STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Edgar W. Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DALE EUGENE KING,

APPELLANT

APPELLATE CASE NO 2019-002078

FINAL BRIEF OF APPELLANT

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Whether the trial judge erred in failing to grant a mistrial after instructing the jury in his opening remarks that a trial was a search for the truth where such an instruction impermissibly shifted the burden of proof to the defendant?

2.

Whether the trial judge erred in failing to grant a mistrial after the decedent's sister testified that she advised the decedent to end her relationship with Appellant because Appellant physically assaulted her where the trial judge ruled such testimony was inadmissible?

3.

Whether the trial judge erred in allowing testimony that Appellant physically assaulted the victim two months prior to her death where the prior assault was not probative of intent or lack of mistake or accident, and any probative value was substantially outweighed by the danger of unfair prejudice?

STATEMENT OF THE CASE

Appellant was indicted by the Beaufort County grand jury for murder. R. 202. Appellant's jury trial was held before the Honorable Edgar W. Dickson and a jury from December 9 – 11, 2019. R. 1. Appellant was represented by Trasi Campbell. R. 1. The state was represented by Kimberly Smith and Hunter Swanson. R. 1.

The jury found Appellant guilty as charged. R. 190, ll. 16 – 19. The judge sentenced Appellant to thirty-five-years imprisonment. R. 200, ll. 14 – 18.

This appeal follows.

STANDARD OF REVIEW

Issues 1 and 2

"The decision to grant or deny a mistrial is within the sound discretion of the trial court." State v. Wilson, 389 S.C. 579, 585, 698 S.E.2d 862, 865 (Ct. App. 2010). "The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." Id.

"An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012).

Issue 3

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. Whitner, at 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009).

STATEMENT OF FACTS

On May 16, 2017, Matt Bowsher with the Beaufort Fire Department responded to the Atlantic Inn for a person who was possibly in cardiac arrest. R. 41, l. 25 – 42, l. 14. Bowsher arrived on the scene around 8:10 a.m. and found a woman who was "unresponsive, laying on the sofa, stiff and cold to the touch [and] also had signs of blood and a cut to the lip and also blood coming from the nose." R. 42, l. 15 – 43, l. 14. The woman was later identified as Veronica King, Appellant's wife of over thirty years.

Bowsher recalled that Appellant was present on the scene and that Appellant told him that King had a history of seizures and the two of them had been drinking with friends the night before. R. 46, l. 14 – 47, l. 1. Bowsher did not find any seizure medication. R. 47, ll. 18 – 19. A paramedic arrived shortly after Bowsher and found that the woman had "no cardiac activity whatsoever" and that her body was cold and stiff. R. 50, l. 20 – 53, l. 3.

Prior to law enforcement's arrival, Atul Patel, an employee of the hotel, recalled that Appellant came to his office and told him that King was not responding so Atul called 911. R. 56, ll. 9 – 18. Chet Patel owned the Atlantic Inn at the time of King's death, and he testified that both Appellant and King worked for him for almost seven years and lived in one of the rooms at the hotel during that time. R. 59, ll. 1 – 24.

Jerome Bates, who was married to King's sister, recalled speaking with Appellant on several occasions after King's death. R. 64, l. 7 – 66, l. 22. Bates maintained that on the morning of King's death, Appellant told Bates that he did not know what happened. Bates also testified that Appellant was "highly intoxicated." R. 66, l. 23 – 67, l. 4. Bates further stated that later, while he and Appellant were still at the hotel, Appellant stood in the doorway of his hotel room and said, "I have to face this the rest of my life." R. 68, ll. 1 – 8.

Bates further claimed that Appellant told him that King must have fallen and hit her head while taking a shower. R. 68, ll. 9 – 15. Bates then recalled that he and Appellant were sitting in the hotel room when he asked Appellant what happened and Appellant responded: "I went to sleep around 10:30, 11 and I did not wake up until about 8:00 the next morning. When I got up, I noticed [King] wasn't in the bed and I found her on the couch and was stiff." R. 69, ll. 19 – 25. Bates then claimed that Appellant was "questioning himself" out loud and asked: "What was I thinking? What did I just do?" R. 70, ll. 2 – 18.

Ultimately, Appellant left the hotel and went to stay with Bates at his house later that day. While at Bates' house, Bates claimed that Appellant said: "[King] wanted to take a shower and I just told her to get her ass in bed and we'd wash up in the morning when we get up. I don't know why she just made her head so hard. She just wouldn't listen to me." R. 71, l. 17 – 72, l. 7.

Appellant was arrested the following day after law enforcement received the preliminary autopsy results which showed King was strangled. R. 96, l. 13 – 100, l. 24. After Appellant was arrested, Bates recalled having two separate conversations with Appellant while he was in jail. First, Bates claimed that Appellant said he put King in the shower and as he was taking her out of the shower, she "slipped and she felt like dead weight" so he put King on the bed. R. 73, ll. 3 – 16. Bates claimed that in a second conversation with Appellant, Appellant said he grabbed King by the neck while getting her out of the shower and that she accidently fell and hit her mouth. R. 73, ll. 17 – 24.

The morning that King was found dead, Appellant was transported to the Beaufort City Police Department to be interviewed. R. 92, l. 3 – 93, l. 25. Investigator Dowling, who interviewed Appellant, recalled his initial conversation with Appellant:

> [Appellant] advised that he resided in that unit with his wife, that the previous night they had been consuming alcohol with friends and he explained that at roughly 10:00 to 11:00 that his friends had departed and . . . it was just him and his wife, that they had secured the hotel room. . . . He stated that they both went to bed together. He didn't report any disturbance or any arguments that occurred.
>
> He advised me that when he woke up in the morning at roughly 8 a.m., that he found his wife on the couch. He went over to investigate, and he described that he had rolled her over and noticed that she wasn't breathing.

R. 94, l. 12 – 95, l. 6. Dowling further recalled that in Appellant's first interview, Appellant said that he believed King might have taken a shower that night and that Appellant did not like King taking showers after she had been drinking for fear that she would slip and fall. R. 95, ll. 12 – 25.

Dowling interviewed Appellant again the next day prior to arresting him. R. 96, l. 13 – 100, l. 24. In the second interview, Dowling claimed that Appellant admitted to being angry at King for wanting to take a shower because she had been drinking. R. 100, l. 25 – 101, l. 23. Appellant then supposedly told Dowling that if he was responsible for King's death that "it was not intentional and that he didn't mean to hurt [her]." R. 103, ll. 4 – 14. Appellant further admitted that he and King were fighting on the night of her death and that he slapped her in the face at one point. R. 103, l. 15 – 104, l. 11.

The autopsy of King determined that she died from strangulation. R. 116, ll. 21 – 23. King had three areas of bruising on the left side of her neck, two areas of bleeding in her left eye, and hemorrhages in six of her ten neck muscles. R. 117, l. 17 – 121, l. 21.

ARGUMENT

1.

The trial judge erred in failing to grant a mistrial after instructing the jury in his opening remarks that a trial was a search for the truth because such an instruction impermissibly shifted the burden of proof to the defendant.

Relevant Facts

During the judge's opening remarks to the jury, he gave the following instruction:

> This trial, like all trials, may be different from what you might expect. Many people do not have the chance to attend actual court sessions and take part in a trial as you are now doing and they think from watching television or movies or reading books, that trials are always full of high drama, intense action and riveting circumstances.
>
> While all of these things may be true at times, this trial is not for entertainment. It is a fundamental part of our democracy. *A search for the truth in an effort to make sure that justice is done between the parties before this Court. Searching for the truth and making sure justice is done is often slow, deliberate and repetitive*. It's the opposite of what you may have seen on television or in movies or read in books. This courtroom is a place of honor, dedicated to the protection and preservation of citizen's rights through what many have called the greatest justice system ever created.

R. 27, ll. 6 – 24 (emphasis added). The trial judge also instructed the jury that the attorneys were "officers of this Court, sworn to uphold the integrity and fairness of our judicial system *and to help you in the search for the truth*." R. 28, ll. 1 – 4 (emphasis added). While the trial judge told the jurors that his opening remarks were not a charge on the law, he did tell the jury that his comments were an explanation of the procedure that would be followed during the trial. R. 28, ll. 10 – 19.

The judge also instructed the jury that it was their "purpose" to find and determine the facts and that it was their "solemn responsibility to determine the guilt *or innocence* of the Defendant." R. 29, l. 1 – 32, l. 23 (emphasis added). Finally, the judge instructed: "In determining what the true facts are in this case, you must decide whether or not the testimony of a witness is believable." R. 34, ll. 3 – 5. The judge did not define reasonable doubt in his opening instructions.

Defense counsel objected to these remarks arguing that instructing a jury that the purpose of Appellant's trial was to seek the truth unconstitutionally shifted the burden of proof to the defendant. R. 76, ll. 1 – 14. Counsel further argued that because this instruction appeared in the judge's opening remarks, the jury would now spend the entire trial believing that their role was to seek the truth. Counsel requested a mistrial because the harm to Appellant could not be cured. R. 76, l. 15 – 77, l. 7.

The judge stated that he believed the instruction was "just a cautionary thing to tell them that *I want them to get to the bottom of this*." R. 77, ll. 16 – 23 (emphasis added). The judge further remarked that this was the charge he was given when he first became a judge and that he believed his closing charge on the law "should take care of that." R. 77, l. 24 – 78, l. 6. The judge denied counsel's motion for a mistrial.

Discussion

More than two decades ago, in State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998), our Supreme Court strongly urged trial judges to avoid using any "seek" language in their charges to the jury. The Court noted that such "in search of the truth" language was unnecessary and ran the risk of unconstitutionally shifting the burden of proof to the defendant. Id. at 151-56, 508 S.E.2d at 865-68.

In State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000), our Supreme Court repeated its warning that trial courts should avoid using any "seek the truth" language. However, the court in Aleksey noted that in that case the "seek" language was used in the instruction on witness credibility. Id. at 27, 538 S.E.2d at 251-52. The "seek" language did not appear in either the reasonable doubt or circumstantial evidence portion of the instruction. Id. Thus, the Aleksey Court found that there was not a reasonable likelihood that the jury applied the challenged instruction in a manner inconsistent with the state's burden of proof beyond a reasonable doubt. Id. at 28-29, 538 S.E.2d at 252-53.

In State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012), our Supreme Court considered a jury instruction that "whatever verdict you reach will represent truth and justice for all parties that are involved in this case." Although the issue was not preserved, the Court instructed trial judges "[to] remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is `just' or `fair' to all parties. Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt." Id. at 256, 737 S.E.2d at 475.

Despite our Supreme Court's repeated admonitions regarding the dangers of "seek the truth" language in the court's jury charge, trial judges have continued to employ new derivatives of this burden shifting language. Recently, in State v. Beaty, 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018), our Supreme Court reviewed the trial court's preliminary remarks to the jury, which included use of the terms "search[ing] for the truth," "true facts," and "just verdict." The Court ruled:

> [W]e agree with Appellant that a trial court should refrain from informing the jury, *whether through comments or through its charge*, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases may be understood

> to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict it believes best serves the jury's perception of justice. We caution trial judges to avoid these terms and any other that may divert the jury from its obligation in a criminal case to determine, based solely on the evidence presented, whether the State has proven the defendant's guilt beyond a reasonable doubt.

Id. (emphasis added). However, the Beaty Court found no prejudice sufficient to warrant reversal from the comments in light of its review of the entirety of the opening comments and the trial record. Id.

It is not the jury's function to search for the truth in criminal trials, or as the trial judge in this case stated: "to get to the bottom of this." R. 77, ll. 16 – 23. A jury's function is to determine whether the state has proven the defendant's guilt *beyond a reasonable doubt.* See Francis v. Franklin, 471 U.S. 307, 313 (1985) ("The Due Process Clause of the Fourteenth Amendment protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (citing In re Winship, 397 U.S. 358, 364 (1970)).

Here, while the judge's improper comments about searching for the truth appeared in his opening remarks rather than his definition of reasonable doubt, these opening remarks set the tone for the remainder of the trial. Including the "searching for the truth" language in the opening remarks was more prejudicial to Appellant than putting this same language in the charge on the law at the end of the trial. This is because the jurors spent the duration of the trial believing their job was something that it was not. In other words, the jurors spent the entire trial under the false and incorrect impression that their role was to determine "the truth." This is especially problematic in light of the judge's juxtaposition of a fictional television drama with Appellant's trial, which the judge incorrectly described as a search for the truth. "An instruction

is defective if a reasonable juror could interpret it to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." State v. Manning, 305 S.C. 413, 416, 409 S.E.2d 372, 374 (1991).

When viewed in this light, the judge unconstitutionally shifted the burden of proof to Appellant not only by telling the jurors that their job was to search and find the truth, but also that it was their solemn duty to determine whether Appellant was guilty *or innocent*. This is unequivocally not the role of a criminal jury. Their job is solely to determine whether the state has proven its case beyond a reasonable doubt. That is quite different from determining whether a criminal defendant is innocent. "[A]n essential of the due process guaranteed by the Fourteenth Amendment [is] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 443 U.S. 307, 316 (1979).

The trial judge erred in this case by informing the jury at the outset of Appellant's trial that their role was to search for the truth and to determine whether Appellant was guilty or innocent. This was an incorrect statement of the law and of the actual role a criminal jury has. Furthermore, this improperly invited the jury to choose between the state's version of events and Appellant's. This resulted in an unconstitutional shifting of the burden of proof to Appellant by implicitly requiring him to prove his innocence. Appellant's conviction should be reversed. See State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018); State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012); State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998); State v. Manning, 305 S.C. 413, 409 S.E.2d 372 (1991).

2.

The trial judge erred in failing to grant a mistrial after the decedent's sister testified that she advised the decedent to end her relationship with Appellant because Appellant physically assaulted her because the trial judge ruled such testimony was inadmissible.

Relevant Facts

The state made a pretrial motion to introduce "the prior history of difficulties" between Appellant and King. R. 3, ll. 7 – 15. In support of its motion the state proffered testimony by King's sister, Bessie Bates. Bates testified, in part, that Appellant and King's relationship consisted primarily of "arguing, fighting, [and] fussing" and that she advised King to "move away from the situation." R. 6, l. 17 – 7, l. 5. The solicitor also informed the judge that it would seek to introduce testimony from one of Appellant and King's daughters regarding a domestic violence for which Appellant was arrested two months prior to King's death.[1] R. 9, l. 24 – 10, l. 3.

The state argued that the testimony was admissible pursuant to State v. Smith, 337 S.C. 27 (1999) to establish Appellant's intent and a lack of mistake or accident as allowed under Rule 404 (b), SCRE. R. 14, l. 18 – 15, l. 14. The judge ruled that the sister's testimony about the generalized prior difficulties and the daughter's testimony about the domestic violence arrest from two months prior were admissible. R. 23, ll. 6 – 13.

When Bates was called before the jury the solicitor asked her if she ever gave King advice about her relationship with Appellant. R. 132, ll. 7 – 9. Bates answered that she had and continued: "witnessing the times when I had to go to the hospital and to check after her for being

1 This testimony is the subject of Appellant's Issue 3.

beaten and stuff like that." R. 132, ll. 10 – 13. Defense counsel objected and the judge informed the jury to disregard Bates' last answer. R. 132, ll. 14 – 19.

Outside the presence of the jury, defense counsel requested a mistrial because of Bates' improper testimony. R. 143, ll. 10 – 13. Counsel argued that Bates' testimony about going to the hospital to check on King after she was beaten by Appellant fell outside the permissible testimony about prior difficulties and that the judge's instruction to the jury to disregard the answer was insufficient to cure the harm. R. 143, ll. 13 – 25. The judge denied counsel's motion for a mistrial. R. 144, ll. 2 – 14.

Discussion

"The power of the trial court to declare a mistrial should be used with the greatest caution under urgent circumstances and for very plain and obvious reasons stated on the record by the trial court." State v. Harris, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct. App. 2009). "A mistrial should only be granted when absolutely necessary, and a defendant must show both error and prejudice in order to be entitled to a mistrial." State v. Wilson, 389 S.C. 579, 585–86, 698 S.E.2d 862, 865 (Ct. App. 2010). "Insubstantial errors that do not impact the result of a case do not warrant a mistrial when guilt is conclusively proven by competent evidence." State v. White, 371 S.C. 439, 447–48, 639 S.E.2d 160, 164 (Ct. App. 2006).

Here, the solicitor agreed that pursuant to State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996), the details of prior difficulties between Appellant and King were not admissible. R. 21, ll. 12 – 19. However, Bates testified anyway to the details of the prior difficulties by saying that King was hospitalized from Appellant physically assaulting her on previous occasions. This testimony was extremely prejudicial because Appellant and King were married for over thirty years and there was no time frame given as to the prior assaults and hospitalizations testified to

by Bates. However, the implication of Bates' testimony was that Appellant physically assaulted King resulting in King being hospitalized on more than one occasion. This testimony was highly inflammatory and invited the jury to render a verdict on an improper basis.

In State v. Williams, 321 S.C. 327, 335-56, 468 S.E.2d 626, 631 (1996), the Supreme Court held that evidence of marital discord between the defendant and victim was admissible to show that animus existed between them. The Williams Court came to this conclusion because the evidence introduced at trial showed that the defendant and victim had a "strained" relationship, but that the details of the marital disputes were not disclosed. Id. "[I]t is well settled that in assault and battery and homicide cases, evidence that the accused and prosecuting witness or the deceased had a previous difficulty is admissible, but the details of such difficulty are inadmissible." State v. Clinkscales, 231 S.C. 650, 654, 99 S.E.2d 663, 665 (1957).

Once the jury in this case heard that Appellant had previously hospitalized King on more than one occasion, they were much more likely to convict based on this improper propensity evidence. See State v. Spears, 403 S.C. 247, 258, 742 S.E.2d 878, 884 (Ct. App. 2013) (noting that a jury could have determined defendant was guilty on improper basis by relying on evidence that defendant in murder case had previously shot the victim one month earlier in a different altercation). The jury was less likely to give Appellant the benefit of the doubt, as was required by their oath, but instead would hold his prior conduct against him in assessing whether the state had proven his guilt for the current charged offense – murder. Therefore, the trial judge erred in failing to grant defense counsel's motion for a mistrial. Appellant's conviction should be reversed.

3.

The trial judge erred in allowing testimony that Appellant physically assaulted the victim two months prior to her death because the prior assault was not probative of intent or lack of mistake or accident, and any probative value was substantially outweighed by the danger of unfair prejudice.

Relevant Facts

The state moved pretrial to admit testimony from one of Appellant's daughters and a police officer that Appellant had physically assaulted King in March of 2017 and been arrested for domestic violence as a result. R. 14, ll. 18 – 24. The solicitor argued that State v. Smith, 337 S.C. 27, 522 S.E.2d 598 (1999) permitted the introduction of the prior domestic violence to establish "intent and lack of mistake or accident." R. 15, ll. 4 – 14. The solicitor maintained that she needed to be able to show a lack of mistake or accident based on statements that Appellant made which "[did not] correspond with the medical findings and trie[d] to sort of make a case for an accident or some sort of mistake." R. 15, ll. 15 – 25.

Defense counsel responded that she was not raising an accident or mistake defense and it was the solicitor who was seeking to introduce Appellant's statements. Counsel maintained that the prior domestic violence abuse was improper and inadmissible. R. 17, l. 9 – 19, l. 5. The judge disagreed and ruled that testimony regarding the physical assault from two months prior to King's death was admissible. R. 23, ll. 6 – 13.

Appellant's daughter, Naomi Belk, testified that in March of 2017 she was visiting her parents for her birthday at their hotel room. R. 135, l. 17 – 136, l. 18. Belk claimed that her parents had been drinking that day and were "exchanging words" that night while Belk was trying to get to sleep. R. 137, ll. 4 – 10. Belk said that she "heard" King getting hit so she called

911. R. 137, ll. 10 – 11. According to Belk, King had bruises on her face after the incident and Appellant was arrested by the police that night. R. 137, ll. 12 – 22.

The state also called Trisha Brubaker with the Beaufort Police Department who responded to Belk's 911 call regarding Appellant assaulting King. Brubaker testified that she responded to the hotel and heard a male yelling at someone inside the room. R. 138, l. 18 – 139, l. 12. When Brubaker knocked on the door, Appellant answered and "denied that there was a disturbance" and told Brubaker that she must have the wrong room. R. 139, ll. 13 – 24. Brubaker maintained that she observed several injuries to King including a contusion on her forehead, swelling on her left eye, and swelling to her lower lip. R. 140, ll. 1 – 17. A photograph of King's injuries from that night was introduced over defense counsel's renewed objection. R. 140, l. 18 – 141, l. 8.

Discussion

Rule 404(b), SCRE, provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." "It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual." State v. Gillian, 360 S.C. 433, 443, 602 S.E.2d 62, 67 (Ct. App. 2004). Furthermore, in order to be admissible, "[t]he bad act must logically relate to the crime with which the defendant has been charged." Id.

If the prior bad act which the state seeks to introduce against the defendant is not the subject of a criminal conviction, then "evidence of the bad act must be clear and convincing." State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009). However, even if there is clear

and convincing evidence of the prior bad act, admission of the evidence is still subject to Rule 403, SCRE. Id.

Rule 403, SCRE, permits relevant evidence to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013). "Under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than prior criminal or immoral acts." State v. Gore, 283 S.C. 118, 120, 322 S.E.2d 12, 13 (1984).

In State v. Smith, 337 S.C. 27, 31, 522 S.E.2d 598, 600 (1999), the Supreme Court found that evidence of the defendant's prior conviction for domestic violence was admissible to establish his intent to kill and the absence of mistake or accident. In Smith, the defendant shot and killed his six-week-old daughter while his wife was holding her. Id. at 29, 522 S.E.2d at 599. Appellant claimed the shooting was an accident in a written statement. Id. at 31, 522 S.E.2d at 600. Because the state relied on the doctrine of transferred intent, the Court found that the prior domestic violence was admissible as evidence of the defendant's intent to kill *the mother*. Id. at 33, 522 S.E.2d at 601 n.5. Furthermore, because the defendant claimed in a written statement that the gun fired accidentally while he was removing it from his pants pocket, the prior conviction was probative in negating this claim. Id. at 33, 522 S.E.2d at 601.

In this case, the state sought to create its own exception to Rule 404(b), SCRE, by imputing to Appellant a claim of accident which the defense never raised at trial. Defense counsel specifically stated that she was not raising an accident or mistake defense and Appellant did not testify. The state elicited testimony from its lead investigator that during his second interview of Appellant, Appellant commented that *if* he had done something to King, it was

unintentional. The state did not introduce Appellant's statement in its entirety, nor did defense counsel request the admission of Appellant's statement.

The state therefore introduced an alleged statement made by Appellant, which otherwise would not have been admitted in evidence, for the sole purpose of triggering the lack of mistake or accident exception to Rule 404(b), SCRE. The state introduced testimony about Appellant's statement even though the state did not believe the statement to be true. Instead, the state sought to introduce the statement so that it could introduce improper character evidence in rebuttal.

Appellant did not raise accident as a defense in this case. Defense counsel did not request a jury instruction on accident and the trial judge did not instruct the jury on the defense of accident. In fact, counsel specifically stated on the record that during their charge conference in chambers that counsel, the judge, and the solicitor all agreed that jury instructions for involuntary manslaughter and accident were not proper charges in this case. This negated any possible probative value the prior domestic violence incident would have had in establishing a lack of mistake or accident. Therefore, the trial judge erred in allowing evidence that Appellant physically assaulted King two months prior to her death. Appellant's conviction should be reversed.

CONCLUSION

By reason of the foregoing argument, Appellant's convictions should be reversed, and this case remanded to the Beaufort County Court of General Sessions for a new trial.

s/Adam Sinclair Ruffin
Adam Sinclair Ruffin
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ATTORNEY FOR APPELLANT

This 11th day of May, 2021.

RECEIVED
May 11 2021
SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

May 11, 2021

s/Adam Sinclair Ruffin
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