

STATE OF SOUTH CAROLINA  
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM ORANGEBURG COUNTY  
Court of General Sessions  
Edgar W. Dickson, Circuit Court Judge

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Appellate Case No. 2020-001414

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THE STATE,

Respondent,

v.

JOHNATHAN GREEN,

Petitioner.

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**BRIEF OF RESPONDENT**

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## STATEMENT OF ISSUES ON APPEAL

Evidence of prior difficulties between a defendant and victim preceding a crime of violence is relevant if it tends to prove identity, motive, intent, or res gestae. Green was charged with the attempted murder of his ex-girlfriend and presented an identity defense. Did the trial court abuse its discretion by admitting testimony about a prior threat and incident of violence by Green against Victim?

## STATEMENT OF THE CASE

An Orangeburg County grand jury indicted Petitioner Johnathan Green for two counts of Attempted Murder and one count of Discharging a Firearm into a Dwelling. Green proceeded to jury trial on October 24, 2016, before the Honorable Edgar W. Dickson. The jury convicted him on all counts. The court sentenced him to thirty years' incarceration for each count of Attempted Murder and ten years for Discharging a Firearm into a Dwelling, to be served concurrently. Green appealed, alleging error in the admission of evidence related to prior difficulties between Green and the victim, his former partner. The Court of Appeals affirmed Green's convictions in an unpublished opinion. Unpublished Opinion No. UP-2020-219 (S.C. Ct. App. Filed July 22, 2020). This Court granted certiorari on July 6, 2021.

## STATEMENT OF FACTS

On December 13, 2015, Elise Hogges was on a dinner date with her boyfriend, Ken Minus. R. 115. The couple was driving in Hogges' car from Orangeburg to Santee on Highway 301 with Minus driving and Hogges in the passenger's seat. R. 115. As the couple passed through the outskirts of Orangeburg in the left lane of the highway, Hogges noticed they were approaching a black Hyundai SUV with veteran's tags in the right lane. R. 115. Hogges recognized the vehicle as belonging to the mother of Johnathan Green. R. 115. Hogges and Green had previously been in a long-term relationship and shared a child in common. R. 12-13, 111. Green's mother lived near this section of Highway 301 and Green normally drove her car. R. 115-16. Hogges remarked to Minus, "Oh, Lord, that's my baby's daddy." R. 115, lines 15-16. Minus replied that they were not bothering Green and urged Hogges to remain calm. R. 115, line 17.

Green's car slowed down until the two cars were side by side. R. 116, lines 9-13. Green's window was down. R. 117, 146. Minus and Hogges made eye contact with Green, and both testified at trial they were certain he was the driver. R. 116-17, 151. Green stared menacingly at the couple, causing Hogges to so become afraid that she called 911. R. 116 line 16, 151.<sup>1</sup> Minus sped up, trying to get away from Green. R. 117-19, 154. A chase ensued, with Green following the couple down Highway 301 at speeds reaching 100 miles per hour as Hogges narrated the events to the 911 operator. R. 120, 155. Hogges testified she received a call from a blocked

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<sup>1</sup> "You could see hate in his eyes." R. 151.

number during the chase, and that Green always called her from a restricted number. R. 129, 147. Minus turned onto Old State Road, with Green following closely behind. R. 120. Green pulled even with the couple in the passing lane, but sped in front of them to avoid an oncoming car. R. 120. This gave Minus an opportunity to turn around in a church parking lot and drive back in the opposite direction, but Green quickly turned around and started following them again. R. 120, lines 10–15. In a desperate attempt to find shelter, Minus pulled onto Omega Court, a small dirt road where some family members lived. R. 120–21. Minus pulled into the driveway of 129 Omega Court and the couple sprinted into the mobile home of Minus's cousin, Delphine Gavin. R. 154. There were eight other people in the home at the time, including five children. R. 181. Green pursued them onto Omega Court. R. 155.

Seconds later shots rang out. R. 155. Bullets flew through the walls of the home, shattering appliances and piercing furniture as the victims ducked for cover. R. 88, 90, 122, 186–87. Miraculously, no one was hit. Delphine Gavin observed Green's vehicle speeding away from the scene. R. 183, lines 3-5. Crime scene investigators discovered nine bullet impacts across the front of the mobile home and recovered five bullet fragments, later determined to be 9mm caliber. R. 250; 319–20.

Investigators could not locate Green or his vehicle on the night of the incident, despite attempts to reach him through his mother and brother. R. 270–74. However, Green's mother provided police with Green's cell phone number. R. 274.

Green's mother testified at trial that Green was in possession of her black Hyundai SUV on the night of the incident. R. 266, lines 14–19. Investigators obtained arrest warrants and a search warrant to track Green's cell phone, but it was powered off and could not be tracked. R. 275, 295–96. Officers surveilled Green's residence and his mother's residence, but he never came home. R. 297, lines 13–14. On December 17, investigators learned that Green's girlfriend, Lakeisha Heyward, had been reported missing and that she was last seen with Green. R. 297, lines 4–8. The United States Marshal's Service tracked Heyward's vehicle through a GPS device that had been installed by the vehicle's lienholder, and the couple was apprehended heading south on I-95 near Savannah, Georgia. R. 297–98.

The State obtained Green's cell phone records and presented expert testimony that showed his cell phone's tower location data and call log from the night of the incident. R. 331, 355–74. The testimony corroborated the State's other evidence, showing Green's cell phone switched from tower to tower along the route of the chase and shooting at the exact times the events occurred. R. 362–367. The testimony also showed the phone had been used to communicate with Green's mother, brother, and girlfriend throughout the night, corroborating officer testimony, and that Green continually called Elise's cell phone using star 67 to block caller ID during and after the incident. R. 365–66. The State also obtained phone records from Elise Minus and Lakeisha Heyward, which corroborated the other evidence. R. 275, 358–59.

Green did not present a case. Defense counsel argued Green was not the person who committed the acts. R. 439–40.

### Prior Bad Act Evidence

Prior to trial, the court heard opposing motions regarding the admissibility of evidence related to the history of Green's relationship with Elise Hogges. The State proffered testimony from Hogges related to three specific events that transpired during the calendar year leading up to the incident. The first incident occurred in January, 2015, when Hogges went to pick up her child from Green's mother's house. An argument ensued and Green attacked Hogges, pulling hair out of her scalp, destroying tires on her car, and throwing her keys into the woods. R. 13–14. Hogges reported this incident to the police. R. 15. The second incident occurred around Thanksgiving of 2015, several weeks before the incident date. Green came to Hogges' home, ostensibly to repair her car. When Hogges' declined Green's help, he threatened to "blow her face off." R. 14. Hogges did not report this incident to the police. R. 15. The final incident occurred sometime in 2015. During an argument, Green pulled out a gun in the presence of their young child, and threatened to kill Hogges. R. 16. Hogges did not report this incident to the police. R. 16.

The State argued the evidence was relevant to prove motive and intent. R. 8. Green argued the testimony was unfairly prejudicial. R. 9. The trial court decided to admit the evidence of the first two incidents, explaining it was relevant to show motive and the "animus" that existed between the couple. R. 31–32. However, the

court excluded testimony about the third incident, expressing concern that Hogges could not recall a specific date on which the prior incident occurred, her testimony about this incident wasn't as descriptive, and she did not file a police report. R. 30.

## STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only, and is bound by the trial court's factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001). This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases. Id. Appellate courts do not review a trial judge's ruling on the admissibility of prior bad acts by determining de novo whether the evidence rises to the level of clear and convincing. "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." Wilson, 345 S.C. at 6, 545 S.E.2d at 829.

The appellate court reviews a trial court's 403 ruling for an abuse of discretion. State v. Lee, 399 S.C. 521, 527, 732 S.E.2d 225, 228 (Ct.App.2012) ("A trial court has particularly wide discretion in ruling on Rule 403 objections."); State v. Dial, 405 S.C. 247, 260, 746 S.E.2d 495, 502 (Ct. App.2013) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of relevant evidence should be reversed only in exceptional circumstances. We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment.") (citation omitted).

## ARGUMENT

The trial court did not abuse its discretion by admitting testimony about a prior threat and an incident of violence by Green against Hogges because the testimony was relevant to prove motive, intent, identity, malice, and res gestae. Even if the trial court erred, Green was not prejudiced because evidence of his guilt was overwhelming.

The trial court did not abuse its discretion by admitting evidence of prior difficulties between Green and Hogges. The evidence was highly probative because it bore directly on the issues of motive, intent, identity, malice, and res gestae. The trial court conscientiously considered the evidence's relevance and potential for unfair prejudice before ruling, and the record supports its decision. Even if the trial court erred, Green was not prejudiced because evidence of his guilt was overwhelming. This Court should affirm.

### a. Applicable law.

"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." Rule 404(b), SCRE. In other words, "evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate that the accused is a bad person." Mitchell v. State, 298 S.C. 186, 189, 379 S.E.2d 123, 125 (1989) (holding evidence that defendant was a "devil worshipper" was not admissible where it had no relationship to the charged crime).

"The rule is based on the danger that the jury will reach a guilty verdict because of the defendant's bad character and not based on the evidence of the crime for which he is currently on trial." State v. Smith, 391 S.C. 353, 359–60, 705 S.E.2d 491, 494 (Ct. App. 2011), rev'd, 406 S.C. 215, 750 S.E.2d 612 (2013).

"The process of analyzing bad act evidence begins with Rule 401, SCRE. Pursuant to Rule 401, the trial court must determine whether the evidence is relevant." State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277 (2009). "Upon determining the evidence is relevant, the trial court must then determine whether the bad act evidence fits within an exception of Rule 404(b) as interpreted by our jurisprudence." State v. Wallace, 384 S.C. at 433, 683 S.E.2d at 277. "To be admissible, the bad act must logically relate to the crime with which the defendant has been charged." State v. Clasby, 385 S.C. 148, 155, 682 S.E.2d 892, 895 (2009); State v. Perry, 430 S.C. 24, 34, 842 S.E.2d 654, 659 (2020). As a condition of admissibility, the State must prove the existence of the prior act by clear and convincing evidence. State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001).

Once bad act evidence is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE. Wallace, 384 S.C. at 435, 683 S.E.2d at 278. 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. State v. Gillian, 373 S.C. 601, 611, 646 S.E.2d 872, 877 (2007). "Evidence is unfairly prejudicial if it has an undue tendency to suggest decision on an improper basis,

such as an emotional one." State v. Kirton, 381 S.C. 7, 24, 671 S.E.2d 107, 115 (Ct. App. 2008).

b. The trial court did not abuse its discretion by admitting evidence of prior difficulties between Green and Victim.

The trial court did not abuse its discretion by admitting evidence of prior difficulties between Green and Hogges. Evidence supports the trial court's findings that the prior threat and act of violence by Green against Hogges happened, and that the incidents were relevant and admissible under the rules of evidence. This Court should affirm.

i. The record supports the trial court's finding that the State proved the incidents by clear and convincing evidence.

Green claims the trial court abused its discretion by admitting evidence of prior difficulties because the State failed to prove the historical fact of either incident by clear and convincing evidence. Brief of Petitioner at 11 and 15. This claim is meritless. The record supports the trial court's finding that the incidents occurred.

Prior bad acts must be shown by clear and convincing evidence. "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).

Appellate courts do not review a trial judge's ruling on the admissibility of prior bad acts by determining de novo whether the evidence rises to the level of clear and convincing. 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. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001) ("This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence.").

Credible witness testimony is, in itself, sufficient to prove the historical fact of a prior bad act. See, e.g. State v. Tutton, 354 S.C. 319, 326, 580 S.E.2d 186, 190 (Ct. App. 2003). This credibility-focused determination is the proper and exclusive province of the trial court, who is in a much better position to assess witness credibility than an appellate court. See Wilson, 345 S.C. at 6, 545 S.E.2d at 829 (explaining "it was error for the Court of Appeals to base its ruling on [a witness's] credibility"); Tutton, 354 S.C. at 325–26, 580 S.E.2d at 190 ("The determination of a witness's credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity. Accordingly, the determination as to whether Jane's testimony clearly and convincingly established that the prior assault occurred is a matter well within the trial court's discretion.").

Consistent with this deferential standard of review, this Court should affirm. Elise Hogges' testimony is sufficient by itself to support the trial court's fact-based ruling that the prior incidents occurred. R. 13–15. Additionally, Hogges filed a police report after the January incident, which corroborated her testimony. R. 22,

line 21. The court noted this this in its ruling admitting evidence of this incident while excluding evidence of a third incident (for which Hogges could not provide a date and did not file a police report). R. 16, 30. This shows the court conscientiously considered the proffered testimony and only admitted the two incidents it was convinced occurred. The trial court also enunciated the correct standard for admitting prior bad acts. R. 29, lines 18–20. Evidence supports the trial court's ruling. This Court should affirm.

ii. Evidence of the prior incidents was relevant and admissible under Rule 404(b).

Green claims the court of appeals "overlooked the fact that there is no evidence to support the finding that the testimony is relevant to the December shooting." Brief of Petitioner at 10. The Court of Appeals did not overlook this "fact." Rather, it correctly applied the "abuse of discretion" standard of review and properly held the trial court's decision it supported by the record. Evidence of prior difficulties was relevant to prove Green committed the subsequent attack on Hogges.

"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." Rule 401, SCRE (emphasis added). "The trial judge must have wide discretion on innumerable questions of relevancy before her, and her decision should be reversed only for abuse of that discretion." State v. Anderson, 253 S.C. 168, 182, 169 S.E.2d 706, 712 (1969). "Evidence is admissible if 'logically relevant' to establish a material fact or

element of the crime; it need not be 'necessary' to the State's case in order to be admitted." State v. Sweat, 362 S.C. 117, 127, 606 S.E.2d 508, 513 (Ct. App. 2004) (emphasis added).

Evidence of the prior difficulties between Green and Hogges was highly probative. The evidence provided essential context to explain why this shooting happened, that Green was the person who did it, and whether Green acted maliciously and with intent to kill. The different justifications for the evidence fit within and overlap between several of Rule 404(b)'s enumerated purposes for which prior bad act evidence may be admitted, as well as the common law res gestae doctrine.

### Identity

Evidence of prior difficulties was relevant first to prove identity. Green's defense at trial was that he did not commit the alleged acts, calling into question not only whether he acted with the requisite intent, but whether he acted at all. R. 78, lines 22–24. This was an identity case. Any evidence tending to show Green was the person who committed the acts was extremely probative.

Evidence of prior difficulties between Green and Hogges established Green's motive and shed light on his state of mind. Because a person with a motive is more likely to commit a crime than a person with no motive, the existence of a motive (stemming from Green and Hogges' toxic relationship) was relevant to prove identity. See State v. Thomas, 248 S.C. 573, 583, 151 S.E.2d 855, 861 (1966) (overruled on other grounds) (approving prior bad act evidence where it "was

restricted to the minimum requirements of the case and tended directly and fairly to prove not only the identity of the Petitioner, but his motive as well"). "Certainly motive is useful in detective work and could be quite helpful in a jury's determination as to whether a particular person did the act." McAninch and Fairey, The Criminal Law of South Carolina, 52 (1982). Because Green denied he was the person who committed the alleged acts, prior bad evidence was relevant to prove his identity as the perpetrator.

### Motive

Closely related is the 404(b) "motive" exception. This was such an extraordinarily hateful act that a juror would naturally question who was motivated to commit it. The State theorized Green was motivated by "jealousy, hatred, and obsession," stemming from his terminated relationship with Elise Hogges. R. 394. In order to prove that fact, the State needed to show the history of the relationship. Evidence of the tumultuous relationship was "part of the history of the case" and relevant to motive. See State v. Petit, 144 S.C. 452, 142 S.E. 725, 731 (1928) (explaining evidence about "relations existing between the respective families of the deceased and the defendant" was relevant in murder prosecution), citing State v. Senn, 32 S.C. 392, 11 S.E. 292, 295 (1890) (explaining evidence of threats and a "peace warrant" taken out by wife against husband was relevant in murder prosecution against husband because it "surely tended to show the relation which existed between Senn and his wife, and therefore was germane to the issue, and receivable in evidence").

The two prior acts offered into evidence in this case occurred during the calendar year leading up to the incident, during which time Green and Hogges broke up and Hogges started dating Minus. In the pretrial hearing, Hogges testified that the fighting had been getting worse as time passed, and that she believed Green's threats had become more dangerous and plausible. R. 16. The couple's tumultuous history, illustrated by Green's threat to kill Hogges and an incident where the fighting became physical, was logically relevant to show Green had a motive to attempt to kill Hogges. See State v. Lyle, 125 S.C. 406, 118 S.E. 803, 807 (1923) ("The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced. If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime.").

Similarly, evidence of the prior difficulties—particularly Green's threat to kill Hogges—was relevant to prove malice as an element of Attempted Murder. A person is guilty of Attempted Murder if he "with the intent to kill attempts to kill another person with Malice Aforethought either expressed or implied." S.C. Code Ann. §16-3-29 (2015). "It is well-settled that evidence of previous threats by the defendant is admissible to show malice." Blakely v. State, 360 S.C. 636, 639, 602 S.E.2d 758, 759 (2004) (citing State v. Lee, 255 S.C. 309, 178 S.E.2d 652 (1971) and State v. Alford, 264 S.C. 26, 212 S.E.2d 252 (1975)). Not only can malice be inferred from the January incident where Green struck Hogges, Green demonstrated

express malice when he threatened to kill Hogges in November, the month prior to the shooting. See Sheppard v. State, 357 S.C. 646, 663, 594 S.E.2d 462, 471 (2004) (approving a jury charge that stated "malice can be expressed where there is manifested a deliberate intention to violently and unlawfully take the life of another human being. **For instance with words.**") (emphasis added); State v. Coleman, 6 S.C. 185, 186 (1875) ("The best evidence of the state of mind attending any act is what was said and done by the person whose motive is sought for."). "Generally, motive is not an element of a crime that the prosecution must prove to establish the crime charged, but frequently motive is circumstantial evidence. . . of the intent to commit the crime when intent or state of mind is in issue. **State of mind is an issue any time malice or willfulness is an element of the crime.**" State v. Sweat, 362 S.C. 117, 124–25, 606 S.E.2d 508, 512 (Ct. App. 2004) (citing Danny R. Collins, South Carolina Evidence 319 (2d ed.2000)) (emphasis added). Elise Hogges' testimony about the prior threat and incident of violence was relevant and highly probative of malice, and satisfies the "motive" exception to Rule 404(b).

This rationale overlaps with the line of cases allowing evidence of "prior difficulties" in homicide cases. "Evidence of previous quarrels, ill feeling, or hostile acts between the parties is admissible to show the animus probably existing between them at the time of the homicide." State v. Brooks, 79 S.C. 144, 60 S.E. 518, 518 (1908); 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 where there is some connection of cause and effect between the evidence and the crime.") (citations omitted). Surely, a bitter breakup qualifies as "ill feelings" sufficient to motivate a person to commit an act of violence. See State v. Sweat, 363, S.C. 117, 126, 606 S.E.2d 508 (evidence of tumultuous relationship and breakup admissible to show defendant was "driven by anger" when he attacked ex-girlfriend and her new boyfriend).

Green may argue that jealousy and anger are normal after a breakup, and that the bad act evidence in this case was not necessary to demonstrate Green's motive. First, motive evidence "need not be 'necessary' to the State's case in order to be admitted." State v. Sweat, 362 S.C. 117, 127, 606 S.E.2d 508, 513 (Ct. App. 2004); State v. Parker, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993). Rather, the test is whether the evidence is "logically relevant" to establish a material fact or element of the crime. Sweat, 362 S.C. at 127, 606 S.E.2d at 513. Second, this was not a normal breakup. Normal relationships do not end in gunfire. Green's extreme hatred and escalating pattern of violence against Hogges was an integral part of the story, and necessary to explain his extraordinarily violent and malicious attack. Evidence of the prior difficulties between Green and Hogges was relevant to demonstrate Green's motive.

### Intent

The evidence was also highly probative of Green's intent and state of mind. Not only was the State required to prove malice, it was required to prove the "highest possible mental state for criminal attempt" — specific intent to kill. State

v. King, 422 S.C. 47, 64, 810 S.E.2d 18, 27 n.5 (2017) (noting "if there is no evidence that one charged with attempted murder had express malice and a specific intent to kill, we believe the crime would involve a lower level of intent and, thus, would fall within the lesser degrees of the assault and battery offenses"); State v. Kinard, 373 S.C. 500, 503–04, 646 S.E.2d 168, 169 (Ct. App. 2007) ("Malice aforethought' is defined as 'the requisite mental state for common-law murder' and it utilizes four possible mental states to encompass both specific and general intent to commit the crime. These four possibilities are intent to kill, intent to inflict grievous bodily harm, extremely reckless indifference to the value of human life (abandoned and malignant heart), and intent to commit a felony (felony murder rule).") (citing Black's Law Dictionary 969 (7th ed.1999)). Proving "express malice and a specific intent to kill" is a difficult task and high burden, making the prior act testimony extremely probative and important to the State's case.

Intent is seldom susceptible to proof by direct evidence, and is typically proved through circumstantial evidence. State v. Brandt, 393 S.C. 526, 546, 713 S.E.2d 591, 601 (2011). Intent is only matter of circumstance, which naturally follows and springs out of the facts. Id. (quoting State v. Murray, 72 S.C. 508, 52 S.E. 189, 191 (1905)). Prior difficulties were an integral part of the circumstances of the crime.

The classic example of a case where express malice is shown is when the assailant contemporaneously verbalizes his intent to kill. Absent an expression at the time of the act, the next best evidence of intent to kill is prior threats to kill.

This Court has recognized that evidence of prior threats is admissible under Rule 404(b) to show intent. Blakely v. State, 360 S.C. 636, 639, 602 S.E.2d 758, 759 (2004) (holding prior threats admissible to show intent in ABIK trial).

The proof that Green committed the alleged acts was extremely strong. Both victims identified Green with 100% certainty, and cell phone and other circumstantial evidence strongly corroborated their testimony. However, despite the strength of the State's case, reasonable minds could have disagreed on whether Green specifically intended to kill Hogges and Minus. Evidence of prior difficulties was absolutely crucial to establish Green's intent to kill. The State was entitled to present evidence of prior difficulties to meet its exceptionally high burden of proof that Green acted with intent to kill.

#### Res Gestae

Under the res gestae theory, "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." State v. Dennis, 402 S.C. 627, 635, 742 S.E.2d 21, 25 (Ct. App. 2013). Also known as "complete story" principle, see State v. Price, 123 Ariz. 166, 598 P.2d 985 (1979), res gestae evidence is proper where it "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.'" State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366,

370–71 (1996) (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir.1980) (explaining "(t)he jury is entitled to know the 'setting' of a case. It cannot be expected to make its decision in a void without knowledge of the time, place and circumstances of the acts which form the basis of the charge"))).

The State's presentation of its case would have been incomplete without some testimony showing the toxic nature of the Green and Hogges' relationship. See State v. Fletcher, 379 S.C. 17, 29, 664 S.E.2d 480, 486 (2008) (Toal, C.J., dissenting) (discussing res gestae exception and opining that "evidence that Petitioner abused and neglected the victim just weeks before his death" was admissible under res gestae theory because it showed "escalating abuse" against same victim). Without context, the jury would have been forced to assume the relationship ended in a more normal fashion, and would not have been aware of the pattern of domineering conduct that culminated in Green's homicidal outburst. The testimony was highly relevant because it established "narrative integrity" and allowed the jury to understand the extraordinary animus Green held towards Hogges after the dissolution of their relationship. See Robert P. Moseller et al., 1 McCormick On Evid. § 190.9 (8th ed.2020). The absence of testimony explaining the toxic dissolution of the relationship would have caused the jury to doubt whether Green was capable of such extraordinarily malicious conduct towards the mother of his child, "detract[ing] from the jurors' evaluation of the credibility of [Hogges] testimony." Id. For example, the jury may have disbelieved that Hogges called 911

simply because of the way Green was staring at her as she passed him on the highway. R. 116. Evidence of prior difficulties was admissible as res getae.

#### 403 Analysis

"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. Unfair prejudice means "an undue tendency to suggest [a] decision on an improper basis, commonly, though not necessarily, an emotional one." State v. Sweat, 362 S.C. 117, 128, 606 S.E.2d 508, 514 (Ct. App. 2004). Even if evidence is "highly prejudicial" to a defendant, where the probative value is also high, the evidence should be admitted. State v. Adams, 322 S.C. 114, 119, 470 S.E.2d 366, 369 (1996) ("The evidence... obviously is highly prejudicial. However, its probative value is also high because the evidence tends to establish [defendant's] intent ... The trial judge properly admitted this evidence.") (citation omitted).

As explained above, evidence of prior difficulties was highly probative to show motive, intent, identity, malice and res gestae. In contrast, the evidence does not suggest guilt on an improper basis. Evidence of the prior difficulties between Green and Hogges was not offered to attack Green's character or to show he had a propensity for violence. The State did not introduce evidence of Green's history of violence in general, or specific instances of violence against other ex-girlfriends. Cf. State v. Perry, 430 S.C. 24, 37, 842 S.E.2d 654, 661 (2020) (evidence of defendant's

sex crimes against separate victim had no logical connection to charged crime). The evidence of prior bad acts was limited to Green's relationship with Elise Hogges and had a clear logical connection to the charged acts. This is a far cry from cases where the State introduced evidence of a defendant's other crimes with no relation to the facts of the underlying case. See, e.g. State v. Smith, 309 S.C. 442, 446, 424 S.E.2d 496, 498 (1992) (holding evidence of defendant's drug use was not relevant to murder charge). The evidence in this case was offered to give context and explain to the jury why Green engaged in this homicidal behavior. This is precisely the type of evidence allowed under Rule 404(b).

Any prejudice that resulted was low. The prior acts were much less severe than the charged acts. They involved an episode of hair-pulling and injury to personal property, and a verbal threat to shoot the victim. Certainly, these acts were not "equally heinous" so as to prompt "a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged." State v. Lyle, 125 S.C. 406, 118 S.E. 803, 807 (1923). Nor did the State offer extended or unnecessary details of the prior acts. See State v. Thomas, 248 S.C. 573, 583, 151 S.E.2d 855, 861 (1966) (noting prior bad act evidence "was restricted to the minimum requirements of the case"). Hogges' prior act testimony was brief; it fits on two pages of the trial transcript. R. 112, line 6 – 114, line 7.

Green claims the January incident was too distant in time from the incident date to be relevant. This argument is meritless. Both prior incidents happened within the year prior to the incident. There is no set rule as to what lapse of time

will make particular evidence too remote to be probative, and the determination of remoteness is a matter within the discretion of the trial court. State v. Glenn, 328 S.C. 300, 309, 492 S.E.2d 393, 397 (Ct. App. 1997) (no abuse of discretion where prior acts "occurred sometime during the year prior to the incident"). The temporal attenuation between the making of a statement and the crime is of no moment in assessing its admissibility, but rather goes to the weight of the evidence. State v. Beck, 342 S.C. 129, 135, 536 S.E.2d 679, 682 (2000) ("The four month lapse is at most a matter bearing on the weight of the evidence, which was for the jury to determine."); State v. Brooks, 79 S.C. 144, 60 S.E. 518, 518 (1908) (finding no error in admitting a threat made by defendant to victim eight months earlier); State v. Thomas, 248 S.C. 573, 151 S.E.2d 855 (1966) (no abuse of discretion in admitting testimony regarding prior bad act that occurred four years before incident where relevant to motive). The passage of time from the first incident was less than one year; the time from the second incident was less than a month. They did not lose their probative force due to the passage of time. Obviously, Green's malicious feelings had not dissipated.

Green further claims the "alleged prior threat to Hogges-Minus alone did not logically relate to the State's allegation that Petitioner attempted to murder Hogges-Minus and her boyfriend when he saw them together. . . . The motive exception might have been stronger if the prior alleged threat had been made to Hogges-Minus and her boyfriend rather than to Hogges-Minus only." Brief of Petitioner at 14–15. This is incorrect and totally beside the point. Evidence of the

prior difficulties between Green and Hogges was relevant to show Green's motive to kill Hogges regardless of its relevance to Minus, who was only a target because of his association to Hogges. If Green wanted to exclude evidence of prior difficulties as it related to Minus, he should have moved to sever the cases or asked for an instruction to that effect. In this joint trial, evidence of the prior difficulties was admissible to prove the attempted murder charge against Hogges regardless of its relevance to the charge of attempted murder against Minus.

Green is asking this Court to overturn the discretionary judgment of the trial court, even though that court's decision is one that can be overturned only if "clearly untenable." Norris v. Clinkscales, 47 S.C. 488, 25 S.E. 797, 801 (1896). The record supports the trial judge's findings that the incidents occurred, fit a 404(b) exception, and that their probative value was not substantially outweighed by the danger of unfair prejudice. Considering the high probative value of the testimony, low prejudice, and deferential standard of review, the trial court's decision was well within his discretion. This Court should affirm.

- c. Even if the trial court erred, Green was not prejudiced because admission of prior bad act evidence did not change the result of trial.

Even if this Court determines the trial court erred by admitting one or both of the prior bad acts, the Court should still affirm because the error was not prejudicial. The admission of evidence of either incident did not change the result of trial because evidence of Green's guilt was overwhelming. This Court should affirm.

Even without the prior bad act evidence discussed above, the direct and circumstantial evidence offered by the State in the form of eyewitness testimony, police investigation, expert testimony, and evidence of flight was so overwhelming that Green's guilt was "conclusively proven such that no other rational conclusion could be reached." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). Even if the court erred, error is harmless where it could not reasonably have affected the result of the trial. State v. Charping, 313 S.C. 147, 437 S.E.2d 88 (1993). The determination of the prejudicial effect of prior bad act evidence must be based on the entire record and the result will generally turn on the facts of each case. Details of prior bad act evidence that may not be admissible are deemed harmless where they are minimal. State v. Forney, 321 S.C. 353, 358, 468 S.E.2d 641, 644 (1996) (citation omitted).

The State presented direct evidence in the form of testimony from Ken Minus and Elise Hogges that Green was without a doubt the person who chased them to Omega Court.<sup>2</sup> Other witnesses corroborated their accounts. Delphine Gavin testified she saw Green's vehicle leaving the scene immediately after the shots were fired. R. 183, lines 3–5. Green's mother testified he had possession of the vehicle on the night of the incident. R. 266, lines 14–19.

Green's flight showed consciousness of guilt. Although police notified Petitioner's brother and mother of the attempt on Hogges' life, and that the police wanted to speak with him, Green did not turn himself in. Nor did he return to his

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<sup>2</sup> R. 116, line 19: "I looked in his eyes." R. 151, line 16. "I saw square in his face."

residence, which police were surveilling. Rather, he turned off his phone and fled, forcing federal marshals to track him down and arrest him heading south on I-95.

If this wasn't enough, any doubt of Green's guilt was eliminated by the cell phone evidence offered through expert witness Scott McDonald. The evidence showed Green's cell phone was present at the scene of the crime. The expert was able to demonstrate how cell tower data proved Green's cell phone was moving east away from Orangeburg at 9:30pm, when the victims first encountered him; that his phone called Elise Hogges' cell phone multiple times during the incident, blocking caller ID; that the phone continued east toward 129 Omega Court and was near Omega Court at the time of the incident; and then moved back toward Orangeburg just after the incident. R. 362–67. During this time and immediately after, the phone was used to call Elise Hogges, Lakeisha Heyward (Green's girlfriend), Green's brother, and Palmetto Health Richland (Hogges' place of employment at the time). R. 110, 367.

This evidence conclusively proved Green's guilt. By contrast, the State did not introduce excessive or unnecessary details of the prior difficulties. While the testimony was relevant, any prejudice in the admission of this evidence was so insubstantial that it could not have affected the outcome. State v. Sherard, 303 S.C. 172, 399 S.E.2d 595 (1991) ("Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result."). This Court should affirm.

CONCLUSION


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

Respectfully submitted,

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