 12-gauge pump action with a pistol grip stock and forehand. (R. p. 149, line 2 – p. 151, line 5). This particular makeup would generate a significant recoil directly into the operator's hands when fired. (R. p. 152, lines 1-7; R. p. 196, line 15 – p. 197, line 9; R. p. 246, lines 7-11). Investigators checked Pennington's leg where he showed them the gun rested when it went off. Pennington had no signs of bruising or injury. (R. p. 197, lines 13-24; R. p. 199, line 22 – p. 200, line 5). The firearm worked properly with no signs of cause for malfunction. (R. p. 154, lines 1-13). A firearms examiner determined that the firearm would still fire if the screw connecting the barrel had been loosened. (R. p. 154, line 22 – p. 155, line 1). However, "the barrel was totally removed from the receiver" when law enforcement first saw the gun. (R. p. 155, lines 10-13).

A bump could not set this shotgun off. (R. p. 158, lines 22-25). It had a trigger pull weight of six and a quarter pounds, which is about the weight of three-quarters of a gallon of milk. (R. p. 222, lines 1-23). A trigger pull weight of six and a quarter pounds is far from that of a hair trigger. (R. p. 157, lines 1-6). The shotgun also had a trigger guard preventing any unwanted object from reaching it. (R. p. 157, lines 10-23). Additionally, the shotgun barrel was

painted over to curb rust. (R. p. 149, line 18 – p. 150, line 7). Yet when law enforcement located the shotgun, the barrel appeared to have been sprayed with oil or gun cleaner. It had not been wiped down. (R. p. 239, lines 14-25). An oil can lay nearby and officers observed overspray on the shotgun. (R. p. 127, lines 9-21). Overspray also appeared on the nightstand. (R. p. 239, lines 19-21). A rag but no other gun-cleaning items lay in the bedroom. (R. p. 240, lines 17-21; R. p. 244, lines 2-18).

Rita's gunshot wound entered the left side of her forehead and traveled slightly to the right, removing most of the left side of the upper part of her head and brain. (R. p. 108, lines 13-22). The area around the entrance wound showed stippling, but the pathologist found no stippling on any other area of Rita's body, including her hands and forearms, causing the pathologist to opine that the gun was fired from approximately two to four feet from where Rita stood. (R. p. 108, line 23 – p. 109, line 16; R. p. 116, line 24 – p. 117, line 10). "Could have been a little closer or maybe a foot or two farther away." (R. p. 112, lines 3-9). The shot entered from a "slightly downward" angle. (R. p. 110, lies 1-10).

An investigator approximated that the shot was fired from near the headboard of the bed where they found the disassembled shotgun. (R. p. 272, lines 14-16; R. p. 281, lines 6-12). Investigators could not determine if Pennington was standing or sitting. (R. p. 275, lines 17-24). They could determine the shotgun was pointed at an upward angle when it fired. (R. p. 276, lines 20-22; R. p. 281, lines 14-16). Had Pennington been seated on the edge of the bed facing the wall, he "would have to be turned in a very steep angle for" the gun to have been fired in that direction. (R. p. 278, line 10 – p. 279, line 12). In contrast, had Pennington been seated on the bed against the headboard facing the foot of the bed, the angle in which the shot traveled would be slighter and easier to attain. (R. p. 279, line 20 – p. 280, line 19).

STANDARD OF REVIEW

This Court reviews the admission or exclusion of evidence under the abuse of discretion standard of review. *State v. Douglas*, 411 S.C. 307, 316, 768 S.E.2d 232, 237 (Ct. App. 2014). "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." *State v. Pittman,* 373 S.C. 527, 570, 647 S.E.2d 144, 166-67 (2007). "In other words, the abuse of discretion standard of review does not allow this court to reweigh the evidence or second-guess the trial court's assessment of witness credibility." *State v. Douglas*, 411 S.C. at 316, 768 S.E.2d at 237-38.

ARGUMENT

I. Appellant's prior "shots fired" incident concerning his wife made the existence of malice more or less probable depending on the jury's assessment of the testimony, and did so in a manner not substantially outweighed by the danger of unfair prejudice.

Appellant's son Rocky testified about events between his parents which occurred within "maybe two months" of his mother's shooting. (R. p. 248, line 25). Specifically, Rocky testified that one time he was in the backyard with his mom and Appellant "come around" near the victim's stuff. "He was kind of yelling where she had stuff and he just was shooting the gun, but it was towards the ground of the path that she had walked." He was not aiming at her. (R. p. 342, line 16 – p. 343, line 8). Rocky proffered the testimony pre-trial. More than once Rocky witnessed Appellant "popping shots off" into the ground in the victim's general direction. (R. p. 37, line 9 – p. 38, line 25). Rocky proffered that about two months before the shooting, Rocky came over to help his parents in the yard and when he found them "they were arguing and [Appellant] come around the house shooting the gun towards" where the victim had just stood. (R. p. 37, lines 14-22).

In support of this testimony's admission, the State argued that Appellant's regular, general firing in the victim's direction demonstrated a familiarity with handling firearms, and an absence of mistake, as well as an irresponsible use of firearms. (R. p. 73, lines 10-19; R. p. 79, line 12 – p. 81, line 4; R. p. 327, line 25 – p. 328, line 9). Appellant argued that the proffer was not relevant "because it's not offered to prove anything under Rule 404(b)," and that the danger of unfair prejudice outweighed any probative value. (R. p. 326, line 13 – p. 327, line 8). The trial court ultimately overruled Appellant's objection. (R. p. 330, lines 11-23; R. p. 341, line 23 – p. 342, line 24).[1]

Relevant evidence has "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. "Evidence which assists the jury in arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." *State v. Sweat*, 362 S.C. 117, 126, 606 S.E.2d 508, 513 (Ct. App. 2004). However, evidence of a prior bad act may not be admitted to establish guilt unless presented "to establish (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan, or (5) the identity of the perpetrator." *State v. Braxton*, 343 S.C. 629, 634, 541 S.E.2d 833, 835-36 (2001); Rule 404(b), SCRE; *see also State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923). "The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused." *Id.* (citing *State v. King*, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999)); *State v. Sweat, supra* at 127, 606 S.E.2d at 513. "Prior bad acts evidence must also be clear and convincing to be admissible." *Id.* (citing *State v. King, supra*). "Even if prior bad act evidence is clear and convincing and falls within an

[1] The court did omit some of Rocky's other proffered testimony as too remote. (R. p. 36, line 14 – p. 37, line 7; R. p. 329, line 24 – p. 330, line 10; *see* R. p. 71, line 7 – p. 74, line 14).

exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." *State v. Fletcher*, 379 S.C. 17, 23-24, 664 S.E.2d 480, 483 (2008); Rules 403 and 404(b), SCRE. "The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case." *Id.*

Primarily, the evidence Appellant cites demonstrates a previous quarrel between Appellant and the victim. (R. p. 37, lines 14-22; R. p. 342, lines 16-21). "In homicide cases, evidence of previous quarrels and ill feelings or hostile acts between parties is admissible to show that animus probably existed between the parties at the time of the homicide." *State v. Braxton*, 343 S.C. 629, 541 S.E.2d 833 (2001). In context, Rocky's testimony does not intrinsically constitute evidence of a prior bad act. In fact, Appellant conceded this at trial when he agreed with the State's position that "this was not really a prior bad act so much as it was the conduct of [Appellant] about firing out the window or shooting in the general direction of" the victim.[2] (R. p. 326, lines 13-21). Rather, Rocky's testimony is probative of the status of the victim and Appellant's relationship, making it more or less likely that Appellant would have shot his wife with malice aforethought. *See* Rule 401, SCRE. The incident Rocky testified about occurred during a period of Appellant's escalating paranoia. The victim had been fired in January 2014 with the murder occurring that June. (*See* R. p. 333, lines 10-25). Between January and June, as Rocky testified, Appellant became increasingly consumed and angered with his

[2] To this end, Appellant's Issue I argument may be found unpreserved. Appellant pursued his objection on the basis of relevance, not under 404(b), SCRE. (R. p. 326, lines 21-23). When a party concedes to an issue at trial and argues the issue on appeal, the issue is procedurally barred. *State v. Benton*, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000); *but see State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground.").

unconfirmed concept that his wife was having an affair. (R. p. 39, line 1 – p. 40, line 16; R. p. 44, lines 10-21). Thus, the timing of this particular use of a firearm and its interrelation with the victim is highly relevant to the deteriorating state of Appellant and the victim's relationship and whether Appellant would act out against her with or without malice. It is so probative that it is not substantially outweighed by the danger of unfair prejudice attached to the introduction of the quarrel. Rule 403, SCRE.

Secondarily, if Rocky's testimony is to be construed as a prior bad act, it remains properly admitted. The fact at issue in Appellant's case centered upon intent: did Appellant intentionally and maliciously fire the gun; did Appellant recklessly handle the gun causing it to fire; or did Appellant accidentally fire the gun despite the use of due care? (R. p. 518, line 3 – p. 523, line 18; *see, e.g.*, R. p. 461, lines 4-11). Here, Rocky's testimony plainly functions as evidence that Appellant engaged in a purposeful act each time he fired the gun, but it does not serve the determination of whether Appellant purposefully aimed at the victim. *See* Rule 403, SCRE; *State v. Martucci*, 380 S.C. 232, 669 S.E.2d 598 (2008) (in homicide by child abuse prosecution, evidence of prior abuse in weeks before victim's death deemed highly probative evidence of defendant's state of mind). Appellant would fire the gun at the victim's general direction as a poor means of communication. (*See* R. p. 79, line 13 – p. 80, line 8). Rocky's observation constituted evidence of absence of mistake as to the firing of the gun: not only did Appellant regularly carry a gun, but he also regularly fired one during communications with other people, particularly the victim. Rule 404(b), SCRE. Rocky's observation additionally constituted evidence of intent as to the firing of the gun: that Appellant's use of firearms occurred either with malice or with reckless disregard for the safety of others. *Id.* The evidence proves clear and convincing as Rocky could provide sufficient detail of the direction the shots

were fired and the geographic positions of the family members involved; Rocky's credibility was left for the jury's consideration. *State v. Wilson*, 345 S.C. 1, 6-7, 545 S.E.2d 827, 829-30 (2001) (prior drug transaction admissible through witness who saw it occur and where prior act was relevant to intent to commit PWID crack cocaine); *State v. Smith*, 391 S.C. 353, 362-63, 705 S.E.2d 491, 496 (Ct. App. 2011), *rev'd on other grounds by State v. Smith*, 406 S.C. 215, 750 S.E.2d 612 (2013); *contra State v. Fletcher*, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008).

This evidence is also logically tied to the state of Appellant's method of communicating with the victim in a manner highly probative to a fact of consequence, and not probative solely of some propensity to actually shoot her. Rules 403 and 404, SCRE. His doing so demonstrates Appellant carried guns, knew how to operate guns, and in fact did so freely and without the exercise of due care. It negates the contention that a gun on Appellant's person would accidentally fire rather than be purposefully fired in some direction or another, even if logically unwarranted by the circumstance. (*See* R. p. 328, lines 1-9). As Rocky stated before the jury, "He was kind of yelling where she had stuff and he just was shooting the gun, but it was towards the ground of the path that she had walked." (R. p. 342, lines 18-21; *see proffer at* R. p. 44, line 10 – p. 45, line 15). The evidence was not presented to demonstrate he shot *at* the victim but rather, again, to show that Appellant liberally utilized firearms, making an accidental discharge unlikely. *See* Rule 403, SCRE. Accordingly, Appellant's prior "bad act" is logically connected to the Rule 404(b), SCRE exception for absence of mistake regarding the firing of the gun such that "the judge acted within his discretion in concluding the unfair prejudice in admitting the evidence did not substantially outweigh the probative value." *State v. Smith*, 391 S.C. at 363, 705 S.E.2d at 497.

II. Appellant's prior threats to kill his wife made the existence of malice more or less probable depending on the jury's assessment of the witnesses' testimonies, and did so in a manner not substantially outweighed by the danger of unfair prejudice.

Appellant challenges the admissibility of son Rocky's testimony that Rocky walked into the Pennington home to find his parents arguing. He watched his father respond to his mother by grabbing at his gun and telling her, "I'll kill you." (R. p. 248, line 22 – p. 342, line 8). When specifically asked when this occurred, Rocky stated "[i]t was two weeks" before her death. (R. p. 342, lines 9-11). Appellant moved to exclude the proffered testimony on the basis that it was more prejudicial than probative. (R. p. 35, line 24 – p. 36, line 13; R. p. 327, lines 9-17). The trial court found the testimony admissible as a relevant, prior statement by Appellant for which the witness was present. (R. p. 74, lines 7-14; R. p. 330, lines 11-23). The court later overruled the objection contemporaneous to the State's presentation of that testimony. (R. p. 341, lines 23-25).

Appellant also challenges the admissibility of daughter-in-law Lynn Swofford's testimony that in November 2013, approximately seven months before the shooting, Appellant showed up in her house with his gun on his side and stated he was going to kill Rita, that she was running around and acting stupid, and that he could kill Swofford too. (R. p. 366, lines 6-21). Swofford also testified that around the same time, or at least within a couple of months of the shooting, Appellant told her "he had laid there in the bed at night and he had a gun pointed to [Rita's] head, and he said while she was sleeping she would never know it, he could blow her head right off her shoulders and she would never know it." (R. p. 368, line 3 – p. 369, line 1).

As he had with Rocky's testimony about a prior threat, Appellant moved to exclude Swofford's proffered testimony on the basis that it was more prejudicial than probative and additionally because it was months removed from the shooting. (R. p. 50, line 17 – p. 53, line 7;

R. p. 82, line 10 – p. 83, line 3; R. p. 331, line 25 – p. 333, line 6). The State countered that the threats where not so remote in time because they tied into the remainder of the evidentiary timeline. They occurred as Appellant exhibited an increasing paranoia that Rita was having an affair and her subsequent firing for sexual harassment. (R. p. 83, line 4 – p. 84, line 5; R. p. 333, line 7 – p. 334, line 4). The trial court twice ruled that Appellant's statements to Swofford were neither too remote nor too prejudicial. (R. p. 84, lines 6-15; R. p. 334, line 21 – p. 335, line 21). The trial court again overruled the contemporaneous objection. (R. p. 366, lines 1-2).

The trial court properly admitted both testimonies upon the same basic reasoning. "It is well-settled that evidence of previous threats by the defendant is admissible to show malice." *Blakely v. State*, 360 S.C. 636, 639, 602 S.E.2d 758, 759 (2004). "The general rule is that evidence of previous threats and hostile declarations by the accused against the deceased is admissible to show malice, premeditation and state of mind[.]" *State v. Lee*, 255 S.C. 309, 316, 178 S.E.2d 652, 655 (1971), *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009). Simply stated, prior threats constitute "statements or declarations made by one accused of a crime are admissible against him." *See State v. Plyler*, 275 S.C. 291, 270 S.E.2d 126 (1980)). This does not mean that the evidence need not meet the threshold relevancy test. *State v. Beck*, 342 S.C. 129, 134, 536 S.E.2d 679, 682 (2000) (citing Rule 401, SCRE). However, under Rule 404(b), SCRE, evidence of prior threats "is admissible as evidence of intent" and is therefore relevant to the determination of the fact at issue in Appellant's case. *Blakely v. State*, 360 S.C. at 639, 602 S.E.2d at 759.

Here, Rocky and Swofford's testimonies each meet that test for relevance. Appellant's prior threats quite simply demonstrate state of mind, which comprised the fact at issue before the jury. Rule 401, SCRE. The court charged the jury with the determination of whether Appellant

acted with malice, reckless disregard for the safety of others, or whether Rita's death occurred as a result of an accident notwithstanding the use of due care. (R. p. 518, line 3 – p. 523, line 18; *see, e.g.*, R. p. 461, lines 4-11). Each threat on Rita's life reveals that Appellant embodied an intent to act which was of no slapdash consequence. They establish an absence of mistake. Rocky witnessed Appellant argue with and directly threaten to kill Rita two weeks before the shooting. Similarly, Appellant twice communicated to Swofford that he actively ruminated on the possibility of killing his wife. Appellant's statements to Swofford particularly establish a reason for said state of mind: Appellant believed his wife was unfaithful. The testimonies "bore directly" on Appellant's intent, whether he acted with absence of mistake, and assigning reason to his actions. *State v. Beck*, 342 S.C. at 134-35, 536 S.E.2d at 682 (approving use of prior threats to witness as compelling, circumstantial evidence of guilt as to murder).

Of course, even when "relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Rule 403, SCRE. However, Appellant's threats are "highly probative as to the manifestation of that intent" required to demonstrate malice as an element of murder such that the probative value is not outweighed by the danger of unfair prejudice. *State v. Beck*, 342 S.C. at 135, 536 S.E.2d at 682; *see State v. Lee*, 255 S.C. at 316, 178 S.E.2d at 655. For one, neither witnesses' testimony proves too remote. "The temporal attenuation between the making of th[ese] statement[s] and the crime in this case is of no moment in assessing [their] admissibility." *Id.* at 135, 536 S.E.2d at 682 (approving admissibility of threat made four months prior to killing) (citing *State v. Glenn,* 328 S.C. 300, 492 S.E.2d 393 (Ct. App. 1997)). Rather, the time "lapse is at most a matter bearing on the weight of the evidence, which was for the jury to determine." *Id.*

More, the facts attached to these prior threats so closely match the state in which the

victim was discovered after the shooting that the threats' probative value far exceeds the danger of unfair prejudice. The investigation revealed that the shooting occurred in the bedroom, where the victim was found in a state of partial dress, with woman's pants, a purse, and keys located on the bed. It appeared as though the victim had been shot as she was getting dressed and ready to leave the house for the day. (R. p. 136, lines 5-11; R. p. 138, lines 19-24; *see* State's Ex. 15). Two weeks prior, Rocky witnessed Appellant respond to his mother's argumentative statement by grabbing at his gun and stating he would kill her. This occurred in his parents' bedroom during the victim's performance of everyday chores. (R. p. 341, lines 1-22). Most poignant, however, are the factual similarities in Appellant's threats to Swofford about his desire to kill his wife and his ability to shoot her as she slept so that "she would never know it." (R. p. 366, lines 6-21; R. p. 368, lines 2-21). Given the factual similarities between the prior threats and the scene that law enforcement responded to, each prior threat is highly probative of intent in a manner undeserving of reversal. *State v. Beck, supra*; *see also Blakely v. State*, 360 S.C. at 638-39 (counsel did not error in failing to object to evidence of prior threats by appellant as witnessed by his ex-girlfriend and a victim to the crime even when she had been experiencing the prior threats "all along" over an indeterminate period of time).

III. Any error in the admission of the complained-of testimony proves harmless beyond a reasonable doubt due to other competent evidence from which the jury could conclude Appellant acted with malice aforethought.

The admission of Appellant's prior shooting and threats are subject to a harmless error analysis. *State v. Braxton*, 343 S.C. at 635, 541 S.E.2d at 836 (inadmissible character evidence harmless as cumulative to other evidence offered at trial). When "beyond a reasonable doubt, the error[s] complained of did not contribute to the verdict obtained," the error(s) should be found

harmless because guilt was otherwise conclusively proven by competent evidence. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967). "Whether an error is harmless depends on the circumstances of the particular case." *State v. Mitchell*, 378 S.C. 305, 316, 662 S.E.2d 493, 499 (2008). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *Id.* (internal quotation omitted). Non-exclusive relevant factors "include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 1438 (1986).

Other competent allows a conclusion beyond a reasonable doubt that Appellant intended to shoot his wife. For one, there is a noteworthy amount of additional competent evidence that Appellant collected, handled, cleaned, and shot guns on a regularly, if not daily, basis. (R. p. 340, lines 1-11; R. p. 434, line 24 – p. 435, line 6; R. p. 443, lines 4-6; R. p. 450, lines 14-22). Pennington frequently fired the guns around the outside of his house, including during the weeks prior to the murder. (R. p. 390, line 4 – p. 391, line 17). Pennington stored and cleaned the guns in his bedroom. (R. p. 346, lines 6-20; R. p. 440, lines 12-17; R. p. 446, lines 12-18). This category of evidence, offered through several of Appellant's family members, tends to establish Appellant as proficient with firearms and as unlikely to accidentally discharge the gun during a cleaning.

There also exists evidence of a whole other category of threatening activity Appellant engaged in during the months leading up to the victim's death. In January, the victim was fired

for sexual harassment. (R. p. 375, lines 3-21; R. p. 382, lines 2-23). Appellant responded by angrily appearing at her former workplace demanding to know why she had been fired. (R. p. 372, line 13 – p. 373, line 17; R. p. 376, lines 6-23). Appellant tasked a daughter-in-law with accompanying the victim to pick up her final check for the purpose of returning with written proof of the reason for termination. (R. p. 386, lines 8-23). The victim feared Appellant during this time. (R. p. 386, lines 1-7; R. p. 388, lines 6-15). As a protective measure, the daughter-in-law responded by lying to Appellant about the reason the victim had been fired. (R. p. 387, line 12 – p. 388, line 7). Then, Appellant hired a private investigator to get to the bottom of the victim's firing. He did find out she had been fired for sexual harassment. (R. p. 339, lines 4-7).

Appellant's threatening actions were not confined to family members. A litany of the victim's former co-workers, from two separate jobs, testified that Appellant would lurk around the building, spying on the victim in a threatening manner. Appellant ignored orders to leave these premises. (R. p. 361, line 1 – p. 363, line 23; R. p. 371, line 7 – p. 372, line 12; R. p. 375, line 23 – p. 376, line 5; R. p. 383, lines 2 – p. 384, line 9). Once the victim secured another job, she was made to rush home as soon as her shift ended. (R. p. 396, lines 5-22). Co-workers described her as nervous and depressed. (R. p. 397, lines 3-5). More, Appellant called the victim's new employer to tell them that Rita "was basically trash" and other "ugly names." (R. p. 400, lines 2-22).

In March, Appellant went by himself to make pre-arrangements for his and the victim's funerals. (R. p. 355, line 17 – p. 356, line 25; R. p. 357, lines 2-22). Appellant told the funeral home director that the victim was purportedly cheating on him and that they had become nothing more than roommates. (R. p. 356, lines 19-25). In May, Appellant was banned from the victim's new job because he tried to bribe the guard at the entry gate to tell him if anyone else was

visiting the victim at work. (R. p. 411, lines 8-13). "He said that she was a whore and prostitute on the streets, he took her in and fed her, but you just couldn't turn a whore into a housewife." (R. p. 409, line 7 – p. 411, line 1). "He thought she was cheating on him." (R. p. 411, line 6). In the weeks leading up to the June shooting, Appellant nearly constantly spoke with and questioned his son about his belief the victim was having an affair. (R. p. 338, line 10 – p. 339, line 22). The day before the shooting, a co-worker observed the victim arrive to work in her truck, while the victim's other car, a Camry, appeared to trail her up to the premises. (R. p. 399, lines 13-23; R. p. 414, line 3 – p. 416, line 13). The victim left work a few minutes later than usual that day. (R. p. 416, line 17 – p. 417, line 4). Co-worker recognized the victim was fearful during this time. (R. p. 388, lines 8-17). Based on the competent testimony of a series of witnesses, Appellant exhibited a convincing number of threatening behaviors leading up to the time of the shooting from which the jury could logically determine the existence of malice at the time of the victim's death.

Additionally, law enforcement's investigation returns evidence demonstrative of an intentioned shooting which Appellant then acted to cover up. Appellant admittedly did not call immediately call 911 when he noticed the blood. (R. p. 191, line 20 – p. 192, line 22). He had completely disassembled the barrel from the receiver when law enforcement arrived. (R. p. 155, lines 10-13). Investigators described his audible distress as "a fake cry." (R. p. 124, lines 10-19; *see* State's Ex. 15). And though Appellant described that the victim had brought him coffee that morning, there were no coffee cups in the bedroom. (R. p. 191, line 20 – p. 192, line 22; R. p. 247, lines 1-4).

Poignantly, seven shotgun shells sat upright on the bed. One had been fired, six were unfired, *but the shotgun could only hold six shells*. (R. p. 193, lines 9-16; R. p. 235, lines 21-25;

R. p. 236, line 25 – p. 237, line 12). Appellant said he had been cleaning his gun when it went off. (State's Ex. 16). However, aside from one rag and an oil can, investigators did not locate a typical gun-cleaning kit or materials in the bedroom. (R. p. 240, lines 17-21; R. p. 244, lines 2-18). They observed an overspray of oil on the rifle barrel on the bed, and on the nearby nightstand, but the gun had not been wiped down and its barrel was painted over to deter rust. (R. p. 127, lines 9-21; R. p. 149, line 18 – p. 150, line 7; R. p. 239, lines 14-25).

This gun was a 12-gauge pistol grip shotgun which generated a significant recoil upon firing. (R. p. 149, line 2 – p. 151, line 5; R. p. 152, lines 1-7; R. p. 196, line 15 – p. 197, line 9; R. p. 246, lines 7-11). Appellant said the gun was resting on his leg when it went off, but there were no markings on his legs to corroborate this claim. (R. p. 197, lines 13-24; R. p. 199, line 22 – p. 200, line 5). In fact, the shotgun's trigger pull weight was six and a quarter pounds, which is about the weight of three-quarters of a gallon of milk. (R. p. 156, lines 1-23). It had a trigger guard. (R. p. 157, lines 10-23). This shotgun simply would not fire if bumped. (R. p. 157, lines 1-6; R. p. 158, lines 22-25).

More, investigators could approximate that the gun was fired at an upward angle from a position near the headboard of the bed. This is near where the disassemble shotgun lay upon law enforcement's arrival. (R. p. 272, lines 14-16; R. p. 276, lines 20-22; R. p. 281, lines 6-16). Investigators could not determine if Appellant was standing or sitting when the gun fired. (R. p. 275, lines 17-24). But, had Pennington been seated on the edge of the bed facing the wall as he alleged, he "would have to be turned in a very steep angle for" the gunshot to reach the direction it did. (R. p. 278, line 10 – p. 279, line 12). In contrast, the angle at which the shot traveled was easier to attain had Appellant been seated on the bed against the headboard facing the victim at foot of the bed. (R. p. 279, line 20 – p. 280, line 19). The pathologist's distance calculation of

approximately two to four feet concurs with that assessment. (R. p. 112, lines 3-9).

As a whole, the physical evidence discounted Appellant's claim that an accidental discharge occurred during a cleaning. When taken together with the eyewitness testimony of Appellant's other threatening behavior, his ordinary use of guns, and his consumption with his theory of infidelity, the State presented consistent, competent evidence deserving only of a finding that Appellant harbored malice at the time of the shooting. *See State v. Logan*, 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013). Beyond a reasonable doubt, the errors complained of did not contribute to the verdict obtained. *Chapman v. California*, *supra*; *Delaware v. Van Arsdall*, *supra.*

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should affirm Appellant Pennington's convictions for murder and for possession of a weapon during the commission of a violent crime.

Respectfully submitted,

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Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
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SC Court of Appeals

Appeal from Cherokee County
J. Mark Hayes, II, Circuit Court Judge

THE STATE,

Respondent,

v.

WILLIAM D. PENNINGTON,

Appellant.

Appellate Case No. 2018-001619

CERTIFICATE OF COMPLIANCE

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

This 7th day of May, 2020.

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