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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM MARLBORO COUNTY
Court of General Sessions

Edward B. Cottingham, *Circuit Judge*

S.C. Ct. App. Opinion No. 5390 (Filed March 16, 2016, and Rehearing Denied May 2, 2016)

Supreme Court Case No. 2016-001161

(Court of Appeals Case No. 2012-213461)

THE STATE,

Petitioner,

vs.

TYRONE J. KING,

Respondent.

Respondent's Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

QUESTIONS PRESENTED

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 were 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?

COUNTER QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding Respondent Tyrone King had preserved his objection to the admission of highly prejudicial—and in at least one instance, undisputedly inaccurate—prior bad acts evidence where the trial court had forbidden any further argument and had expressly assured counsel that his objections were preserved. [App. at 77 ("THE COURT: I don't want you to make your objections again as to those items.... You've made them and are protected for the record.")].

2. Did the Court of Appeals err in remanding the case back to the circuit court for an on-the-record Rule 403 / 404(b), S.C. R. Evid., analysis when the State had explicitly asked the Court of Appeals to do so, especially where, as here, the State adduced no possible motive for the killing of Mr. King's neighbor yards away from the Sheriff's Office and the defense at trial was one of accident?

STATEMENT OF THE CASE

In 2012, Respondent Tyrone King was tried before a jury for the murder of his neighbor James Galloway, for assault and battery of a high and aggravated nature, and for possession of a weapon during the commission of a violent crime. [App. 2-10]. Mr. King's defense at trial was that of accident. [App. 328]. Mr. King was sentenced to life for the murder, to a consecutive five years for the possession charge, and to time served for the assault and battery in the third degree, a lesser included offense to the charged battery. [App. 2-4].

I. The Circuit Court Granted in Part but Denied in Part Mr. King's *Motion in Limine* to Exclude Evidence of Prior Alleged Bad Acts.

After jury selection, the circuit court held a hearing to decide which portions of Mr. King's two videotaped police interrogations to play into evidence at trial.

In his first interrogation, which took place a few hours after the incidents giving rise to his indictments, Mr. King said that he had gone across the street to Mr. Galloway's house with a man named Aloysius McLaughlin. [State's Ex. 5 at 05:01-13-27].[1] At that time, Mr. King was facing charges of kidnapping and armed robbery against Mr. McLaughlin in the Town of McColl from a few weeks beforehand. In response to law enforcement's disbelief that they would have been together given that prior conduct, Mr. King advised that the two had made up. [*Id.* at 05:01:15-17]. Mr. King also claimed to law enforcement that Mr. McLaughlin suddenly and un-expectedly killed Mr. Galloway and that Mr. King then ran away out of fear. [*Id.* at 04:59:30-40; 05:00:45-01:07].

[1] Pursuant to guidelines from State Court Administration, the court reporter did not prepare a transcript of the audio of the exhibits. The time references here for Exhibit 4 and 5 refer to the timestamp appearing at the bottom left of the video. The exhibits were filed separately from the printed record. All quotations from the exhibits come from counsel's own transcription of it.

In his second interrogation, held a few days later, Mr. King admitted that he went over to Mr. Galloway's house alone to buy some liquor from him. [State's Ex. 4 at 08:37:50]. Mr. King showed Mr. Galloway a gun, which Mr. King wanted to sell to Mr. Galloway. [*Id.* at 08:38:30-45]. Mr. King said the gun accidentally went off as Mr. Galloway was examining it. [*Id.* at 08:41:30-40].

During the hearing, the circuit court believed that the State could not redact individual sentences or words from the videos. [App. 40 ("THE COURT: Cannot do that [redact a word] because we don't have the capability. If you redact that word you've got to redact whatever he said. Isn't that true? MS. JOHNSON LEE: Yes, Your Honor. THE COURT: I'm not going to do that. Go ahead.")]. Thus the circuit court believed that the only way to avoid playing certain portions was a manual "fast forward" past them, thereby preventing precise redaction. *See* [App. 41, 49 ("THE COURT: ... So that you will understand I ruled that anything about his prior conduct that we can redact sufficiently we're going to redact. But there is no way for them to redact efficiently one sentence or one word out of a sentence. They just don't have that capability in Marlboro County.")].

Given the circuit court's belief—erroneous as it would later turn out—that the State could not perform precise redactions, the circuit court made disparate rulings on the admissibility of references to prior alleged criminal conduct in the videos.

A. References to a Prior Murder Charge That Did Not Result in a Conviction.

In his first interrogation, Mr. King referenced a murder charge against him from 2004. *E.g.* [State Ex. 5 at 04:32:33-36]. The circuit court ruled that three portions of the video referencing that murder charge could not be shown to the jury and had to be fast-forwarded. [App. 330].

Indeed the circuit court was emphatic about the importance of keeping out the references to the prior murder charge:

> 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 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].

> MR. SHAFFER: Objection, Your Honor. He's talking about the previous murder. This investigator just asked him what were you charged with in that murder.
>
> ...
>
> THE COURT: I want to redact any reference to any prior conduct.

[App. 43].

Despite having ruled that three prior references to Mr. King's murder charge could not be admitted, the circuit court decided to permit the State to play the following portion of the video admitted as State's Exhibit 5:

> INVESTIGATOR: Well, that's what I am saying. I mean if you didn't do it, I mean why didn't you just go out in the front yard, give the gun to the police and say hey, man, Aloysius just ran out the back door?
>
> MR. KING: They didn't give me a [expletive] chance. Man she steady screaming about my god damn – I already got – I already got – I already got a murder kidnapping charge on my record. She didn't see [expletive] – she was in a room.

[State's Ex. 5 at 5:08:08-27]. The circuit court offered no specific explanation for why this particular reference was admissible when the prior references were not:

> 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].

B. References to the "McColl" Pending Kidnapping and Robbery Charges

As with the murder references, the circuit court made conflicting rulings regarding references to the McColl kidnapping and robbery charges contained in the video admitted as State's Exhibit 5. On one hand, it excluded two references to the charges. [App. 330; 44 ("MR. SHAFFER: Objection, Your Honor. He's getting into the McColl charges that are pending? THE COURT: Yes. I want that redacted."); 48 ("THE COURT: Can't we redact that part [about the McColl charges]? MS. DAVID: We can try it. We can fast forward past that moment. THE COURT: Do that...")]. Likewise, with respect to the video admitted as State's Exhibit 4, the circuit court ruled inadmissible references to the McColl charges. [App. 66:2-3 ("THE COURT: Let's strike any mention of the McColl charge."); *Id.*:12 ("THE COURT: End it right before he says, 'McColl.'")].

The circuit court did, however, permit two references to the McColl robbery and kidnapping charges in the video admitted as State's Exhibit 5. One reference, at 5:08:08-27, was already quoted in the previous subsection. The other reference was as follows:

> INVESTIGATOR: Who is that?
>
> MR. KING: Aloysius, Same dude that I robbed, me and him got back on good terms.
>
> INVESTIGATOR: Aloysius
>
> MR. KING: From McColl, that one – same dude that signed a warrant on me back in February. Me and him back on good terms.

[State's Ex. 5 at 5:01:12 – 5:01:26]. The circuit court offered only a cursory explanation for its decision to permit this particular reference to the McColl charges: "I think it's appropriate based on the totality of what he's saying. Go ahead." [App. 5296:9-10].

II. The Circuit Court Made Its Evidentiary Rulings Final.

On the morning of trial, the circuit court expressed some discomfort with its decision to permit the reference to the murder and kidnapping charges in State's Exhibit 5, though not sufficient discomfort to revisit the issue again:

> MR. SHAFFER: I made an objection to a prior murder and kidnapping charge at 15:08 –
>
> THE COURT: That's been redacted.
>
> MR. SHAFFER: Your Honor, excuse me. It's actually 5:08:09 through 5:08:10.
>
> THE COURT: Prior burglaries [sic] have not been redacted?
>
> MR. SHAFFER: That hasn't been redacted, Your Honor.
>
> THE COURT: Why?
>
> MR. SHAFFER: He mentioned that – I believe he stated on the record that he couldn't – that Marlboro County was unable to go through line by line

> and redact every word or every reference to anything in the statement. I believe that was when you had said that yesterday.
>
> THE COURT: Well, this equipment is not the best in the world. They have made every effort to do it. It's not as sophisticated as it should be, but you couldn't redact that part?
>
> MR. REDMOND: Beg the Court's indulgence. That was one that at the time, and I recall that section where the Court ruled that that part could stay in. I can't recall exactly –
>
> THE COURT: If I ruled that I'm not going to beat a dead horse to death. If I ruled – did I rule it stays?
>
> MS. JOHNSON LEE: You did.

[App. 72-73]. Although Mr. King noted that other law enforcement agencies did have the capability to make more precise redactions than rudimentary fast-forwarding, the circuit court wanted the trial to proceed right away regardless. [App. 76 ("THE COURT: Well, we don't have that other agency here. We are in the second day of the trial. We spent most [of] the time with your objections. I'm ready for the jury.")]. To avoid any other delays associated with Mr. King's evidentiary objections to State's Exhibit 5, the circuit court made its rulings on the *motion in limine* final for the purposes of appellate review and ordered counsel not to object further to them. [App. 77 ("THE COURT: I don't want you to make your objections again as to those items [in Court's Exhibit 1]. You've made them and are protected for the record.... We don't want to waste another day with objections.")].

III. The Court Conducted a Jury Trial.

The circuit court held a three-day jury trial on the indictments. A summary of the proceedings follows, presented in the light most favorable to the verdicts:

A. The State Offered No Motive for the Murder of Mr. King's Longtime Neighbor Only Yards Away from the Sheriff's Office.

1. Ms. Galloway's Testimony

Ms. Karen Galloway, the wife of the decedent, testified that in the early morning hours of November 11, 2011, her husband got up to answer a knock on the door. [App. 92-93]. Perhaps because Mr. Galloway sold liquor from his home after hours, [App. 100], no one appeared surprised at the knocking on the door at that hour. Mr. Galloway came back to the bedroom shortly after answering the door, told his wife that "Tyrone" was there, and went back out of the bedroom after putting on some shorts. [*Id.*]. Later, she heard her husband say "Naw, man I don't have" and then heard a "pop." [App. 92].

Ms. Galloway jumped out of bed, and Mr. King then came into her room. [App. 93]. Mr. King asked her who was in the house with her, to which she responded her cousin Reggie Cousar, and then Mr. King hit her on the top of the head with a gun handle before running out of the room. [App. 94]. The gun accidentally discharged when she was hit on the head, firing a shot into the wall. [*Id.*].

While Mr. King was out of the room, Ms. Galloway called 911 after finding her husband dead. [App. 95]. When Mr. King returned, he took the phone from her hand and hung it up. [App. 96]. When the 911 operator called back, Mr. King answered it and said that he and "someone" had come there to buy some liquor and that that person had shot the victim. [State's Ex. 40].[2] Eventually Mr. King ran out the back door. [App. 96].

Ms. Galloway was able to identify Mr. King because he had been her neighbor for "12 or 13 years" and had come into her home on other occasions. [App. 96-97]. Ms. Galloway testified that she had no idea why Mr. King would have wanted to kill her husband. [App. 101 ("Yeah. I don't know why he shot him. That's what I want to know.")].

2. D.M's Testimony

[2] As with the video interrogation, no official transcript exists. It was also separately filed.

D.M., an 11-year old, testified that he had spent the night with his grandfather the night of November 10th. [App. 110-13]. D.M. had been sleeping in a chair when he heard Mr. King come in and ask his grandfather for alcohol. [App. 111-12]. D.M. testified that he saw Mr. King pull a pistol out of his pants and point it toward Mr. Galloway's stomach. [App. 113, 115-16]. At some point after D.M. had looked away, he heard the gun go off. [App. 119 ("Q. You heard the noise. Were you looking at him when you heard the noise? A. No.")].

For a witness to an alleged murder, D.M.'s testimony is notable for what it omitted. He made no claim that Mr. King appeared angry, that Mr. King and Mr. Galloway had had any sort of argument, that they struggled, or that Mr. Galloway even appeared frightened. Mr. Moore likewise offered no testimony about whether Mr. King did or did not discuss Mr. Galloway purchasing the pistol. He was not asked, and did not offer, any explanation as to how Mr. Galloway came to be shot in the face, [App. 333], even though Mr. Moore had last seen the gun pointed at Mr. Galloway's stomach.

Although D.M. said that Mr. King was a frequent visitor at the Galloway home, D.M. was unable to locate Mr. King in the courtroom. [App. 111-12].

3. Reggie Cousar

The Galloways' cousin Reggie Cousar also testified at trial. [App. 103]. He had been living at their home for several months before November 11th. [*Id.*]. He woke up when Ms. Galloway cried out for her, walked to the front room, and saw Mr. King pointing a gun at her before Mr. King turned to point it at him. [App. 103-04]. Within five minutes of him having woken up, he saw Mr. King run away. [App. 105-06]. According to him, no one else had been there that night but him, the Galloways, three children, and Mr. King. [App. 106-07]. He also testified that the

Galloway's home was only "a block" away from the Marlboro County Sherriff's Office. [App. 107].

4. Deputy Timothy Shaw

About a minute after the 911 call, Deputy Timothy Shaw arrived at the Galloway home, from the Sheriff's Station about 200 yards away. [App. 120-121]. When he approached the home, he saw someone running out the back. Deputy Shaw then chased and apprehended that person, who was Mr. King. [App. 121-24]. At the time of his arrest, Mr. King had a bottle of alcohol in his pocket. [App. 124].

B. The Jury Heard the References to Murder, Kidnaping, and Robbery Charges Through State's Exhibit 5.

At trial, the jury watched the videotaped interrogation admitted as State's Exhibit 5, including the references to Mr. King's prior murder, kidnapping, and armed robbery charges at 5:01:12-26 and 5:08:08-27, quoted earlier. [App. 171].[3]

C. The Circuit Court Instructed the State that any Reference to the Armed Robbery Charge Would Result in a Mistrial.

None of the first nine witnesses who testified believed that anyone other than Mr. King had come into the house the morning of November 11th. *See, e.g.*, [App. 106-07]. Nonetheless, to rebut the suggestion that Mr. King made in his videotaped interrogation that Mr. McLaughlin had been present and shot Mr. Galloway, the State called Mr. McLaughlin to testify. He said that he had not been with Mr. King at all on the night in question. [App. 179-81]. Indeed, Mr. McLaughlin said that he would not have been with Mr. King at all that night because they had not been "cool" at that time. [App. 103].

[3] The State later played State's Exhibit 4, in which Mr. King had told the police that the gun had accidentally discharged. [App. 204].

The questioning about why Mr. McLaughlin would not have been with Mr. King on November 11 was elliptical due to the circuit court's specific admonition to the solicitor and witness just before Mr. McLaughlin's testimony. The circuit court emphatically indicated that any reference to Mr. King having allegedly robbed Mr. McLaughlin—one of the McColl charges—would result in an immediate mistrial:

> THE COURT: We're not – you didn't call [Mr. McLaughlin] for any pending charges?
>
> MS. DAVID: No, Your Honor, but he might reply based on a pending charge. I am going to ask him was he with the defendant on this night, and I am going to ask him, you know, were they friends.
>
> THE COURT: You can do that, but don't go into anything further, you understand? About any pending charges. Don't you understand that?
>
> MS. DAVID: Yes, Your Honor.
>
> THE COURT: Let there be no question about it, now. If you do that you're getting into trouble that we don't need in as much as that video referenced this individual I'm going to let him testify as to whether he was there or not. That's going to end it. Do you understand that?
>
> MS. DAVID: Yes, Your Honor. So he is not to mention that he would not have been with the defendant the night before because the defendant had robbed him two weeks prior.
>
> THE COURT: We went through that. That's got knowledge [sic – probably "nothing"] to do with this case, all right.
>
> MS. DAVID: Yes, Your Honor.
>
> THE COURT: If you do that I'm going to declare a mistrial, now, I tell you one more time. How strong can I be with you, Mia, on this issue? ... You tell me what you're going to elicit from him.
>
> MS. DAVID: I am only going to ask him if he was at the scene with Mr. Tyrone King....
>
> THE COURT: I'm warning you both, now... And I tell this witness respond to her question and hers only. No reference to anything that occurred about an alleged robbery the night before that. You[] understand that?

THE WITNESS: Yes, sir.

MR. REDMOND: Now, Your Honor, just to be clear, and I know it might be necessary to do a proffer just to be sure, but I do think it is proper, without getting into reasons why that, because that was a reference on the table. Well, actually, there was a reference about this incident. We are not getting into that, but he made a comment that we are all good now or we are cool now referring to the defendant and –

THE COURT: I'll permit that as long as you don't talk about a robbery the night before.

MR. REDMOND: Absolutely, and that's what we're not getting into.

...

THE COURT: Whatever his answer. He can answer that.

MR. REDMOND: I just want to be clear.

THE COURT: I understand that. I understood that he said they were cool. He may not say they were cool. But we'll see. Bring the jury in. Just leave that question of robbery alone, you understand that, Mr. Witness?

THE WITNESS: Yes, sir.

THE COURT: All right.

[App. 174-178].

D. The Jury Received Their Final Instructions.

The circuit court provided the jury with their final instructions. [App. 309-29]. It included instructions for murder, the lesser-included offense of involuntary manslaughter, and the defense of accident. [*Id.*]. It also included instructions for assault and battery of a high and aggravated nature; together with the lesser-included offenses of assault and battery first, second, and third degrees. [App. 325-27]. And the circuit court instructed the jury on the charge of possessing a firearm during the possession of a violent crime. [App. 327-28]. Although the circuit court had admitted bad-acts evidence, it did not provide the jury with a bad-acts instruction to limit their use of the evidence. *See* [App. 309-29].

E. The Jury Returned Its Verdicts After Asking to Be Recharged on the Lesser-Included Offenses of Murder and of Assault of a High and Aggravated Nature.

After about an hour-and-a-half of deliberations, the jury requested to be re-charged on the different degrees of assault. [App. 331]. The circuit court did so. [App. 289]. Approximately thirty minutes later, they asked to be recharged on the difference between murder and involuntary manslaughter [App. 332]. The circuit court likewise obliged. [App. 289].

The jury returned mixed verdicts. It convicted Mr. King on the charge of murder; assault and battery only in the third degree; and possession of a weapon during the commission of a violent crime.[4] [App. 291-92].

F. The Circuit Court Sentenced Mr. King.

The circuit court accepted the jury verdicts and sentenced Mr. King to life imprisonment for the murder, to a consecutive five years for the pointing and presenting, and to time served for the assault and battery in the third degree. [App. 2-4].

IV. The Circuit Court Denied Mr. King's Motion for New Trial.

Mr. King filed a post-trial motion that, as is relevant to this appeal, argued that he should be retried because—contrary to the parties' understanding at the *motion-in-limine* hearing—the Marlboro County Sheriff's Office actually had the capability to redact videotaped interrogations in one-second intervals. [App. 348-50, 352-58]. Thus, the circuit court could have excluded the references to Mr. King's prior murder, kidnapping, and armed robbery charges, without impacting the other portions it found admissible. [*Id.*].

At the motion hearing, the State did not dispute that the software's instruction manuals showed that one-second redactions were possible. *See* [App. 298-305].

[4] The jury also convicted him on the charge of pointing a firearm. Mr. King did not include that conviction in his notice of appeal.

The circuit court ruled that the motion should be denied for the following reason: "Both parties were given an opportunity to redact the videos and/or agree to the redacted times when played before the court, following pre-trial motions on August 27, 2012. The Court then ruled upon the admissibility of the video statements on September 10th, before the trial began." [App. 1].

V. The Proceedings in the Court of Appeals

Via a published opinion dated March 16, 2016, the Court of Appeals held that Mr. King had preserved error over the trial court's failure to conduct an on-the-record Rule 403 / 404(b), S.C. R. Evid., analysis. *State v. King*, 416 S.C. 92, 96 (S.C. Ct. App. 2016); [App. 482-86]. As the State specifically requested that it do, the Court of Appeals remanded the case to the trial court for an on-the-record analysis. *Compare* [App. 430], *with* [App. 485-86 (doing exactly as the State had requested)]. While all three judges apparently found that the error had been preserved, Judge Geathers would have found the error harmless. [App. 488 (not disagreeing with the preservation analysis)].

The Court of Appeals held that review of the denial of the motion for new trial, due to the trial court's misunderstanding of the redaction capabilities, was premature in light of the need for the on-the-record analysis of the trial rulings. [App. 487].[5]

On May 2, 2016, the Court of Appeals denied the State's timely petition for rehearing. [App. 497].

VI. Proceedings in this Court

[5] The court held Mr. King's trial counsel had not preserved a motion for mistrial. [App. 486-87]. Mr. King did not seek *certiorari* on that issue.

The State timely filed a petition for writ of *certiorari*, which this Court granted as to both questions presented on Feb. 2, 2017. *State v. King*, ___ S.C. ___ (2017).

ARGUMENT

I. The Evidentiary Objections Were Preserved, Especially Where the Trial Court Ordered Counsel to Make No Further Objections.

Not even the dissent below questioned the error preservation of the trial court's failure to conduct the required and well-settled analysis before admitting the prior bad acts evidence, *see, generally State v. Lyle*, 125 S.C. 406 (1923). That required analysis prevents admission of a bad act absent findings that (1) that the bad act, if true, is relevant to the case; (2) that either a conviction or clear and convincing proof establishes that the defendant committed the act; (3) that the bad act has non-propensity value; and (4) the danger of unfair prejudice from the evidence does not substantially outweigh the non-propensity purpose of the bad act. *State v. Clasby*, 385 S.C. 148, 154-56 (2009) (citations omitted); *State v. Fletcher*, 379 S.C. 17, 23 (2008) (citations omitted); *State v. Pagan*, 369 S.C. 201 (2006) (citations omitted).

Because "trial judges are presumed to know the law," *State v. Ray*, 310 S.C. 431, 437 (1993), Mr. King was not required to say anything more than to cite to Rule 404(b), S.C. R. Evid., to require the trial judge to apply settled South Carolina law on it. *Cf.* Rule 18(b), S.C. R. Crim. Pro. ("No argument shall be made on objections to admissibility of evidence or conduct of trial unless specifically requested by the court."). The circuit court failed to engage in the required analysis, as even the State fails to contest. Had it done so, it would have been impossible to have admitted the evidence—for example, although the circuit court let the jury hear that Mr. King "already got a murder kidnapping charge on [his] record," [State's Ex. 5 at 5:08:08-27], the State told the circuit judge that Mr. King actually "does not have a conviction for murder on his record," [App. 52]. Because Rule 404(b), S.C. R. Evid., sets up a default rule of "exclusion, not inclusion," the State bears the burden of demonstrating that evidence falls within an exception. *State v. Tuffour*, 364 S.C. 497, 504 (Ct. App. 2005) (Kittredge, J., joined by Hearn, C.J. and Williams, J.), *vacated*

as moot by 371 S.C. 511 (2007). No reasonable judge who actually conducted the requisite analysis could possibly let the evidence in. Indeed, the State makes no argument that such evidence could ever lawfully pass muster under the rules of evidence.[6]

It also would be quite unfair to trial counsel to hold that he had not preserved error when the trial court explicitly assured him—when forbidding further argument—that he was "protected for the record." [App. at 77]. An attorney should not be forced to run the risk of contempt to preserve evidentiary objections.

II. Harmless Error Does Not Apply.

While the majority opinion below was correct that erroneous admission of the bad acts evidence could not be harmless and thus denial of the petition is appropriate on that basis, any error of the Court of Appeals below was invited and ought not form the basis of a reversal here.

A. The Invited-Error Doctrine Precludes Reversal of the Court of Appeals.

The State is hoist by its own petard. Before the Court of Appeals, the State specifically asked for a remand if the court found the evidentiary issue preserved for appeal. [App. 430 ("Furthermore, if this Court finds the trial court erred in not conducting an on-the-record analysis of the balance of the probative value against the prejudicial effect..., Respondent submits the appropriate remedy under state law at this time would be for a remand for such an analysis to be done." (citations omitted)]. It cannot, therefore, be heard to complain when the Court of Appeals agreed to the requested remand. *See, e.g.*, *State v. Chasteen*, 242 S.C. 198, 201 (1963) ("Even if there were error, it was clearly invited by counsel for appellant, leaving appellant in no position to complain.").

[6] To the extent that the Court of Appeals erred, it only erred in remanding rather than simply ruling that, whether or not the trial court had engaged in the required analysis, it was an abuse of discretion to let the evidence in, full stop.

B. The Court of Appeals Majority Was Correct on the Merits.

With all due respect to the dissent below, the State has not come anywhere close to proving that excluding the bad-acts evidence could not have altered the trial's result. An error can only qualify as harmless if guilt was "conclusively proven by competent evidence, such that no other rational conclusion could be reached." *State v. Brooks*, 341 S.C. 57, 63 (2000) (quotation omitted). The record below establishes that the jury struggled to reach a verdict; this was no slam-dunk case.

Even with the erroneously admitted bad-acts evidence, the jury struggled with whether the State had met its burden of proof. Thus the circuit court had to recharge the jury on the difference between manslaughter and murder, indicating that the jury struggled with the charge, [App. 289, 332]—a fact that the State makes absolutely no effort to explain away. And the fact that the State could come up with no motive for the murder of a longtime neighbor, *see* [App. 260 (State's closing argument)], mere yards away from law enforcement, likewise helps establish that the State faced an uphill battle in convincing the jury of malice. *See State v. Powell*, 202 S.C. 432, 436 (1943) (ordering judgment of acquittal, in part, because the defendant and victim "were friends and no motive for murder appears in the record"). The jury's struggle would have been all the more difficult—and thus an acquittal may have resulted—had the erroneous evidence been withheld, as it should have been. *See generally State v. Gore*, 283 S.C. 118, 121 (1984) (noting "enhanced" danger of prejudice when bad acts are similar to the crime at issue); *Lyle*, 125 S.C. at 416 ("Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty....").

Most of the State's arguments in support of harmlessness are legally irrelevant. Because the defense was accident, it does not matter that eyewitnesses put Mr. King in the house; identity was not at issue. Likewise the fact that Mr. King brought a gun with him to the house is a red herring: He was trying to sell the gun to Mr. Galloway, [State's Ex. 4 at 08:38:30-45]. As for D.M., while he may have seen a pointing of the gun at one time, he testified that he was not looking when the gun went off. [App. 119 ("Q. You heard the noise. Were you looking at him when you heard the noise? A. No.")]. As the jury was deciding what happened after D.M. looked way—accident or malice—the bad-acts evidence was undoubtedly a thumb on the scale.

In general, courts should be reluctant to invoke harmless error regarding evidentiary rulings. *United States v. Cerro*, 775 F.2d 908, 915-16 (7th Cir. 1985) ("The lay mind evaluates evidence differently from the legal mind.... This is a reason to be wary about invoking the doctrine of harmless error with regard to evidentiary rulings in jury cases." (citation omitted)). And in particular here, this Court should not hold that the State has shown beyond a reasonable doubt that it did not matter to the jury hearing this murder case that Mr. King supposedly had previously been charged with murder (among other things), when all agree that he never had. *See also, e.g.*, *State v. Smith*, 300 S.C. 216, 219 (1989) (ordering retrial where trial court admitted in a murder trial unfounded evidence that the defendant had committed a previous murder).

CONCLUSION

Mr. King respectfully requests that this Court affirm the Court of Appeals.

Respectfully submitted this 18th day of April, 2017,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing paper by first-class mail, proper postage prepaid, this 18th day of April, 2017, on the following parties:

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Sworn to and subscribed before me this
18th day of April, 2017.

Notary Public State of South Carolina
My Commission Expires: October 30, 2022