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**Feb 03 2021**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM DORCHESTER COUNTY  
The Honorable Maité Murphy, Circuit Court Judge

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Appellate Case No. 2019-001810

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THE STATE,

Respondent,

v.

DAMON R. RILEY

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Appellant.

**INITIAL BRIEF OF RESPONDENT**

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## **STATEMENTS OF ISSUES ON APPEAL**

- I. The trial judge did not abuse her discretion in admitting video footage and still photos of Appellant holding a gun because it was not prior bad act evidence.**
- II. Even if the video footage and photos were prior bad act evidence, it would be admissible under the identity exception because it was introduced to establish Appellant as the shooter.**
- III. Admitting the video footage and photos were not unduly prejudicial to Appellant because any possible connection to prior bad act evidence would have had to come from pure speculation by the jury.**

## **STATEMENT OF THE CASE**

Appellant was indicted by a Dorchester County Grand Jury for two counts of attempted murder and one count of possession of a weapon during the commission of a violent crime. Appellant proceeded to a jury trial on August 19-21, 2019, in the Dorchester County Court of General Sessions before the Honorable Maite Murphy. The State was represented by Assistant Solicitors Mike Spears and George Smythe. Chad Shelton, Esq. and Michael Barrett, Esq. represented the Appellant. The jury found Appellant guilty as indicted on each count. He was sentenced to consecutive terms of thirty years' imprisonment for both counts of attempted murder. He was sentenced to a concurrent five year term for the weapons charge for an aggregate total of sixty years' imprisonment. This appeal follows.

## STATEMENT OF FACTS

On June 4, 2016 Kimberlee Felder and her best friend, Regina Wright, went to a club for Wright's birthday. (Tr. 102). Felder's husband, Carsheme Dinkins, stayed at Felder's mother's house with their children. (Tr. 102). Felder and Wright met at a club by the name of "221" shortly after 10:00 PM. (Tr. 102). They left the club around 3:00 AM in the morning on June 5, 2016 and went to Waffle House to get Wright food to sober her up. (Tr. 104). Felder went inside to get the food and then sent Wright home with Wright's sister and sister's boyfriend because Wright was too intoxicated to drive. (Tr. 104). Felder had not been drinking because she was still nursing her youngest child. (Tr. 103). Felder drove Wright's car back to her mother's home, where she woke Dinkins up. (Tr. 105). They needed to pick up his truck so that it would not get towed. (Tr. 105).

With Felder driving and Dinkins in the passenger seat, they drove to the Waffle House. (Tr. 105). Before they arrived, they were stopped by a red light. (Tr. 105). Felder heard sounds of "ting, ting, ting." (Tr. 105). She looked over her left shoulder and saw a car approaching on the driver's side. (Tr. 105). Felder saw her cousin Damon Riley (Appellant) leaning out of the car window and firing shots at her and Dinkins. (Tr. 107). Felder was shot in the face and Dinkins was shot in the arm. (Tr. 108, 136). Dinkins managed to pull the car over from the passenger seat and put Felder in the back seat. (Tr. 108). Dinkins drove them to Trident Hospital. (Tr. 110).

Jacob Cramer, a Field Training Officer with the Summerville Police Department (SPD), heard the shots and responded to the area. (Tr. 157). Cramer found shell casings, so he shut down the road and secured the scene. (Tr. 157).

Chris Hirsch, a detective with SPD, was called out to the scene of the shooting. (Tr. 142). He was briefed on the scene and where the shell casings were found. (Tr. 143). After investigating the scene, he returned back to the Summerville Police Department. (Tr. 143). The

vehicle that the victims had been driving was towed from the hospital back to SPD. (Tr. 143). The car was searched and projectiles were found in the bullet holes of the car. (Tr. 149). There was no evidence found that shots were fired from the victim's vehicle (Tr. 149).

Nick Santana, a Sergeant with SPD, went to the hospital to speak to the victims. (Tr. 202). He was not able to speak to Felder as she was being prepped for surgery. (Tr. 203). He did however, speak with Dinkins and was able to obtain the name Damon Riley as a suspect in the case. (Tr. 203). He returned to the police department to obtain attempted murder warrants as well as possession of a firearm for Appellant's arrest. (Tr. 203).

On June 10, 2016, Santana received information that Appellant was in Summerville at an apartment complex. (Tr. 205). Officer Cramer was called out for the warrant service to try and apprehend Appellant. (Tr. 162). He was given the description of the vehicle Appellant was seen getting into. (Tr. 163). He conducted a traffic stop of the vehicle just around the corner from where it was seen leaving. (Tr. 163). There were five individuals found in the car. (Tr. 163). Cramer received identification from four of the individuals, but not from Appellant, who was whom they were looking for. (Tr. 163).

Appellant was removed from the car. (Tr. 166). When asked his name he stated, "Damon Riley. I know I got warrants, just put me in the car." (Tr. 166-167). Behind the back passenger seat, where Appellant was sitting, a Glock 19 was found beside Appellant's identification card. (Tr. 168). Chad Smith, an expert in firearms analysis, was able to determine that all thirteen 9mm cartridges found on scene were fired from Appellant's gun. (Tr. 283-284).

Appellant was taken back to SPD and given his Miranda rights. (Tr. 206). Appellant provided Santana with an alibi stating he was in Columbia at the time of the shooting. (Tr. 208).

Appellant was not able to provide Santana with any receipts or evidence that this was true and Santana could not find anything that supported his alibi. (Tr. 208).

Santana was able to meet with Felder on June 15, 2016. (Tr. 211). She informed Santana that she was driving the vehicle that was shot that night. (Tr. 211). She further informed him that she saw her cousin, Appellant, fire a gun from another vehicle. (Tr. 211). Santana was also able to recover a bullet fragment that had been removed from Felder. (Tr. 212).

A search warrant was obtained for Appellant's phone. (Tr. 209). Text messages were found on Appellants phone showing he was headed to Summerville on the night of the shooting. (Tr. 239). There was also a video found of Appellant holding a gun and pointing it at the camera. (State's Exhibit 30). From that video there were still shots created. (State's Exhibit 39-43). It was determined that the gun in these videos and pictures was a Glock 19. (Tr. 257).

The video (State's 30) and still shots (State's 39-43) were introduced at trial. Defense Counsel objected to the admission of the video and still shots on the basis of 404(b) and 403 objections. (Tr. 197) Specifically, as to character. (Tr. 197). Defense counsel argued that since Appellant was in a car with a firearm and waving it around that could be unlawful carrying therefore, the video is showing a crime or bad act. (Tr. 197-198). He further argued that the video is highly prejudicial and the probative value was not outweighed by the prejudicial value. (Tr. 198).

The State argued that they were introducing the evidence for the purpose of showing Appellant is holding a Glock 19. (Tr. 198). The State further argued that in doing so it showed that the same make and model gun was in previous video of him and is the gun found in the car by his identification excluding the other people potentially possessing it. (Tr. 198). The trial

judge ruled that the evidence was admissible to prove possession of the gun by Appellant. This appeal follows.

## STANDARD OF REVIEW

“In criminal cases, the Appellate court sits to review errors of law only.” State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). “A trial judge has considerable latitude in ruling on admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion.” State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). “A ruling on the admissibility of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008). “An abuse of discretion occurs when the trial court’s ruling is based on an error of law.” Id. “If there is any evidence to support the admission of bad act evidence, the trial judge’s ruling cannot be disturbed on appeal.” State v. Martucci, 380 S.C. 232, 253, 669 S.E.2d 598, 609 (Ct. App. 2008). “To warrant reversal based on the admission or exclusion of evidence, the [A]ppellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury’s verdict was influenced by the challenged evidence or lack thereof.” State v. Singleton, 395 S.C. 6, 13, 716 S.E.2d 332, 336 (Ct. App. 2011)(quoting Fields v. Reg’l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)).

## ARGUMENT

### I.

**The trial judge did not abuse her discretion in admitting video footage and still photos of Appellant holding a gun because it was not prior bad act evidence.**

Appellant contends that the trial judge erred in admitting video footage and photographs of Appellant posing with a gun. Specifically, Appellant argues the footage and photographs were inadmissible under Rule 404(b), as it showed Appellant posing with a gun in a moving car. Appellant further argues this was unlawful carrying of a handgun and therefore shows Appellant committing a crime. Appellant's argument lacks merit because the video footage and photographs are not prior bad act evidence because they were not introduced to prove the character of Appellant. Further the evidence's probative value was not significantly outweighed any risk of unfair prejudice.

"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, absence of mistake or accident, or intent." Rule 404(b), SCRE. "To be admissible, a bad act must logically relate to the crime with which the defendant has been charged." State v. Fletcher, 379 S.C. 17, 23, 664 S.E.2d 480, 483 (2008). "If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing." Id. Even if prior 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. Rule 403, SCRE.

In State v. Thompson, the State introduced a trespass notice letter that stated defendant had been banned from the apartment. State v. Thompson, 420 S.C. 386, 393, 803 S.E.2d 44, 48 (Ct. App. 2017). Defendant objected arguing that the letter was impermissible character evidence

because it indicated defendant committed a prior bad act to justify banning him from the apartment complex. Id. at 397, 49. This Court held that the letter was not improper character evidence because a person could be banned from an apartment for many reasons that do not include committing a prior bad act. Id. at 398, 50. Further, there was no testimony as to why defendant was banned from the apartment. Id.

In State v. Patterson, Patterson argued that the trial court erred in admitting testimony that his DNA matched a DNA database search because it implied that Patterson had a criminal record in violation of Rule 404(b). State v. Patterson, 425 S.C. 500, 510, 823 S.E.2d 217, 223 (Ct. App. 2019). Again, this Court held that the testimony was admissible because the reference to the database did not refer to Patterson as a suspect, there was no mention of where the database came from or its purpose, nor was there testimony of Patterson's prior record. Id.

Similarly, in this case, the video footage and still photos of Appellant posing with a gun were not introduced to show that Appellant was unlawfully carrying a gun, or that he had a propensity for violence, but for the purpose of showing that he possessed a Glock 19. The testimony that followed the video and photos was the testimony of Richard Gebhardt, an expert in firearms identification, whose main purpose in testifying was to determine that the make and model of the handgun in the video and photos was a Glock 19. (Tr. 257). There was also testimony of four other people being in the vehicle with Appellant when a Glock 19 was found, so the purpose of the video footage and photos was to exclude the other people in the vehicle from possessing the gun. Further, there was no testimony that Appellant had or did not have a concealed weapons permit and no testimony that Appellant had any prior crimes involving that or any weapon. Therefore the video footage and the photos were not impermissible character evidence and the trial judge did not abuse her discretion in admitting them.

## II.

**Even if the video footage and still photos were prior bad act evidence, it was admissible under the identity exception because it was introduced to establish Appellant as the shooter.**

“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, absence of mistake or accident, or intent.” Rule 404(b), SCRE. “Ofcourse, Rule 404(b), Federal Rules of Evidence prohibits the admission of evidence of past criminality for the purpose of establishing a criminal propensity. Such evidence is admissible, however, for other purposes including proof of Identity.” State v. Johnson, 623 F.2d 339, 341 (Fourth Cir. 1980). In Johnson, the Fourth Circuit Court of Appeals held that past masked photos of a bank robber were admissible in his trial for a different bank robbery for the purposes to show his identity. Id. “Evidence sufficiently relevant to the possession of particular property later used in furtherance of criminal activity is generally admissible to prove the identity of the accused in the subsequent trial for those crimes, even when such evidence incidentally reflects the defendant’s guilt of a previous crime.” State v. Gillian, 360 S.C. 433, 445, 602 S.E.2d 62, 69 (Ct. App. 2004). In State v. Stokes, the Court held that evidence of a subsequent shooting was admissible to connect Appellant to the gun used in the charged crime because that same gun was used in the past crime and found on him when Appellant was apprehended. State v. Stokes, 381 S.C. 390, 673 S.E.2d 434 (2009). The State introduced the video and photos of Appellant posing with a Glock 19 not for the purpose of showing him committing a crime or the propensity for criminal activity, but for the purpose of showing that Appellant possessed a Glock 19, a Glock 19 was found in the vehicle with

Appellant, and a Glock 19 was the type of gun that fired at the victims and their vehicle. The purpose the evidence was introduced was to establish Appellant's identity as the shooter.

### III.

**Admitting the video footage and photos were not unduly prejudicial to Appellant because any possible connection to prior bad act evidence would have had to come from pure speculation by the jury.**

Appellant argues that the video footage and photos was unduly prejudicial because the jury could see the trees moving in the windows of the video and therefore the video was showing a prior bad act because he was posing with a gun in a moving vehicle is unlawful carry of a weapon in violation of §16-23-20. In State v. Council, the Court held that no prejudice was found from the admission of testimony establishing that law enforcement already had defendant's fingerprints on record at the time of his arrest for the charged offense. State v. Council 335 S.C. 1, 515 S.E.2d 514 (1999). "This Court has held that similar references to a defendant's past conduct too vague to be prejudicial." Id. at 13, 514. The Court in State v. Singleton held that testimony from the arresting officer vaguely referencing defendant's prior crimes in the presence of the jury did not warrant a mistrial. State v. Singleton, 284 S.C. 388, 326 S.E.2d 153 (1985). In State v. Stokes, the Court held that the evidence of defendant's subsequent shooting was not unduly prejudicial because it was not offered to show defendant's bad character, but to connect defendant to the weapon used. State v. Stokes, 381 S.C. 390, 673 S.E.2d 434 (2009). In all of these cases the trial judge found that actual references to past crimes in testimony in front of the jury was not prejudicial enough to be inadmissible or create reason for a mistrial. In this case there was no reference at all to any bad act. The jury would have had to speculate simply by watching the video that Appellant had committed a prior bad act. The Supreme Court has held that actual references, although vague, to a defendant's past crimes were

not prejudicial enough to be excluded, a potential jury speculation is definitely not sufficient to be prejudicial.

Even if the jury somehow did come to the conclusion that Appellant was committing another crime in the video footage and still photos based on the trees moving in the window, Appellant was not prejudiced because the State never attempted to prove that Appellant was committing or had committed another crime. There was no testimony or insinuation that the car was moving, no testimony that Appellant did or did not have a permit to carry the gun or any testimony that Appellant had committed a crime whatsoever. The only testimony that went along with the video footage and still photos was that the type of gun shown in them was a Glock 19. Finally, probative value of the video footage and photos of Appellant posing with the gun was not substantially outweighed by the risk of unfair prejudice to Appellant. Therefore the trial judge did not abuse her discretion in admitting video footage and photos of Appellant posing with a gun because any prejudicial effect it may have had would have had to come from the jury's pure speculation.

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

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February 3, 2021

STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM DORCHESTER COUNTY  
Court Of General Sessions  
The Honorable Maité Murphy, Circuit Court Judge

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Appellate Case No. 2019-001810

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THE STATE

Respondent,

v.

DAMON R. RILEY

Appellant

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**PROOF OF SERVICE**

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I, Anne Mueller, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Joanna K. Delany, counsel of record for Appellant, by sending one copy by electronic mail to the address listed for counsel in AIS.

I further certify that all parties required by Rule to be served have been served.  
This 3<sup>rd</sup> day of February, 2021.



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**SC Court of Appeals**

**State v. Damon R. Riley, 2019-001810**

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 2 attachments (1 MB)

Riley Damon -Cover letter for IBOR (02481541xD2C78).PDF; Riley Damon - Initial Brief of Respondent and Designation of Matter (02481494xD2C78).PDF;

Good afternoon, Ms. Delany.

Attached to this email is the State's Initial Brief of Respondent and Designation of Matter along with Ms. Muller's cover letter. We will be filing the brief and designation with the court electronically later today.

If you don't mind, we would appreciate it if you would acknowledge receipt of this email and the attachments by return email.

Thank you.

Sincerely,

Anne Mueller

Legal Assistant for Ambree M. Muller, Assistant Attorney General

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