THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
General Sessions Court
DeAndrea G. Benjamin, Circuit Court Judge

Case No. 2017-GS-40-07158
Case No. 2017-GS-40-07162
Case No. 2017-GS-40-07165
Case No. 2017-GS-40-07166
Appellate Case No. 2019-001981

The State,

Respondent,

v.

Charles Barham,

Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant, Charles Brandon Barham, was indicted by the Richland County grand jury on charges of murder, first-degree burglary, common-law conspiracy, and possession of a weapon during the commission of a violent crime. R. pp. __[indictments]. He was tried before a jury on August 26-30, 2019, in the Richland County General Sessions Court, with Judge DeAndrea G. Benjamin presiding. Tr. p. 1. The jury returned a verdict of guilty with respect to all four charges. Tr. pp. 1180-81. At a sentencing hearing held November 18, 2019, Judge Benjamin sentenced appellant to concurrent terms of 40 years for the murder and burglary convictions and five years for the conspiracy and weapon convictions. R. p. __[sentencing sheets]; Tr. p. 31.

ARGUMENT

These charges arose from the shooting death of Charles Kusko in his home on the night of September 5-6, 2015, by Floyd Owen. Owen and Charles[1] were former lovers who had briefly lived together and who had remained friends after breaking up. Tr. pp.

[1] Charles Kusko and other members of his family are referred to in this brief by their first rather than last names, for clarity as to the identities of the various individuals involved in the events that were the subject of the trial testimony.

646-48. They partied and did drugs together. Tr. pp. 646, 648, 650. In the early hours of September 6, the Sunday of Labor Day weekend, Owen broke into Charles's residence at 1710 Budon Court, Columbia, South Carolina. Tr. pp. 679-80. Owen went to Charles's bedroom and shot him twice in the head while he was sleeping. Tr. pp. 244-45, 682-83, 703. Owen admitted he committed these offenses. Tr. pp. 679-80, 682-83, 703. Charles's murder was discovered on Tuesday, September 8, after James Jones went to Charles's home to check on him. Tr. pp. 106-07. Jones observed a broken window and smelled an odor, and he called 911 because things did not seem right. Tr. pp. 107-08, 120. Law enforcement officers arrived, entered the house, and found Charles's body. Tr. p. 130.

Owen admitted he had a motive. Charles was threatening to report Owen to the Department of Social Services, thereby jeopardizing Owen's contact with his children. Tr. pp. 326-27, 725-26. Owen was interviewed by Columbia police investigators the day after the body was found, September 9, and he lied and denied he had committed the crimes. Tr. pp. 697, 720-21, 730-31. He was questioned by the police again in 2017 after he was arrested for an unrelated armed robbery and gun charge, and he continued to lie to them and deny committing these crimes. Tr. pp. 698, 722-23, 729-30. He finally admitted the break-in and murder in his third statement to the police, but even then he gave an account that was not consistent with his trial testimony. Tr. pp. 731-35, 737-38.

Owen claimed appellant provided the gun he used and drove Owen to Charles's home for the purpose of killing him, waited nearby as lookout while Owen went in, and drove Owen away after the shooting was over. Tr. pp. 668-85, 691. Appellant denied any involvement in the events at Budon Court that night. Tr. pp. 1043-44.

A week before this trial, Owen pleaded guilty to murder, burglary, conspiracy, and possession of a firearm in connection with the break-in of the residence and the murder of Charles, but he had not yet been sentenced. He was facing varying amounts of prison time for the offenses, including a potential life sentence. Tr. pp. 704-05, 713-16. He was also facing additional time for the unrelated armed robbery and firearm charges. Tr. pp. 717-18. He had not been sentenced on these charges following his plea, pending his testifying in this trial against appellant, and he was hoping for more favorable treatment based on his cooperation and testimony against appellant in this trial. Tr. pp. 718-20.

The defense suggested Owen implicated appellant to protect his girlfriend, Jessica James. That contention was supported by evidence that the police had begun questioning her in 2017 and had threatened her with incarceration. Tr. p. 806. When Owen ultimately gave a statement to police in 2017 confessing to the murder and implicating appellant as well, he repeatedly asked law enforcement to keep James out of it. Tr. pp. 728-30.

The defense also suggested that Charles's brother, Andrew Kusko, fabricated information against appellant to divert attention from himself. Charles and Andrew were brothers of appellant's mother, Karin Jean Barham. Tr. pp. 347, 1012. Karin was disabled and required caregivers, having been in an accident some years earlier that left her with traumatic brain injury. Tr. pp. 349-50, 1013. Over the years, various family members served as her caregiver and handled her affairs through successive powers of attorney. Tr. pp. 111, 349-50, 1013-16. At the time of these events, Charles was the person handling Karin's finances. Tr. pp. 111, 350, 355, 1015. Karin's brother Andrew believed Charles was misusing or stealing Karin's personal property and funds. Tr. pp. 271-72, 355, 429, 447-49. He believed Charles had misused or stolen from her property and funds worth

$38,000 to $39,000. Tr. pp. 355, 429. In the months ahead of Charles's murder, Owen told Andrew Charles was selling and throwing away Karin's things. Tr. pp. 651-52. Owen's doing so led to an ongoing dispute between Owen and Charles in July and August 2015, prior to Owen's murder of Charles on September 6, 2015. Tr. p. 651-63.

Charles and Andrew had a history of angry disputes and an "up and down relationship." Tr. pp. 270-73, 348, 351, 383, 414-15. Andrew admitted having made statements that others would characterize as threats against Charles, including that he would choke him. Tr. p. 415. On the Friday of Labor Day weekend, September 4, an incident occurred between Charles and Andrew at Charles's residence. Tr. pp. 113-15, 270-71. Andrew had gone there because of what Owen had told him Charles was doing with their sister's belongings. Tr. pp. 351-52. Charles told Jones what had occurred on Friday, September 4, including that he and Andrew had been fighting. Tr. p. 115. Charles was agitated, upset, and physically afraid of Andrew. Tr. pp. 115, 139, 270-71. Charles called the police, and the police arrived and placed Andrew under a no-trespass notice. Tr. pp. 115, 352-53, 430. When Charles's body was found the next Tuesday, September 8, Jones told law enforcement Charles had said he was afraid for his life because he and Andrew were in a dispute over property. Tr. pp. 116, 139.

On Tuesday, September 8, Andrew picked up his sister and took her to the Columbia Police Department to make a report about what Charles had been doing with her property. Tr. pp. 330, 354-55, 447-49. While the lead investigator was at the Budon Court address following the discovery of Charles's body, he received a call and learned Andrew was at the police department making a report against his brother Charles. Tr. p. 330.

The defense contended it was Andrew, not appellant, who put Owen up to murdering Charles and supplied the gun for that purpose. That contention was supported by Owen's girlfriend's statement to police that Owen told her "Midget" supplied the gun. Tr. pp. 808-09. Midget was Andrew's nickname. Tr. pp. 418-19, 871-73.

The exact time of Charles's death was not pinpointed with certainty, but the pathologist who conducted the autopsy acknowledged it could have occurred within a 12-hour window on the night of September 5-6 through the morning of September 6. Tr. pp. 249, 254-55. He believed the level of decomposition was consistent with death in the early morning hours of September 6, or could have been within a period of hours before or after the early morning hours. Tr. pp. 248-49, 254-56.

In its efforts to link appellant to Owen's crimes that night, the state offered into evidence a video from the security camera system of a business near the Budon Court neighborhood. That video showed a truck similar to appellant's white Chevy pickup truck in the area at approximately 5:04 and 5:10 a.m. on September 6. Tr. pp. 319-21, 336; State's Exhibits. 132, 133. The state suggested this truck may have been appellant's, in keeping with Owen's claim that appellant drove him to the Budon Court residence for the purpose of having Owen enter and kill Charles. Tr. pp. 319-21. However, the occupant or occupants of the vehicle in the video were not discernible, and the presence of this truck in the video, if it was appellant's truck, was consistent with Owen's having taken it while appellant was asleep and driven himself to Charles's residence to commit these crimes. Tr. pp. 337-38, 1030.

Another vehicle appearing in the video at approximately 4:53 a.m. was similar in appearance to a Chevy Blazer, the make of vehicle then driven by Andrew. Tr. pp. 335,

338-39, 370; Defendant's Exhibit 1. Despite the similarity of that vehicle to Andrew's, the known conflicts between Andrew and Charles, the altercation between the brothers to which police were called just two days prior to the murder, and information the gun came from "Midget," who was Andrew, the investigating officers never considered that the vehicle seen on the video might be Andrew's. Tr. pp. 338-40, 430, 871-78.

The state also introduced evidence attempting to show the whereabouts of various individuals near the time of the murder, through analysis of their cell phone records during the time period of the murder and the particular cell towers that handled their cell phone communications. The information obtained from appellant's cell phone usage did not place him in the vicinity of Budon Court during the window of time in which the murder could have been committed. Tr. pp. 279-80, 284, 287, 512. However, the information the state offered that purported to pertain to Andrew was useless, because Andrew had given the police his wife's cell phone number, not his own, and law enforcement officials had not obtained cell phone records for Andrew's actual number. Tr. pp. 285-86, 288-89, 880-84, 937-38.

Charles was a friend of Columbia lawyer Neal Lourie. Tr. pp. 258-59. Lourie owned the 1710 Budon Court residence where Charles was living and employed Charles as a handyman. Tr. pp. 112, 259, 264-65. Appellant at times worked with Charles on the projects he did for Lourie. Tr. pp. 260, 1019-21. Lourie testified appellant came to him a week or two before Labor Day and said Charles had not paid him for work he had done for Lourie. Tr. pp. 261-62. On the Friday before Labor Day, Lourie asked Charles about it, and Charles said appellant had been paid. Tr. pp. 261-62. Lourie testified appellant called him again the day after Labor Day, and Lourie told him what Charles had said. Tr. pp.

261-62. Appellant testified Charles owed him $1,900 for work he had performed. Tr. pp. 1019-20. Lourie recalled the amount to be about $2,000, consistent with appellant's testimony. Tr. p. 268. As appellant noted, he expected to be paid for the work and would not have killed Charles over the delayed payment, since his doing so would have resulted in his never being paid. Tr. p. 1021.

Andrew and Owen imputed to appellant a much greater monetary motive, an amount of $5,000 they claimed appellant said Charles owed him. Tr. pp. 367, 431, 440, 727. However, that amount was contradicted by Lourie's testimony, which corroborated appellant's assertion he was owed only $1,900. Tr. pp. 268, 1019-20. Owen also claimed appellant was upset about Charles's treatment of his mother and her missing money. Tr. pp. 666, 726. To the contrary, the evidence established it was Andrew, not appellant, who was upset and angry with Charles. Tr. pp. 354-55, 1016-17. Andrew believed Charles had stolen or misused as much as $38,000 to $39,000 of Karin's assets, going so far as to initiate police action against him. Tr. pp. 330, 354-55, 429.

The state contended Charles's non-payment for appellant's work was appellant's motive for his alleged involvement in the crimes. However, Lourie testified about appellant's demeanor when discussing being paid for his work. Appellant was not belligerent or upset and was not causing a scene. Tr. pp. 267, 269. There were no threats between Charles and appellant and no allegations of any physical violence between them. Tr. p. 269. On the other hand, Lourie was aware of the disputes between Charles and Andrew and knew that Charles was agitated, upset, and afraid of Andrew. Tr. pp. 270-71. But Charles never expressed to Lourie that he was afraid of appellant. Tr. p. 270. Jones, who was also an employee of Lourie, knew of Charles's dispute with Andrew, that they

had been fighting and Charles was upset, and that Charles feared for his life. Tr. pp. 115-16, 139.

Some time after his initial statement to the police on Tuesday, September 8, Andrew gave the police information about a gun he claimed to have seen in appellant's possession prior to Labor Day weekend. Tr. pp. 359, 426-27. The bullets that killed Charles were .45 caliber bullets. Tr. pp. 187, 189. They could have been fired from multiple kinds of firearms, including but not limited to revolvers, some level action rifles, carbines, and short barrel rifles. Tr. pp. 188-89. Andrew claimed he had seen a gun appellant had in his truck the Sunday before, and he thought it was a .40 caliber. Tr. pp. 363-64, 420, 464. The bullet he examined that came from that gun was cut off at the tip and had a hole in the top. Tr. pp. 365, 420. However, the bullets that killed Charles and were found in his bed linens were semi-wadcutter, not hollow point. Tr. pp. 189-90. Andrew claimed he later asked appellant about the gun, and appellant said he no longer had it and had thrown it in a lake. Tr. pp. 379-80, 440. Contrary to Andrew's implication that appellant supplied the gun for this murder and then disposed of it, the confessed murderer, Owen, testified he personally threw the gun he used to kill Charles into a field or woods after leaving the scene but before returning home. Tr. pp. 686-88, 738.

Jessica James, Owen's girlfriend who was being questioned by the police in her own right and had been threatened with incarceration before she gave any information, testified Owen had confessed the killing to her and implicated appellant as providing the gun and serving as lookout. Tr. pp. 798, 800-01, 806. Her trial testimony was contrary to her earlier statement to the police, in which she stated Owen said appellant was merely with him. Tr. p. 808. James also was inconsistent as to where Owen said he got the gun,

initially insisting to the police it came from "Midget," who was Andrew. Tr. pp. 418-19, 808-09, 871-73. She acknowledged the state had subpoenaed her father for the purpose of having him influence her to testify. Tr. p. 805.

Jenny Baker, who was serving a 20-year federal sentence for serious drug charges, was an admitted meth addict and drug trafficker, and was by Owen's account a liar, also testified. Tr. pp. 558, 606-07, 614-15, 627, 724. She claimed appellant told her his uncle was a bad guy and deserved to be killed. Tr. pp. 602-03. She did not tell the police about this alleged conversation until after she was jailed over eight months later, in 2016, or over a year later, in 2017. Tr. pp. 606, 608-09. She gave the statement to keep herself out of trouble and help herself with her own charges. Tr. pp. 607, 626. She acknowledged she was hoping for a downward departure on her federal sentence as a result of her testimony. Tr. pp. 617-19.

Appellant testified in his defense. He denied any involvement in the crimes at the Budon Court address. Tr. pp. 1043-44. He denied he was present or participated in any way. Tr. pp. 1032-35, 1043-44. He did not own a firearm at the time of these crimes. Tr. p. 1039. He and Owen had been at Jenny Baker's the night before Owen killed Charles, and they had been drinking. Tr. pp. 1028-29. Appellant did not think he had used cocaine but acknowledged he may have told the police he had. Tr. pp. 1050-51. He and Owen both denied they used meth, contradicting the testimony of Baker that they had. Tr. pp. 570-71, 627, 658, 1050. He and Owen had left Baker's house in the early hours of September 6 and returned to Owen's house, where appellant went to sleep. Tr. p. 1028. When appellant woke the next morning, Owen was already up and outside. Tr. p. 1031. Appellant's truck had been there when appellant went to sleep, and he had set his keys

down on the counter or floor with the other items from his pocket. Tr. pp. 1029-30. Owen could have taken appellant's truck to Charles's residence and committed the crimes while appellant was sleeping. Owen had on multiple occasions in the past taken appellant's truck without his permission. Tr. pp. 1036. On two of those occasions, appellant had filed police reports with respect to Owen's having taken his truck, a fact corroborated by the case investigator. Tr. pp. 893, 1036. No DNA evidence or other forensic evidence placed appellant at the scene or implicated him in any way in the break-in and murder. Tr. pp. 237, 343-44.

I. THE TRIAL COURT ERRED IN ADMITTING TESTIMONY THAT CHARLES SAID APPELLANT STOLE HIS TOOLS.

The state called Laurin Barnes, Charles's daughter, to testify about a conversation she had with her father a few months before his death, in which he told her appellant stole his tools. The defense objected to the testimony, but the court allowed it, finding it was within the state of mind exception for hearsay of Rule 803(3) of the South Carolina Rules of Evidence and that its prejudicial effect did not outweigh its probative value. Tr. pp. 758-69. Laurin testified that several months before his death, her father told her appellant stole his tools and that he was mad at appellant. Tr. pp. 945-46. This testimony was both inadmissible and prejudicial.

Hearsay is defined as a statement, other than one made by the declarant while testifying, offered to prove the truth of the matter asserted. *See* Rule 801(c), SCRE. Hearsay is inadmissible, unless it is within one of the exceptions recognized by the evidence rules. *See* Rule 802, SCRE. Rule 803(3), commonly called the state-of-mind exception, allows admission of "[a] statement of the declarant's then existing state of mind,

emotion, sensation, or physical condition . . . , but not including a statement of memory or belief to prove the fact remembered or believed . . . ." *See* Rule 803(3), SCRE.

The decisions of our appellate courts construing this rule have been clear with respect to its limits. The statement of the declarant's state of mind or emotion is admissible, but the reason for that state of mind or emotion is not. *See State v. Tennant*, 394 S.C. 5, 15-16, 714 S.E.2d 297, 302-03 (2011), *State v. Garcia*, 334 S.C. 71, 76, 512 S.E.2d 507, 509 (1999); *State v. Daise*, 421 S.C. 442, 460, 807 S.E.2d 710, 719 (Ct.App. 2017); *State v. Hughes*, 419 S.C. 149, 155-56, 796 S.E.2d 174, 177-78 (Ct.App. 2017); *Vail v. State*, 402 S.C. 77, 87, 738 S.E.2d 503, 508-09 (Ct.App. 2013). The *Garcia* Court explained the restriction in Rule 803(3) with respect to a statement of memory or belief to prove the fact remembered or believed, stating,

> The purpose of this exclusion is "to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as a basis for an inference of the happening of the event which produced the state of mind." Consequently, while the present state of the declarant's mind is admissible as an exception to hearsay, the reason for the declarant's state of mind is not.

See Garcia, 334 S.C. at 76, 512 S.E.2d at 509 (footnote and citations omitted). *Garcia* noted an example from the case it cited: "If the reservation in the text of the rule is to have any effect, it must be understood to narrowly limit those admissible statements to declarations of condition – 'I'm scared' – and not belief – 'I'm scared because [someone] threatened me'." *See id.* (citation omitted). Under Rule 803(3), the *Garcia* decision, and *Garcia*'s progeny, Charles's statement to his daughter of his state of mind or emotion – that he was mad at appellant – was admissible. His further statement of the reason for that state of mind or emotion – his belief that appellant stole his tools – was not. The court erred in finding the statement was admissible under the state-of-mind exception.

Charles's statement that appellant stole his tools was also inadmissible under Rules 403 and 404(b) of the evidence rules. Rule 404(b) precludes admission of propensity evidence, in keeping with the holding of *State v. Lyle*, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923), and numerous cases decided by our courts since *Lyle*. *See State v. Perry*, 430 S.C. 24, 29-33, 842 S.E.2d 654, 657-58 (2020). The modern formulation of the rule generally precludes admission of prior crimes, wrongs, or other acts to prove the character of a person or to show action in conformity therewith. *See* Rule 404(b), SCRE. Such evidence is admissible only to show motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent. *See id.* Even if evidence falls within one of these exceptions, however, if the defendant was not convicted of the crime, the evidence may not be admitted unless it rises to the level of clear and convincing evidence. *See State v. Fletcher*, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008); *State v. Bell*, 430 S.C. 449, 466, 845 S.E.2d 514, 523 (Ct.App. 2020); *State v. Thompson*, 420 S.C. 386, 397, 803 S.E.2d 44, 50 (Ct.App. 2017), *cert. dismissed as improvidently granted*, 426 S.C. 325, 826 S.E.2d 871 (2019). Moreover, it must be excluded if the prejudicial effect of the evidence outweighs its probative value. *See* Rule 403, SCRE.

In this case, the evidence is outside these parameters in multiple ways. First, contrary to the argument of the state and the court's ruling, this evidence was not admissible as evidence of motive. Had the evidence been that ***Charles stole appellant's tools***, it may have established a motive for the killing of Charles. But Charles's belief that ***appellant stole Charles's tools***, without more, does not establish an alleged motive for appellant to have participated in Owen's crimes against Charles. The statement is outside the limited parameters for admission under Rule 404(b).

Even if this statement could be deemed to provide evidence of motive, it is still inadmissible under the requirement of clear and convincing evidence, where the defendant has not been convicted of the crime. The Court of Appeals' recent decision in *State v. Bell,* 430 S.C. 449, 845 S.E.2d 514 (Ct.App. 2020), addressed an almost identical statement – that a murder defendant had stolen property from the decedent. The Court found there was "no evidence, let alone clear and convincing evidence, demonstrating that [the defendant] had previously stolen [the decedent]'s property." *Id.*, 430 S.C. at 468, 845 S.E.2d at 524. The witnesses to the decedent's statements as to her belief also testified the family had no proof of the alleged thefts, had not called the police, and had not confronted the defendant about the alleged thefts. *Id.* The Court further noted there was "no evidence, beyond her statements of belief, that [the decedent]'s property had in fact been stolen." *Id.* The Court found reversible error in the admission of the statements under Rule 404(b). *Id.* This reasoning is correct and dictates a finding that the trial court erred in admitting Laurin's testimony that Charles said appellant stole his tools. *See id.*, 430 S.C. at 468-73, 845 S.E.2d at 524-27.

The court also erred in its finding that the prejudicial effect of this testimony was outweighed by its probative value. Even where evidence is deemed admissible under Rule 404(b), the court is required to conduct an analysis under Rule 403. *See Perry*, 430 S.C. at 31, 44, 842 S.E.2d at 657-58, 665; *Fletcher*, 379 S.C. at 23-24, 664 S.E.2d at 483; *Thompson*, 420 S.C. at 398, 803 S.E.2d at 50. Here, the evidence against appellant was weak. There was no forensic evidence that he committed the offenses. The state's attempt to establish his whereabouts through the location of his cell phone did not confirm that he was present at or in the vicinity of the Budon Court residence. The witnesses that

implicated him – Owen, Baker, James, and Andrew – all had motives to fabricate his involvement for their own purposes, and they all were demonstrated to have lied in their previous statements. The inadmissible prior statement of Charles, imputing to appellant a past crime of stealing, was not probative of the crimes for which he was charged but was extremely prejudicial. *Cf. State v. Williams*, 430 S.C. 136, 844 S.E.2d 57 (2020) (Supreme Court questioned whether details of two prior domestic violence incidents that involved the defendant's presenting a firearm had any probative value in trial of charges stemming from a shooting of another individual outside a bar and a claim of self-defense, and found the introduction of the details had an undue tendency to suggest a decision on an improper basis). The introduction of this evidence invited the jury to convict based on a perception that appellant had a propensity to commit criminal acts, not on the basis of actual guilt, the very issue sought to be addressed by *Lyle* and Rules 404(b) and 403. The trial court erred in concluding that the probative value of the evidence outweighed its prejudicial effect. The admission of this evidence was not harmless but likely tipped the balance in the jurors' minds in favor of a verdict of guilty. This Court should reverse and remand for a new trial.

II. THE TRIAL COURT ERRED IN ADMITTING TESTIMONY CONCERNING APPELLANT'S ALLEGED PARTICIPATION IN A PRIOR BURGLARY.

Owen testified as a witness for the state. Later, during cross-examination of the investigating officer, the defense asked if Owen had previously tried to bring appellant's name into a charge he faced, but the answer did not elicit that information. Tr. p. 891. Thereafter, the state sought to recall Owen to have him testify about appellant's alleged participation with Owen in an unrelated burglary years earlier, claiming the defense opened the door to introduction of the details of those allegations through its cross-examination of the investigating officer. The defense argued that it did not open the door and that the

evidence was inadmissible under Rules 404(b) and 403. The court found the defense opened the door and admitted the evidence. Tr. pp. 901-12, 952-96.

As previously noted, evidence of other crimes, wrongs, or bad acts is generally inadmissible under Rule 404(b). The information about appellant's alleged involvement in the 2007 burglary was within the preclusive scope of Rule 404(b) and not admissible in the state's case against appellant. It was also inadmissible under Rule 403, because it had no probative value with respect to the crimes for which appellant was on trial but was extremely prejudicial in suggesting he had a propensity to engage in criminal behavior and inviting a conviction on the basis of such propensity.

Our courts recognize that inadmissible evidence may become admissible when a party opens the door to its admission: "A party may introduce otherwise inadmissible evidence in rebuttal when an opponent introduces evidence as to a particular fact or transaction." *See State v. Heyward*, 426 S.C. 630, 636, 828 S.E.2d 592, 595 (2019). But under this "invited response" doctrine, our courts also recognize that the response must be proportional. *See State v. Simmons*, 430 S.C. 1, 14-15, 841 S.E.2d 845, 852 (2020); *Heyward*, 426 S.C. at 637, 828 S.E.2d at 595. The rebuttal evidence is appropriate only so long as it does not unfairly prejudice the defendant. *See Simmons*, 430 S.C. at 14, 841 S.E.2d at 852. Our Supreme Court has repeatedly admonished, "we will not condone 'a thinly-veiled attempt to show propensity by way of the open-door doctrine.'" *See Simmons*, 430 S.C. at 15, 841 S.E.2d at 85, *quoting Heyward*, 426 S.C. at 637, 828 S.E.2d at 595; *see also Williams*, 430 S.C. at 151, 844 S.E.2d at 65 (acknowledging the application of the same principle in the context of impeachment evidence). In this case, the defense did not open the door to admission of this inadmissible evidence, but if it did, the rebuttal

evidence introduced by the state was wholly disproportional and unduly prejudicial to appellant.

The defense questions of the investigating officer did not elicit the evidence the defense was seeking, and therefore did not open the door to the otherwise inadmissible testimony about the prior burglary. The defense sought to establish that Owen had previously implicated appellant in a crime with which Owen was charged, but the witness did not provide that testimony. The relevant questions and answers in the officer's cross-examination are these:

Q . . . And this isn't the first time that Floyd Owen has tried to bring Brandon's name into something, is it?

A I don't know about his past. I know about what he may have said to me, Floyd Owen, during his interview.

Q In fact, back in 2007, Floyd got charged with a burglary charge. You're familiar with that, right?

A I don't know the entire case or the particulars of it, but I do recall information like that, yes.

Q And at that point, he tried to bring Brandon's name into it, and there was no credibility in that case either?

A I don't know whether there was credibility or not. It wasn't my case.

Tr. p. 891, lines 3-18. In answer to the defense question about Owen trying to bring appellant into a prior charge, the witness did not testify that had in fact occurred. These questions and the answers they elicited did not open the door to Owen's being recalled to

testify to the details of his prior burglary offense and the details of what he claimed was appellant's involvement.

However, if these questions could be deemed to have opened the door to some response by the state, that response was required to be proportional and not unduly prejudicial to the defendant. Here, the rebuttal testimony offered by the state and allowed by the court was grossly disproportional and extremely prejudicial to appellant. As the defense argued, its questions did not go into the facts or allegations of the offense, asking the officer only if Owen brought appellant into it, and the defense contended allowing the state to introduce the specifics of the alleged offense was improper. Tr. p. 908, lines 8-14. The court asked if what the state was trying to put in was that "[appellant] did get charged, and it got dismissed. And the other guy [Owen] got convicted of it." The state responded, "Yes, ma'am." Tr. p. 909, lines 5-15. The defense offered to stipulate to that if that's what the state wanted to do. Tr. p. 909, lines 20-22. The state, however, wanted to put Owen on the stand and go into the facts of the offense, which is what the court ultimately allowed. The court erred in not limiting the state's response to a proportional response that did not include the details of the alleged crime.

The testimony given by Owen in rebuttal was very detailed and implicated appellant in a break-in at an apartment that had previously been appellant's residence. Owen testified he and appellant went to the apartment to retrieve items of property appellant had left. When they found the locks had been changed, they broke into the apartment, but nothing was there. They then broke into the office of the apartments which contained a storage room, but they did not find what they were looking for. As they were getting ready to leave, Owen claimed, appellant stole a computer from the office. Tr. pp.

981-85. Only at the very end of his testimony did Owen offer the precise rebuttal of the matter suggested by the defense's questions – denying that he lied about appellant in that burglary. Tr. p. 988. His testimony far exceeded what would have been sufficient to rebut the suggestion made by the defense's question posed to the investigating officer. It was not a proportional response. Rather, it was the very kind of "thinly-veiled attempt to show propensity evidence" that the Supreme Court disapproves.

It was also extremely prejudicial and inadmissible under a Rule 403 analysis. As with the testimony addressed in Argument I, this testimony invited the jury to convict appellant on an improper basis. The apartment incident in 2007 or 2008 was remote and unrelated to the events of September 2015, and it had no probative value with respect to the charges for which appellant was on trial. On the other hand, it was highly prejudicial, inviting conviction on an improper basis. The prejudicial effect clearly outweighed the non-existent probative value. *See* Rule 403, SCRE. The trial court's error in admitting any evidence of appellant's alleged participation in a prior break-in where the defense did not open the door or, alternatively, in admitting a disproportional response that unnecessarily included the specific details of the alleged prior conduct, was not harmless, because it likely influenced the jury to find appellant guilty. This Court should reverse the trial court's admission of this prejudicial evidence and remand for a new trial.

III. THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRORS WAS, IN COMBINATION, SO PREJUDICIAL AS TO DENY APPELLANT A FAIR TRIAL.

If this Court finds error in the admission of Barnes's and Owen's testimony addressed in Arguments I and II, above, but further finds neither error sufficiently prejudicial standing alone to warrant reversal, it should review the cumulative effect of

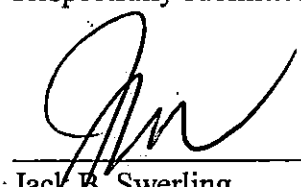
these two errors and find they were so prejudicial as to deny appellant the fairness required by due process. *See* U.S. Const. amends. V, XIV; S.C. Const. art. I, § 3; *State v. Blurton*, 342 S.C. 500, 512-13, 537 S.E.2d 291, 297-98 (Ct.App. 2000) (finding cumulative effect of improper comments in closing argument and erroneous exclusion of evidence warranted reversal), *rev'd on other grounds*, 352 S.C. 203, 573 S.E.2d 802 (2002) (finding additional error with respect to a jury charge); *State v. Freeman*, 319 S.C. 110, 123-24, 459 S.E.2d 867, 875 (Ct.App. 1995) (reversing conviction based on combined effect of court's limitation of cross-examination and court's improper comments interjected during the trial).

The cumulative error doctrine requires reversal when multiple errors, which may be found harmless in isolation, in combination prevent the defendant from receiving a fair trial and affect the outcome of his trial. In this case, both the erroneous evidentiary rulings resulted in the admission of testimony pertaining to alleged prior wrongs committed by appellant. This evidence of prior wrongs invited the jury to make a determination of his guilt on the basis of a propensity to commit criminal activity, and not on the basis of his actual guilt of the crimes charged. The cumulative effect of these two errors was so prejudicial as to undermine the fairness of the proceedings and to deprive appellant of his due process right to a fair trial. Based on the cumulative effect of the errors, the Court should reverse and grant appellant a new trial.

CONCLUSION

For all the reasons set out above, the Court should reverse appellant's convictions and remand for a new trial.

Respectfully submitted,



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Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
General Sessions Court
DeAndrea G. Benjamin, Circuit Court Judge

Case No. 2017-GS-40-07158
Case No. 2017-GS-40-07162
Case No. 2017-GS-40-07165
Case No. 2017-GS-40-07166
Appellate Case No. 2019-001981

The State,

Respondent,

v.

Charles Barham,

Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal by depositing a copy of it in the United States Mail, postage prepaid, on November 12, 2020, addressed to the following:

Melody J. Brown, Senior Assistant Deputy Attorney General
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November 12, 2020
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November 12, 2020

VIA HAND-DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: The State v. Charles Barham
Appellate Case No. 2019-001981

Dear Ms. Kitchings:

Enclosed herewith for filing is the original and one copy each of the Initial Brief of Appellant, Designation of Matter to be Included in the Record on Appeal and Proof of Service in the above referenced matter. It would be greatly appreciated if you would clock the additional copy, and return it to me in the enclosed envelope.

By copy of this letter, I am serving a copy of same on Melody J. Brown, Senior Assistant Deputy Attorney General.

If you have any questions, do not hesitate to contact me.

Very truly yours,

Jack B. Swerling

JBS/ksr
Enclosures

cc: Melody J. Brown, Senior Assistant Deputy Attorney General
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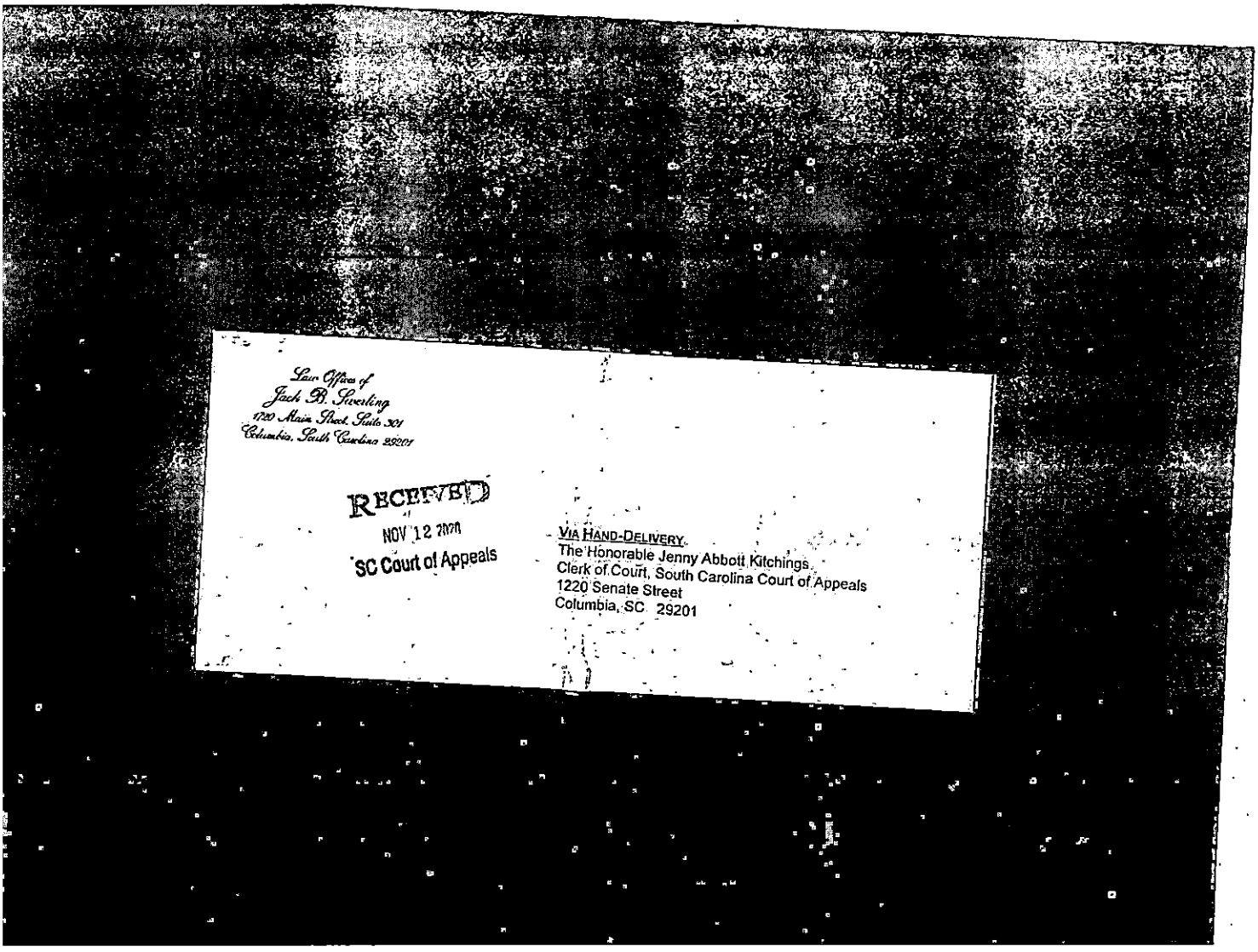

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