STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-001529

THE STATE, ...RESPONDENT,

v.

CURTIS ALLEN BABB, JR., ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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I. The trial judge properly allowed the State to introduce a video recording of the crime because the State's witness explained the objected to portion of the video, showing images of bullet holes from a prior shooting, were from a prior incident entirely unrelated to Appellant's charged offenses.

II. The trial judge properly allowed the State to introduce evidence regarding Appellant's ownership of a shotgun where the evidence was not of a prior bad act, but related to Appellant's possession of the shotgun during the crime in question and proved his identity as one of the men responsible for Victim's death.

STATEMENT OF THE CASE

In a multi-count indictment true billed in September 2018, the Greenville County Grand Jury indicted Appellant for the December 8, 2016 murder of Clinton Pearson; for the first degree burglary of Clinton Pearson and/or James Moss; for the attempted armed robbery of Clinton Pearson and/or James Moss; for possession of a weapon during the commission of a violent crime; and for conspiracy with Connell Shauntaveis Wells, Jr. and/or William Shane Fordham Brown to commit murder and/or burglary and/or armed robbery.

From August 12 through 16, 2019, Appellant proceeded to a jury trial before the Honorable Robin B. Stillwell. (Tr.p.1). The State jointly tried Appellant with Brown, one of the codefendants named in the conspiracy portion of the indictment. (Tr.p.1). Sarah M. Henry, Esquire, represented Appellant at trial. Assistant Thirteenth Circuit Solicitors Elizabeth Gary and Katryna B. Owens prosecuted the case. (Tr.p.1).

The jury convicted Appellant as indicted. (Tr.p.858, lines 18–24). Pursuant to Appellant's criminal history which included four convictions for attempted criminal homicide, the State sought a sentence of life without the possibility of parole. (Tr.p.860, line 7–Tr.p.864, line 24). Accordingly, the trial judge sentenced Appellant to life without parole for this murder, burglary, and attempted armed robbery convictions; he received concurrent sentences of five years' incarceration for his possession of a weapon during the commission of a violent crime and conspiracy convictions. (Tr.p.867, lines 6–19).

Appellant filed a timely notice of appeal and a brief in support of his position. This Brief of Respondent now follows.

STATEMENT OF FACTS

James Moss lived on "a dead-end street down there next to the railroad tracks" in Greenville. (Tr.p.147, lines 3–8). Moss rented out space in the house to help with his own costs. (Tr.p.147, lines 12–17). Sometime after 1:00 in the morning on December 8, 2016, Clinton Pearson was asleep on Moss' sofa when someone kicked in the door. (Tr.p.148, line 2–T.p.149, line 5). From his own bedroom, Moss awoke to the noise and heard an intruder say "you got my money?" (Tr.p.149, lines 3–10). Moss did not know how many suspects there were in total, but he remembered hearing multiple voices. (Tr.p.159, lines 24–25; Tr.p.162, lines 5–8). Moss heard "two voices outside" the house, and heard and saw one other person enter the house. (Tr.p.150, lines 20–22; Tr.p.156, lines 7–13; Tr.p.162, lines 5–10). Moss peeked "around the corner" and was able to "barely" view the "first person come in shooting." (Tr.p.150, lines 9–11; Tr.p.154, lines 2–22). Moss described the intruder as "about five-foot something," wearing a hood, and holding "a little small gun" in his hand. (Tr.p.151, lines 10–17; Tr.p.162, lines 16–18). Moss hid in his closet in the back room. (Tr.p.149, lines 13–15; Tr.p.150, lines 9–13). Moss testified that "[a]fter a while, they kicked the door next to [him] and they shot in there about three times." (Tr.p.150, lines 12–14).

Moss emerged from his hiding place when the "commotion" died down. (Tr.p.150, lines 14–15). After Moss called the police, he drove up the road to Poinsett Highway and met with Greenville County Deputy Judson Belding. (Tr.p.151, line 22–Tr.p.152, line 8; Tr.p.166, lines 2–5). Speaking to Belding, Moss described the intruder he saw as a short, young, dark-skinned black male. (Tr.p.155, lines 10–17; Tr.p.160, lines 16–20; Tr.p.174, lines 11–13). Moss told Belding "there was a friend of his roommate asleep on the couch when he went to bed. And that he was woken up by the front door being kicked in. He heard someone say, [']Where is my money?['] And then he heard gunshots." (Tr.p.174, lines 4–8). Moss told Belding "he hid in his

closet," and that "while looking back towards the doorway of his room, he observed a male ... go into the room of his roommate. After this, when he felt it was safe to do so, he quickly went out the back, got into his vehicle and called 911 for help." (Tr.p.174, lines 9–15).

Greenville County Deputy Joshua Shaw responded to the house and located the victim on the floor inside the front entryway. (Tr.p.181, lines 1–7). He was nonresponsive and had been covered with "a black cloth" that appeared to match the curtain hanging in that room. (Tr.p.181, lines 7–10). Forensic pathologist Dr. Michael Ward conducted an autopsy on the victim later that morning. (Tr.p.227, lines 9–18). Dr. Ward noted three gunshot wounds to the chest, each fatal or potentially fatal on its own. (Tr.p.226, line 24–Tr.p.227, line 1; Tr.p.228, lines 8–23; Tr.p.230, line 18–Tr.p.231, line 6; Tr.p.232, lines 5–14). Dr. Ward also testified that each of the three gunshots traveled in an upward direction. (Tr.p.234, lines 11–13). The victim was five-foot-eleven. (Tr.p.234, lines 21–22).

Dustin Kretschmar, a forensic technician with Greenville Public Safety, responded to the house and began processing the property for evidence. (Tr.p.196, lines 3–25). Kretschmar collected a total of three .40 caliber shell casings from the scene. (Tr.p.205, lines 1–7). He documented damage to the doorknob area of the front door. (Tr.p.206, lines 13–18). He documented gunshot holes in the front window and fragments of plexiglass on the interior of the windowsill. (Tr.p.207, lines 12–16). The bullet holes appeared to have been fired from the outside in. (Tr.p.207, lines 12–17). He also documented a small cut to one of the victim's fingers and a cell phone in one of his hands. (Tr.p.207, lines 3–6). Kretschmar documented additional damage to the doorknob and door frame of the rear bedroom door. (Tr.p.208, lines 7–8).

Also during the early morning hours of December 8, 2016, Greenville City Police Officer Ryan Weeks responded to a reported gunshot victim at an apartment complex on Shemwood

Lane in Greenville. (Tr.p.237, lines 15–22). He arrived at Apartment 29-C at 5:14 that morning. (Tr.p.238, line 22). Inside the apartment, Weeks located a male, Connell Wells, on the sofa with a bloody wrap around his knee. (Tr.p.239, lines 1–9; Tr.p.245, lines 11–15). Weeks also located a female, Kia Sims, mopping up the kitchen. (Tr. p. 239, lines 11–16). Weeks called EMS to the scene to tend to Wells's knee. (Tr.p.245, lines 15–17). Weeks observed a large injury to Wells's right knee which appeared to be a gunshot wound. (Tr.p.245, lines 17–20). Weeks witnessed shotgun pellets fall from the bloody bandaging as EMS removed it from the wound. (Tr.p.246, lines 7–10). Weeks also witnessed a piece of plastic shotgun wadding fall from the bandage. (Tr. p. 246, lines 10–12). Weeks documented a red Crown Victoria parked in front of the apartment. (Tr.p.250, lines 5–10). The car was registered to Connell Wells. (Tr.p.250, lines 12–16). Weeks observed "a large amount of what appeared to be blood in the back seat of the vehicle." (Tr.p.252, lines 16–17).

Greenville County Investigator Christopher McCalmont contacted Wells at the hospital several hours later, after Wells came out of surgery and his anesthesia had worn off. (Tr.p.287, line 12–Tr.p.288, line 7). McCalmont spoke with Wells on three occasions: December 8 in the hospital, December 9, and again on December 22. (Tr.p.330, line 11–Tr.p.331, line 8). On December 9, 2016, McCalmont also executed a search warrant on Apartment 29-C, during which time McCalmont spoke to the female residents of the apartment, including Sims. (Tr.p.332, lines 2–11; Tr.p.334, line 15–Tr.p.335, line 11). McCalmont learned that Appellant William Shane Fordham Brown lived at Apartment 29-C. (Tr.p.335, lines 12–22).

Fingerprints collected from the red Crown Victoria parked outside of Apartment 29-C matched Connell Wells and Brown. (Tr.p.337, lines 5–19). Greenville County Sergeant Dar Shaw processed the Crown Victoria for evidence on December 8. (Tr.p.382, lines 15–

17). Inside the car, Shaw located "a stocking mask," "a boot," and what "looked like blood in different areas of the vehicle, on the outside as well as on the inside." (Tr.p.384, lines 1–4). Shaw better described the mask as "a brown stocking mask with eyeholes" which he located and collected from the rear passenger floorboard. (Tr.p.388, lines 15–16). Shaw collected "a black hooded sweatshirt" from the rear passenger floorboard as well. (Tr.p.386, line 25–Tr.p. 387, line 1). Shaw collected "a black hoodie with a red bandanna in the pocket," a cell phone, and "a black gym bag" from the front passenger seat. (Tr.p.388, lines 16–18; Tr.p.391, lines 19–24). From the trunk, Shaw collected "a red bandanna with two pair of gloves wrapped inside." (Tr.p.394, lines 3–11).

As a result of his investigation, McCalmont developed Brown, Connell Wells, and Appellant (Curtis Babb, Jr.) as suspects in the shooting that took place at the home of James Moss. (Tr.p.338, lines 17–23). Law enforcement located Brown in Baltimore, Maryland, and apprehended him there on January 17, 2017. (Tr.p.358, line 20 –Tr.p.359, line 2).

While executing a search warrant on an unrelated case, McCalmont went to a home located off of Shirley Street where he spoke to one of the home's residents, Deashia Babb. (Tr.p.338, line 24–Tr.p.339, line 19). McCalmont discovered Deashia Babb was a relative of Appellant. (Tr.p.339, lines 20–25). While executing the warrant, officers found a bolt-action shotgun with a sawed-off stock. (Tr.p.346, lines 17–24). McCalmont noted that bolt-action shotguns are fairly are, and this was the only one he had ever personally seen. (Tr.p.347, line 24–Tr.p.348, line 8). As a result of the search warrant, officers arrested Shyheim Looper and charged him with crimes unrelated to Appellant's appeal. (Tr.p.348, lines 10–16).

Prior to trial, Wells pled guilty to murder for his participation in Pearson's death. (Tr.p.272, lines 3–18). However, Wells invoked his Fifth Amendment privilege and refused to answer any other questions regarding the case. (Tr.p.272, line 19–Tr.p.275, line 7).

Looper, who by the time of trial had pled guilty and sentenced for several crimes, testified about his knowledge of Appellant. (Tr.p.534, line 5–Tr.p.535, line 3). In December of 2016, he lived at the Shirley Street home along with Deashia Babb, the mother of this child. (Tr.p.535, lines 4–24). He knew Appellant through Deashia, and hand known him approximately a year at that time. (Tr.p.535, line 25–Tr.p.536, line 21). When asked whether he told investigators that he obtained the shotgun from Appellant, he stated he did not "recall telling them that" and claimed he found the gun in an abandoned house. (Tr.p.536, line 22–Tr.p.540, line 5). He also did not recall informing officers that he felt his life would be in danger if he signed the written statement memorializing that he told police the shotgun belonged to Appellant. (Tr.p.547, lines 12–22). However, on cross-examination, Looper admitted he did tell police that he obtained the gun from Appellant but did so because police pressured him to do so by threatening his family. (Tr.p.544, line 7–Tr.p.546, line 2)

Damean Wideman testified he lived at the apartment complex on Shemwood Lane and knew Brown "[fJrom the neighborhood." (Tr.p.403, lines 10–25; Tr.p.406, lines 17–22). Wideman called Brown "Little nephew," but he also knew him as "Deuce." (Tr.p.406, lines 23–25; Tr.p.407, lines 7–10). They are not related by blood. (Tr.p.407, lines 17–21). Wideman identified Brown in the courtroom. (Tr.p.409, lines 2–14). At an earlier date, Wideman told officers that he had known Deuce and his family for about two years. (State's Exhibit 39).

Wideman identified a photograph of Deuce for officers at that time. (Tr.p.460, line 16–Tr.p.461, line 7; State's Exhibit 39).

At trial, Wideman testified because he had been arrested at a traffic stop a few days after the shooting. (Tr.p.448, lines 15–18). He told his arresting officer "that he was afraid of a gentleman, [Appellant], that lived in Shemwood[.] He said he had heard on the street that [Appellant] was involved in" the shooting at Moss' house. (Tr.p.448, lines 20–25). Wideman went on to speak to a handful of officers that day. (Tr.p.411, lines 7–24; State's Exhibit 39). He told them he had been "threatened by several people in the neighborhood" including Appellant. (Tr. p. 412, lines 15–24). Wideman told officers that Appellant made the threat to "kill" Wideman because Appellant learned Wideman "was spreading rumors on him." (Tr.p.416, lines 1–8; Tr.p.452, lines 13–19). Wideman provided an audio-recorded statement. (State's Exhibit 39). In the statement, he repeatedly stated he was concerned about the threats he was receiving from Appellant, whom Wideman at one point referred to as "one of your guys in one of your homicides." (State's Exhibit 39). Wideman spent several minutes in his statement revealing that "the night of the crime" Appellant told him that he had "a lick" and asked Wideman for gloves to carry it out. When Wideman inquired further, Appellant reportedly said, "Deuce got a lick set up for [them]." Wideman stated that Appellant, Deuce, and "the guy that's in the hospital" met up at the Shemwood Apartments to get "suited up" in black clothing and gloves. (State's Exhibit 39). Wideman said the three men intended to rob someone of "supposedly a half a brick of cocaine in the house." (State's Exhibit 39). Wideman reported that when the three men got to the house they planned to kick in the door and tell the people inside "don't move just like a regular robbery," but "when they got there, Deuce shot through the window," then Appellant "went in and kicked the door open and they guy was laying there dead and they

pulled him off the couch." (State's Exhibit 39).

Wideman said that people saw the three men return to the apartments with the black gym bag and then saw the incident reported on the news. Wideman stated that the three men talked about what happened "all day" after that, and that "everybody knew what they were fixin' to do" anyway. (State's Exhibit 39). Wideman denied most of the details from his prior statement when he testified at trial, instead maintaining the information consisted of "rumors." (Tr.p.416, line 1–Tr.p.417, line 10; Tr.p.431, lines 22–25). The parties stipulated at trial that Brown was known as "Deuce" and the court instructed the jury that "Deuce" was Brown's nickname. (Tr.p.576, lines 10–22). Lieutenant Robert Pendergrass with the Greenville County Detention Center testified that a keyword search in the jailhouse email system for Brown's records containing the keyword "Deuce" returned forty-seven pages of results. (Tr.p.572, lines 1–16). These results included an email Brown sent to one Andre Wagner on February 28, 2019. (Tr.p.570, line 16–Tr.p.571, line 17). In that email, Brown instructed Wagner to quickly get in touch with Damean Wideman and tell him "not to show up at trial and to shut the f--- up." (State's Exhibit 44). The email specifically refers to "Butta" as the person scheduled for trial. (State's Exhibit 44). Earlier at Brown's trial, Wideman testified that he knew Connell Wells as "Butta." (Tr.p.409, lines 15–22).

Investigator Chad Maltby of the Greenville County Sheriff's Office and investigated armed robbery and other violent crimes for the sheriff's office. (Tr.p.548, line 12–Tr.p.549, line 7). He interviewed Wideman and testified that he was never threatened or coerced into providing any of the information relating to this case. (Tr.p.549, line 21–Tr.p.550, line 17). Additionally, Investigator Maltby was involved in the investigation into Looper's crimes. (Tr.p.550, line 18–Tr.p.551, line 1). He was present at the home when the bolt-action

shotgun was found and identified it at trial. (Tr.p.553, line 23–Tr.p.555, line 22). Later, when he interviewed Looper, the latter told him that he obtained the gun from Appellant, who was related to his child's mother. (Tr.p.557, lines 1–21). Looper obtained the gun from Appellant approximately a week before the police interview, near the Shemwood Apartments/Butler Community. (Tr.p.558, line 21–Tr.p559, 8). Prior to that, officers had no idea that the shotgun had belonged to Appellant. (Tr.p.557, lines 22–25). Further, he confirmed Looper feared that his safety was in jeopardy by identifying Appellant. (Tr.p.558, lines 7–20). Portions of Investigator Maltby's interviews with Appellant were played at trial, confirming his testimony and the fact that Looper identified Appellant as the owner of the shotgun. (Tr.p.559, line 9–Tr.p.560, line 14; Tr.p.609, line 20–Tr.p.611, line 19).

Charles Moore, a custodian of records for the Greenville County Detention Center, identified several phone calls made by Appellant while incarcerated there. (Tr.p.477, line 4–Tr.p.480, line 20; Tr.p.489, lines 6–9) Those calls included: (1) Appellant discussing Wideman, whom he identified as "the snitch" needing to sign an affidavit; (2) Appellant checking up on whether Wideman signed an affidavit recanting his statement to police, and the person on the other end of the phone call claiming the affidavit has been drafted; (3) a call about getting the affidavit notarized and that everyone in the statement did what they were supposed to do; and (4) a conversation about having the affidavit dropped off at the solicitor's office. (Tr.p.483, line 21–Tr.p.485, line 10; State's Exhibit 28) The edited calls were later published to the jury. (Tr.p.608, lines 4–22)

State's expert Jack Jamieson, SLED's document examiner, testified that Brown prepared State's Exhibit 23, a handwritten letter which states in part:

> ... but they know you were talkin about me bcuz you pointed me out in a lineup. But you need 2 rerace[sic] my name ... anyways you need 2 replace my name with someone else. 4 example, you remember that N--- "D" with the light blue maxima, Kandice's sister's baby daddy? Well that N---- all up in our case [redaction] basically bragging saying he caught a body, SMH, I got something 4 his b---- a--. But "D' real name is "Damean Wideman." Since he wanna snitch put his b---- a-- in it instead of me. Or remember that N---- you was beefing with that sold you that "hot" revolver? We don't have 2 say his name but why not say his name? Why tell on your right hand man? The evidence says u don't have any blood @ the crime scene!! SMH, u told 4 nothing. U need to talk to your lawyer, the investigators, & the Solicitor & tell them I ain't have nothing 2 do with it. If they ask u y u put my name in it just say bcus I called 911 (Ambulance) instead of driving you out of town to a far away hospital bcus I thought u would die B4 we made it. Just be like you were mad@ me 4 calling the police. I got my whole motion so I know every loophole in our case. I even know how 2 make sure u don't get charged with murder and get off. . .. Either way I'm gettin off eventually because the only evidence against me are your statements. That's it. It's up 2 you now N----. Wat u gonna do??? Not 2 Late 2 fix this s b4 it gets real ugly & u know wat I mean bra. I mean wat would you do if I snitched on you? *Ion[sic]* want my people 2 take it there though but you leaving me no choice bra. Hit me Back ASAP!!! ...

(Tr.p.628, line 17–Tr.p.629, line 8; State's Exibit 23).

Chris Shipman, an attorney who previously represented Connell Wells, testified that Wells gave him this letter during the course of his legal representation. Shipman passed a copy along to the State at that time. (Tr.p.585, line 17–Tr.p.587, line 12).

Brown presented Nakia Sims at trial. (Tr.p.708, lines 3–13). Sims lived with Brown at the Shemwood apartment 29-C in December 2016. (Tr.p.708, line 22–Tr.p.709, line 24). Sims testified that she saw Brown asleep in his bedroom around midnight on the night of the

incident. (Tr.p.712, lines 1–15). Sometime after that, Sims awoke to a banging at the door downstairs. (Tr.p.713, line 20–Tr.p.714, line 9). When she left her bedroom to investigate she testified she ran into Brown at the staircase. (Tr.p.714, lines 10–25). Sims went on to testify about the arrival of Wells with his bloody knee and Brown's calling an ambulance. (Tr.p.716, line 1–Tr.p.717, line 25). Sims testified that, to her knowledge, Brown was at their apartment the entire time, but she did not recall what time Wells arrived. (Tr.p.719, lines 11–23). She never saw Brown leave or run down the hill away from their apartment. (Tr.p.723, lines 12–19).

In reply, the State called Investigator McCalmont back to the stand. (Tr.p.728, lines 3–6). McCalmont testified that when he executed the search warrant on Apartment 29-C the next day, Sims agreed to speak with him and told him that "Deuce and Connell show[ed] up at her apartment together" the night that Wells sustained the knee injury. (Tr.p.730, lines 21–24).

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Appellate courts are bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 453, 527 S.E.2d 105, 111 (2000). In reviewing findings on admissibility of evidence, appellate courts are limited to determining whether the trial judge abused his or her discretion, and whether that abuse of discretion has prejudiced the defendant. State v. Scott, 405 S.C. 489, 497, 748 S.E.2d 236, 241 (Ct. App. 2013) ("appellate courts recognize that the trial judge has considerable latitude [in the admissibility of evidence] and will not disturb such rulings absent a prejudicial abuse of discretion"). In criminal cases, appellate courts do not reevaluate the facts based on their view of the evidence, but merely determine whether the trial judge's ruling is supported by any evidence. Wilson, at 6, 545 S.E.2d at 829; State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003). "If there is any evidence to support the admission of the bad act evidence, the trial judge's ruling will not be disturbed on appeal." State v. Mathis, 359 S.C. 450, 462, 597 S.E.2d 872, 878 (Ct. App. 2004) *citing* State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001).

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Taylor, 396 S.C. 193, 720 S.E.2d 522 (Ct. App. 2011); State v. Kirton, 381 S.C. 7, 23, 671 S.E.2d 107, 114 (Ct. App. 2008). Abuse occurs when the determination of the trial court lacks factual support or is controlled by an error of law. Id. Evidence is deemed relevant and admissible if "it logically or reasonably tends to prove or disprove a crime charged or any fact material to the issue." State v. Tillman, 304 S.C. 512, 405 S.E.2d 607, 611 (1991). Evidence which is logically relevant to a material element of the offense will not be excluded because it may also show guilt of another crime.

Id. If the proffered evidence is determined to be relevant pursuant to Rule 401, SCRE, then the trial court must then consider whether the bad act evidence falls within an exception of Rule 404(b), SCRE. State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009).

ARGUMENT

I.

The trial judge properly allowed the State to introduce a video recording of the crime because the State's witness explained the objected to portion of the video, showing images of bullet holes from a prior shooting, were from a prior incident entirely unrelated to Appellant's charged offenses.

Appellant argues the trial judge erred in allowing the State to introduce a video of the crime scene into evidence because a portion of the recording showed bullet holes from a previous crime. The State disagrees with this allegation of error. Notably, the video was properly introduced after the State informed the Court its witness would explain the challenged bullet holes were from a previous crime unrelated to Appellant's charges. At trial, the witness testified as expected, informing the jury the disputed bullet holes were entirely unrelated to Appellant's case and eliminating any potential prejudice to Appellant.

Relevant Facts

At the beginning of trial, Appellant's counsel objected to the introduction of a video taken of the crime scene shortly after the murder, later identified as State's Exhibit 5. (Tr.p.190, line 17–Tr.p.191, line 4). Counsel objected to the video because the video contained images of other bullet holes in the home which occurred from other crimes which occurred at the residence. (Tr.p.191, lines 5–17). The State explained it sought to admit the video to show the crime scene as officers found it and to confirm officers did not tamper with anything prior to collecting evidence. (Tr.p.191, line 18–Tr.p.192, line 1). It noted that the officer through which the video was being introduced was prepared to explain to the jury that the challenged bullet holes were from a prior, unrelated case and were excluded from his investigation. (Tr.p.192, lines 1–17). The trial judge ruled the video could be introduced, subject to appropriate authentication. (Tr.p.192, lines 22–25).

Kretschmar, confirmed State's Exhibit 5 accurately portrayed the home when he arrived at the scene. (Tr.p.198, line 16–Tr.p.201, line 12). After the video was published to the jury, Kretschmar testified the bullet holes on the exterior of the residence were not connected to Pearson's death and were from a shooting in a difference case from earlier in 2016. (Tr.p.201, line 14–Tr.p.202, line 5; Tr.p.213, lines 14–21). Kretschmar went on to explain that shells casings he found outside the home were, however, related to Appellant's shooting and that they were found beneath a front porch window from which the shooter(s) fired into the home. (Tr.p.202, line 6–Tr.p.205, line 3). The shells casings found were for a 40-caliber gun. (Tr.p.205, lines 4–12). On cross-examination, Codefendant Brown's counsel raised questions about when shell casings found at the scene were left there and whether they could have been there from a prior shooting. (Tr.p.214, line 8–Tr.p.215, line 4) Dr. Michael Ward, the forensic pathologist who performed Victim's autopsy, noted Victim suffered three gunshot wounds (Tr.p.222, line 14–Tr.p.228, line 1)

Analysis

Appellant argues the trial judge erred in allowing the State to introduce the crime scene video which showed bullet holes in the home's exterior predating the murder. The State disagrees with this allegation of error. The video, in general, was relevant to the State's case because it showed the crime scene to jurors and was used to explain the physical evidence recovered by investigators. Showing the portion containing the unrelated bullet holes did not mislead jurors in any way because the State's witness explained the bullet holes were unrelated to the defendants and the case.

Pursuant to Rule 401, SCRE: "'Relevant evidence' means 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." Additionally: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible." Rule 402, SCRE. "Although relevant, evidence may be excluded if its probative value is **substantially** outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE (emphasis added).

"Probative" means "[t]ending to prove or disprove." Black's Law Dictionary 1323 (9th ed. 2009). "Probative value" is the measure of the importance of that tendency to the outcome of a case. State v. Gray, 408 S.C. 601, 609–10, 759 S.E.2d 160, 165 (Ct. App. 2014). "It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues." Id. at 610, 759 S.E.2d at 165. "[T]he more essential the evidence, the greater its probative value." Id. (quoting United States v. Stout, 509 F.3d 796, 804 (6th Cir.2007)) (internal quotation marks omitted). "Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates." Gray, 408 S.C. 610, 759 S.E.2d 165.

"Unfair prejudice means an undue tendency to suggest decision on an improper basis." State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "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." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir.1993)). "[A]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided." United States v. Rodriguez–Estrada, 877 F.2d 153, 156

(1st Cir.1989). "The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172, 180, 117 S.Ct. 644, 650, 136 L.Ed.2d 574, 587–88 (1997).

In the instant case, the portion of the recording to the bullet holes was not unfairly prejudicial to Appellant. Appellant argument that the bullet hole evidence by citing to prior cases in which South Carolina courts found error in the admission of evidence which appeared unrelated to the charges facing defendants, State v. McConnell, 290 S.C. 278, 350 S.E.2d 179 (1986), and State v. Lee, 399 S.C. 521, 732 S.E.2d 225 (Ct. App. 2012). McConnell, specifically, included the improper admission of bullets recovered from the defendant's apartment and air conditioning unit which did not match the caliber of the weapon used on the victim. Id. at 279–80, 350 S.E.2d at 179–80. However, Appellant's cited cases differ from the instant matter in one critical aspect: the jury was informed the bullet holes were not evidence for the jury's consideration. Kretschmar explained the bullet holes were from an unrelated incident predating the murder. These direct statements eliminated the danger that the jury would be misled in any way by this evidence and ensured that admission of the value outweighed the potential for unfair prejudice. See Rule 403, SCRE (saying relevant evidence may be excluded only if its probative value is **substantially** outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . .).

II.

The trial judge properly allowed the State to introduce evidence regarding Appellant's ownership of a shotgun where the evidence was not of a prior bad act, but related to Appellant's possession of the shotgun during the crime in question and proved his identity as one of the men responsible for Victim's death.

Appellant argues the trial judge erred in allowing the State to introduce evidence related to Appellant's ownership of the shotgun because it was a "distinct" crime for which he was not charged and was thus irrelevant evidence of a prior bad act. The State disagrees with this allegation of error for several reasons: (1) the shotgun evidence was not evidence of a separate crime, but evidence of Appellant's participation in the crimes for which he was charged; (2) even if the shotgun evidence was evidence of a separate crime, it was admissible as evidence pursuant to Rule 404(b), SCRE; and (3) the disputed information was also admissible as res gestae evidence. Accordingly, the trial judge properly allowed its introduction at trial.

Relevant Facts

During the pretrial hearing, Appellant's counsel made a motion to exclude any evidence related to the shooting of Wells with the shotgun, arguing it was not confirmed with forensic evidence at the crime scene, Appellant was never indicted for it, and it was inadmissible evidence of a prior bad act. (Tr.p.45, lines 8–23). However, Appellant's counsel did not dispute the fact that Wells was injured by a shotgun; her main contention was that the State did not provide forensic testing linking the shotgun found at Looper's home with Wells's injury. (Tr.p.48, lines 12–18).

In response, the State explained Wells's shotgun injury was very relevant to the case because Wells was likely shot by Appellant during the robbery and went to the hospital for treatment hours after the murder occurred. (Tr.p.46, lines 1–24). Within weeks of the

murder, officers found the shotgun while investigating an unrelated case and Looper, in a recorded statement, told police that Appellant gave him the gun. (Tr.p.46, line 25–Tr.p.47, line 13). Law enforcement also discovered other compelling information,[1] including the fact that Looper had a direct connection to Appellant: Looper was in a relationship with Appellant's relative Deashia Babb. The trial judge decided to allow the State to develop the issue during the trial, explaining that evidence of the shotgun could potentially be relevant to establishing identity, intent, or the existence of a common scheme or plan. (Tr.p.49, line 21–Tr.p.50, line 8). However, the trial judge urged counsel to make contemporaneous exemptions when the evidence attempted to admit the evidence at trial. (Tr.p.50, lines 8–13).

When the State sought to admit evidence of the shotgun at trial, Appellant's counsel renewed her objection that evidence pertaining to Wells's injury and the shotgun was improper evidence of a prior bad act. (Tr.p.240, line 20–Tr.p.242, line 3). In response, the State explained the shotgun evidence was not being submitted as evidence of a prior bad act, but was used to identify him as a participant in the murder. (Tr.p.242, lines 4–24). The State noted that the evidence of the shotgun injury was being offered along with evidence presented later at trial to connect Appellant to the shotgun. (Tr.p.242, line 24–Tr.p.243 line 2). The State was emphatic that the shotgun evidence did not pertain to a separate uncharged crime, but pertained solely to the crimes for which Appellant stood trial. (Tr.p.243, lines 3–7). The trial judge overruled Appellant's objection, noting the evidence was not being

[1] The State also explained that Wells told investigators that he had been shot with a bolt action shotgun. (Tr.p.47, lines 14–22). Unfortunately, the State was not able to explore this later at trial due to Wells's invocation of his Fifth Amendment right against self-incrimination.

introduced as a prior bad act but as evidence that Appellant participated in the crimes charged. (Tr.p.243, line 21–Tr.p.244, line 18).

The Shotgun Evidence was Direct Evidence of Guilt

As noted by the State at trial, the shotgun evidence was not evidence of a separate crime. All of the State's evidence indicated Appellant was armed with the shotgun while he and his coconspirators murdered Pearson. First, Wells's participation in the charged crime was not contested at trial; he had pled guilty to the offense previously and that evidence was given to the jury. The evidence presented by the State was submitted to connect Appellant and Brown to Wells and Pearson's murder.

Officer Weeks testified he arrived at Wells's apartment at 5:14 a.m., only a few hours after the murder. While there, he saw clear evidence that the wound was caused by a shotgun. Not only was the wound severe, but shotgun pellets and shotgun wadding were present in the wound. Further, he observed Wells's vehicle was filled with a large amount of blood, indicating the shotgun wound happened at a location other than the apartment. Later, Dar Shaw processed the vehicle for evidence and found several items of clothing, including a stocking mask, which appeared to be related to the robbery. Wideman, who spoke with police the week after the murder, knew Appellant and the other conspirators and was told by Appellant himself that the men planned to rob a house for cocaine and saw the men leave to get "dressed" for the crime just before the murder. Wideman also told officers that Appellant shot Wells in the knee with a shotgun. Later, in a separate interview, Looper told officers that the shotgun found at his home was given to him by Appellant shortly after crime. In addition to bolstering the evidence against both Brown and Appellant participation in the murder, the evidence relating to the shotgun was, by itself, relevant to the question of Appellant's guilt. See Rule 401, SCRE ("'Relevant

evidence' means 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.")

Because the shotgun evidence pertained directly to the events surrounding the charges for which Appellant was put on trial, it was not evidence of a separate bad act.

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." State v. Cope, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013); see also State v. Weaverling, 337 S.C. 460, 467, 523 S.E.2d 787, 791 (Ct. App. 1999) *citing* State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923) ("Generally, South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt of the crime charged."); 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).

However, evidence of other crimes or misconduct is admissible to prove the specific crime charged when it tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related that proof of one tends to establish the other; or (5) identity. See Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923); also State v. Wilson, 274 S.C. 635, 266 S.E.2d 426 (1980); State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984); State v. Atkins, 309 S.C. 542, 424 S.E.2d 554 (1992); State v. Weaverling, at 468–69, 523 S.E.2d at 791; State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009); State v.Clasby, 385 S.C.148, 682 S.E.2d 892 (2009); "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. When considering whether there is clear and convincing evidence of other bad acts, an appellate court is bound by the trial judge's factual findings unless they are clearly erroneous. State v. Clasby, 385 S.C. at 154, 682 S.E.2d at 895, *citing* State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001).

Even if the evidence in dispute related to a prior/other bad act by Appellant, it was admissible pursuant to Rule 404(b), SCRE. Notably, evidence of separate bad acts is admissible for, among other reasons, proving the identity of the perpetrator of a crime. Rule 404(b), SCRE. In the instant case, the shotgun evidence was submitted for this exact purpose. Wells's participation in Pearson's death was not disputed at trial, nor did trial counsel challenge that law enforcement became aware of his shotgun wound mere hours after the murder. Establishing the identity of who possessed the shotgun which injured Wells would "logically relate" to establishing who was with him during the time period in which he was shot and Pearson was murdered. This information, without question, was probative to the question of who participated in the crime along with Wells.

Res Gestae

Evidence of prior bad acts is admissible when it furnishes part of the context of the crime or is necessary to a full presentation of the case. State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996); State v. Fletcher, 363 S.C. 221, 246, 609 S.E.2d 572, 585 (Ct. App. 2005). "The res gestae theory recognizes that evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred." Fletcher, 363 S.C. at 246, 609 S.E.2d at 585 (citing State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004). This evidence of other crimes is admissible:

> when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae' " or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ... '[and is thus] part of the res gestae of the crime charged.' And where evidence is admissible to provide this 'full presentation' of the offense," [t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "res gestae."

State v. Adams, 322 S.C. at 122, 470 S.E.2d at 370 71 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir.1980) (citations omitted)).

The evidence of each crime is essential to provide a full presentation of the context in which the crimes occurred. As explained supra and demonstrated by the evidence at trial, Wells's shotgun wound was inextricably tied to Pearson's murder and law enforcement's investigation into it. His shotgun wound led officers to Wells, his vehicle and the evidence within it, and various witnesses who provided evidence of the defendants' guilt. Wells's participation in the crime was undisputed, so the investigation into how he obtained his injury was important for demonstrating how the State's investigation led law enforcement to believe Brown and Appellant participated in the charged offenses; this, in turn, provided context for the State's case. See Adams, 322 S.C. at 122, 470 S.E.2d at 370–71.

Accordingly, evidence pertaining to the shotgun was admissible as res gestae evidence.

CONCLUSION

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

Respectfully submitted,

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March 10, 2021

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-001529

THE STATE, ...RESPONDENT,

v.

CURTIS ALLEN BABB, JR., ...APPELLANT.

PROOF OF SERVICE

I, Shana Montgomery, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by email to the address listed in AIS and with a copy of the same to follow in the United States mail, postage prepaid, addressed to:

Adam Sinclair Ruffin, Esquire
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I further certify that all parties required by Rule to be served have been served this 10th day of March, 2021.

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Cc: Shana Montgomery; Bill Schumacher; William Blitch
Subject: BABB Curtis A ; Appellate Case No. 2019-001529 ; IBOR (REVISED)
Attachments: 02511907.PDF

Good Afternoon,

Attached please find a revised copy of the Initial Brief of Respondent and Designation of Matter along with the proof of service for State v. Curtis A. Babb (2019-001529). Please confirm receipt. This Initial Brief will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System. Please don't hesitate to contact our office should you have any questions or concerns.

Thank You.

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