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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Orangeburg County
Honorable Edgar W. Dickson, Circuit Court Judge

Opinion No. 2020-UP-219 (S.C. Ct. App. Filed July 22, 2020)

2016-GS-38-01244

THE STATE,

RESPONDENT,

V.

JOHNATHAN GREEN,

PETITIONER

APPELLATE CASE NO 2016-002256

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INDEX

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 22, 2020.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding that the trial judge did not err in allowing the witness to testify that on a prior occasion Petitioner assaulted her when the testimony was not relevant, did not meet an exception pursuant to Rule 404(b), the State failed to prove the alleged prior assault by clear and convincing evidence and the probative value of the alleged prior assault was substantially outweighed by the danger of unfair prejudice pursuant to Rules 403 and 404(b), SCRE?

2. Did the Court of Appeals err in finding that the trial judge did not err in allowing the witness to testify that on a prior occasion Petitioner threatened to blow the witness's face off when the testimony did not meet an exception pursuant to Rule 404(b), the State failed to prove the alleged prior threat by clear and convincing evidence and the probative value of the alleged prior threat is substantially outweighed by the danger of unfair prejudice pursuant to Rules 403 and 404(b), SCRE?

STATEMENT OF THE CASE

In April of 2016, the Orangeburg County Grand Jury indicted Petitioner, Johnathan Green, for several counts of attempted murder. In August of 2016, the Orangeburg County Grand Jury indicted Petitioner for one count of discharging a firearm into a dwelling, indictment #2016-GS-38-1244. (R. p. 476). On October 25, 2016, Petitioner proceeded to jury trial before the Honorable Edgar W. Dickson on two counts of attempted murder, indictments #2016-GS-38-223, 224 and the one count of discharging a firearm into a dwelling. (R. p. 494-497). Byron E. Gipson represented Petitioner at trial. Tommy Scott and Josh Edwards prosecuted the case. The jury returned verdicts of guilty and Judge Dickson sentenced Petitioner to two thirty (30) year concurrent sentences for attempted murder and ten (10) years concurrent for discharging a firearm into a dwelling. A timely notice of intent to appeal was served on November 4, 2016, and the direct appeal perfected. On July 22, 2020, a three-judge panel of the South Carolina Court of Appeals affirmed the convictions in an unpublished opinion. State v. Johnathan Green, Op. No. 2020-UP-219 (S.C. Ct. App. Filed July 22, 2020). A timely petition for rehearing was filed on August 5, 2020, and then denied on September 22, 2020. This petition for writ of certiorari follows.

ARGUMENTS

1. **The Court of Appeals erred in finding that the trial judge did not err in allowing the witness to testify that on a prior occasion Petitioner assaulted her when the testimony was not relevant, did not meet an exception pursuant to Rule 404(b), the State failed to prove the alleged prior assault by clear and convincing evidence and the probative value of the alleged prior assault was substantially outweighed by the danger of unfair prejudice pursuant to Rules 403 and 404(b), SCRE.**

The jury found Petitioner guilty of shooting at the mother of his child, Elise Hogges, and her boyfriend who she later married, Kenduan Minus, on December 13, 2015. Prior to trial Petitioner moved to suppress testimony about three prior acts allegedly committed by Petitioner against Hogges-Minus. During the pre-trial hearing Hogges-Minus testified about an alleged incident almost a year earlier in January of 2015, an alleged incident when Petitioner allegedly pulled a gun on her in front of their daughter and an alleged incident at Thanksgiving. During the pre-trial hearing Hogges-Minus testified that during the alleged incident in January of 2015, Petitioner "... pulled my hair, snatched my hair out and pulled it from scalp." (R. p. 13, lines 19-23). She also testified that, "He bust my tire and threw my keys in the woods." (R. p. 14, line 4). Hogges-Minus admitted that she did not call the police but testified that she went to the sheriff's department and filed a report. (R. p. 15, lines 15-22). The officer who took the report noted that he did not observe any physical injury. (R. p. 26, lines 1-5). The sheriff's department did not press charges against Petitioner for the alleged January incident. (R. p. 26, lines 8-18).

The judge properly suppressed any testimony in regard to the alleged incident of pulling a gun in front of the daughter. (R. p. 30, lines 3-13). In ruling the trial judge addressed the alleged Thanksgiving incident, finding that the incident went to motive which is addressed in issue two below. The judge then stated, "It kind of goes along with the January event that shows the animus between them. And there are a couple of cases where there's domestic violence you can

use that testimony later on, a prior domestic violence even in an assault and battery with intent to kill. And so I've got some cites here if you are interested, but I - - " (R. p. 31, line 24 – p. 32, lines 1-4). Counsel for Petitioner responded, "I understand Judge. But to call it domestic violence when it's never been charged or there was never a chance for Mr. Green to face an accuser to have his, you know, chance to defend himself because there was never a charge brought." (R. p. 32, lines 5-9). The judge indicated that he was not inclined to suppress the prior bad act. (R. p. 32, lines 13-17).

At trial the prosecutor asked Hogges-Minus about the January incident and the judge noted Petitioner's objection. (R. p. 111, line 20 – p. 112, lines 1-2). Hogges-Minus then was allowed to testify about the alleged January incident. (R. p. 112, lines 7-17). Hogges-Minus told the jury:

> We had an agreement to pick my child up from his mom's house. And when I got there, he arrived as I was getting – putting my daughter in the car. And he reached in and snatched my keys out my ignition and in the process of me trying to, you know, get my keys back – I was trying to like protect my daughter from seeing it. And he came around the front of the car and he grabbed my hair. And he pulled me to the ground by my hair and ripped my sewing out. And that's when he punched me. And his mom came off the porch and, you know, she was trying to get him off of me. And she called the police and made a report.

(R. p. 112, lines 7-17).

The trial judge erred in allowing the witness to testify about an alleged incident that took place almost a year before the shooting. The testimony was irrelevant and did not meet an exception pursuant to Rule 404(b). There was no connection of cause and effect between the January allegation and the December shooting. The January allegation was too remote in time to be probative of motive, intent or malice in the December shooting. Additionally, the State failed to prove the alleged prior assault by clear and convincing evidence. Finally, any probative value of the alleged prior allegation was substantially outweighed by the danger of unfair prejudice

pursuant to Rules 403, 404(b), SCRE. The testimony constituted inadmissible propensity evidence that should have been excluded.

First, the testimony about an alleged incident that took place almost a year prior was not relevant. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. The testimony about an alleged incident in January, almost one year earlier, did not make the existence of any fact of consequence in the attempted murder trial more or less probable. The January allegation, involving only the mother, is not relevant as to whether Petitioner was guilty of attempted murder in December for shooting at the mother of Petitioner's child and her boyfriend at the time. There was no connection of cause and effect between the January allegation and the December shooting. The testimony should have been excluded as irrelevant.

Second, the testimony did not meet an exception pursuant to Rule 404(b). In State v. Fletcher, 379 S.C. 17, 23–24, 664 S.E.2d 480, 483 (2008), the South Carolina Supreme Court wrote:

> Under Rule 404(b), SCRE, evidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged. Such evidence is, however, admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. Id.; State v. Beck, 342 S.C. 129, 135–36, 536 S.E.2d 679, 682–83 (2000). Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rules 403 and 404(b), SCRE (although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice); State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001). 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. State v. Bell, 302 S.C. 18, 393 S.E.2d 364 cert. denied, 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990).

The testimony about the alleged January incident constituted inadmissible evidence of an alleged prior bad act. The testimony about the alleged incident that took place almost a year prior did not show motive, identity, common scheme or plan, absence of mistake or accident or intent.

In State v. Perry, 430 S.C. 24, 31, 842 S.E.2d 654, 658 (2020), the South Carolina Supreme Court wrote:

> Historically, to justify a finding that evidence of other crimes, wrongs, or acts is offered for a legitimate purpose, and thus should not be excluded pursuant to Rule 404(b), South Carolina courts have required a logical relevancy or connection between the other crime and some disputed fact or element of the crime charged. *See, e.g.*, Gaines, 380 S.C. at 29, 667 S.E.2d at 731 ("To be admissible, the bad act must logically relate to the crime with which the defendant has been charged."); State v. Brooks, 341 S.C. 57, 61, 533 S.E.2d 325, 327-28 (2000) ("If the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected." (quoting Lyle, 125 S.C. at 417, 118 S.E. at 807)).

While the Court in Perry addressed the common scheme or plan exception of Rule 404(b), the logical relevancy analysis should apply to all 404(b) exceptions. The alleged prior January incident involving only Hogges-Minus did not logically relate to the State's allegation that Petitioner attempted to murder Hogges-Minus and her boyfriend when he saw them together a year after the prior alleged incident. The judge found that the second incident, the alleged threat in November discussed below, " . . . goes along with the January event that shows the animus between them." (R. p. 31, line 24 – p. 32, lines 1-4). Showing animus is not an exception pursuant to Rule 404(b). There is no connection between the January allegation and the crime charged in December. The January allegation is too remote in time to be probative of motive, intent or malice in the December shooting. The testimony about the January allegation should not have been admitted.

Third, the State failed to prove the alleged prior bad act by clear and convincing evidence. As Petitioner was not convicted of the alleged prior assault, the State was required to prove the alleged prior bad act by clear and convincing evidence. State v. Beck, 342 S.C. 129, 135-36, 536 S.E.2d 679, 682-83 (2000). "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal." State v. Fletcher, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008). The only person to testify about the alleged January incident was Hogges-Minus. Hogges-Minus testified that Petitioner's mother was a witness to the January incident and called the police. (R. p. 112, lines 16-17). Petitioner's mother, however, while called as a witness by the State at trial, was not questioned about the alleged January incident and was not called as a witness at the pre-trial hearing. The testimony should have been excluded because the State failed to prove the alleged January incident by clear and convincing evidence.

Fourth and finally, the probative value of the alleged prior assault was substantially outweighed by the danger of unfair prejudice pursuant to Rules 403, 404(b), SCRE. In State v. Perry, 430 S.C. 24, 44, 842 S.E.2d 654, 665 (2020) this Court wrote:

> The State must also convince the trial court that the probative force of the evidence when used for this legitimate purpose is not substantially outweighed by the danger of unfair prejudice from the inherent tendency of the evidence to show the defendant's propensity to commit similar crimes. Rule 403, SCRE. Whether the State has met its burden 'should be subjected by the courts to rigid scrutiny,' considering the individual facts of and circumstances of each case. 125 S.C. at 417, 118 S.E. at 807.

The State failed to meet its burden required by Rule 403, SCRE, for the admission of the alleged prior assault almost one year earlier. The probative value of the prior alleged assault is substantially outweighed by the danger of unfair prejudice. As discussed above, testimony about the alleged

incident in January of 2015, was irrelevant and not probative of the attempted murder charges that arose in December of 2015. The admission of the propensity evidence was unfairly prejudicial. The trial judge erred in allowing the witness to testify that on a prior occasion Petitioner assaulted her when the testimony was not relevant, did not meet an exception pursuant to Rule 404(b), the State failed to prove the alleged prior assault by clear and convincing evidence and the probative value of the alleged prior assault was substantially outweighed by the danger of unfair prejudice pursuant to Rule 404(b), SCRE.

In affirming the convictions the Court of Appeals did not address the January allegation separately from a Thanksgiving allegation discussed in issue two below but wrote as to both:

> As to whether the trial court erred in allowing a victim to testify Green previously assaulted and threatened her because the testimony was not relevant and did not meet an exception pursuant to Rule 404(b), SCRE; the State failed to prove the alleged prior incidents by clear and convincing evidence; and the danger of unfair prejudice substantially outweighed the probative value: State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion."); id. ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."); State v. Sweat, 362 S.C. 117, 126, 606 S.E.2d 508, 513 (Ct. App. 2004) ("For evidence to be admissible, it must be relevant."); State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) ("Evidence is relevant and admissible if it tends to establish or make more or less probable the matter in controversy." (citing Rules 401 & 402, SCRE)); Rule 401, SCRE (providing relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"); Rule 404(b), SCRE ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."); State v. Plyler, 275 S.C. 291, 296, 270 S.E.2d 126, 128 (1980) ("Evidence of previous difficulties or ill feelings between the accused and the victim and of facts showing the cause of such difficulties or ill will is admissible on the question of motives whe[n] there is some connection of cause and effect between the evidence and the crime." (quoting 40 C.J.S. Homicide § 228 (currently located at 41 C.J.S. Homicide § 337))); id. (finding the challenged evidence "admissible as a circumstance bearing on the identity of the accused as the perpetrator of the crime" because it "tend[ed] to show motive on the part of

> the accused and [wa]s not so remote in time as to negate its probative value"); Blakely v. State, 360 S.C. 636, 639, 602 S.E.2d 758, 759 (2004) ("[E]vidence of previous threats by the defendant is admissible to show malice."); S.C. Code Ann. § 16-3-29 (2015) (defining the offense of attempted murder as when "[a] person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied"); Blakely, 360 S.C. at 639, 602 S.E.2d at 759 ("[U]nder Rule 404(b), SCRE, [evidence of previous threats] is admissible as evidence of intent."); State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007) ("If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing."); State v. Kirton, 381 S.C. 7, 26, 671 S.E.2d 107, 116 (Ct. App. 2008) ("When considering whether there is clear and convincing evidence of other bad acts, this court is bound by the trial judge's factual findings unless they are clearly erroneous."); id. at 26-27, 671 S.E.2d at 116 ("The determination of a witness's credibility is left to the trial [court, which] saw and heard the witness and is therefore in a better position to evaluate his or her veracity."); Wiles, 383 S.C. at 158, 679 S.E.2d at 176 ("[E]ven whe[n] the evidence is shown to be relevant, if its probative value is substantially outweighed by the danger of unfair prejudice, the evidence must be excluded." (citing Rule 403, SCRE)); id. ("Unfair prejudice means an undue tendency to suggest decision on an improper basis.").

State v. Green, No. 2016-002256, 2020 WL 4201818, at *1 (S.C. Ct. App. July 22, 2020).

As to the relevance of the prior January allegation, the Court of Appeals overlooked the fact that there is no evidence to support the finding that the testimony is relevant to the December shooting. The January allegation is too remote in time to be relevant as defined by Rule 401, SCRE. The alleged assault in January of the mother when she was picking up their child does not make it more or less probable that Petitioner shot at the mother and her boyfriend almost a year later in December.

As to Rule 404(b), the Court of Appeals overlooked the fact that the alleged assault of Hogges-Minus in January does not logically relate to the State's allegation that Petitioner attempted to murder Hogges-Minus and her boyfriend when he saw them together a year later. The January allegation is too remote in time to be probative of motive, intent or malice in the December shooting. The present case is distinguished from State v. Plyler, 275 S.C. 291, 270

S.E.2d 126 (1980) cited in the opinion by the Court of Appeals. First the alleged assault in the present case is far more inflammatory and prejudicial than the prior verbal altercation in Plyler. Second, and more importantly, the prior verbal altercation in Plyler took place three days prior to the charged crime and was not so remote in time as to negate its probative value. The January allegation in the present case took place almost a year before the charged crime, negating its probative value. Additionally, as noted in Plyler, there must be some connection of cause and effect between the prior allegations and the charged crime. In the present case there is no evidence to support such a connection of cause and effect between the January allegation involving only the mother and the December shooting at mother and her boyfriend at the time.

As to the State's failure to prove the alleged prior assault by clear and convincing evidecne, the reliance by the Court of Appeals on Blakely v. State, 360 S.C. 636, 602 S.E.2d 758 (2004) is misplaced as the Court in Blakely did not address the prior threats pursuant to Rule 404(b) requiring clear and convincing evidence of the prior threat. In the present case the State failed to prove either of the prior allegations, neither of which resulted in a conviction or even a charge, by clear and convincing evidence. The case is additionally distinguished from State v. Kirton, 381 S.C. 7, 27, 671 S.E.2d 107, 117 (Ct. App. 2008), where the Court of Appeals wrote, "Testimony in the record supports the finding made by the trial judge that there was clear and convincing evidence of the prior bad acts, and that finding was not erroneous." The trial judge in the present case did not make a finding that there was clear and convincing evidence of the prior allegations. Instead, the trial judge in the present case stated:

> Now, here with the Thanksgiving incident, it's more descriptive. And I think – but, of course, again, I think it's up to the jury whether or not they believe her in that situation. And right now, all of these motions are just essentially – I can change my mind. These are essentially Motions in Limine. But I'm inclined to let it in. It's close. It kind of goes along with the January event that shows the animus between them. And there are a couple of cases where there's domestic violence you can

> use that testimony later on, a prior domestic violence even in an assault and battery with intent to kill. And so I've got some cites here if you are interested, but I - - "

(R. p. 31, line 24 – p. 32, lines 1-4). Counsel for Petitioner responded, "I understand Judge. But to call it domestic violence when it's never been charged or there was never a chance for Mr. Green to face an accuser to have his, you know, chance to defend himself because there was never a charge brought." (R. p. 32, lines 5-9). The judge in the present case failed to make a finding that there was clear and convincing evidence of either of the prior allegations.

As to Rule 403, the Court of Appeals cited the rule without explanation. The State failed to meet its burden to show that the probative value of the prior alleged assault was not substantially outweighed by the danger of unfair prejudice from the inherent tendency of the evidence to show propensity. In this trial for two counts of attempted murder the probative value of the prior bad act allegations is substantially outweighed by the danger of unfair prejudice.

2. The Court of Appeals erred in finding that the trial judge did not err in allowing the witness to testify that on a prior occasion Petitioner threatened to blow the witness's face off when the testimony did not meet an exception pursuant to Rule 404(b), the State failed to prove the alleged prior threat by clear and convincing evidence and the probative value of the alleged prior threat is substantially outweighed by the danger of unfair prejudice pursuant to Rules 403 and 404(b), SCRE.

In addition to the alleged incident in January 2015, Petitioner also moved to suppress an alleged prior bad act from Thanksgiving in November of 2015. Hogges-Minus testified at the pre-trial hearing that, "The week of Thanksgiving, he came to my house to try and fix my car. And I told him I didn't want him to do anything for me, that, you know, I didn't want him to do anything for me. And he was just like don't – me I'll blow your face off. And I told him to get out the yard and don't come back no more." (R. p. 14, lines 9-14). Hogges-Minus admitted that she did not

call the police after this alleged threat by Petitioner. (R. p. 26, line 24 – p. 27, lines 1-6). The judge ruled:

> Now, here with the Thanksgiving incident, it's more descriptive. And I think – but, of course, again, I think it's up to the jury whether or not they believe her in that situation. And right now, all of these motions are just essentially – I can change my mind. These are essentially Motions in Limine. But I'm inclined to let it in. It is close. It goes to the motive for him to be chasing her. It kind of goes along with the January event that shows the animus between them. And there are a couple of cases where there's domestic violence you can use that testimony later on, a prior domestic violence even in an assault and battery with intent to kill. And so I've got some cites here if you are interested, but I - - "

(R. p. 31, line 24 – p. 32, lines 1-4). As noted above, counsel for Petitioner responded, "I understand Judge. But to call it domestic violence when it's never been charged or there was never a chance for Mr. Green to face an accuser to have his, you know, chance to defend himself because there was never a charge brought." (R. p. 32, lines 5-9). The judge indicated that he was not inclined to suppress the prior bad act. (R. p. 32, lines 13-17).

At trial the prosecutor asked Hogges-Minus about the Thanksgiving incident and the judge noted Petitioner's objection. (R. p. 112, lines 18-22). Hogges-Minus then was allowed to testify about the alleged Thanksgiving threat incident. (R. p. 112, line 25 – p. 113, 114, lines 1-3). Hogges-Minus told the jury that Petitioner and his brother came to her house to fix her car and she told him she did not want him to do anything for her. (R. p.112, line 25 – p. 113, lines 1-24). Hogges-Minus testified, "And he looked at me and said, don't play with me I'll blow your face off. And then I said that's the problem right there. I said get out of my yard and don't come back and leave me alone." (R. p. 113, line 25 – p. 114, lines 1-3).

The trial judge erred in allowing the witness to testify that on a prior occasion Petitioner threatened her when the testimony did not meet an exception pursuant to Rule 404(b). Additionally, the State failed to prove the alleged prior threat by clear and convincing evidence

and finally the probative value of the alleged prior assault was substantially outweighed by the danger of unfair prejudice pursuant to Rules 403, 404(b), SCRE. The testimony constituted inadmissible propensity evidence.

First, the testimony did not meet an exception pursuant to Rule 404(b). As discussed above in State v. Fletcher, 379 S.C. 17, 23–24, 664 S.E.2d 480, 483 (2008), the South Carolina Supreme Court wrote:

> Under Rule 404(b), SCRE, evidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged. Such evidence is, however, admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent. State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). To be admissible, the bad act must logically relate to the crime with which the defendant has been charged. If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing. Id.; State v. Beck, 342 S.C. 129, 135–36, 536 S.E.2d 679, 682–83 (2000). Even if prior bad act evidence is clear and convincing and falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Rules 403 and 404(b), SCRE (although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice); State v. Gillian, 373 S.C. 601, 646 S.E.2d 872 (2007); State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001). 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. State v. Bell, 302 S.C. 18, 393 S.E.2d 364 cert. denied, 498 U.S. 881, 111 S.Ct. 227, 112 L.Ed.2d 182 (1990).

The testimony about the alleged threat constituted inadmissible evidence of an alleged prior bad act. The testimony about the alleged threat did not show motive, identity, common scheme or plan, absence of mistake or accident or intent. The alleged prior threat to Hogges-Minus alone did not logically relate to the State's allegation that Petitioner attempted to murder Hogges-Minus and her boyfriend when he saw them together. Contrary to the trial judge's finding, the alleged threat to Hogges-Minus because she rejected Petitioner's offer of help did not provide a motive for Petitioner to attempt to kill Hogges-Minus and her boyfriend. The motive

exception might have been stronger if the prior alleged threat had been made to Hogges-Minus and her boyfriend rather than Hogges-Minus only.

Second, as discussed in regard to the alleged January attack, the State failed to prove the alleged prior threat by clear and convincing evidence. As Petitioner was not convicted of the alleged prior threat, the State was required to prove the alleged prior bad act by clear and convincing evidence. State v. Beck, 342 S.C. 129, 135-36, 536 S.E.2d 679, 682-83 (2000). "Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal." State v. Fletcher, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008). The only person to testify about the alleged threat was Hogges-Minus. Hogges-Minus testified that Petitioner's brother was a witness to the alleged threat but he was not called as a witness by the State. The testimony should have been excluded because the State failed to prove the alleged threat by clear and convincing evidence.

Finally, as also discussed above in regard to the alleged January assault, the probative value of the alleged prior threat was substantially outweighed by the danger of unfair prejudice pursuant to Rules 403, 404(b), SCRE. In State v. Perry, 430 S.C. 24, 44, 842 S.E.2d 654, 665 (2020) this Court wrote:

> The State must also convince the trial court that the probative force of the evidence when used for this legitimate purpose is not substantially outweighed by the danger of unfair prejudice from the inherent tendency of the evidence to show the defendant's propensity to commit similar crimes. Rule 403, SCRE. Whether the State has met its burden 'should be subjected by the courts to rigid scrutiny,' considering the individual facts of and circumstances of each case. 125 S.C. at 417, 118 S.E. at 807.

The State failed to meet its burden required by Rule 403, SCRE, for the admission of the prior alleged threat. The testimony about the alleged threat because Hogges-Minus did not accept Petitioner's offer to help repair her car was not probative of the attempted murder charges involving Hogges-Minus and her boyfriend. The admission of testimony that Petitioner allegedly threatened to "blow her face off" was unfairly prejudicial and constituted inadmissible propensity evidence. In State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998), the South Carolina Court of Appeals wrote:

> Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis. United States v. Bonds, 12 F.3d 540, 567 (6th Cir.1993); United States v. Rodriguez–Estrada, 877 F.2d 153, 156 (1st Cir.1989) ("[A]ll evidence is meant to be prejudicial; it is only *unfair* prejudice which must be avoided.").

The highly inflammatory alleged threat to "blow her face off" tends to suggest a decision on an improper emotional basis. The State failed to meet its burden to show that the probative value of the prior alleged threat was not substantially outweighed by the danger of unfair prejudice from the inherent tendency of the evidence to show propensity. The testimony should have been excluded as more prejudicial than probative.

As discussed above with regard to the alleged January assault, the Court of Appeals erred in finding that the trial judge did not err in allowing the witness to testify that on a prior occasion Petitioner threatened her when the testimony did not meet an exception pursuant to Rule 404(b), the alleged prior threat was not proved by clear and convincing evidence and the probative value of the alleged prior threat was substantially outweighed by the danger of unfair prejudice pursuant to Rules 403 and 404(b), SCRE.

CONCLUSION

Based on the above arguments, this Court should grant the petition for writ of certiorari to allow further briefing on the issue.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of October, 2020.