STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County
Honorable Brooks P. Goldsmith, Circuit Court Judge

THE STATE,

Respondent,

vs.

VARSHEEN ANTUAN SMITH,

Appellant.

Appellate Case No. 2018-000373

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

I. McDUFFIE STONE
Solicitor, Fourteenth Judicial Circuit

Post Office Box 1880
Bluffton, South Carolina 29910
(843) 255-5880

ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

Appellant Varsheen Smith was indicted for kidnapping, possession of a handgun by a person convicted of a violent crime, and possession of a weapon during the commission of violent crime. Following trial February 21-22, 2018, the jury convicted Appellant of all three charges. The Honorable Brooks P. Goldsmith sentenced Appellant to twenty-five years' imprisonment for kidnapping and concurrent sentences of five years' imprisonment for the weapons charges.

Appellant appealed and appellate counsel submitted a brief pursuant to Anders v. California, 386 U.S. 738 (1967). Thereafter, this Court ordered appellate counsel to submit a brief on the question of error preservation and the substantive issue originally raised in the Anders brief. The State's brief follows.

STATEMENT OF FACTS

Ver'mon "Monte" Steve (Monte) was Victim Andre Frazier's best friend since fourth or fifth grade. Victim was also good friends with Pete Singleton. The three met on October 25, 2015, at Buffalo Wild Wings to watch a football game. Because all three were working, it was a rare chance to get together. Monte did not stay long and went home; he was planning to paint his car's grill with paint he just purchased from Wal-Mart. During the game, Monte and Victim made plans to get together after the game was over. After the game, Victim called Monte as he left the restaurant to make sure Monte was home, then stopped at the gas station to fill his car and bought some cigars. He paid ten dollars for gas, but he forgot to pump the gas, which he realized as he reached Monte's street, so he returned to the gas station. R. pp. 84-91.

Upon arriving on Monte's street again, Victim saw Varsheen "Twiz" Smith (Appellant) and Tyrone Wallace standing in front of Monte's apartment although he did not realize it until he walked up to the house because they were wearing hoodies. At the time, Appellant was housemates with Monte. Victim knew Wallace because he used to date Wallace's cousin. He knew Appellant since childhood. Monte's car was parked in the driveway. Victim parked his car in front of an abandoned house. R. pp. 91-93.

When Victim asked them where Monte was, Appellant and Wallace seemed to ignore his question. Instead of answering Victim's question, Appellant asked Victim, "Did you talk to Monte?" Victim said he had, Appellant dismissively commented on the paint job on Monte's car and claimed Monte did that yesterday, which Victim knew was not true. Victim asked about Monte again. Specifically, Victim provided a point and counterpoint report of the conversation to the jury:

> And he kind of kept on and I asked him again, Where's Ver'mon. I

> said Monte. And he was like, Let me holler at you right quick. And then I asked him again, Where's Monte. Let me holler at you. And I asked him again, Where Monte. Man, Monte in the house. I kind of believed him, but knowing that that was my best friend and what type of guy he was I took that, but I started walking toward the house. As I started walking toward the house, he came behind me and [Wallace] came behind him and I kind of feel a funny situation. . . .

R. p. 95, lines 15-24.

Victim walked to the threshold of the door, but stopped because he had a bad feeling as Appellant and Wallace walked behind him. He explained, "Something told me don't go into the house because by the time I got there the lights were on and the door was open." Wallace told Victim, "Man, go on in the house." R. pp. 95-96. Appellant and Wallace forced Victim inside the house, Appellant put a silver pistol into Victim's stomach. R. pp. 96-97.

They shut the front door. Wallace went through Victim's pockets and took out his phone, identification, fifteen dollars in cash, and a cigar. However, they returned everything except a cigar. Appellant put the gun to the back of Victim's head. He told Appellant to get on the floor, but Appellant refused. They used Victim's belt to bind his hands behind his back. R. pp. 98-100.

Appellant called Victim a snitch and also accused Victim of "slipping." Appellant told Victim, **"Funny time you came up here."** R. p. 100, line 24 – p. 101, line 25. Appellant hit Victim in the back of the head with the butt of the gun. They stuffed a rag in Victim's mouth. R. pp. 100-103.

Victim went into a second room with Appellant while Wallace was elsewhere. When Wallace called for Appellant, Victim found himself alone and dialed 911, but ended the call because his cell phone lit up and he was worried the kidnappers would return and overhear the operator. R. pp. 104-07.

Appellant and Wallace returned and Appellant's mood changed. Victim explained, beforehand, Appellant was looking "pretty evil." "[B]ut now he didn't look evil like he was." R. p. 107, lines 11-17. Appellant told Wallace, "Alright Tyrone, you can let him go." R. p. 107, lines 18-22. They took the belt off his wrists. Victim did not know why he was released, but he "just went with it." That is when Appellant started talking about Monte, complaining, "If he didn't want me to stay – if your homeboy didn't want me to stay here, why couldn't he tell me like a man. Why do I have to hear it through the grapevine that he didn't want me to stay here." R. p. 108, lines 4-7. Appellant further remonstrated, "He could have told me told me if he didn't want me to live in his house." R. p. 108, lines 11-15.

Walking out, Victim saw a policeman on the side of the street. However, Victim did not dare yell for the police because Appellant told him not to say anything and Victim knew Appellant still carried his gun. R. pp. 108-09; p. 151. Victim surmised the reason he was released was because Appellant and Wallace were afraid the police would discover them. Victim observed, "The policeman saved my life and he didn't even know it." R. p. 161. As they walked out of Monte's house, Appellant further complained, "If [Monte] didn't want me to stay . . ." R. pp. 108-09.

Victim explained what Appellant was talking about. Monte had put up a "For Rent" sign and claimed they were being evicted to try to trick Appellant into moving out of the apartment. R. p. 137. Monte actually moved out for a week to carry out the scheme. R. pp. 157-58.

On the street, Appellant and Victim walked around the corner. Victim saw a phone light come on by an abandoned house, although he denied seeing it when Appellant asked if he saw it because Victim thought it might be Monte hiding. Appellant walked over by the side of the house with his gun and beckoned, "Monte, come out, come out, wherever you are, Monte come out . . . ."

R. p. 140, line 22 – p. 141, line 15.

Before they parted, **Victim again asked Appellant where Monte was and Monte said, "[H]e thought that I was going to shoot him and he ran."** R. p. 111, lines 9-16. Appellant told Victim as he left, "When you see Monte, tell him to holler at me." R. p. 142. After Victim left, he tried to call Monte, with no answer. Victim initially thought Monte "ran" or went into hiding, perhaps staying with one of his girlfriends. R. pp. 111-12; p. 146.

Victim explained why he did not call the police that evening:

> Because, for number one, I have kids. I know what kind of guy he is, so I had to really think what I was going to do, you know, make sure that I made the right choice to know what I was going to do. . . . When he said he ran, I kind of believed him. It was a throw-off but I kind of believed him. And I thought that he ran and went to one of his girlfriends' house[s], because he had a few girlfriends.

R. p. 111, line 23 – p. 112, line 6. Victim later explained on cross-examination, "I just wanted to be careful about what I'm doing because I have kids, I don't need nobody come looking for me or doing no crazy stuff when I have kids that I'm raising by myself." R. p. 155, lines 16-19.

Victim was scared and he could not sleep. R. p. 112, lines 7-8. Unsuccessful in his attempts to contact Monte by phone, the next day he looked for Monte. When he failed to find Monte, Victim contacted Monte's mother and told her what happened to him and also told her he was worried something could be wrong with Monte. R. pp. 152-54.

Pete Singleton testified similarly about the friends meeting at Buffalo Wild Wings. He went home after the game while Victim headed to Monte's. Singleton never heard from Monte again. Singleton and Victim rode around the neighborhood together looking for Monte to no avail. So Singleton told Victim he needed to call Monte's mother. R. pp. 167-68.

The State introduced footage from the Shell station to corroborate Victim's testimony. R. pp. 171-72. Monte's mother, Janice Steve, testified she last saw Monte the Sunday before he disappeared and he seemed uneasy. Monte had a "For Rent" sign in his yard, but the house was not really for rent. Victim called her to warn that Monte was missing, so she drove from her home in Hampton to Beaufort to file a missing persons report. R. pp. 68-71. Ms. Steve explained on cross-examination that Monte let Appellant stay at his house, supposedly for a few days, because Appellant was homeless. R. p. 75. Deputy Heidi Light, at the time with the Beaufort Police Department, confirmed that Ms. Steve reported her son was missing. R. p. 65.

Investigator George Irdell was assigned both the kidnapping case involving Victim and the missing persons case for Monte because, Investigator Irdell explained, "[I]t was really intertwined." R. p. 204, lines 11-15. Victim started off really nervous during his interview with Investigator Irdell and it devolved to outright fear. Victim cried "pretty hard" and Investigator Irdell observed, "[H]e was probably about as scared as I have ever seen anybody in an interview room . . . ." R. p. 206, lines 1-7. On November 18, Monte's remains were found on St. Helena Island. Tyrone Wallace was charged with his murder. R. p. 210.

On October 26, 2015, Appellant called Shabonda Milledge and asked where Monte lived. She would not tell Appellant. She remained in contact with Appellant until November 16. Appellant told Milledge the police were looking for him. She asked him if he was not guilty, then why is he running. Appellant would not tell her where he was calling from. R. pp. 244-47. At first he was calling her with a local number, but later switched to an out of state phone number. R. p. 254.

Appellant was arrested by U.S. Marshalls in Georgia on November 16 in Hall County, a rural

county about five and a half hours away from Beaufort. R. p. 256. On cross-examination, defense counsel asked Investigator Dowling if Appellant was cooperative when he was arrested and whether he tried to run away. Investigator Dowling agreed he did not try and run away because he was handcuffed and wore leg shackles. R. pp. 256-57.

ARGUMENT

I.

The issue raised is not preserved for review because Appellant never objected to the evidence before the jury, and Appellant received the only relief requested, which was to have no mention of his own role as an accessory after the fact in the murder of Appellant's housemate and Victim's friend.

Appellant claims the trial court erred by allowing evidence that Monte disappeared the same day Victim was kidnapped, that Monte's remains were found on St. Helena Island, and that Wallace was charged for murder. However, these arguments are not preserved for review because Appellant's defense counsel agreed all that evidence was admissible. Defense counsel only objected to evidence that Appellant was an accessory after the fact or charged with accessory after the fact to murder, and the trial court ruled in his favor. Defense counsel made no further objections before the jury. The issue is not preserved for review.

The *in limine* motion, testimony in support, and arguments of counsel

At trial, the State made a motion *in limine* to provide evidence that Victim's friend, Monte, disappeared the day Appellant and Wallace kidnapped him. Monte's remains were found a few weeks later on St. Helena Island, Wallace was charged with murder, and Appellant was charged with accessory after the fact to the murder. Ultimately, after hearing testimony and arguments of counsel, the trial court allowed the evidence except it found evidence Appellant was charged as an accessory or was otherwise implicated in the murder inadmissible.

Victim testified during the hearing he remembered October 25, 2015 because, "It was a bad day for me." R. p. 6, lines 4-7. He explained, "I had a gun pulled on me. Pretty much I was kidnapped." R. p. 6, lines 10-11. Victim testified Appellant kidnapped him on Greene Street when

he was visiting his best friend Ver'mon "Monte" Steve. That day was the last time he saw Monte. R. pp. 6-7.

Victim explained when he first arrived at Monte's, Appellant asked him if he spoke to Monte. R. p. 7, lines 21-24. Appellant asked him what did Monte say, and Victim replied he did not say anything except he was coming over to Monte's house. R. p. 9, lines 2-6. Victim asked Appellant where Monte was and Appellant did not answer but kept saying, "Let me holler at you." R. p. 7, line 24 – p. 8, line 1. Appellant complained that if Monte did not want him in the house, he should have told him. When Victim was able to leave Monte's house, he asked again where Monte was and Appellant answered, "[H]e thought that I was going to shoot him so he ran." R. p. 8, lines 15-18. Victim summarized, "Basically, he was saying a lot about Monte." R. p. 10, line 12. Victim testified that during the kidnapping, both Appellant and Wallace kept saying, "It sure is a funny time you are here." R. p. 9, line 21 – p. 10, line 1.

Victim described the kidnapping consistent with his later trial testimony, including noting that except for a cigar, the kidnappers returned everything they took out of his pockets. He noted, as he did to the jury, that suddenly Appellant's mood changed and Appellant was allowed to leave the house. R. pp. 11-12.

The prosecution called Investigator Erdel as the second witness in support of the prosecution's motion. Investigator Erdel confirmed no one saw Monte alive since the evening of October 25, 2015. Monte's mother contacted the police the next day that her son was missing and told police about Victim's kidnapping incident. Monte's remains were subsequently found on November 18, on St. Helena Island. R. pp. 22-24. Subsequently, Wallace was arrested for murder. Appellant and two other people were arrested for accessory after the fact to murder. R. pp. 24-25.

On cross-examination, defense counsel confirmed Victim did not report the kidnapping, instead Monte's mother reported the kidnapping. R. p. 25.

The State, at the conclusion of the testimony, argued that testimony concerning Monte's disappearance and death was admissible as res gestae and under the motive exception to Lyle. R. p. 27; p. 31. The prosecution noted the kidnapping did not occur during a robbery or as a result of drug deal, and there was no prior disagreement or problem between Victim and either Appellant or Wallace. R. pp. 28-29. The prosecution asserted Appellant's discussions about Monte with Victim were calculated to gain information from Victim about Monte. R. p. 29.

The prosecution argued Appellant and Wallace were at the residence to confront Monte, but "[Victim] got in their way. He wasn't supposed to show up. They did not expect him to come. They were waiting on Monte to come. And instead it is [Victim] who comes. They have to react." R. p. 29, lines 12-19. The prosecution surmised Appellant and Wallace let Victim go because they realized he did not have any useful information and did not know what was going on, and perhaps they were spooked by the presence of an officer out on the street. R. p. 30.

The prosecution observed that without the res gestae evidence to explain why the kidnapping occurred, the jury was prone to thinking it was a drug deal, Victim owed the kidnappers something, or there was a prior fight, none of which was true. R. p. 30. The prosecution explained:

> The reason that he was tied up and gagged was because he was in their way. It finishes the story. There's no way to explain the kidnapping without getting into the disappearance of Ver'mon Steve. And when I look at Lyle, it's essentially the same argument.

R. p. 30, lines 20-25. The prosecution also argued the evidence was part of the common scheme or plan, "This is one series of events." R. p. 31, lines 10-11.

The prosecution advised it was not contending Appellant pulled the trigger, but that he assisted in dumping and burning Monte's remains. The prosecution concluded:

> The proximity of the events, the motive, the no other explanation for the kidnapping, this all tends to prove that this in one event. And the evidence of disappearance and ultimate murder of Monte is necessary to prove why this happened to [Victim]. And if it doesn't, the State will be forced to fragmentize our case and I'll be deprived of the opportunity to fully present the facts to the jury.

R. p. 31, line 25 - p. 32, line 7.

In response, Appellant argued the prosecution fragmented their own case by not trying kidnapping and accessory after the fact to murder together, and claimed a defense to an accessory charge. He asserted a lack of motive and argued Victim did not say Appellant realized he was being tricked about the pretend eviction. R. pp. 32-33.

The trial court asked defense counsel if the prosecution would be prohibited from introducing that there was a murder. Defense counsel replied,

> Yeah, I mean, if they wanted to introduce that – first, I would say that at the time of this kidnapping was charged Mr. Steve was missing. So, first, I would submit **that I would have no problem for the jury to hear that he's missing.**
>
> Now, about the murder**, if they want to say that eventually there was a murder charge and that Tyrone Wallace was charged with that murder and leave it at that so that there's some closure as to what happened.** But any evidence as far as accessory after the fact, which is completely unrelated. I mean, and his goes into res gestae, this is not the same set of facts. They are not intertwined.

R. p. 35, lines 2-14.

Defense counsel proceeded to argue: (1) there were different co-defendants for the accessory charge; (2) the disposal of the body was in a separate location; and (3) anything the accessory codefendants said would be hearsay. R. pp. 35-36.

After the prosecution's reply to defense counsel's argument, the trial court commented that he thought defense counsel agreed "with everything that you said about what you want to put up except for the fact of the charge of accessory." R. p. 37, lines 11-14. Defense counsel answered affirmatively, noting he would object "absolutely that he was charged with accessory after the fact or any charge of accessory after the fact, or any discussion at all that he may be involved at all with the murder." R. p. 37, lines 15-22.

The trial court ruled as follows:

> **I agree with the argument and the position taken by defense counsel as to evidence on accessory after the fact.** As far as the rest of the State's motion is concerned, about what they can introduce, I agree and grant that motion based on what we went through just a few moments ago.

R. p. 39, lines 4-11.

The issue raised on appeal is not reviewable because defense counsel received exactly the relief he asked for. The trial court ruled no evidence that Appellant was an accessory after the fact to Monte's murder would be admitted. As shown above, defense counsel agreed evidence of Monte's disappearance was admissible, and defense counsel further agreed evidence Monte's remains were subsequently found and Wallace was charged with murder was probative to provide closure on the missing person aspect of the case. R. p. 35, lines 2-14

"[I]t is the responsibility of trial counsel to preserve issues for appellate review." Jackson v. Speed, 326 S.C. 289, 306 S.E.2d 750, 759 (1997). An objection should be addressed to the trial court in a sufficiently specific manner that brings attention to the exact error. State v. Byers, 392 S.C. 438, 446, 710 S.E.2d 55, 59 (2011); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724-25 (2000) ("Imposing this preservation requirement on the appellant is meant to

enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. . . It prevents a party from keeping an ace card up his sleeve – intentionally **or by chance** – in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.") (Emphasis added, citations omitted). Express consent to the admission of evidence constitutes a waiver of the issue on appeal. State v. Johnson, 298 S.C. 496, 498, 381 S.E.2d 732, 733 (1989).

Appellant received the relief requested

The trial court ruled in defense counsel's favor, suppressing the evidence defense counsel requested to be disallowed. A party receiving the relief requested may not be heard to complain on appeal. State v. McEachern, 399 S.C. 125, 146, 731 S.E.2d 604, 614 (Ct. App. 2012). An issue conceded in trial court is not preserved for review. State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000). There is no issue for the appellate court to decide if a defendant receives the relief requested from the trial court. State v. Parris, 387 S.C. 460, 465, 692 S.E.2d 207, 209 (Ct. App. 2010).

In the instant case, defense counsel agreed evidence Monte disappeared was admissible and suggested it was beneficial to have evidence Monte was murdered to provide closure. Defense counsel certainly wanted the jury to know Wallace was charged with the murder. Defense counsel simply wanted to ensure the jury did not discover that Appellant was charged or otherwise implicated in the murder, and the trial court agreed. Appellant received the relief requested and therefore the issue should not be renewed.

The Forrester rule does not apply

Further, defense counsel never renewed his objection before the jury. This is hardly surprising since defense counsel received the relief he requested. However, an *in limine* objection is

generally not preserved for review if the defendant fails to renew the objection when the evidence is introduced to the jury. A ruling *in limine* is not a final ruling on the admissibility of evidence. State v. Griffin, 339 S.C. 74, 528 S.E.2d 668 (2000); State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999). Generally, a motion *in limine* seeks a pre-trial evidentiary ruling to prevent the disclosure of potentially prejudicial matter to the jury. See State v. Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988). A pre-trial ruling on the admissibility of evidence is preliminary, and is subject to change based on developments at trial. Id. Unless an objection is made at the time the evidence is offered and a final ruling made, the issue is not preserved for review. State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) *overruled on other grounds by* State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016).

Where evidence defendant objected to is admitted closely following a motion *in limine*, the exception may be preserved despite the lack of contemporaneous objection. State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001); cf. State v. Burton, 326 S.C. 605, 613, 486 S.E.2d 762, 766 (Ct. App. 1997) (holding a ruling made during an in camera hearing to determine the admissibility of the victim's sister's testimony was not sufficient to preserve the issue where, after the in camera hearing, testimony was provided from two other witnesses, a break was taken, and then the victim's sister testified without objection).

Officer Goethie was the tenth witness called by the prosecution. When he testified that Monte's remains were found on St. Helena Island and Wallace was charged with murder, there was no objection. R. pp. 209-10. Because Goethie was the tenth witness at trial, the evidence was not admitted closely after the pre-trial ruling on its admission. Forrester does not apply.

Appellant argues the issue is nonetheless preserved for review because the prosecution mentioned during the prosecution's opening argument that Monte disappeared and was murdered. Specifically, the prosecution argued:

> [Victim] is terrified of that man right there, that man that kidnapped him, who tied him up, who gagged him and pushed him to his knees. He doesn't tell anyone. He keeps his mouth shut. Now, it wasn't too late for him, but he keeps his mouth shut. But it was too late for [Monte], see, [Monte] was never seen again after October 2 [sic], 2015. [Monte's] remains were found on November 18, 2015. He had been shot. He had been burned and he had been discarded on a rural road on St. Helena Island.

R. p. 56, lines 12-22.

The opening statement serves to inform the jury of the general nature of the action and the issues involved so they can better understand the evidence presented. State v. Brown, 277 S.C. 203, 284 S.E.2d 777 (1981). The solicitor is permitted in opening statement to outline the facts the State intends to prove. Highfield v. State, 272 S.E.2d 62 (Ga. 1980). However, the statements of counsel are not considered evidence and cannot be relied on under the Forrester rule for preservation. See Ex parte Morris, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006) ("It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence."); McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) (appellate courts repeatedly have held "that statements of fact appearing only in arguments of counsel will not be considered"); S.C. Dept. of Transp. v. Thompson, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) ("[a]rguments made by counsel are not evidence").

The State would note that after Appellant was convicted, defense counsel made a motion for new trial. As one ground defense counsel argued, "[A]s far as any other facts that were associated

with the murder case [they] might have also unfairly prejudiced my client. And so I would just make a motion for a new trial at this time, Your Honor." R. p. 328, lines 22-25. However, a new trial motion may not be used to raise an evidentiary issue for the first time. State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995); Dixon v. Dixon, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (holding that an issue first raised in a post-trial motion is not preserved for appellate review). "In our opinion, a motion for new trial does not preserve or revive an issue not properly and timely raised by objection. This is true because, by the time a new-trial motion is made, the trial court has lost its best opportunity to correct the error at issue." Louisiana v. Marcotte, 817 So. 2d 1245, 1250 (La.Ct.App. 2002); see "One may not preserve a vice until he learns what the result will be and then take advantage of the error on appeal." State v. Penland, 275 S.C. 537, 273 S.E.2d 765, 766 (1981) (not preserved due to failure to move for mistrial until after the verdict). In the instant case, this Court should not review the ground raised because it was not properly or timely presented to the trial court.

II.

Because the murder victim's disappearance was intertwined with the kidnapping for which Appellant was on trial, the trial court did not abuse its discretion by allowing evidence that the murder victim disappeared the day of the kidnapping, that his remains were found several weeks later, and that the accomplice to the kidnapping was charged with murder. The evidence was admissible under the motive exception to Rule 404, SCRE and under the res gestae theory.

Appellant argues the trial court erred in allowing the State to admit evidence of Monte's disappearance and murder. However, as the prosecutor noted, Victim's kidnapping and Monte's disappearance are intertwined and closely linked with each other. Appellant and Wallace were at Monte's apartment when Appellant arrived. They were strangely evasive when Victim asked Monte's whereabouts. Victim knew Appellant was being disingenuous with him when Appellant claimed Monte painted the car grill the day before. Later, Appellant admitted to Victim he thought Monte ran because he thought Appellant was going to shoot him. R. p. 111, lines 9-16. After they left the house, but while Victim still felt he was not free to leave Appellant and Wallace, Appellant sought out Monte when he thought Monte was hiding by the abandoned house. R. pp. 140-41. Appellant told Victim to let Monte know he was looking for him, and he complained about Monte scheming to trick him into moving out of the apartment instead of Monte directly telling Appellant he did not want to live with him. R. p. 108; p. 142. Further, the kidnapping case would have gone unreported but for Monte's disappearance and Monte's disappearance explains how law enforcement became involved because it came to light after Monte's mother reported Monte missing upon Victim warning her about his concerns for Monte's well-being.

Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." State v. Jenkins, 412 S.C. 643, 650, 773 S.E.2d 906, 909 (2015). The admission or exclusion of evidence is a matter addressed to the trial court's sound discretion and will not be reversed absent a manifest abuse of the trial court's discretion and probable prejudice. State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004).

Evidence is admissible if it is "'logically relevant'" to a material fact or element to be proved. State v. Sweat, 362 S.C. 117, 606 S.E.2d 508, 513 (Ct. App. 2004) (quoting State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990)). "The relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court and a ruling will be disturbed only upon a showing of an abuse of discretion." State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003). Thus a trial court's decision regarding the comparative probative value and prejudicial effect of relevant evidence will be reversed only in exceptional circumstances. State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). "If judicial self-restraint is ever desirable, it is when a Rule 403 [SCRE] analysis of a trial court is reviewed by an appellate tribunal." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 598 (Ct. App. 2001) *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence." State v. Stephens, 398 S.C. 314, 320, 728 S.E.2d 68, 71 (Ct. App. 2012).

Res gestae

As the prosecutor noted, the disappearance and death of Monte is clearly intertwined with

Victim's abduction and imprisonment. It is unlikely Victim would have found himself a kidnapping victim at all had he not happened to show up when Appellant and Wallace were looking for Monte. As Appellant told Victim, "Funny time you came up here." R. p. 101, line 25. They lured Victim to the door under the pretense that Monte was inside when Monte obviously was not inside. Appellant searched for Monte after they "released" Victim. Appellant complained about Monte not telling him directly about not wanting Appellant to live with Monte anymore. Appellant even surmised Monte ran because he thought Appellant was going to shoot him. Victim spent the next day trying to find Monte. The kidnapping only came to light when Monte's mother, after being told by Victim what happened and was warned Monte was in trouble, filed a missing person report.

This Court noted the following:

> One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae'" or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other' [and is thus] part of the res gestae of the crime charged."

State v. Preslar, 364 S.C. 466, 474, 613 S.E.2d 381, 385 (Ct. App. 2005) (quoting State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996)[1] (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir. 1980))); *accord* State v. McGee, 408 S.C. 278, 288, 758 S.E.2d 730, 735-36 (Ct. App. 2014) ("When evidence is admissible to provide this full presentation of the offense, there is no reason to fragmentize the event under inquiry by suppressing parts of the res gestae.").

Monte disappeared immediately prior to Victim arriving and quickly becoming Appellant's kidnap victim. Temporal proximity is important to determining the admissibility of evidence under the res gestae theory. State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004) (finding temporal proximity of other acts to the charged crime is important in determining admissibility). A jury might reasonably believe Monte was scared away right before Victim arrived because Victim spoke with Monte immediately before driving to Monte's house and Appellant lied to Victim about when Monte painted the grill. In his interview with law enforcement, Appellant told law enforcement the last he saw Monte was when he was painting the car grill that evening, then Monte disappeared and did not return, right before Victim pulled up. State's Exhibit No. 1 (31:00 – 32:30).

This Court's opinion in State v Rice, 368 S.C. 610, 629 S.E.2d 393 (Ct. App. 2006) is instructive. In that case, Rice's car, which contained drugs and cash, was stolen while he was at a restaurant. He arranged a drug deal with the person he suspected stole the vehicle at a hotel where the victim was murdered. When Rice was pulled over by law enforcement, he had trafficking levels of cocaine in his vehicle. This Court found no error in the denial of a motion to sever the trafficking and murder charges, finding Rice was not prejudiced because the evidence of cocaine trafficking was admissible under the res gestae theory "to show the complete, whole unfragmented story regarding [the victim's] murder." Id. at 616, 629 S.E.2d at 396.

In State v. Preslar, 364 S.C. 466, 474, 613 S.E.2d 381, 385 (Ct. App. 2005), this Court found evidence that Preslar's daughter was the alleged victim for his pending criminal sexual conduct (CSC) charge was admissible under the res gestae theory in his trial for intimidation of a witness. Preslar sent a letter to his daughter and a letter to her sister attempting to have the CSC charge

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[1] *Overruled on other grounds by* State v. Giles, 407 S.C. 147, 54 S.E.2d 261 (2014).

dropped. This Court found evidence he was charged with criminal sexual conduct admissible noting that information the daughter was the alleged victim of Preslar's CSC charge was necessary for the jury to understand why his reference to the daughter's baby was intimidating to the daughter. This Court further found the nature of the CSC charges was "inextricably interwoven in the fabric of the charge of intimidation [of the daughter]" as the primary witness for those charges. Id. at 474-75, 613 S.E.2d at 386; *accord* State v. Dickerson, 341 S.C. 391, 535 S.E.2d 119 (2000) (evidence of defendant's cocaine use during time period of "overkill" murder was admissible as *res gestae*); State v. Gagum, 328 S.C. 560, 492 S.E.2d 822 (Ct. App. 1997) (in strong arm robbery prosecution, evidence that defendant offered his civilian captors dope to let him go was admissible as *res gestae* of crime); State v. Crim, 327 S.C. 254, 489 S.E.2d 478 (1997) (Evidence of defendant's larceny of car defendant drove when the accident leading to the felony DUI charge occurred was admissible as *res gestae* in prosecution for felony DUI); State v. Hough, 325 S.C. 88, 480 S.E.2d 77 (1997) (finding evidence that defendants purchased crack cocaine with proceeds of stolen items sold was necessary for full presentation of the case and admissible as *res gestae*); State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) (defendant's use of cocaine prior to robbery and murder admissible as the drug usage was inextricably intertwined with robbery and murder); State v. Johnson, 306 S.C. 119, 410 S.E.2d 547, 552 (1991) (finding that evidence of a dead body in defendant's van tended to explain why the defendant shot the trooper when the trooper opened the van door).

When evidence is relevant under the res gestae theory, the trial court must still undergo a Rule 403 balancing test to determine whether the probative value is substantially outweighed by the danger of unfair prejudice. State v. McGee, 408 S.C. 278, 758 S.E.2d 730 (Ct. App. 2014); Rule 403, SCRE. In the present case, the trial court ensured no evidence was presented that Appellant was

charged with accessory after the fact or was otherwise implicated in Monte's murder, limiting the potential for prejudice. Clearly, evidence of Monte's disappearance and death were integral to understanding the circumstances of the kidnapping. Further, the res gestae evidence was probative because defense counsel tried to paint the circumstances as some sort of dispute over drugs or a woman. In his opening statement he referred to Frazier as the Victim, but then told the jury, "When I say 'Victim,' I'm going to put quotes around it because [Victim], he is a grown man. . . . And he is not some innocent, football-loving man. . . . You heard no mention about drugs. You heard no mention about a love triangle that exists between [Appellant] and [Victim]. . . . He did not report it to the police. He did not tell anybody. He didn't flag anybody down." R. p. 61, lines 1-22. While cross-examining Victim, defense counsel asked him if he sold or used drugs. R. pp. 158-59. Defense counsel also asked Victim if his relationship with Milledge overlapped Appellant's relationship with Milledge. Victim denied it. R. pp. 155-56. Subsequently, Milledge denied dating Appellant. R. p. 244. During closing argument, defense counsel argued, "I mean, this just seems like the slackest kidnapping I can think of. There's more to this story. These aren't strangers. You heard they grew up together. What else is going on?" R. p. 295, lines 19-23. He lamented that in his view, Milledge "won't even admit that she was in a romantic relationship with [Appellant]." R. p. 297, lines 20-22. In light of defense counsel's allusions to some sort of prior difficulty between Victim and Appellant, and the claim "there is more to this story," the evidence was highly probative to explain to the jury why the kidnapping occurred. Therefore, the trial court did not abuse its discretion by finding the highly probative value of the res gestae evidence was not substantially outweighed by the danger of unfair prejudice.

Motive/Common Scheme or Plan

Bad acts extrinsic to the charged conduct may be admissible when the extrinsic acts establish (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan; or (5) identity of the person charged. State v. Lyle, 125 S.C. 406, 118 S.E.803 (1923); Rule 404(b) SCRE. When evidence is "logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime." Id. at 406, 118 S.E. at 807.

To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "Further, even though the evidence . . . falls within a Lyle exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." State v. Braxton, 343 S.C. 629, 634, 541 S.E.2d 833, 836 (2001) (citing Rule 403, SCRE; State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999)).

Rule 404(b) is inapplicable: "Evidence of other crimes, wrongs, or acts is not admissible to show the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE. Evidence about Monte's unfortunate end and Wallace's role in that end does not constitute evidence of Appellant's character or an action to show conformity with Appellant's actions during the kidnapping. See Anderson v. State, 354 S.C. 431, 435, 581 S.E.2d 834, 836 (2003) (holding because a threatening statement made by the accused was not a prior bad act, the bar against admitting prior bad acts was not applicable). That might be another reason defense counsel did not object to this evidence.

However, evidence of Monte's disappearance and death is probative as evidence of motive. To be sure, this conceptually overlaps with common scheme or plan. It was an especially bad day for Victim because he had a gun to his head (see R. p. 6), but his ordeal was merely an added step to the itinerary of Appellant and Wallace's common, shared plan to find Monte.

In State v. Du Rant, 87 S.C. 532, 70 S.E. 306 (1911), a police officer was shot in front of Du Rant's store. Du Rant previously demanded officers stay away from the front of the store, asserting the sidewalk in front of the store was his property. The officer was sitting in front of the store when, without provocation, Du Rant shot him. The police searched Du Rant's store and found illegal liquor. The Supreme Court found the evidence of contraband liquor was admissible to show animus between the parties and to show Du Rant's possible motive for the shooting.

In State v. Wiles, 383 S.C. 151, 679 S.E.2d 172 (2009), the Supreme Court found in a prosecution for failure to stop for a blue light and assault and battery of a high and aggravated nature, evidence that Wiles escaped from prison a week earlier was admissible as motive for fleeing law enforcement and intent for the car-crash assault (Wiles crashed his vehicle into an officer's patrol car). The evidence was also admissible as res gestae. Id. at 158-59, 679 S.E.2d at 176.

In State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001), the appellant was on trial for the murder at a barber shop. Evidence of the murder of a cab driver was admitted into evidence. Forensic evidence showed the same gun was used in both shootings. The Supreme Court found evidence of the prior cab driver murder was admissible under the common scheme or plan exception because the same gun was used in both murders: "This fact establishes a substantial connection between the two crimes that supports the admission of evidence regarding the cab driver murder." The two crimes were further connected by appellant's own actions because he wrote about both

killings in letters to an inmate. Id. at 546, 552 S.E.2d at 311. The evidence was also admissible to show identity and motive because both murders occurred during robberies and the appellant expressed a need for money in his letters to the inmate. Id. at 547, 552 S.E.2d at 311.

In United States v Hattaway, 740 F.2d 1419 (7th Cir. 1984), Hattaway, a member of the Outlaws biker gang, and an accomplice abducted a drug dealer, Forester, and the dealer's girlfriend, Callahan, in Asheville, North Carolina. Hattaway pushed Forester down a mine shaft to his death in North Carolina, and then they took Callahan to Chicago, where she was moved around to several locations and raped by several other members of the Outlaws. Five defendants were convicted various crimes related to the kidnapping and sexual assaults on Callahan, as well as firearms charges. Hattaway – and two other defendants who raped and moved Callahan to different locations in the Chicago area, but were not involved with the murder in North Carolina – complained evidence of Forester's death should not have been admitted as extrinsic act evidence under Rule 404(b), FRE.

The Seventh Circuit found the district court did not abuse its discretion, explaining:

> The evidence of Forester's death helped the jury understand many important factors surrounding Callahan's abduction and holding. It helped show that Callahan did not consent to leaving the motel [in North Carolina] and to travelling with the defendants. It also showed the defendants' possible motivation for taking Callahan to Chicago and for abandoning her after Forester's body was discovered. Finally, the evidence helped explain why Callahan decided to call the FBI. As the government states, excluding this evidence would have left a "chronological and conceptual void" in the story of Callahan's ordeal. This evidence thus both showed motive, as permitted in Rule 404(b), and was highly relevant to the alleged criminal acts.

Id. at 1425. The Seventh Circuit further rejected the claim that evidence of murder while on trial for a lesser offense was highly prejudicial and inflammatory, finding its probative value outweighed the danger of unfair prejudice. Id.

In United States v. Turpin, 707 F.2d 332 (8th Cir. 1983), Turpin was on trial for violating federal law for attempting to make a railroad track dangerous for use. The government's theory of the case was Turpin killed his friend and then put the friend's body in the friend's car and parked the car across the tracks at a railroad crossing relying on a prospective collision with a train to conceal the cause of death. The Eighth Circuit found no error in admitting evidence of the friend's murder because it was an integral part of the immediate context of the crime and was relevant to prove motive and identity because it tended to show why Turpin parked the car on the railroad tracks. Further, the Eighth Circuit found the homicide evidence provided "compelling motive for [Turpin's] actions" and "was essential" to the prosecution's case Id. at 336.

In the present case, Appellant and Wallace's common scheme of locating Monte precipitated their actions in abducting and imprisoning Victim. Their desire to find Monte and Victim's unfortunate timing in arriving at that point in time created their motive to kidnap Victim and maybe glean information from Victim. Accordingly, the evidence was admissible under Rule 404(b) as evidence of motive and common scheme or plan evidence to the extent it could be considered prior bad act evidence.

Accordingly, the trial court did not err in allowing the testimony that Appellant never objected to because it was admissible as res gestae, motive, and common scheme or plan evidence. Therefore, this Court should affirm the convictions and sentences.

CONCLUSION

For all of the foregoing reasons, the judgment and convictions of the lower court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General

I. McDUFFIE STONE
Solicitor, Fourteenth Judicial Circuit

BY: _____
DAVID SPENCER

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

July 30, 2020