

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Orangeburg County

Honorable Edgar W. Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHNATHAN GREEN,

APPELLANT

APPELLATE CASE NO. 2020-001414

BRIEF OF PETITIONER

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ISSUES PRESENTED

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

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

STATEMENT OF THE CASE

In April of 2016, the Orangeburg County Grand Jury indicted Petitioner, Johnathan Green, for several counts of attempted murder. In August of 2016, the Orangeburg County Grand Jury indicted Petitioner for one count of discharging a firearm into a dwelling, indictment #2016-GS-38-1244. (R. p. 476). On October 25, 2016, Petitioner proceeded to jury trial before the Honorable Edgar W. Dickson on two counts of attempted murder, indictments #2016-GS-38-223, 224 and the one count of discharging a firearm into a dwelling. (R. p. 494-497). Byron E. Gipson represented Petitioner at trial. Tommy Scott and Josh Edwards prosecuted the case. The jury returned verdicts of guilty and Judge Dickson sentenced Petitioner to two thirty (30) year concurrent sentences for attempted murder and ten (10) years concurrent for discharging a firearm into a dwelling. A timely notice of intent to appeal was served on November 4, 2016, and the direct appeal perfected. On July 22, 2020, a three-judge panel of the South Carolina Court of Appeals affirmed the convictions in an unpublished opinion. State v. Johnathan Green, Op. No. 2020-UP-219 (S.C. Ct. App. Filed July 22, 2020). A timely petition for rehearing was filed on August 5, 2020, and then denied on September 22, 2020. The petition for writ of certiorari was filed on October 22, 2020. The State filed a return on November 18, 2020. On July 6, 2021, this Court granted the petition for writ of certiorari. This brief of petitioner follows.

STATEMENT OF FACTS

The jury found Petitioner guilty of shooting at the mother of his child, Elise Hogges, and her boyfriend at the time, Ken Minus, on December 13, 2015. According to Hogges she and Minus were in the car on the way to Santee, their “little get away spot,” when they saw Petitioner driving his mother’s truck. (R. p. 115, lines 2-18). According to Minus, Petitioner gave them a dirty look so Minus sped up. (R. p. 152, lines 15-22). Minus testified that when he sped up Petitioner also sped up and started driving erratically. (R. p. 152, lines 23-25). Hogges testified that she was scared and called 911. (R. p. 116, lines 13-16). A high-speed chase ensued as Minus drove toward Omega Court where some of his family members lived. (R. p. 119, lines 2-21). Hogges testified that once they arrived at Omega Court they ran inside the house. (R. p. 121, lines 2-19). Hogges testified that she heard gunshots as somebody she could not see shot into the house. (R. p. 122, lines 1-18). Nobody was injured from the gunshots. Petitioner was arrested a few days later.

Prior to trial Petitioner moved to suppress evidence about three prior acts allegedly committed by Petitioner against Hogges. During the pre-trial hearing Hogges testified about an alleged incident almost a year earlier in January of 2015, an alleged incident when Petitioner allegedly pulled a gun on her in front of their daughter and an alleged incident at Thanksgiving. The judge properly suppressed any testimony in regard to the alleged incident of pulling a gun in front of the daughter. (R. p. 30, lines 3-13). The judge, however, allowed evidence about the alleged January incident and the alleged Thanksgiving incident. The two alleged prior incidents are addressed separately below.

STANDARD OF REVIEW

“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. An abuse of discretion occurs when the trial court's ruling is based on an error of law.’ State v. Washington, 379 S.C. 120, 123-24, 665 S.E.2d 602, 604 (2008) (citation omitted).” State v. Morales, 433 S.C. 196, 201, 857 S.E.2d 383, 385 (Ct. App. 2021).

ARGUMENTS

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

During the pre-trial hearing to suppress evidence of alleged prior bad acts Elise Hogges, the mother of Petitioner's child, testified that during an alleged incident in January of 2015, when Hogges picked up their daughter from Petitioner's mother's house Petitioner "... pulled my hair, snatched my hair out and pulled it from scalp." (R. p. 13, lines 19-23). She also testified that, "He bust my tire and threw my keys in the woods." (R. p. 14, line 4). Hogges admitted that she did not call the police but testified that she went to the sheriff's department and filed a report. (R. p. 15, lines 15-22). The officer who took the report noted that he did not observe any physical injury. (R. p. 26, lines 1-5). The sheriff's department did not press charges against Petitioner for the alleged January incident. (R. p. 26, lines 8-18).

The trial judge preliminarily denied the motion to suppress both the January of 2015, alleged incident as well as an alleged Thanksgiving incident which is addressed in issue two below. (R. p. 30, line 12 – p. 31, 32, lines 1-24). The judge stated, "It kind of goes along with the January event that shows the animus between them. And there are a couple of cases where there's domestic violence you can use that testimony later on, a prior domestic violence even in an assault and battery with intent to kill. And so I've got some cites here if you are interested, but I - -" (R. p. 31, line 24 – p. 32, lines 1-4). Counsel for Petitioner responded, "I understand Judge. But to call it domestic violence when it's never been charged or there was never a chance for Mr. Green to face an accuser to have his, you know, chance to defend himself because there

was never a charge brought.” (R. p. 32, lines 5-9). The judge indicated that he was not inclined to suppress the prior bad act. (R. p. 32, lines 13-17).

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

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

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

The trial judge erred in allowing the witness to testify about an alleged incident that took place almost a year before the shooting. The testimony was irrelevant and did not meet an exception pursuant to Rule 404(b). There was no connection of cause and effect between the January allegation and the December shooting. The January allegation was too remote in time to be probative of motive, intent or malice in the December shooting. Additionally, the State failed to prove the alleged prior assault by clear and convincing evidence. Finally, any probative value of the alleged prior allegation was substantially outweighed by the danger of unfair prejudice pursuant to Rules 403, 404(b), SCRE. The testimony constituted inadmissible propensity evidence that should have been excluded.

Relevance

First, the testimony about the alleged January 2015, incident that took place almost a year prior should have been excluded because it was not relevant. In State v. Clasby, 385 S.C. 148, 154–55, 682 S.E.2d 892, 895 (2009), this Court wrote:

As a threshold matter, the trial judge must initially determine whether the proffered evidence is relevant as required under Rule 401 of the South Carolina Rules of Evidence. 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.”).

Testimony about the alleged January 2015, incident was not relevant. Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Rule 401, SCRE. The testimony about an alleged incident in January, almost one year earlier, did not make the existence of any fact of consequence in the attempted murder trial more or less probable. The January allegation, involving Hogges picking up their child, is not relevant as to whether Petitioner was guilty of attempted murder in December for shooting at Hogges and her boyfriend at the time, Minus. The alleged January incident had nothing to do with a boyfriend. The attempted murder charges had nothing to do with the child. The testimony should have been excluded as irrelevant.

In affirming the convictions the Court of Appeals found that both the alleged January 2015, allegation and the Thanksgiving allegation admissible and with regard to relevance wrote:

State v. Sweat, 362 S.C. 117, 126, 606 S.E.2d 508, 513 (Ct. App. 2004) (“For evidence to be admissible, it must be relevant.”); State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (“Evidence is relevant and admissible if it tends to establish or make more or less probable the matter in controversy.” (citing Rules 401 & 402, SCRE)); Rule 401, SCRE (providing relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”);

State v. Green, No. 2016-002256, 2020 WL 4201818, at *1 (S.C. Ct. App. July 22, 2020). The Court of Appeals erred. There is no evidence to support the finding that testimony about the January allegation is relevant to the December shooting. The January allegation is too remote in

time to be relevant as defined by Rule 401, SCRE. The alleged assault in January of Hogges when she was picking up their child does not make it more or less probable that Petitioner shot at Hogges and her boyfriend almost a year later in December.

The present case is distinguished from State v. Sweat where the Court of Appeals found that evidence of domestic violence in October was relevant to the charged crimes that took place in December because the October domestic violence went to motive and intent for the December attack for which Sweat was charged. “We agree that both motive and intent can be inferred from the prior bad act. Following the October assault, Robin reported Sweat's conduct and Sweat spent forty-five days in jail. He was released eleven days before the December incident occurred. Robin became involved with Blake and refused to resume her relationship with Sweat. Within days, Sweat perpetrated the December 11 attack. Thus, the October incident and Sweat's time in jail relate to his actions on December 11, 2001.” Sweat, 362 S.C. at 124, 606 S.E.2d at 512. The Court of Appeals then addressed relevancy and wrote, “The October incident was relevant as it suggested motive and intent and tended to make the State's version of the case more probable. While not strictly necessary to the State's case, it was logically related to why Sweat went to the house that night and to his intentions once there. We find the trial judge did not abuse her discretion by concluding the October incident was relevant to the event that took place on December 11, 2001.” Sweat, 362 S.C. at 127, 606 S.E.2d at 514.

In Sweat the prior domestic violence from October was relevant because the State argued the charged December crimes were partly in retaliation for the girlfriend causing Sweat to be jailed for forty-five days as a result of the October domestic violence. The charged December crimes took place only eleven days after Sweat was released from jail on the October criminal domestic violence charge. The October incident was relevant to the December charged crimes.

In contrast, in the present case, the January assault allegation involving Hogges picking up their daughter is not relevant to the charged attempted murder of Hogges and Minus. The January allegation is too remote, unlike the domestic violence in Sweat, to be relevant to the December charges. As discussed below, the January allegation does not show motive and intent as the Court of Appeals found in Sweat.

The present case is also distinguished from State v. Wiles, 383 S.C. 151, 679 S.E.2d 172 (2009). In Wiles the Court wrote:

Here, the evidence of petitioner's escape was logically relevant for several reasons. First, the evidence of escape shows his **motive** for fleeing from police; thus, it was relevant on the failure to stop for a blue light charge. *See* Rule 404(b), SCRE. Second, the evidence that petitioner was an escapee was relevant to his alleged **intent** on the ABIK charge. *Id.*; *cf.* State v. Green, *supra* (where the Court held that evidence of appellants' escape from prison, and their status as fugitives, was admissible on the issues of intent and common design in an attempted armed robbery case).

383 S.C. at 158, 679 S.E.2d at 176. The January allegation is not logically relevant to the December attempted murder charges the way the escape, one week earlier, in Wiles was logically relevant to the failure to stop for a blue light and ABIK. The January allegation is too remote, unlike the escape in Wiles, to be relevant to the December charges. As discussed below, the January allegation does not show motive or intent for the attempted murder charges in December. The January allegation is not relevant and should have been excluded.

Rule 404(b)

Second, the testimony about the alleged January 2015, incident should also have been excluded because the testimony did not meet an exception pursuant to Rule 404(b). In State v. Fletcher, 379 S.C. 17, 23–24, 664 S.E.2d 480, 483 (2008), the South Carolina Supreme Court wrote:

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

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

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

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

Clarifying the proper standard this Court in Perry wrote:

As we said in Lyle, “Whether evidence of other ... crimes properly falls within any of the recognized exceptions ... is often a difficult matter to determine.” 125 S.C. at 416-17, 118 S.E. at 807. Rule 404(b) of our Rules of Evidence provides, “Evidence of other crimes, wrongs, or acts ... may ... be admissible to show ... the existence of a common scheme or plan” The trial court's standard for making this determination is the Lyle “logical connection” test. The State must demonstrate to the trial court that there is in fact a scheme or plan common to

both crimes, and that evidence of the other crime serves some purpose other than using the defendant's character to show his propensity to commit the crime charged.

430 S.C. at 44, 842 S.E.2d at 664–65.

There is no logical relevancy or connection between the alleged prior January 2015, incident involving Hogges picking up her daughter and the State's allegation that Petitioner attempted to murder Hogges and her boyfriend when he saw them together almost a year later. The State failed to demonstrate that the January allegation served some purpose other than using purported character evidence to show propensity to commit the crimes charged.

The trial judge found that the second incident, the alleged threat in November discussed below, “. . . goes along with the January event that shows the animus between them.” (R. p. 31, line 24 – p. 32, lines 1-4). Showing animus is not an exception pursuant to Rule 404(b). Evidence of prior difficulties must still meet an exception pursuant to Rule 404(b). Evidence of prior difficulties must serve some legitimate purpose. No connection or logical relevancy exists between the January allegation and the crimes charged in December. Additionally, the January 2015, allegation is too remote in time to show motive, identity, common scheme or plan, absence of mistake or accident or intent. The testimony about the January allegation did not meet an exception to Rule 404(b) and should have been excluded.

With regard to Rule 404(b), the Court of Appeals wrote:

Rule 404(b), SCRE (“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.”); State v. Plyler, 275 S.C. 291, 296, 270 S.E.2d 126, 128 (1980) (“Evidence of previous difficulties or ill feelings between the accused and the victim and of facts showing the cause of such difficulties or ill will is admissible on the question of motives whe[n] there is some connection of cause and effect between the evidence and the crime.” (quoting 40 C.J.S. *Homicide* § 228 (currently located at 41 C.J.S. *Homicide* § 337))); *id.* (finding the challenged evidence “admissible as a

circumstance bearing on the identity of the accused as the perpetrator of the crime” because it “tend[ed] to show motive on the part of the accused and [wa]s not so remote in time as to negate its probative value”); Blakely v. State, 360 S.C. 636, 639, 602 S.E.2d 758, 759 (2004) (“[E]vidence of previous threats by the defendant is admissible to show malice.”); S.C. Code Ann. § 16-3-29 (2015) (defining the offense of attempted murder as when “[a] person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied”); Blakely, 360 S.C. at 639, 602 S.E.2d at 759 (“[U]nder Rule 404(b), SCRE, [evidence of previous threats] is admissible as evidence of intent.”);

State v. Green, No. 2016-002256, 2020 WL 4201818, at *1 (S.C. Ct. App. July 22, 2020). The Court of Appeals erred. The January allegation did not show motive or intent for the December shooting. The State failed to show that the January allegation served some legitimate purpose.

The present case is distinguished from State v. Plyler, 275 S.C. 291, 270 S.E.2d 126 (1980). First the alleged assault in the present case is more inflammatory and prejudicial than the prior verbal altercation in Plyler. Second, and more importantly, the prior verbal altercation in Plyler took place three days prior to the charged crime and was not so remote in time as to negate its probative value. The January allegation in the present case took place almost a year before the charged crime, negating its probative value. Additionally, as noted in Plyler, there must be some connection of cause and effect between the prior allegations and the charged crime. In the present case there is no evidence to support such a connection of cause and effect between the January allegation involving Hogges picking up their daughter and the December shooting at Hogges and Minus, her boyfriend at the time.

In Blakely v. State, 360 S.C. 636, 602 S.E.2d 758 (2004), a post-conviction relief case, this Court found that trial counsel was not ineffective for failing to object to testimony about prior threats because the testimony proved malice and showed intent pursuant to Rule 404(b). In the present case the prior alleged assault in January does not prove malice for the December shooting and does not show intent pursuant to Rule 404(b). Evidence and testimony about the

January allegation does not meet an exception to Rule 404(b). The testimony should have been excluded as improper propensity evidence

Clear and Convincing

Third, the testimony about the alleged January 2015, incident should have been excluded because the State failed to prove the alleged prior bad act by clear and convincing evidence. As Petitioner was not convicted of the alleged prior assault, the State was required to prove the alleged prior bad act by clear and convincing evidence. State v. Beck, 342 S.C. 129, 135-36, 536 S.E.2d 679, 682-83 (2000). In State v. Smith, 300 S.C. 216, 218, 387 S.E.2d 245, 246-47 (1989), this Court wrote:

Evidence of prior bad acts is admissible under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), if it tends to show motive or a common scheme or plan and its probative value outweighs its prejudicial effect. This Court has recognized the danger of prejudice where the prior bad acts are not subject to conviction and has limited the State's use of this evidence. See State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984); State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984); State v. Smith, 279 S.C. 440, 308 S.E.2d 794 (1983). To be admissible, proof of prior bad acts must be clear and convincing. State v. Conyers, 268 S.C. 276, 233 S.E.2d 95 (1977).

“Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal.” State v. Fletcher, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008). The only person to testify about the alleged January incident was Hogges. Hogges admitted during the pre-trial hearing that she did not call the police but testified that she went to the sheriff’s department and filed a report. (R. p. 15, lines 15-22). The officer who took the report noted that he did not observe any physical injury. (R. p. 26, lines 1-5). The sheriff’s department did not press charges against Petitioner for the alleged January incident. (R. p. 26,

lines 8-18). Hogges testified that Petitioner's mother was a witness to the January incident and called the police. (R. p. 112, lines 16-17). Petitioner's mother, however, while called as a witness by the State at trial, was not questioned about the alleged January incident and was not called as a witness at the pre-trial hearing. The testimony should have been excluded because the State failed to prove the alleged January incident by clear and convincing evidence.

With regard to the clear and convincing standard, the Court of Appeals wrote:

State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007) ("If the defendant was not convicted of the prior crime, evidence of the prior bad act must be clear and convincing."); State v. Kirton, 381 S.C. 7, 26, 671 S.E.2d 107, 116 (Ct. App. 2008) ("When considering whether there is clear and convincing evidence of other bad acts, this court is bound by the trial judge's factual findings unless they are clearly erroneous."); *id.* at 26-27, 671 S.E.2d at 116 ("The determination of a witness's credibility is left to the trial [court, which] saw and heard the witness and is therefore in a better position to evaluate his or her veracity.");

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

The present case is distinguished from State v. Kirton, 381 S.C. 7, 27, 671 S.E.2d 107, 117 (Ct. App. 2008), where the Court of Appeals wrote, "Testimony in the record supports the finding made by the trial judge that there was clear and convincing evidence of the prior bad acts, and that finding was not erroneous." The trial judge in the present case did not make a finding that there was clear and convincing evidence of the prior allegations. Instead, the trial judge in the present case stated:

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

(R. p. 31, line 24 – p. 32, lines 1-4). Counsel for Petitioner responded, “I understand Judge. But to call it domestic violence when it’s never been charged or there was never a chance for Mr. Green to face an accuser to have his, you know, chance to defend himself because there was never a charge brought.” (R. p. 32, lines 5-9). The State failed to present clear and convincing evidence of the January allegation. The testimony and evidence about the January allegation should have been excluded.

Rule 403

Fourth and finally, testimony about the alleged January 2015, incident should have been excluded because the probative value of the alleged prior assault was substantially outweighed by the danger of unfair prejudice pursuant to Rules 403, 404(b), SCRE. In State v. Perry, 430 S.C. 24, 44, 842 S.E.2d 654, 665 (2020) this Court, citing Lyle wrote:

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

The State failed to meet its burden required by Rule 403, SCRE, for the admission of the alleged prior assault almost one year earlier. The probative value of the prior alleged assault is substantially outweighed by the danger of unfair prejudice. As discussed above, testimony about the alleged incident in January of 2015, was not probative of the attempted murder charges that arose in December of 2015.

As to Rule 403, the Court of Appeals wrote, “Wiles, 383 S.C. at 158, 679 S.E.2d at 176 (“[E]ven whe[n] the evidence is shown to be relevant, if its probative value is substantially outweighed by the danger of unfair prejudice, the evidence must be excluded.” (citing Rule 403,

SCRE)); *id.* ("Unfair prejudice means an undue tendency to suggest decision on an improper basis.")” State v. Green, No. 2016-002256, 2020 WL 4201818, at *1 (S.C. Ct. App. July 22, 2020). The State failed to meet its burden to show that the probative value of the prior alleged assault was not substantially outweighed by the danger of unfair prejudice from the inherent tendency of the evidence to show propensity. In this trial for two counts of attempted murder the probative value of the prior bad act allegation is substantially outweighed by the danger of unfair prejudice.

The admission of the propensity evidence was unfairly prejudicial. The trial judge erred in allowing the witness to testify that in January, almost a year prior to the charged offenses, Petitioner assaulted her when the testimony was not relevant, did not meet an exception pursuant to Rule 404(b), the State failed to prove the alleged prior assault by clear and convincing evidence and the probative value of the alleged prior assault was substantially outweighed by the danger of unfair prejudice pursuant to Rule 404(b), SCRE. The error is not harmless.

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

In addition to the alleged incident in January 2015, Petitioner also moved to suppress an alleged prior bad act from Thanksgiving in November of 2015. Hogges testified at the pre-trial hearing that, “The week of Thanksgiving, he came to my house to try and fix my car. And I told him I didn’t want him to do anything for me, that, you know, I didn’t want him to do anything for me. And he was just like don’t – me I’ll blow your face off. And I told him to get out the yard and

don't come back no more." (R. p. 14, lines 9-14). Hogges admitted that she did not call the police after this alleged threat by Petitioner. (R. p. 26, line 24 – p. 27, lines 1-6). The judge ruled:

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

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

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

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

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

Rule 404(b)

First, the testimony about the alleged prior threat did not meet an exception pursuant to Rule 404(b). In State v. Perry, 430 S.C. 24, 30–31, 842 S.E.2d 654, 657–58 (2020), this Court wrote:

The question for a trial court, and for this Court on appeal from Perry's conviction, is whether the evidence also serves some legitimate purpose that is not prohibited by Rule 404(b). The rule provides examples of legitimate purposes, stating evidence of other crimes “may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.” Rule 404(b), SCRE. To the extent a trial court finds evidence of “other crimes” does serve these dual purposes, the court must determine whether the evidence has sufficient probative force for serving the legitimate purpose that the evidence should be admitted, despite its inherent tendency to serve the improper purpose.

The trial judge found that the prior alleged threat showed motive writing, “But I’m inclined to let it in. It is close. It goes to – to me it goes to the motive for him to be chasing her.” (R. p. 31, lines 22-24). The trial judge erred. The alleged prior threat did not show motive or any other legitimate purpose provided by the rule.

As discussed above, in Perry this Court wrote:

As we said in Lyle, “Whether evidence of other ... crimes properly falls within any of the recognized exceptions ... is often a difficult matter to determine.” 125 S.C. at 416-17, 118 S.E. at 807. Rule 404(b) of our Rules of Evidence provides, “Evidence of other crimes, wrongs, or acts ... may ... be admissible to show ... the existence of a common scheme or plan” The trial court's standard for making this determination is the Lyle “logical connection” test. The State must demonstrate to the trial court that there is in fact a scheme or plan common to both crimes, and that evidence of the other crime serves some purpose other than using the defendant's character to show his propensity to commit the crime charged.

430 S.C. at 44, 842 S.E.2d at 664–65.

The alleged prior threat did not show motive, identity, common scheme or plan, absence of mistake or accident or intent. There was no logical connection between the alleged prior threat and the charged crimes. The alleged prior threat to Hogges alone did not logically relate to the State's allegation that Petitioner attempted to murder Hogges and her boyfriend when he saw them together. The alleged threat to Hogges because she rejected Petitioner's offer of help did not provide a motive for Petitioner to attempt to kill Hogges and her boyfriend. The motive exception might have been stronger if the prior alleged threat had been made to Hogges **and** her boyfriend or was even a threat to Hogges about seeing other people generally. The threat, however, resulted from Hogges's rejection of Petitioner's help. The State failed to prove that the alleged prior threat served some purpose other than using Petitioner's character to show his propensity to commit the crime charged.

In State v. Plyler, 275 S.C. 291, 296, 270 S.E.2d 126, 128 (1980), this Court wrote, "Evidence of previous difficulties or ill feelings between the accused and the victim and of facts showing the cause of such difficulties or ill will is admissible on the question of motives where there is some connection of cause and effect between the evidence and the crime. 40 C.J.S., Homicide, Section 228." There is no connection of cause and effect between the prior threat and the charged crime. The prior threat after Hogges rejected Petitioner's help with repairing her car does not show motive or intent for the charged attempted murder of Hogges and her boyfriend. The testimony should have been excluded as improper propensity evidence.

Clear and Convincing

Second, as discussed in regard to the alleged January attack, the State failed to prove the alleged prior threat by clear and convincing evidence. As Petitioner was not convicted of the alleged prior threat, the State was required to prove the alleged prior bad act by clear and

convincing evidence. State v. Beck, 342 S.C. 129, 135-36, 536 S.E.2d 679, 682-83 (2000). In State v. Smith, 300 S.C. 216, 218, 387 S.E.2d 245, 246–47 (1989), this Court wrote:

Evidence of prior bad acts is admissible under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), if it tends to show motive or a common scheme or plan and its probative value outweighs its prejudicial effect. This Court has recognized the danger of prejudice where the prior bad acts are not subject to conviction and has limited the State's use of this evidence. See State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984); State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984); State v. Smith, 279 S.C. 440, 308 S.E.2d 794 (1983). To be admissible, proof of prior bad acts must be clear and convincing. State v. Conyers, 268 S.C. 276, 233 S.E.2d 95 (1977).

“Clear and convincing evidence is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Such proof is intermediate more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal.” State v. Fletcher, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008). The only person to testify about the alleged threat was Hogges. Hogges testified that Petitioner’s brother was a witness to the alleged threat but he was not called as a witness by the State. Hogges did not report the alleged threat to the police. The testimony should have been excluded because the State failed to prove the alleged threat by clear and convincing evidence.

Like the January allegation, proof of the prior threat is distinguished from the proof of the prior bad act in State v. Kirton, 381 S.C. 7, 27, 671 S.E.2d 107, 117 (Ct. App. 2008), where the Court of Appeals wrote, “Testimony in the record supports the finding made by the trial judge that there was clear and convincing evidence of the prior bad acts, and that finding was not erroneous.” The trial judge in the present case did not make a finding that there was clear and convincing evidence of the alleged prior threat. Instead, the trial judge in the present case stated:

Now, here with the Thanksgiving incident, it’s more descriptive. And I think – but, of course, again, I think it’s up to the jury whether or not they believe her in that

situation. And right now, all of these motions are just essentially – I can change my mind. These are essentially Motions in Limine. But I’m inclined to let it in. It’s close. It kind of goes along with the January event that shows the animus between them. And there are a couple of cases where there’s domestic violence you can use that testimony later on, a prior domestic violence even in an assault and battery with intent to kill. And so I’ve got some cites here if you are interested, but I - - ”

(R. p. 31, line 24 – p. 32, lines 1-4). In order for the jury to have an opportunity to determine credibility with regard to Hogges’s testimony about the alleged prior bad acts, the judge had to first determine that the State presented clear and convincing evidence of the alleged prior bad acts. The judge failed to make that determination before admitting the testimony. The trial judge erred. The State failed to prove the alleged prior threat by clear and convincing evidence. The testimony about the alleged prior threat should have been excluded.

Rule 403

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

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

The State failed to meet its burden required by Rule 403, SCRE, for the admission of the prior alleged threat. The testimony about the alleged threat after Hogges did not accept Petitioner’s offer to help repair her car was not probative of the attempted murder charges involving Hogges and her boyfriend. The admission of testimony that Petitioner allegedly threatened to “blow her face off”

was unfairly prejudicial and constituted inadmissible propensity evidence. In State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998), the South Carolina Court of Appeals wrote:

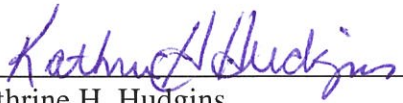
Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis. United States v. Bonds, 12 F.3d 540, 567 (6th Cir.1993); United States v. Rodriguez-Estrada,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

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

Testimony and evidence about both the January allegation and the alleged prior threat should have been excluded because neither met an exception pursuant to Rule 404(b), neither was proved by clear and convincing evidence and the probative value of both was substantially outweighed by the danger of unfair prejudice pursuant to Rules 403 and 404(b), SCRE. Additionally, the January allegation was not relevant to the December shooting. The trial judge abused his discretion in admitting the testimony and evidence about the prior bad acts. The errors were not harmless.

CONCLUSION

Based on the above arguments, this Court should reverse the convictions and remand the case for a new trial.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of August, 2021.