STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Marlboro County
Court of General Sessions
Edward B. Cottingham, Circuit Court Judge

Opinion No. 5390 (S.C. Ct. App. filed March 16, 2016)
Rehearing Denied May 2, 2016
Supreme Court Case No. 2016-001161; Court of Appeals Case No. 2012-213461

THE STATE,

PETITIONER,

V.

TYRONE J. KING,

RESPONDENT.

BRIEF OF PETITIONER

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INDEX

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUES ON APPEAL

1. Whether the Court of Appeals erred in finding King's objections to the introduction of portions of King's statements regarding a prior armed robbery and an alleged prior murder charge was preserved for appellate review when King did not ask the trial court to conduct a full analysis as required under Rule 404(b) and Rule 403 of the South Carolina Rules of Evidence?

2. Whether the Court of Appeals erred in remanding this case to the trial court for analysis upon King's objections under Rule 404(b) when, as correctly found by the dissent, any error made by the trial court was harmless beyond a reasonable doubt as there was overwhelming evidence of King's guilt outside of the alleged improper bad acts evidence?

STATEMENT OF THE CASE

On September 10-13, 2012, Respondent Tyrone J. King ("King") was tried by a jury for the murder of James Galloway, assault and battery of a high and aggravated nature of Karen Galloway, pointing and presenting a firearm, and possession of a weapon during the commission of a violent crime. King was tried in the Marlboro County Court of General Sessions before the Honorable Edward B. Cottingham, Circuit Court Judge. Tristan Shaffer, Esquire, and Assistant Public Defender Richard Jones, Esquire, represented King. The State was represented by Deputy Solicitor Kernard Redmond, Esquire, and Assistant Solicitors Mia B. David, Esquire and Mary Thomas Johnson-Lee, Esquire, all of the Solicitor's Office for the Fourth Judicial Circuit.

On September 13, 2012, King was convicted of Murder, Third Degree Assault and Battery, Pointing and Presenting a Firearm, and Possession of a Weapon during the Commission of a Violent Crime. (App. 291-92). He was sentenced to life imprisonment for the murder conviction, thirty days suspended on time served for the assault and battery in the third degree conviction, five years confinement for the possession of a firearm during the commission of a violent crime conviction, and five years confinement for the pointing and presenting a firearm conviction. (App. 2-4). The latter two sentences are consecutive to the life sentence for the murder conviction and to each other. (App. 2-4). King subsequently filed a Motion for a New Trial. (App. 346-358). A hearing on the motion was heard on October 10, 2012. (App. 296-308). The trial court denied the motion on the record. (App. 298, 303-05, 306-08).

King appealed. King perfected the appeal with the filing of a Final Brief of Appellant. In that brief, he raised three issues:

1. In this murder case involving the defense of accident, did the circuit court err in excluding some but not all references to Defendant-Appellant's prior charges of murder, kidnapping, and armed robbery?

2. Did the circuit court—which had admitted the bad-conduct references above on the belief that the State could not redact them—err in denying Mr. King's motion for new trial once it became clear that the State could redact precise portions of the videotaped interrogations?

3. Did the circuit court err in denying a mistrial after a witness referenced the Defendant-Appellant's charge for armed robbery only few transcript pages after the circuit court had told the solicitor in self-described "strong" terms that any questioning about the armed robbery would result in a mistrial?

(App. 366-404). The State filed a Final Brief of Respondent. (App. 405-54). King also filed a Final Reply Brief of Appellant. (App. 455-70).

The South Carolina Court of Appeals heard oral argument on January 6, 2015. On March 16, 2016, the Court of Appeals issued a published opinion affirming the trial court's denial of King's motion for a mistrial and King's motion for a new trial. (App. 486-87). However, the Court of Appeals remanded this case to the trial court to conduct a Rule 404(b) analysis regarding its admission of prior bad act evidence. (App. 485-86). Judge Geathers dissented from the majority opinion. (App. 488). The dissent found that remand was not necessary because any error by the trial court was harmless; there was overwhelming evidence of guilt. Id. The State subsequently filed a Petition for Rehearing. (App. 489-96). The South Carolina Court of Appeals subsequently denied the Petition for Rehearing on May 2, 2016. (App. 506). The State subsequently filed a Petition for Writ of Certiorari. By Order filed February 10, 2017, this Court granted a writ of certiorari. This Brief follows.

STATEMENT OF FACTS

On the early morning of November 11, 2011, Respondent Tyrone King shot and killed the victim, James Galloway. King shot Mr. Galloway in the right side of his face. (See App. 215). The forensic pathologist testified that Mr. Galloway died as a result of a gunshot wound to the face. (App. 215).

King knocks on the victims' door early that morning

Karen Galloway, the murder victim's wife and the victim of the third degree assault and battery, testified that at around 2:30-2:45 on November 11, there was a knock at their door. (App. 92). Mrs. Galloway testified that her husband answered the door. (App. 92). Mr. Galloway came back to their bedroom and informed Mrs. Galloway that it was King at the door. Mrs. Galloway testified that her husband put his shorts on, went back out the room. She then heard Mr. Galloway go back into the other room, "and he said, 'Naw, man, I don't have'. . ." (App. 92, l 24). Mrs. Galloway then heard a pop. (App. 92).

Devonte M. testified that he heard someone come to the house on the early morning of November 11. (App. 111). He saw King that morning. (App. 111). Devonte testified that King asked for some beer or liquor. (App. 112). Then Devonte saw King shoot Mr. Galloway. (App. 113). Devonte indicated that King's gun was initially in his pants; King pulled the gun out and shot Mr. Galloway. (App. 113). After hearing the pop from the gun, Devonte jumped but did not run. (App. 114). Devonte later stated that he saw King point the gun at Mr. Galloway, but he did not remember see him fire the shot. (App. 119). Devonte noted that he heard the shot, but he was not looking at Mr. Galloway when the shot was fired. (App. 119).

King charges into Mrs. Galloway's bedroom

Mrs. Galloway testified that after she heard the pop, she jumped out of her bed. (App. 92-3). By the time she was out of the bed, King started running into her bedroom with the gun in his right hand, pointing the gun in her face and asking her who was in the house with her. (App. 93, 94). Mrs. Galloway stated that King then hit her in the top of her head with the gun, and she sat down. (App. 93). Mrs. Galloway testified that King hit her with the handle of the gun, and the gun fired a bullet through the wall. (App. 94). After King hit her, he walked out of her bedroom and out towards the front room. (App. 95). She then got to her telephone and called 911. (App. 95). While on the phone, she walked into the living room and saw where Mr. Galloway was on the floor. (App. 95).

Reggie Cousar, the Galloways' first cousin who was living with them at the time, testified that on November 11, he was awoken when he heard Mrs. Galloway screaming his name. (App. 103). When he walked around from his bedroom to the front room, he saw King pointing a gun to Mrs. Galloway's face. (App. 104, 108). Cousar saw King point the gun at her face. (App. 104; see App. 108). Cousar indicated that he asked King what was going on, and King started talking about one of his boys did it. (App. 105). Then King turned and pointed the gun at Cousar in his chest. (App. 104). Cousar noted that he knew it was a gun from the way it felt on his chest, and from the fact that he saw it. (App. 104). Cousar then heard Mrs. Galloway on the phone talking about her husband being shot. (App. 105). When Cousar saw Mr. Galloway on the floor, he rushed to him, and King ran out the door. (App. 105).

Mrs. Galloway testified that King snatched the phone out of her hand and hung up the phone. (App. 96). When the 911 operator called back, King spoke with her. (App. 96). Mrs. Galloway recalled hearing King tell the 911 operator that his friend shot his neighbor. (App. 96).

Mrs. Galloway asked King for the phone, and she recalled he said that he was not about to go to jail. (App. 96). Mrs. Galloway indicated that she asked him to just go outside and surrender, but King declined. (App. 96). After some further back and forth, King ran out the back door with the gun and phone in hand. (App. 96).

King runs away from the house

Mrs. Galloway testified that King ran out the back door. (App. 97). As he did so, she opened the front door and told the officers that King ran out the back door. (App. 97).

Deputy Shaw of the Marlboro County Sheriff's Office testified that as he walked towards the front porch of the residence, one of the people on the porch stated that the subject was running from the back door. (App. 122). Shaw indicated that he could hear someone running inside the residence. Shaw headed towards the back of the residence. (App. 122). As he got to the back corner, but before he could get to the back door, he saw the back door open and someone run out of it. (App. 122). Deputy Shaw engaged in a foot chase. (App. 122-23). He saw King slide up underneath a truck. Shaw testified that he started shouting to him to show Shaw his hands. Shaw noted that he could tell the subject had something in one of his hands. Eventually, King threw something towards the front of the truck and slid out from under the truck. (App. 123). The item was later identified as a telephone from the Galloways' residence. (App. 126). In securing King, Deputy Shaw found a bottle of alcohol, but no weapon on King. (App. 124).

Shaw noted that he saw no one else exit the Galloway residence. (App. 125).

Police investigation

Law enforcement recovered a telephone that was identified as belonging to the victims' house and a liquor bottle near the truck where King was apprehended. (App. 136). It was also

noted that the liquor bottle was of the same type found in the victim's closet in the master bedroom. (App. 136). Law enforcement also found a bullet hole in the master bedroom, which led to the den and to the roof of the residence. (App. 136-37). A nine millimeter handgun with an extended clip was found in the wooded area behind King's residence. (App. 137). A projectile was also recovered from the living room of the victims' residence. (App. 138-39, 145, 151). Also, two cartridge casings were found, one in the living room and one in the master bedroom. (App. 155, 156).

Two statements were taken from King. In the first, he claimed that Aloysius McLaughlin was with him that night. (App. 168; State's Exhibit Five). He further claimed that they went to the Galloway house to purchase some alcohol, and McLaughlin shot Mr. Galloway. (App. 168; State's Exhibit Five). King then noted that Mrs. Galloway came out of her bedroom hysterical, and he tried to calm her down. (App. 168; State's Exhibit Five). He noted that he swung the gun at her. (App. 168; State's Exhibit Five). King also claimed that Aloysius ran out the door with the gun, and King ran behind the residence. (App. 169).

In his second statement to law enforcement, King claimed that he had obtained the gun from a guy named Broom. (App. 200; State's Exhibit Four). King asserted that he was going to try to sell the gun, and he took it to Mr. Galloway's house to see if he wanted to buy it. (App. 200; State's Exhibit Four). King claimed that as he was attempting to take the clip out of the gun, it fired and struck Mr. Galloway. (App. 200; State's Exhibit Four). He also stated that he would not assert that Mrs. Galloway was lying if she said King struck her with the gun. (App. 201; State's Exhibit Four).

The forensic pathologist was able to determine that the shot that killed the victim was fired between six inches and four feet away from the entry wound in the victim's face. (App. 215-18).

Round lead particles were found in King's right palm. (App. 226, 228-29). The two cartridge casings recovered from the scene, along with the projectile recovered from the wall in the living room, were all fired from the gun found in King's back yard. (App. 233-36, 365). Mr. McLaughlin and his girlfriend at the time of the incident, Melissa Graham, both testified that they were not with King on the night before or the early morning of the shooting. (App. 178-81, 183-88).

ARGUMENT

The issues presented in this appeal both stem from the admission of portions of law enforcement's interviews with King. The Court of Appeals has opined the case should be remanded with instructions to the trial court to conduct the on-the-record Rule 403 balancing test required in assessing the admission of prior bad acts evidence. This remand is not warranted. First, contrary to the Court of Appeals' determination, King's contention on appeal that the trial court failed to conduct the on-the-record balancing test was not preserved for appellate review. King never objected to the trial court's failure to conduct such an analysis at trial. Second, a remand was not warranted in this case because any error that may have occurred in admitting the prior bad acts evidence at issue was harmless beyond a reasonable doubt. The State presented overwhelming evidence of King's guilt that in no relied upon the alleged improper prior bad acts evidence contained in the interviews of King. Since any error was harmless, a remand is not warranted.

Relevant facts:

Pre-trial discussion regarding the first statement

The first interrogation, State's Exhibit 5, was of an interview done with King on the morning of the shooting on November 11. After Investigator Feldner testified about the voluntariness of the statement, it was played in open court during a pre-trial hearing. While the first interview was playing, King made several objections through counsel. Initially, King requested that profanity that he used during the interview be redacted. (App. 40). Those requests were denied by the trial court, which indicated that it did not have the capability to do so. (App. 40). King further objected on relevancy grounds, to which the trial court again denied the request because it was the language King chose to use during the interview. (App. 40-41).

King objected to a discussion about his previous murder charge in the interview being mentioned:

> MR. SHAFFER: At this point he's talking about his previous murder charge. It's 4:28 on the video. 4:28:58.
>
> THE COURT: I want that redacted; that part. Can you do that without destroying the whole video?
>
> MS. WHITE: We would have to fast forward it through that part.
>
> THE COURT: Pardon me.
>
> MS. WHITE: We will have to fast forward through it, your Honor.
>
> THE COURT: Well, make sure you do it in the right place, but back up a little bit and then fast forward. I don't want to hear anything about that. To the extent possible get to where he talks about allegedly this incident. Go ahead. Let's see where we're going. Go ahead. You be sure that's redacted.

(App. 41, ll 9-23).

Next, King moved to redact a part of the interview where he admitted that he had shot a gun and that he carries a gun with him. (App. 42). Specifically, King contended those statements were not relevant, it was a prior bad act, and it was inadmissible under Rule 403. (App. 42). The trial court noted the objection for the record, but ultimately found the statement was admissible: "No, sir. There is evidence of the gun was used, and it was evidence as I understand it for the jury's consideration. It was his gun. He mentioned his gun. It's appropriate that it stays and will." (App. 42, ll 13-16).

King then moved to redact a discussion about a lawyer he had on a prior charge. (App. 42-43). After the trial court indicated that it was inclined to let that part of the interrogation into evidence, King noted that his objection was under Rule 404(b). (App. 43). The trial court then noted that it wanted anything that gets into significantly old charges redacted, as well as any reference to prior conduct. (App. 43).

King next objected to a portion of the interview where he was discussing charges he had pending from an incident in McColl. (App. 44). The trial court agreed that should be redacted. (App. 44). Next, King objected to a portion of the video where he discussed being stabbed during an alleged armed robbery. (App. 44). The trial court noted that they had discussed this particular segment in chambers, and indicated that it would not require that part of the interrogation be redacted. "I'm leaving that because the individual is coming in, and he's saying he was stabbed 20 times in self-defense. There is a witness coming in saying that's not true; isn't that true?" (App. 44, ll 20-3). The trial court further noted that it was letting the information in based on the totality of the evidence that was there. (App. 45).

At that point, King contended "[t]he objection I want to make are 401, 403 and 404(B) and the fact that it's a collateral issue that is not relevant to this case." (App. 45, ll 7-9). In response, the State argued, "we thought that this part was relevant because the defendant is saying in this case that he carried a gun because he was stabbed 20 times whereas we know that the guy that stabbed him said that he did so because the defendant was trying to rob him." (App. 45, ll 13-18). The trial court ruled that was why it was going to let the information into evidence. The trial court further explained that it was not going to allow King to claim that he was stabbed twenty-two times without the truth coming out as to why he was stabbed. (App. 45).

King next objected to a reference of him carrying a gun for self-defense, contending that it was irrelevant. (App. 46). The trial court stated that it was going to allow that statement to be played. (App. 46).

King next moved to suppress a discussion in which he indicated that he was familiar with members of the Marlboro County Sheriff's Office and the Marlboro County Jail. (App. 47). He

specifically moved to suppress those statements under Rule 404(b) and Rule 401. (App. 47). The trial court denied the motion. (App. 47).

King next objected to discussion about his pending charges relating to an incident in McColl. (App. 48). The trial court agreed and ordered that the statement made by King regarding how he was going to be charged for robbing a drug dealer be redacted. (App. 48). King next objected to a statement he made about this being his life. That objection was overruled. (App. 48). Similarly, an objection to a statement King made about the police around 4:46:14 on the video was overruled. (App. 49). Also, the trial court denied an objection based on Rule 404(b) and Rule 403 to the inclusion of a statement where King referred to himself as a criminal. (App. 50).

After a brief discussion about whether everything before the second time King was Mirandized was admissible, King objected to another mention of the charges in McColl. (App. 51). The State responded by noting that the only reason it was mentioned was because King was saying that Aloysius McLaughlin was the one that murdered James Galloway. (App. 52). The investigator was confirming that he was talking about the same person. (App. 52). The trial court indicated that he was going to allow that statement to stay in the video. (App. 52). At that point, King noted that his objection was under Rules 404(b), 403, and 401. (App. 52). The trial court responded that it thought it was appropriate based on the totality of what King was saying. (App. 52).

Next, King requested that a statement at around 5:08:25 be redacted.

MR. SHAFFER: Your Honor, at approximately 4:08 – I mean 5:08:25 he said he already had murders on his record, and I move to redact that, 404(B).

THE COURT: What was the specific remark?

MR. SHAFFER: He said, "I've already got murders on my record."

MS. DAVID: Your Honor, he does not have a conviction for murder on his record.

MR. SHAFFER: And he's been charged with murder, Your Honor.

THE COURT: He said -- I'm going to leave it where it is. Go ahead.

(App. 52, ll 13-24).

King then objected to the inclusion of a discussion in which he talked about when he was stabbed. (App. 53). The trial court ordered that discussion be redacted. (App. 53).

Discussion regarding second statement pre-trial

After Investigator Seales testified about the voluntariness of the statement given by King on November 16, 2011, the video of that statement was shown in open court. (App. 55-65). King objected to a portion of the video as follows:

MR. SHAFFER: Objection.

THE COURT: What's your objection?

MR. SHAFFER: Just before this point which is 8:44:33 on the November 16th video it -- he begins to talk about he[sic] McColl charges. He asks, 'what about my McColl charges'. He's asking this investigator questions.

THE COURT: They didn't go any further into it that I recall.

MR. SHAFFER: They're about to, Your Honor.

THE COURT: Are they going into the McColl charge?

MS. DAVID: Yes, Your Honor. They're about to for the next four minutes.

THE COURT: Let's strike any mention of the McColl charge.

MR. SHAFFER: I believe that right there, actually, he will be -- the end of the tape will be a perfect time because he says, "I appreciate you being honest with me," and that's almost a natural end of the tape.

THE COURT: Does the McColl charge end the tape any way?

MS. DAVID: Yes, Your Honor. We do not oppose that. We discussed that in chambers.

THE COURT: End it right before he says, 'McColl'.

MS. DAVID: Yes, Your Honor.

THE COURT: Is that what you want?

MR. SHAFFER: Yes, Your Honor.

THE COURT: You're entitled to that.

MR. SHAFFER: Thank you, Your Honor.

THE COURT: Yeah, we discussed that in chambers. Make sure that that's the only change I note in the objection as to that video.

MR. SHAFFER: Yes, Your Honor, that's the only objection.

THE COURT: Okay. And I sustain that. All right.

(App. 65, l 15 – App. 66, l 23).

After the trial court ruled that both statements were freely and voluntarily given, and after some discussion regarding scheduling, the trial court requested that the parties meet to discuss the redactions. (App. 364).

Overnight, King sent an email outlining the video timestamps of the redactions to be made along with the timestamps of the redactions he requested, but which were not granted by the trial court. (Court's Exhibit 1, App. 330). Specifically, King noted the following:

To be Redacted

Previous murder charge 4:28:52 - 4:29:04
Previous murder charge and Mccoll charge 4:32:20 - 4:34:04
Previous murder charge 4:40:44 -- 4:41 : 14
Mccoll charge 4:41:40 - 4:42:36
Stabbing 5:13:30-5:14:03

Not Granted but Obiectioned[sic] to (This is not an exclusive list)

Mentions a lawyer on another charge 4:31 :40 (Rules 404b 403)
Prior Stabbing 4:34:04 - 4:34: 1 0 (Rule 401)
Statemment[sic] "fuck the police" and " I am a criminal" 4:46:06 - 4:47:07 (Rules 404b and 403)
Aloyisious[sic] is same as previous charge 4:59:18 - 4:59:24 and 5:01:13 - 5:01:25
Prior stabbing 5:10:50 (401)
Prior Murder and Kidnapping Charge 5:08:09 - 5:08:10

Times where he said he shot a gun or carried a gun

4:30:05
4:36:11
4:44:31
5:06:48
5:10:55

(Court's Exhibit 1, App. 330).

On the next morning, prior to the start of trial, the State moved the two videos into evidence as State's Exhibits Four and Five. (App. 68). King noted that pursuant to the redactions for the videotape and the previous objection, he had no further problems with the tapes being admitted. (App. 68-69). After that, the parties and the trial court went through a discussion of what was being redacted and what was not being redacted from the two videos.

MR. SHAFFER: And I had made two other objections for that were not ruled upon -- or that were ruled upon by the Court but were denied. Two that I can think of. I want to preserve - - -

THE COURT: What are they, please?

MR. SHAFFER: One was the mention of the prior stabbing, again.

THE COURT: No, they redacted that. Anything to prior stabbing.

MR. SHAFFER: Yes, Your Honor. There was another mention of that that was not redacted because the Court ruled not to redact.

THE COURT: Where was that and what line?

MR. SHAFFER: I think it was at 15:40:50 or approximately 15:40:50.

THE COURT: Can you tell me about that?

MS. DAVID: 15:40:50; that's the -- could the defense attorney be more specific. Tyra White, who has our times for the video, she said it's not on there.

THE COURT: It's not on there.

MS. DAVID: It is not on our -- the time that we have is 4:55:20 to be redacted.

MR. SHAFFER: Your Honor, there is another reference to the stabbing after the Miranda, and it's at 15:10:50. I believe the Court ruled not to redact it yesterday.

THE COURT: I ruled not to redact that one?

MR. SHAFFER: Yes, Your Honor.

THE COURT: Well, if I ruled on it that's fine.

MR. SHAFFER: Thank you, Your Honor. There is – and there were a few other ones that you ruled not to redact. I would like to actually make this a Court's Exhibit. 15 This is an e-mail with just for clarification of some of the points I objected to.

(App. 70, l 18 – 71, l 16).

Further, King noted that he objected to a prior murder and kidnapping charge at 15:08. (App. 72). Initially, King noted that he believed the trial court had mentioned that the sheriff's office could not go through line by line and redact every reference to anything in the statement. (App. 72). The trial court noted that the equipment that the sheriff's office had was not the as sophisticated as it could be. (App. 72). In response, the solicitor noted that the trial court had ruled that the statement during the interview was admissible and not to be redacted. (App. 72). Both parties agreed that the trial court had ruled the statement did not need to be redacted. (App. 73).

After some discussion about the quality of the videos, King objected to the proposed approach regarding the testimony because they would be cumulative and a prior consistent statement. (App. 73-74). Further, counsel raised a due process and equal protection objection

against the admission of the videos. Specifically, he contended that some of the reasons for not redacting certain parts were that the equipment in Marlboro County was not sufficient to do so. The trial court noted most of the video was not discernable. (App. 75).

After some discussion, both the State and King agreed that the equipment the Sheriff's Office had was current, and that it was not designed to allow for redacting and editing. (App. 75-76). King then noted that he believed other agencies could make those redactions. (App. 76). After further discussion, King requested that his objections to the statements in the video be made final so that he would not have to object to each one when the video was played for the jury. (App. 77). The trial court informed counsel that he was protected for the record. (App. 77).

State's Exhibit Five, the video of the November 11, 2011 statement, was played for the jury after Investigator Feldner testified. (App. 171). State's Exhibit Four, the video of the November 16, 2011 statement, was published to the jury after Investigator Seales' testimony. (App. 204).

Court of Appeals Opinion

The Court of Appeals affirmed the trial court's rulings denying King's motion for a new trial and motion for a mistrial. (App. 486-87). However, the Court of Appeals also remanded the case to the trial court to conduct an analysis upon the Rule 404(b) objection to the introduction of King's statement regarding his prior charges regarding the McColl robbery and the alleged prior murder charge. The Court of Appeals found King's argument regarding the objections was preserved for appellate review. The Court of Appeals then found the matter should be remanded for further analysis by the trial judge.

While we acknowledge that the circuit court is given broad discretion in ruling on questions concerning the relevancy of evidence,[1] the circuit court here provided no indication that it properly considered Rules 401, 403, or 404(b). Even if these prior bad acts fell within a 404(b) exception, the circuit court failed to determine whether the prior bad act evidence was clear and convincing, and failed to conduct an on-the-record Rule 403 balancing test. See State v. Spears, 403 S.C. 247, 254, 742 S.E.2d 878, 881 (Ct.App.2013) ("find[ing] the [circuit] court erred by failing to conduct an on-the-record Rule 403 balancing test."), cert. denied (Sept. 11, 2014).

Generally, the proper remedy for failing to conduct such an analysis is to remand this issue to the circuit court to conduct the necessary analysis. See, e.g., State v. Colf, 337 S.C. 622, 629, 525 S.E.2d 246, 249 (2000) (concluding that when the circuit court failed to include an on-the-record Rule 609 balancing test, the appellate court "should have remanded the question to the trial court" rather than conduct the balancing test, reasoning that "[i]t is difficult, if not impossible, for an appellate court to balance the interests at stake when the record does not contain the specific facts and circumstances necessary to a decision"); State v. Howard, 384 S.C. 212, 223, 682 S.E.2d 42, 48 (Ct.App.2009) (finding the circuit court erred in failing to conduct a proper Rule 609(b) balancing test because it "provided no analysis of the prejudicial impact of admitting [the defendant's] prior convictions," and remanding for an on-the-record balancing test).

In State v. Spears, this court "decline[d] to conduct a de novo Rule 403 balancing test" and remanded the issue to the circuit court because it failed to perform a Rule 403 balancing test in admitting evidence of a prior conviction at trial. 403 S.C. 247, 258–59, 742 S.E.2d 878, 883 (Ct.App.2013). Noting the potential prejudice to the defendant in that case, the court stated "the jury could have determined Spears was guilty on an improper basis by relying on the ... testimony as propensity evidence." Id. at 258, 742 S.E.2d at 884. The court was "unable to say that the admission of the prior bad act testimony was harmless error" and found it "appropriate to remand for an on-the-record Rule 403 balancing test." Id. at 259, 742 S.E.2d at 884.

Here, we find the circuit court erred in failing to conduct a Rule 404(b) analysis before admitting prior bad acts evidence regarding King's "prior murder charge" and the McColl Charges. Thus, we remand to allow the circuit court the opportunity to conduct the necessary analyses.

(App. 482-86; State v. King, 416 S.C. 92, 784 S.E.2d 252, 262 (Ct. App. 2016)).

[1] See State v. Aleksey, 343 S.C. 20, 35, 538 S.E.2d 248, 256 (2000) ("The [circuit] judge is given broad discretion in ruling on questions concerning the relevancy of evidence, and his decision will be reversed only if there is a clear abuse of discretion.").

The dissent found that remand was not necessary. Any error by the trial court in admitting the evidence was harmless beyond a reasonable doubt because of the other overwhelming evidence of guilt. (App. 488).

> I would affirm King's conviction because the non-Lyle evidence of King's guilt was overwhelming. Victim's grandson saw King point the gun at Victim immediately prior to the gun's discharge. After shooting Victim, King pistol-whipped Wife, pointed the gun at Cousin's chest, and hung up the telephone Wife was using to speak to a 911 operator. When the 911 operator called back, King told the operator one of his homeboys shot Victim. When King learned police had arrived at the home, he fled the home and attempted to hide from police. King initially told police that McLaughlin shot Victim; only in his second statement to police did he allege that he shot Victim by accident.
>
> Therefore, any possible error in admitting the Lyle evidence was harmless beyond a reasonable doubt. See State v. Gillian, 373 S.C. 601, 609–10, 646 S.E.2d 872, 876 (2007) (finding that the admission of the specifics of the defendant's prior bad act in violation of Rule 403, SCRE, was harmless because the defendant's guilt was proven by other competent evidence "such that no other rational conclusion can be reached"); State v. Keenon, 356 S.C. 457, 459, 590 S.E.2d 34, 35 (2003) (holding the trial court erred in allowing the State to present evidence of multiple prior convictions "without first weighing the prejudicial effect against the probative value" but finding the error harmless "because of the overwhelming evidence of petitioner's guilt"); State v. Brooks, 341 S.C. 57, 62–63, 533 S.E.2d 325, 328 (2000) (holding whether the improper introduction of prior bad acts is harmless requires the appellate court to review "the other evidence admitted at trial to determine whether the defendant's 'guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached'" (quoting State v. Parker, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993))); State v. Adams, 354 S.C. 361, 381, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A]n insubstantial error not affecting the result of the trial is harmless where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.'" (quoting State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989)), cert. denied, (2004); id. (concluding even if the admission of evidence of an initial burglary of the victim's house violated Lyle, it did not affect the evidence that supported the defendant's guilt in the subsequent burglary).

(App. 488; King, 416 S.C. 92, 784 S.E.2d at 263-64(footnote omitted)).

I. THE COURT OF APPEALS ERRED IN FINDING KING'S ARGUMENT THAT THE TRIAL COURT ERRED IN FAILING TO PROPERLY ASSESS THE ADMISSIBILITY OF THE ALLEGED PRIOR BAD ACTS EVIDENCE IN HIS STATEMENT WAS PRESERVED FOR APPELLATE REVIEW.

"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." Rule 404(b), SCRE. "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. "As a threshold matter, the trial court must determine whether the proffered evidence is relevant as required under Rule 401, SCRE." State v. Cope, 405 S.C. 317, 337, 748 S.E.2d 194, 204 (2013)(citing State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895(2009)). "If the trial court finds the evidence is relevant, it must then determine whether the bad act evidence fits within an exception in Rule 404(b)." Id.

If "an on-the-record Rule 403 analysis is required, [an appellate court] will not reverse the conviction if the trial judge's comments concerning the matter indicate he was cognizant of the evidentiary rule when admitting the evidence of [a defendant's] prior bad acts." State v. King, 349 S.C. 142, 156, 561 S.E.2d 640, 647 (Ct.App.2002). In that case, the Court of Appeals determined the trial court's ruling was "a compressed Rule 403/404(b) analysis" with "some indicia of his consideration of whether admission of the testimony was fair to the defendant (i.e., more probative than prejudicial)." Id. at 157, 561 S.E.2d at 647.

"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." State v. Scott, 405 S.C. 489, 497, 748 S.E.2d 236, 241 (Ct.App.2013) (citing State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009)). "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." Whitner, 399 S.C. at 557, 732 S.E.2d at 866 (citation omitted).

Evidence of other crimes is generally admissible when it is necessary to establish a material fact or element of the crime charged. State v. Byers, 277 S.C. 176, 178, 284 S.E.2d 360, 361 (1981); State v. Cheatham, 349 S.C. 101, 108, 561 S.E.2d 618, 622 (Ct.App.2002).

> Evidence of prior bad acts is admissible when it tends to establish (1) motive; (2) intent; (3) absence of mistake; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; and (5) the identity of the person charged with commission of the present crime.

State v. Sweat, 362 S.C. 117, 123, 606 S.E.2d 508, 511-12 (Ct.App.2004) (citing State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923); see Rule 404(b), S.C. R. EVID. "[T]he '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." State v. Beck, 342 S.C. 129, 135, 536 S.E.2d 679, 682-83 (2000). If the prior bad act evidence 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." State v. Nix, 288 S.C. 492, 497, 343 S.E.2d 627, 630-631 (Ct.App.1986)). "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." Sweat, 362 S.C. at 128, 606 S.E.2d at 514.

> 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. 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. Fletcher, 379 S.C. 17, 23-24, 664 S.E.2d 480, 483 (2008)(internal citations omitted).

While King did make a general objection under Rule 404(b), SCRE, he did not specifically request that the trial court assess whether the State was proving those prior bad acts with clear and convincing evidence. King further did not request the trial court engage in an on the record prejudice analysis as required by Rule 403, SCRE. Thus, King's contention that the trial court improperly admitted the evidence because it did not undertake the required analysis, his argument was not preserved for appellate review. See State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (stating an objection should be sufficiently specific to bring the exact error to the trial court's attention); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct.App.2003); see State v. Perez, 334 S.C. 563, 565-66, 514 S.E.2d 754, 755 (1999) (issue not raised and ruled upon by trial court is procedurally barred and not preserved for appeal); see also State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (party cannot argue one ground below and then another on appeal); see State v. Smith, 391 S.C. 353, 365, 705 S.E.2d 491, 497 (Ct.App.2011) (concluding appellant did not preserve for review arguments that trial court conducted an improper analysis under Rule 403, SCRE, where the arguments were never presented to the trial judge).

The record clearly demonstrates the trial court was never asked to consider whether the admission of the McColl charges or the alleged murder charge under Rule 404(b), required an on the record, Rule 403 balancing test. Likewise, defense counsel never objected on the record to the trial court's failure to conduct a Rule 403 balancing test. As a result, the trial court obviously never ruled on such a question on the record.

Because the record reflects that the argument which is now the basis for the remand was never advanced at trial or ruled upon by the trial court, the issue was not preserved for appellate review. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It

is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review."); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding an appellant must present both his issues and arguments to the lower court and obtain a ruling before presenting the issues and arguments on appeal); State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) (concluding appellate courts will generally not address an argument unless it was first raised to and ruled upon by the trial court).

II. THE COURT OF APPEALS ERRED IN FINDING REMAND WAS WARRANTED FOR FURTHER ANALYSIS UPON THE 404(B) OBJECTIONS TO THE ADMISSION OF THE ALLEGED PRIOR BAD ACTS CONTAINED IN KING'S STATEMENT. REMAND IS NOT WARRANTED BECAUSE ANY ERROR IN ADMITTING THE TESTIMONY WAS HARMLESS.

Even if this issue was preserved for appellate review, remand for an on-the-record Rule 403 analysis was not warranted because any error in admitting the prior bad acts evidence at issue was harmless beyond a reasonable doubt. The majority opinion from the Court of Appeals erred in that it did not even attempt to assess whether any error would be harmless.

Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). Thus, an insubstantial error not affecting the result of the trial is harmless where "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989); see also State v. Broadnax, 414 S.C. 468, 478, 779 S.E.2d 789, 794 (2015), reh'g granted (Sept. 8, 2015), remand granted (Nov. 5, 2015).

The majority opinion from the Court of Appeals completely ignores the overwhelming evidence of King's guilt in finding this case should be remanded to the circuit court. In State v. Spears, 403 S.C. 247, 742 S.E.2d 878 (Ct. App. 2013), the Court of Appeals remanded the case for further analysis when the trial court failed to conduct an on-the-record Rule 403 analysis in assessing the admissibility of prior bad acts testimony. In remanding the case in Spears, the Court of Appeals noted the potential prejudice to Spears from the introduction of the evidence at issue. Id. at 258, 742 S.E.2d at 884. Further, the Court of Appeals noted that based upon the

record before it, it was unable to say that the admission of the prior bad act testimony was harmless error. Id. at 258, 742 S.E.2d at 884.

The remand in Spears was consistent with the approach outlined in cases where an on-the-record balancing analysis was not done in relation to Rule 609, SCRE, in that a remand was only necessary because the record could not support a finding that admission of the evidence at issue was harmless error. See generally State v. Scriven, 339 S.C. 333, 344, 529 S.E.2d 71, 77 (Ct.App.2000)(remand for on-the-record balancing analysis required under Rule 609(a), SCRE, after appellate court was unable to say admission of convictions at issue was harmless error); State v. Martin, 347 S.C. 522, 532, 556 S.E.2d 706, 711 (Ct.App.2001)(same). In cases where the admission of the evidence was harmless, remand has been deemed to not be warranted. See Broadnax, 414 S.C. at 479, n. 8, 779 S.E.2d at 794, n. 8 (finding discussion of remand argument unnecessary in light of this Court's findings that the admission of the convictions in dispute were harmless beyond a reasonable doubt because of overwhelming evidence of guilt); see also State v. Heller, 399 S.C. 157, 171, 731 S.E.2d 312, 320 (Ct.App.2012)(affirming conviction finding any error by trial court in not conducting an on-the-record balancing analysis was harmless);

This case is clearly distinguishable from Spears because it is clear from the record in this case that any error in admitting the prior bad act evidence at issue was harmless. The majority opinion in this case did not assess whether the admission of the evidence at issue could be harmless error. As accurately pointed out by the dissent, remand is unnecessary in this case because there was overwhelming evidence of King's guilt outside of the evidence in dispute.

There was overwhelming evidence establishing King murdered Mr. Galloway and assaulted Mrs. Galloway absent the comments at issue. Three eyewitnesses identified King as being in the house with the firearm used in the shooting. Karen Galloway testified that she heard

King argue with her husband before she heard the shot that killed him. (App. 92-3). She noted that her husband identified King as he person who was at their door. (App. 92). Immediately afterwards, King ran into Karen Galloway's bedroom and pointed the firearm at her. (App. 94). She identified King in court as her assailant. (App. 94-5). She also identified King as the person who pointed the gun at Reggie Cousar and as the person who shot the victim. (App. 95-7).

Reggie Cousar, the cousin, also testified that he saw King point the gun at Karen Galloway. (App. 104, 108). He further testified King then pointed the gun at Cousar. (App. 104). Cousar identified King in court. (App. 104). Devonte, the Galloways' grandson, testified that he saw King point the gun at his grandfather immediately before the shooting occurred. (App. 113). He also testified King shot and killed the victim. (App. 113-14).

Further, immediately after law enforcement arrived, King ran away from the scene. Flight from prosecution is admissible as guilt. State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (evidence of flight admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension). The weapon used in the shooting at the victims' house was found behind King's residence. (App. 149-50, 233-35). As to the murder charge, King admitted to being in the residence when the shooting occurred. He initially misled law enforcement about being the one who actually shot the victim. Instead, he accused Aloysius McLaughlin of being the one who shot the victim. The State presented the testimony of Mr. McLaughlin and his girlfriend to disprove King's initial account that they were together on the night of the shooting. (App. 178-81, 183-88). Further, in his second statement, King later admitted that he was the one who shot Mr. Galloway. (State's Exhibit Four).

Law enforcement recovered a telephone that was identified as belonging to the victims' house and a liquor bottle near the truck where King was apprehended. (App. 136). It was also noted that the liquor bottle was of the same type found in the victim's closet in the master bedroom. (App. 136). Law enforcement also found a bullet hole in the master bedroom, which led to the den and to the roof of the residence. (App. 136-37). A nine millimeter handgun with an extended clip was found in the wooded area behind King's residence. (App. 137). A projectile was also recovered from the living room of the victims' residence. (App. 138-39, 145, 151). Also, two cartridge casings were found, one in the living room and one in the master bedroom. (App. 155, 156). Round lead particles were found in King's right palm. (App. 226, 228-29). The two cartridge casings recovered from the scene, along with the projectile recovered from the wall in the living room, were all fired from the gun found in King's back yard. (App. 233-36, 365).

Malice could be inferred from several different facts. First, Mrs. Galloway's testimony regarding hearing the discussion between her husband and King prior to the shooting indicated some ill will on the part of King. (See App. 92). Second, Devonte's testimony that he saw King point the gun at Mr. Galloway indicated there was no accident. (App. 113). Malice could also have been inferred from the fact that King killed the victim with a firearm. See State v. Belcher, 385 S.C. 597, 612 n. 9, 685 S.E.2d 802, 810 n. 9 (2009)(noting that State can argue malice can be inferred from use of a deadly weapon even though jury may not be charged with inference of malice from use of deadly weapon).

Also, there was overwhelming evidence King was in possession of a firearm during the commission of the murder. Again, three eyewitnesses saw King with the gun in the victims' house that early morning. Devonte saw it in King's hand just prior to the shooting. (App. 113).

Mrs. Galloway saw it right after the shooting was over when King attacked her. (App. 94). Mr. Cousar saw the gun when King pointed it at him shortly after he attacked Mrs. Galloway. (App. 104). King also admitted to having the gun in his possession during the shooting in his second statement to law enforcement. (State's Exhibit Four).

There is nothing in the record to support a finding that the two comments made by King that are at issue in this appeal played any role in his convictions. None of the facts relating to those alleged acts were presented by the State. Thus, there were no details for the jury to compare to determine if King's acts in this case were similar to those in the other alleged acts. Further, the State did not reference the comments at any other point in time during the trial. The only other mention was made by Ms. Graham, and the trial court immediately instructed struck the comment by Ms. Graham from the record, and he later instructed the jury to not consider what she had said in regards to her prior encounter with King. (See App. 183-88). In all, there was overwhelming evidence of guilt. Thus, as correctly explained by the dissent, King's convictions for the murder of Mr. Galloway and for possession of a firearm during the commission of a violent crime should be affirmed.

Altogether, the majority opinion erred in not assessing whether any error in admitting the alleged prior bad acts evidence was harmless. The record supports a finding that any error was harmless beyond a reasonable doubt because the State presented overwhelming evidence of King's guilt presented. As a result, the remand ordered by the majority opinion in the Court of Appeals should be vacated, and King's convictions should be affirmed.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court reverse the South Carolina Court of Appeals' opinion to the extent it remands this case for an on-the-record Rule 403 analysis, and affirm King's convictions for the murder of James Galloway, assault and battery in the third-degree of Karen Galloway, pointing and presenting a firearm, and possession of a weapon during the commission of a violent crime.

Respectfully submitted,

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March 23, 2017

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
MAR 23 2017
S.C. SUPREME COURT

Appeal from Marlboro County
Court of General Sessions
Edward B. Cottingham, Circuit Court Judge

Opinion No. 5390 (S.C. Ct. App. filed March 16, 2016)
Rehearing Denied May 2, 2016
Supreme Court Case No. 2016-001161; Court of Appeals Case No. 2012-213461

THE STATE,

PETITIONER,

V.

TYRONE J. KING,

RESPONDENT.

PROOF OF SERVICE

I, Alphonso Simon, Jr., counsel for the Petitioner, certify that I have served the within Brief of Petitioner on the Respondent by depositing two (2) copies of the same via U.S. mail, first class, postage prepaid to his attorneys of record, Robert M. Dudek, Esq., SCCID\Division of Appellate Defense, 1330 Lady St., Ste. #401, Columbia, SC 29201; and to Howard W. Anderson, III, Esq., 176 E. Main Street, P.O. Box 661, Pendleton, SC 29670

I further certify that all parties required by Rule to be served have been served.

This 23rd day of March, 2017.

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