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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Lexington County
Hon. Eugene Griffith, Jr., Circuit Court Judge
Appellate Case No. 2021-001052

The State,

Respondent,

v.

Joshua C. Reher,

Petitioner.

Opinion No. 2021-UP-245 (S.C. Ct. App. Filed June 30, 2021)

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON CERTIORARI

- I. The trial court properly admitted the relevant and probative photographs and video recordings from firearm experiments performed by an investigator and correctly concluded they were not unfairly prejudicial nor was it likely to confuse the jury. Further, any possible error in admitting the photographs and videos was entirely harmless in light of the testimony provided by multiple investigators.

STATEMENT OF THE CASE

Procedural History

Petitioner was indicted by the Lexington County Grand Jury for attempted murder and possession of a weapon during the commission of a violent crime. On October 2-3, 2017, a hearing was held pursuant to Petitioner's motion for immunity from prosecution under § 16-11-440(C) of the Protection of Persons and Property Act ("Act") before the Honorable William P. Keesley. The judge denied the motion for immunity and on December 10-13, 2018, Petitioner appeared before the Honorable Eugene Griffith Jr., and a jury, for trial. The jury found Petitioner guilty of the lesser-included charge of ABHAN, along with the weapons charge, and the trial judge sentenced him to nine years and five years to be served concurrently.

Petitioner appealed his convictions and sentences. On June 30, 2021, the South Carolina Court of Appeals affirmed Petitioner's conviction in an unpublished opinion. State v. Reher, Op. No. 2021-UP-245 (S.C. Ct. App. Filed June 30, 2021). Thereafter, Petitioner filed a petition for rehearing on July 15, 2021, which was denied on August 23, 2021. On September 23, 2021, Petitioner submitted a Petition for a Writ of Certiorari to this Court and the State submitted a Return. This Court granted the Petition for Writ of Certiorari on April 28, 2022.

Factual Background

Joseph "Jersey" Meyers, the victim in this case, and Petitioner worked together. Meyers picked Petitioner up from his home every morning to go to work and dropped him off after work. (R.116-117). Meyers thought of Petitioner as his "buddy" or best friend and indicated the two had never been in a fight or argument. (R.119). On August 21, 2015, the men went to work together in the morning and then attended a noon company meeting, during which both men began drinking. They left work and went to a side job, which had to be stopped. After, they

headed to a bar called Hemingway's to shoot pool and continue drinking. Meyers drank two beers, but Petitioner switched to consuming liquor cocktails. Between 7:30 and 8:00 p.m., the men left the bar to return to Petitioner's house. (R.121-123).

When the men arrived, they found "kids" sitting on a car outside the house. Prior to that night, Petitioner complained daily about the kids gathering at his house and drinking alcohol underage, which was given to them by Petitioner's girlfriend, Brooke. Brooke's son, Jacob, was friends with the teenagers and the primary reason they began hanging out at the house. Brooke was also the source of Petitioner's other major frustration; she had a "pills" addiction. Petitioner yelled at the kids, but they did not respond. Meyers joined in, and the kids finally left the property. After the kids departed, Petitioner went into the home and began yelling at Brooke. Brooke exited the home crying and left with her son's friend Ian, who also supplied her pill addiction. Ian's presence at the home was another sore spot for Petitioner, and after Ian and Brooke left Petitioner became even more agitated. (R.p.124, line 7-R.p.129, line 13).

Before she left, Petitioner gave Brooke money for the store. After he returned to the garage where Meyers waited, he complained about giving money to Brooke and indicated she probably was not even going to the store. Meyers, tired of hearing Petitioner's complaining, "started calling him a dumbass." (R.130-131). Meyers asked Petitioner: "What do you think she's going to do with the money" and rhetorically responded: "The pill head is going to go buy pills." (R.130). Petitioner "went ballistic" and tackled Meyers off the chair he was on. (R.130-131). The two started fighting in the garage and it escalated and moved into the driveway. Meyers hit Petitioner with his elbow and pinned Petitioner. Petitioner asked to be let up and when Meyers did, Petitioner ran into the house. (R.130; 132).

Meyers began gathering his things, but minutes later he heard a “bang.” (R.130; 133). Meyers remembered very little after being shot other than having difficulty breathing. (R.133). Meyers drove home and took a cold shower in an attempt to help him breathe. He did not realize he had been shot. (R.133-134). Meyers was shot in the abdomen and the bullet fragment was lodged in his tailbone. He had several feet of both his large and small intestines removed. (R.136).

Deputy Andrew Senn of the Lexington County Sheriff’s Office was dispatched to Petitioner’s home to investigate the shooting. After he arrived, Petitioner exited the home and Deputy Senn, along with other officers, handcuffed Petitioner. Deputy Senn immediately noticed a strong odor of alcohol from Petitioner’s breath and person along with slurred rambling from him. Deputy Senn also observed that Petitioner had only minor injuries and did not appear to be in a state of shock. However, Petitioner requested medical attention for his injuries so the deputies arranged for transportation for him to the hospital. Deputy Senn accompanied Petitioner to the hospital and allowed medical staff to treat him. Eventually, the hospital staff discharged him after finding Petitioner had only minor injuries. At all points during Deputy Senn’s interactions with Petitioner, Petitioner understood all questions asked and commands issued to him. Finally, Deputy Senn testified that in his experience, AR-15s ejected spent shell casings in every direction and with no discernible pattern. (R.p.39, line 22–R.p.50, line 5).

Keith Sprinkle, a crime scene investigator with the Lexington County Sheriff’s Department, responded to Petitioner’s residence to process the scene. (R.57; 59). He began by taking photographs of the outside and inside of the residence and then proceeded to locate, identify, and mark and physical evidence to be collected. (R.60). Sprinkle then

detailed the significant number of photographs taken at the residence and of the evidence such as the shell casings. Sprinkle specifically noted four shell casings were found inside the garage and one was located just inside the doorway entering the kitchen from the garage. (R.70; 83).

When questioned about the firearm used, Investigator Sprinkle noted it ejected to the right. (R.100). He also indicated the location of the shell casings in one room is not indicative of the firearm being fired from within that room—though it could have been. (R.101-102). When specifically asked about the location of shell casing marked number 9, Sprinkle indicated it was possible both the victim and shooter could be in the kitchen if they were “on top of each other” and it would be consistent with them being fired right at the doorway. (R.105). He also acknowledged: “in my experience, ejection patterns on any kind of ammunition, regardless of handguns, rifles, or even shotguns, there’s no determined exact pattern of ejection.” (R.109). He ended his cross-examination admitting:

Again, I cannot say exactly where that shell casing is going to land whenever it falls after ejection because whenever a shell casing is ejected, it can land directly to the right of the firearm, to the right in front of the firearm, to the right behind the firearm. There is an area of where it can land, so I cannot say exactly where the firearm was when that -- based off of solely just on where that shell casing is located.

(R.112).

Detective Brannon Marthers spoke with Petitioner after he had been taken to the hospital and evaluated by hospital staff. Notably, Petitioner’s discharge paperwork had already been processed and his only observable injuries were cuts on his face, which a nurse helped him clean while Detective Marthers waited. (R.177-178). Detective Marthers smelled an odor of alcohol from Petitioner but indicated he appeared to be in control of his faculties.

(R.180). Detective Marthers sought to obtain information about the shooting from Petitioner, because he had yet to provide officers with his account of the night's events. After other witnesses began providing their statements to police, Detective Marthers advised Petitioner of his Miranda rights and obtained a written statement from him. (R.180-182).

In his statement, Petitioner claims the fight began with the two men wrestling. During this struggle, Meyers hit Petitioner in the face. Eventually, Petitioner escaped into the home and locked the door. Between ten to twenty minutes later, Petitioner opened the door to the garage and Meyers barges into the home, and Petitioner shot at him "three to four times" while in the kitchen. (R.185-186). Petitioner claims he fired the shots while near the island in his kitchen and backing up. (R.188). Petitioner and Meyers then fought more outside the garage, Petitioner eventually told Meyers to leave, and then Meyers got into his truck and left. (R.186). Petitioner claimed he was unsure as to whether Johnny or Jacob were at the house at the time of the shooting. (R.191). He also stated he and Meyers had never had any fights or issues prior to that night and acknowledged he could have called the police while he was in the home but did not have his own personal cell phone. (R.191; 193).

Michael All, Jacob's friend who was approximately sixteen years' old at the time on the day of the crime, testified about what he witnessed the night of the crime. Prior to Petitioner and Meyers arriving at the home, Jacob was at the home with Johnny, Ian, and Brooke. Jacob was asleep in a bedroom of the house. After Petitioner and Meyers ordered the teenagers outside the home to leave, Petitioner entered the house and yelled at Brooke, blaming her for the teenagers on the property. Petitioner exited the home and Meyers apologized for bringing him home drunk before also going outside. After Brooke and Ian

left, Michael and Johnny decided to watch TV in the living room until they returned. After a bit, Michael heard yelling outside and walked to the kitchen window, where he saw Petitioner and Meyers fighting; when he first observed them, Meyers had Petitioner pinned to the ground but was not hitting or choking him. Petitioner did not request for anyone to call 9-1-1 but was yelling at Meyers and demanding he get off him. Johnny eventually entered the kitchen, but before he could look out the window Michael sent him back into the living room. Michael also returned to the living room. Shortly thereafter, Petitioner entered the home and grabbed his gun. Michael tried to get Petitioner to “slow down,” but Petitioner, angrily replied by telling Michael to “get the f--k out of his way.” Petitioner did not ask Michael to call 9-1-1 or seek any help. (R.p.223, line 12–R.p.233, line 3)

After grabbing the gun, Petitioner opened the garage doors, stood in the doorway, propped the storm door open, and fired four or five shots. Michael could not see where Petitioner fired the shots; Johnny was in the living room and could not have seen them at all. After the shots, Meyers never entered the house; no struggle ever occurred inside the home. Petitioner shut the doors, went into the kitchen, dropped the gun, and sat down. Jacob, finally awake, entered the kitchen and asked what happened. Michael testified that as Jacob went towards the door, Petitioner grabbed the gun and pointed it at him and asked a rhetorical question: “[Y]ou’re on [Meyers’s] side, aren’t you?” (R.237).

James Sullivan, a crime investigator for the State with prior experience as a marine, patrol officer, and SWAT team member testified about test firing an AR-15 of the same make and model as the one used by Petitioner using the same brand and type of ammunition at an indoor firing range. Recording his results using photographs and video, Sullivan fired a set of rounds in the open and then a set of rounds next to a wall, recreating Petitioner’s

experience of firing out the garage doors with the storm door propped open to his right. Bullets fired next to the wall had their shell casings bounce off the wall and go a variety of directions, including to the shooter's left. Without a wall, the bullets were ejected to the right of the gun. Additionally, without a wall, most of the shell casings ended up behind the weapon and shooter. However, Sullivan emphasized on both direct and cross-examination that when the bullets hit the ground, they could bounce in a variety of directions and there was "no particular pattern" as to where they would come to rest. Trial counsel did not object to Sullivan's testimony, but did object to the introduction of the photographs and video he collected. (R.p.254, line 12–R.p.265, line 8; State's Exhibits 73–76).

ARGUMENT

- I. **The trial court properly admitted the relevant and probative photographs and video recordings from firearm experiments performed by an investigator and correctly concluded they were not unfairly prejudicial nor was it likely to confuse the jury. Further, any possible error in admitting the photographs and videos was entirely harmless in light of the testimony provided by multiple investigators.**

The trial court did not err in admitting the photographs and video recordings of Investigator Sullivan's experiment showing the location of spent shell casings. Many of the arguments made by Petitioner go to the weight of the evidence and not its admissibility. Further, the trial court considered the relevance of the experiment, the nature of the results, and the conditions under which it was conducted, and concluded its probative value was not significantly outweighed by the danger of unfair prejudice. Even if this ruling was in error, the admission of the experiment was entirely harmless given the very limited nature of its findings, Petitioner's ability to use its findings to his advantage, and the other testimony in the record.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

"A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). "Prejudice occurs when there is reasonable probability

the wrongly admitted evidence influenced the jury's verdict." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

In discussing a review of a trial court's Rule 403, SCRE, ruling, this Court has stated:

A trial judge's decision regarding the comparative probative value and prejudicial effect of 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.

State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003). Various federal courts have also articulated the great deference owed the trial court. United States v. Green, 887 F.2d 25, 27 (1st Cir.1989) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in 'exceptional circumstances.'"); United States v. Long, 574 F.2d 761, 767 (3d Cir. 1978) ("If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal."); see also, State v. Lyles, 379 S.C. 328, 338-339, 665 S.E.2d 201, 207 (Ct. App. 2008) (citing both Green and Long in discussing the great deference owed to the trial court on questions of probative versus prejudicial balancing).

Merits

Petitioner moved pretrial and again when the State sought to admit the photographs and video recordings to exclude them under Rule 403, SCRE. He asserted they were inadmissible because the investigator used a weapon other than the one used by Petitioner and because his experiment did not yield any definitive conclusions. The trial court found both were arguments related to the weight of the evidence for the jury and concluded the prejudicial effect did not substantially outweigh the evidence's probative value.

Relevance and Probative Value

Generally, all relevant evidence is admissible. State v. Aleksey, 343 S.C. 20, 34, 538 S.E.2d 248, 255 (2000); Rule 402, SCRE. Evidence that assists the jury in arriving at the truth of an issue is relevant and admissible unless otherwise incompetent. State v. Sweat, 362 S.C. 117, 126, 606 S.E.2d 508, 513 (Ct. App. 2004). Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. In the Matter of Care and Treatment of Corley, 353 S.C. 202, 205, 577 S.E.2d 451, 453 (2003); State v. King, 349 S.C. 142, 153, 561 S.E.2d 640, 645 (Ct. App. 2002); Rule 401, SCRE (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

In this case, the video recordings and photographs are relevant evidence. Petitioner asserts the experiment is not admissible because the State did not reach any absolute conclusion or discern a definitive pattern. The experiment, however, did provide the jury with insight into how the gun fired by Petitioner and the casing it ejects would behave under certain conditions similar to the possible conditions at the time Meyers was shot. While not establishing a conclusive pattern, the evidence shows generally the casings will end up behind the shooter based on the fact they are ejected to the right and behind. The videos and photographs do not preclude any possibility of casings going somewhere other than behind the shooter, but they demonstrate that is the likely result after shooting the weapon unless they ricochet off another object. The State used the evidence to argue it would be unlikely that a casing would end up in the same location where the gun was fired. This fact was made more probable based on the experiment conducted by Investigator Sullivan detailing that while the casings may go anywhere

once they hit the ground, they generally stay behind and to the right of the person firing the weapon.

Additionally, the evidence had probative value to corroborate other testimony admitted without objection. Both Deputy Senn and Investigator Sprinkle also testified regarding the discharge of casings from Petitioner's weapon or similar weapons. Even accepting Petitioner's argument that no pattern was discerned by the experiment, that finding would support much of the testimony of the State's witnesses, Deputy Senn and Investigator Sprinkle, so the videos and photos would still be relevant and probative as corroborative evidence.

Deputy Senn, who is a member of the SWAT team, testified ejected casings end up "all over the place. They're to the side, behind, everywhere." (R.49). Specifically, he testified: "There's no certain pattern." (R.50).

Investigator Sprinkle indicated Petitioner's weapon ejected casings to the right. (R.100). He was also asked if the room a casing is located in likely means the weapon was fired in that room, and he gave a qualified response that it could, but it would depend on lots of factors. (R.102-103). Investigator Sprinkle further testified: "ejection patterns on any kind of ammunition, regardless of handguns, rifles, or even shotguns, there's no determined exact pattern of ejection." (R.109). He continued:

Again, I cannot say exactly where that shell casing is going to land whenever it falls after ejection because whenever a shell casing is ejected, it can land directly to the right of the firearm, to the right in front of the firearm, to the right behind the firearm. There is an area of where it can land, so I cannot say exactly where the firearm was when that -- based off of solely just on where that shell casing is located.

(R.112).

Finally, on cross-examination, Investigator Sprinkle was specifically asked questions related to the spent shell casing just inside the kitchen. In general, he responded that you could not say that the shot was fired in the kitchen solely because shell casing marked number 9 ended up in the kitchen. He was asked: "You don't believe that number 9 could have been fired from right around where it fell?" He responded: "Again, it's possible, but in this case, not very probable." (R.110).

As a result, the test results corroborate the testimony of Senn and Sprinkle by demonstrating that, while the casings eject initially to the right and back from the weapon, they can land and end up in a wide variety of locations. The experiment supports their testimony that they could not definitively say where the shot was fired from within the residence, and further buttresses the testimony that solely because the casing was in the kitchen, they could not say it was fired from within the kitchen.

Accordingly, the video recordings and photographs depicting the experiment conducted by Sullivan were relevant and had probative value.

Prejudice

Even relevant, evidence may still be excluded. Rule 403 provides: "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 decision on an improper basis." State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v.

Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir.1993)). “[A]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided.” United States v. Rodriguez–Estrada, 877 F.2d 153, 156 (1st Cir.1989). “The term ‘unfair prejudice,’ as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.” Old Chief v. United States, 519 U.S. 172, 180, 117 S.Ct. 644, 650, 136 L.Ed.2d 574, 587–88 (1997).

In this case, Petitioner’s primary argument is that Investigator Sullivan did not use Petitioner’s gun to conduct the experiment and did not do it under identical conditions. Investigator Sullivan admitted he did not use Petitioner’s weapon for the test. He explained the circumstances of the test and the trial court ultimately concluded the experiment admissible, determined it was not unfairly prejudicial, and allowed Petitioner to fully cross-examine Sullivan regarding all the discrepancies between his experiment and the original circumstances and any weaknesses which would go to the weight of the evidence.

Initially, as this Court recently noted: “The results of experiments are substantive evidence.” Hamrick v. State, 426 S.C. 638, 651, 828 S.E.2d 596, 603 (2019) (quoting 2 Michael H. Graham, Handbook of Federal Evidence § 401:10 (8th ed. 2018)). As a result, “the trial court did not have the discretion to exclude the video except in reliance upon a specific, applicable rule or other provision of law.” Id. at 651–52, 828 S.E.2d at 603.

This Court has long established a determination on the admissibility of an experiment, especially when the challenge relates to the similarity of the conditions and circumstances is within the discretion of the trial court. “Where the competency of evidence of experiments depends upon similarity of circumstances and conditions, the question is one for

the court to determine.” State v. Avant, 85 S.C. 570, 67 S.E. 908, 909 (1910). Additionally, this Court has never required identical conditions or circumstances.

The rule laid down by this court for the introduction of evidence and an experiment out of court requires that the experiment be made under conditions and circumstances similar to those prevailing at the time of the occurrence involved in the controversy. It is not required that the conditions be identical with those existing at the time of the controversy; it is sufficient if there is a substantial similarity.

Weaks v. S.C. State Highway Dep’t, 250 S.C. 535, 542, 159 S.E.2d 234, 237 (1968) (citing McDowell v. Floyd, 240 S.C. 158, 125 S.E.2d 4); see also, State v. Kahan, 268 S.C. 240, 246, 233 S.E.2d 293, 294 (1977) (“[T]his Court has not required that conditions of an experiment be identical to those existing at the time of the controverted event; only that there be substantial similarity.”).

In the instant case, Investigator Sullivan used the same make and model weapon. He fired the same type and caliber ammunition produced by the same manufacturers as found on the scene. He fired under controlled conditions of an indoor shooting range so that wind and other factors would not alter the results and so the results would be as consistent as possible with firing inside a residence. He tried to mimic the location by shooting in the open versus having a structure to his right. Short of firing Petitioner’s gun in Petitioner’s house, the experiment was conducted under as similar conditions as possible.

As a result, the trial court did not err in allowing the experiment into evidence and allowing Petitioner to make any arguments regarding the weight the jury should assign to the experiment. The trial court properly admitted the relevant and probative substantive evidence of the experiment which was correctly determined by the trial court to not likely result in confusion or unfair prejudice to Petitioner.

Harmless Error

Even if there was error in admitting the experiment, any error was entirely harmless beyond a reasonable doubt. “Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result.” State v. Brown, 424 S.C. 479, 493, 818 S.E.2d 735, 743 (2018) (quoting State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006)). This Court has explained:

Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it “could not reasonably have affected the result of the trial.”

State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (quoting State v. Key, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971)); see also, State v. Reyes, 432 S.C. 394, 406, 853 S.E.2d 334, 340 (2020) (acknowledging same). “Put simply, the harmless error rule embodies a commonsense principle our appellate courts have long recognized—‘whatever doesn’t make any difference, doesn’t matter.’” Reyes, 432 S.C. at 406, 853 S.E.2d at 340 (citations omitted).

Extensive testimony in the record, which was never objected to by Petitioner, provided consistent information with that produced and presented in the experiment. Further, the experiment did not result in prejudice to Petitioner because, if you believe his arguments on the experiment, it provided no evidence to contradict his theory of the case, and it was even used by his counsel during closing argument to support his arguments.

Initially, the results of the experiment and Investigator Sullivan’s testimony regarding the experiment are entirely cumulative to other testimony in the record. “When improper evidence is ‘merely cumulative’ its admission is harmless beyond a reasonable doubt, and the conviction should not be reversed.” State v. Warner, 436 S.C. 395, 872 S.E.2d 638, 645 (2022); see also,

State v. Haselden, 353 S.C. 190, 577 S.E.2d 445 (2003) (admission of improper evidence is harmless where the evidence is merely cumulative to other evidence.); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993) (any error in admission of evidence cumulative to other unobjected to evidence is harmless).

In the instant case, as discussed above, both Deputy Senn and Investigator Sprinkle testified the shell casings could end up anywhere once fired because they can bounce once they hit the ground. Both testified there were no discernable patterns to where the casings ended up. In its worst case scenario, the videos and photographs demonstrate there is no distinctive pattern to the end location of fired shell casings from Petitioner's gun. The jury knew this fact from the extensive testimony of both Seen and Sprinkle.

Significantly, Investigator Sullivan directly acknowledged the fact that the spent shell casings can go in any direction when they hit the ground—indicating it “bounces wherever it bounces”. (R.261-262). He explained: “Other than extracting to the right from the shooter, from the ejection port, hitting an object, it can go to the front, side, rear, doesn't matter. It just ejects to the right, sir.” (R.264). Most significantly, Sullivan twice used an example all the jurors were likely to be familiar with to demonstrate where the casings would go—dropping a pill and then trying to find where it went. (R.261; 264). There is no chance the jury did not understand the results of the experiment in the videos and photos. While the majority of the shell casings ended up behind the shooter, it was impossible to determine with certainty, because like the pill they have all dropped and had to find, the casings can bounce just about anywhere when they hit the ground.

Additionally, the information presented in the videos and photographs, if Petitioner's description of their findings is accurate, did not prejudice Petitioner. Investigator Sprinkle

specifically indicated Petitioner's theory of how it occurred would be possible, just unlikely. Additionally, the evidence presented in the experiment showed Petitioner's theory was possible, just unlikely. Finally, Petitioner's counsel used the State's experiment to his advantage arguing it directly supported his theory of the shooting. As a result, even if error to admit the videos and photographs, their admission could not have reasonably contributed to the jury's verdict and was entirely harmless. State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) ("Error is harmless where it could not reasonably have affected the result of the trial."); In re Gonzalez, 409 S.C. 621, 636, 763 S.E.2d 210, 217 (2014) ("A fundamental principle of appellate procedure is that a challenged decision must be both erroneous and prejudicial to warrant reversal.").

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court of Appeals opinion should be affirmed.

Respectfully submitted,

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