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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
The Honorable Clifton Newman, Circuit Court Judge
Appellate Case No. 2026-000486

THE STATE,

RESPONDENT,

v.

ERNEST CONDRE BETHEL,

PETITIONER

BRIEF OF RESPONDENT

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PETITIONER'S QUESTION PRESENTED

1. Did the Court of Appeals err in finding the trial court did not abuse its discretion in admitting evidence of Petitioner's alleged involvement in a prior shooting at the same location when the State failed to prove the prior bad act by clear and convincing evidence, the propensity evidence was not logically relevant to the material fact at issue, and the striking similarity of the evidence enhanced the substantial unfair prejudice to Petitioner?

RESPONDENT'S QUESTION PRESENTED

1. Did the Court of Appeals err in deciding that the prior act of the Petitioner was proven by clear and convincing evidence and the prior act was related to the determination of whether or not the Petitioner acted in self-defense where it revealed he brought on the difficulty and though it was in close similarity to the convicted crimes and was the probative value outweighed by any prejudicial effect?

STATEMENT OF THE CASE

On August 22, 2019, appellant Ernest C. Bethel (“Petitioner”) murdered Christopher Lott and Tolliver Wise and attempted to murder Cameron Jenkins and Gregory Martin. On December 18, 2019, a Richland County Grand Jury indicted Petitioner for 2 counts of murder, 2 counts of attempted murder, and 1 count of possession of a weapon during a violent Crime (Indictment Nos. 2019-GS-40-8050 through 8054).

On April 17, 2023, Petitioner proceeded to a jury trial before the Honorable Clifton E. Newman, Circuit Court Judge. Present before the Court was the Petitioner along with his counsel Mr. Justin Kata. Representing the State of South Carolina was Deputy Solicitor Dan Goldberg and Assistant Solicitor Nicholas Fowler of the Fifth Circuit Solicitor’s Office. On April 20, 2023, a jury of his peers found Petitioner guilty of both murders, both attempted murders and the weapons offense. After the reading of the verdict Petitioner appeared before Judge Newman. The Petitioner was sentenced to a 50-year period of incarceration for each murder, 30 years for each attempted murder, and 5 years for the weapon charge. (App. p. 423 l. 25 – p. 424 l. 10). Petitioner filed a timely notice of appeal before the South Carolina Court of Appeals.

On November 26, 2025, the Court of Appeals filed an unpublished opinion affirming the decision of the trial court. *State v. Petitioner*, Op. No. 2025-UP-383 (S.C. Ct. App. filed November 26, 2025)(App. pp. 424-425, 428-429, 432-433, 436-437, 440-441). In this case Judges McDonald, Hewitt, and Turner decided the trial court did not err in allowing into evidence the Petitioner’s prior bad act, because these acts were logically related to a determination of whether the Petitioner acted in self-defense. The Court of Appeals also found that the risk of prejudice did not substantially outweigh any probative value.

Upon receiving this decision, Petitioner filed a petition for writ of certiorari before this Court on March 2, 2026. A return to this Petition was filed by the Respondent on April 17, 2026. This Court granted Certiorari on June 17, 2026. The initial brief of the Respondent defending their arguments follows.

STATEMENT OF THE FACTS

One or two weeks prior to the murders of Christopher Lott and Tolliver Wise and the attempted murders of Cameron Jenkins and Gregory Martin, Petitioner was inside *McCary's* Bar and Grill (hereinafter *McCary's*) on Bush River Road in Columbia, S.C. While there, Petitioner got into an altercation with a female patron. This led to a further altercation between the Petitioner and Assistant Manager Kerry Ross. This altercation occurred because Mr. Ross intervened in the altercation between Petitioner and the female patron. Petitioner punched Mr. Ross in the face and walked out the front door. Petitioner circled the parking lot area at the back of the bar. Mr. Ross walked out the front door behind Petitioner and told Petitioner that he was banned and never to return. Mr. Ross then went through the bar and out the rear door. When Mr. Ross opened the back door of the bar, Petitioner was standing there with a firearm in his hand, Petitioner then fired several shots up into the air. Mr. Ross then told the manager and the bar tender that Petitioner was banned from *McCary's*. (App. p. 153 l. 13; p. 154 l. 14-16). There were two other witnesses beside Mr. Ross; Gregory Martin, who worked at the bar, and patron Amiracle Wright. (App. p. 154 l. 20-22). Martin witnessed the same altercation between Petitioner and Ross, and after Petitioner left the bar, Martin heard the gunshots fired outside the bar. (App. p. 108 l. 1-3). Amiracle Wright witnessed the altercation between Petitioner and Mr. Ross. Mr. Wright was outside the bar in the parking lot area and witnessed Petitioner firing the gun into the air. (App. p. 185 l. 15-22).

A week or two later, on **August 22, 2019**, Petitioner had two acquaintances drive him to *McCary's*. They arrived at approximately 2:25 a.m. after first visiting two other bars in the area. At the previous bar, Petitioner ran into Amiracle Wright. Petitioner told Ms. Wright that he was going to *McCary's* next. Ms. Wright warned Petitioner that he should not go to *McCary's* because Petitioner knew he had been banned from that establishment because of the previous incident. Petitioner stated he was going anyway and would tell *McCary's* employees that it was his twin brother who was involved in the prior incident. (App. p. 186 l. 22 – p. 187 l. 4). Petitioner later admitted to police he was drunk when he arrived at *McCary's* on August 22nd.

When they arrived, Petitioner got out of the car first, leaving his two friends inside their car. As he approached the front door while armed with a loaded semi-automatic pistol, Petitioner peered through the front door glass window to see who was inside. Petitioner did not see Assistant Manager Ross, so he entered *McCary's*. After Petitioner entered the establishment, his two friends got out of their car and entered as well. Petitioner's actions and the crimes he committed on August 22, 2019, were all recorded on several surveillance cameras, the footage of which was played for the jury. (App. p. 67 l. 12 – p. 68 l. 25); State's Ex. 4 [*McCary's* video]; State's Ex. 65 [compilation of surveillance videos]; (App. p. 243 l. 1-7); State's Ex. 3 [neighboring business surveillance video](App. p. 69 l. 23 – p. 70 l. 1).

Immediately upon entry Petitioner was greeted by Tolliver Wise. Mr. Wise shook Petitioner's hand, hugged him and eventually told Petitioner he was not allowed to come inside the bar. John Miller and Christopher Lott also walked over and told Petitioner he needed to leave because he was banned.¹ Petitioner told the men he wanted to talk to someone who worked there.

¹ There was testimony that *McCary's* and its regular patrons were a "community" that watched out for each other, hence several regular patrons of the bar told Petitioner he had to leave because of

Cameron Jenkins, the bartender on duty, and Gregory Martin, the cook, walked over to diffuse the situation and told Petitioner he was banned from *McCrary's* and he had to leave. Petitioner refused to listen to either man and argued with them and the nearby patrons. Petitioner stuck his hand in the face John Miller, as they were arguing. Mr. Miller threw a drink on Petitioner. Petitioner responded by pushing and punching Miller and the two began to fight. Mr. Jenkins grabbed Petitioner around the waist in an attempt to separate them. Someone else grabbed Miller and restrained him. Jenkins eventually was able to pull Petitioner away from Miller and with the help of others, push Petitioner out the front door of *McCrary's*. As the front door was shutting, Tolliver Wise, who had hugged Petitioner when he entered the bar, saw Petitioner outside the front door reaching for his gun. Christopher Lott grabbed the front door handle from the inside of *McCrary's* as the door was shutting and held it shut. Once the door closed, Wise drew his gun in anticipation that Petitioner was going to fire. (App. p. 186 l. 2-5; State's Ex. 4; State's Ex. 65, App. p. 69 l. 1-2).

Petitioner pointed his semi-automatic pistol at the front door of *McCrary's* and fired 7 shots. These shots went through the front door striking four different victims, Wise, Lott, Jenkins, and Martin. Wise, who saw and heard the shots coming through the front door, was struck in the chest. Prior to being shot Mr. Wise told his sister, Amiracle and a friend to flee to the bathroom. Amiracle thought Petitioner was shooting up in the air again like he did in the prior incident, but Wise signaled to her that Petitioner was shooting through the door and that she and her friend should flee to the bathroom. (App. p. 190 l. 3-8).

the prior incident *one to two weeks* earlier. (Tr. 99, l. 16-18; 73, l. 16-20; 74, l. 10-24; 78, l. 3-10; 90).

Two of the victims, Christopher Lott and Tolliver Wise, died from their gunshot wounds. Cameron Jenkins who testified during the trial, identified Petitioner, and recounted exactly what occurred before the shooting. Mr. Jenkins suffered a gunshot wound to the neck, and the fired bullet remained in Mr. Jenkins' neck during the trial. Gregory Martin, also testified, he identified Petitioner, and testified to what occurred. Mr. Martin suffered catastrophic injuries and multiple surgeries but was able to survive the multiple gunshot wounds he received from Petitioner. (App. p. 110 l. 7-13; l. 15-22).

After the shooting Petitioner fled to his acquaintances' car. Petitioner indiscriminately fired five more shots back at *McCary's*. Petitioner then fled the crime scene in his acquaintances' car. (App. p. 210 l. 14-18); State's Ex. 4 [*McCary's* surveillance video]; State's Ex. 65 [surveillance video compilation]; State's Ex. 3 [surveillance video of neighboring business]). Petitioner disposed of the semi-automatic pistol; so, it was never recovered. Richland County Sheriff's Department investigator Jason Roach testified during Petitioners' trial. Investigator Roach was found qualified as an expert in the field of firearms and tool mark examination. (App. p. 202 l. 3-6). Investigator Roach testified that all the fired shell casings found outside *McCary's*, 12 in all, were fired by the same weapon. (App. p. 206 l. 10-11).

Petitioner was arrested and charged with two counts of murder and two counts of attempted murder. Petitioner was questioned several days later by the FBI. He admitted being present at the bar and intoxicated but denied possessing a gun or firing any bullets. Petitioner testified during the trial admitting that he lied to police when interviewed about whether he had a gun or firing off any shots. (App. p. 323 l. 2-22).

Petitioner admitted that he fired the seven shots through the front door striking four people, killing two, and severely wounding two others. Petitioner claimed he fired two additional shots

when he got to his friend's car. Petitioner claimed he acted without malice and was merely acting in self-defense or defense of others [his friends] when he fired his weapon. The jury rejected his claim of self-defense finding the State had disproved self-defense. Because the jury found the Petitioner guilty on each offense. (App. p. 405 l. 13 – p. 406 l. 9).

Notably, in his closing argument, Deputy Solicitor Dan Goldberg pointed out to the jury that the surveillance video of the actual crimes showed Petitioner's actions on a digital clock down to the second. The same cameras showed Wise's actions in response to Petitioner's actions down to the second. Goldberg pointed out that the jury could watch the surveillance videos and see that Petitioner reached for his gun before the front door even closed and Wise saw Petitioner go for his gun, but Petitioner could not see Wise pull his gun because of Petitioner's position and seconds passed before Wise drew his gun. Goldberg also pointed out that in the video Petitioner can be seen finishing drawing his weapon after the front door closed, and Petitioner can be seen taking several steps and then pointing his firearm at the exterior of the front door and firing 7 shots into the front door where the men who had just ejected Petitioner would have been standing, striking and eventually killing Christopher Lott and Tolliver Wise and severely wounding Jenkins and Martin. Mr. Goldberg also pointed out that Petitioner fired the seven shots through the front door before Wise was able to return fire. (App. p. 360 l. 19 – p. 361 l. 17; See also State's Ex. 4 & State's Ex. 65).

ARGUMENT

1. **The Court of Appeals did not err in deciding that the prior act was proven by clear and convincing evidence, and that the prior act related to a determination of whether the Petitioner acted in self-defense and although the act was in close similarity to the convicted crimes its probative value, proving Petitioner's did not act in self-defense was greater than any prejudice it might have caused.**

Relevant Facts

During pre-trial Petitioner raised the issue of the prior incident he had with Assistant Manager Ross in which he was removed from bar and upon leaving firing shots into the air outside. The Petitioner moved that this incident not be mentioned due to him never being criminally charged and it being prejudicial. Upon conclusion of this argument Judge Newman decided that he would rule on this issue when the evidence was presented. When Gregory Martin testified Petitioner's trial counsel objected. This was ultimately overruled by Judge Newman. The testimony regarding Petitioner's prior act was allowed into evidence. (App. p. 152 l. 16-25).

Standard of Review

In criminal cases the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The trial court has considerable discretion on the admissibility of evidence. State v. Sheldon, 344 S.C. 340, 342, 543 S.E.2d 585 (2001). On appeal, the trial court ruling will not be disturbed absent a prejudicial abuse of discretion amounting to an error of law. State v. Smicklevich, 268 S.C. 411, 234 S.E.2d 230 (1977). The evidence admitted must logically relate to the crime with which the defendant has been charged. State v. Beck, 342 S.C. 129, 135, 536 S.E.2d 679, 682-83 (2000). Where the defendant was not convicted of the prior crime, evidence of the bad act must be clear and convincing. State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009). The basic definition of when a person is justified in using deadly force

in self-defense is when the defendant was without fault in bringing on the difficulty. State v. Wiggins, 330 S.C. 538, 545, 500 S.E.2d 489, 493 1998).

Discussion

Prior event was evidence of malice; therefore, admissible

The Court of Appeals did not err in affirming Judge Newman's decision to admit the prior incident because it was separate evidence of Petitioner's malice toward *McCary's* and its employees **and** prior difficulties between the parties. The evidence was admissible not only under Rule 404(b), SCRE, to show motive, intent, and the absence of a mistake or an accident, where he claimed self-defense, but also under other case authority as evidence of malice, including prior difficulties between the parties, and of Petitioner's state of mind. Blakely v. State, 360 S.C. 636, 602 S.E.2d 758 (2004); State v. Cooley, 342 S.C. 63, 536, S.E.2d 666 (2000); State v. Beck, 343 S.C. 9, 536 S.E.2d 679 (2000).

First, testimony that a defendant had threatened the victims before the crimes is admissible to show malice toward the victims. Blakely, 360 S.C. 636, 602 S.E.2d 759 ("It is well-settled that evidence of previous threats by the defendant is admissible to show malice."); Beck, 342 S.C. 129, 134, 536 S.E.2d 679, 682 (noting appellant's statement of intent to commit a crime was admissible as a statement or declaration made by one accused of a crime). "As such[,] the bar against admitting prior bad acts is not applicable." Anderson v. State, 354 S.C. 431, 435, 581 S.E.2d 834, 836 (2003). Petitioner's actions in the prior incident were in the nature of a threat. He punched Assistant Manager Ross in the face and then went outside the bar and just outside the back door raised his pistol in the air and fired several shots in Ross's presence shortly after being told by Ross that he was banned from *McCary's* and was never to return. A defendant's threats to injure or harm the victim are not necessarily prior bad acts that fall under Rule 404(b) but are independent evidence

that is admissible to show malice, the defendant's criminal intent, and the defendant's state of mind. Beck, 342 S.C. 129, 536 S.E.2d 679. Such threats are admissible because they are relevant under Rule 401 & 402, SCRE. Evidence is relevant and admissible if it tends to establish or make more or less probable a fact in issue or a matter in controversy. State v. Wiles, 383 S.C. 151, 158-59, 679 S.E.2d 172, 176 (2009).

Petitioner's punching Assistant Manager Ross and firing a gun up in the air after being ejected from *McCary's* and banned just one to two weeks before the actual crimes was admissible under Rule 401 & 402, SCRE, because it established Petitioner's malice toward the bar and its' employees, his criminal intent when returning later, and his state of mind upon returning to the bar on April 22nd with a loaded firearm concealed on his person. Further, the probative value of this evidence was enhanced where Petitioner asserted the defense that the shooting of all four victims was in self-defense or defense of others and without malice. Furthermore, the probative value of this evidence was enhanced where Petitioner asserted the prior actions did not occur and he was never banned from *McCarry's*. Any unfair prejudice was minimal where Petitioner was not arrested for the prior incident, and he only fired a gun up in the air; and did not shoot anyone. As a result, the probative value of this evidence was not substantially outweighed by the danger of any unfair prejudice to Petitioner. Rule 403, SCRE.

All the evidence of the prior incident was also admissible to show prior difficulties between the parties. Petitioner had animus and malice toward *McCary's* and its' employees because of the prior incident. He returned one to two weeks later with a loaded firearm concealed on his person and looked through the front door to see Assistant Manager Ross was present before entering. In a homicide case, prior difficulties between the parties are admissible to prove motive. State v. Sweat,

362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004); Cooley, 342 S.C. 63, 536 S.E.2d 666 (evidence that accused and decedent had previous difficulties are admissible).

Here, prior difficulties between Petitioner and *McCary's* and its' employees were just one to two weeks prior to the actual crimes. These acts were not so remote as to be unfairly prejudicial and require exclusion under Rule 403, SCRE. Sweat, 362 S.C. 117, 606 S.E.2d 508 (prior CDV 2 months before murder was not too remote and was admissible); Beck, *supra* (4 months between statement or threat and the crime went only to the weight of the evidence not its admissibility); Glenn, *supra* (statements made by defendant 1 year before the incident, were relevant where the defendant was accused of injuring his victim in the same manner); Cooley (where son's testimony about father's domestic abuse of mother was over 2 years prior to the date of the killing and son had not lived with his parents since then, son's testimony should have been excluded under Rule 403); State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999)(excluding evidence of Defendant's bad acts that occurred more than 1 year before the crime on trial). This is true especially, where Petitioner claimed the shooting of the victims in this case was in self-defense **and** Petitioner returned to McCary's armed with a concealed semi-automatic weapon *just one to two weeks* after the prior incident where he was ejected and banned from the bar. (App. p. 316 l. 9-13).

Evidence was admissible pursuant to Rule 404(b)

Rule 404(b) of the South Carolina rules of evidence specifically state:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

Rule 404(b), SCRE.

Rule 404(b) provides for the admission of such evidence, not to prove action in conformity therewith, but to prove motive, identity, the existence of a common scheme or plan, the absence of

mistake or accident, or intent. Rule 404(b), SCRE. Evidence of other bad acts or crimes is inadmissible, unless it can be shown by the prosecution the evidence is necessary to establish a material element of the crime charged. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987). In State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990), the Court defined the term “necessary” as being synonymous with the term relevant:

Bell requests that this Court limit the Lyle rule by finding that other acts evidence is admissible only if necessary. Relying mainly on State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987), Bell argues that the trial judge erred in admitting the other acts evidence because it was not needed. Bell notes that the testimony of an eyewitness who identified Bell as the abductor as well as other evidence linking him to the crime. In Johnson, we stated that evidence of other crimes is never admissible unless necessary to establish a material fact or element of the crime charged. 293 S.C. at 324, 360 S.E.2d at 319. Consistent with our rulings since Lyle, we define necessary as synonymous with relevant. Thus, evidence of other crimes is never admissible unless relevant to establish a material fact or element of the crime charged.

Bell, 302 S.C. at 27-28, 393 S.E.2d at 369.

The State proved by clear and convincing evidence that the prior acts had occurred.

Petitioner first claims the State did not prove the prior incident occurred by clear and convincing evidence because Petitioner was not arrested or convicted for the prior incident. The Respondent disagrees. “To be admissible, other crimes that are not the subject of conviction must be proved by clear and convincing evidence.” State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Appellate courts do not review a trial court's ruling on the admissibility of other bad acts by determining *de novo* whether the evidence rises to the level of clear and convincing. If there is any evidence to support the admission of the bad act evidence, the trial [court]'s ruling will not be disturbed on appeal. Id. at 6, 545 S.E.2d at 829.

Evidence of bad acts does not have to be proof beyond a reasonable doubt but needs only be proven by clear and convincing evidence. State v. Pierce, 326 S.C. 176, 485 S.E.2d 913 (1997);

Bell, 302 S.C. 18, 393 S.E.2d 364. Clear and convincing is that degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established, and such proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal. See State v. Fletcher, 379 S.C. 17, 24, 664 S.E.2d 480, 483 (2008). Where a witness's testimony is the sole evidence of a bad act, the determination of the witness's credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate the witness's veracity. State v. Kirton, 381 S.C. 7, 671 S.E.2d 107 (Ct. App. 2008); State v. Tutton, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003). Should the trial judge determine the witness's testimony clearly and convincingly establishes the bad act occurred, an appellate court is bound by the trial judge's factual findings unless clearly erroneous. State v. Scott, 405 S.C. 489, 748 S.E.2d 236 (Ct. App. 2013); Kirton, 381 S.C. 7, 671 S.E.2d 107; Tutton, 354 S.C. 319, 580 S.E.2d 186. An appellate court will not conduct a *de novo* review of a trial judge's ruling on the admissibility of bad act evidence on the issue of whether the evidence rises to the level of clear and convincing evidence. State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001); State v. Perry, 420 S.C. 643, 803 S.E.2d 899 (Ct. App. 2017). A trial judge's ruling admitting bad act evidence will be upheld on appeal if it is supported by any evidence. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300; State v. Smith, 391 S.C. 353, 705 S.E.2d 491 (Ct. App. 2011), *reversed on other grounds*, 406 S.C. 215, 750 S.E.2d 612 (2013); Sweat.

The State proved the facts of the prior incident, by clear and convincing evidence through the testimony of 3 different witnesses, which was sufficient. Assistant Manager Kerry Ross (App. p. 151 l. 15 – p. 157 l. 19); Gregory Martin (App. p. 103 l. 16 – p. 115 l. 8); and Amiracle Wright (App. p. 183 l. 11 – p. 198 l. 15), each testified to the prior incident. State v. Gilchrist, 329 S.C.

621, 496 S.E.2d 424 Ct. App. 1998)(testimony of co-defendant with defendant when prior bad acts were committed was sufficient to meet the clear and convincing standard); State v. Aiken, 322 S.C. 177, 470 S.E.2d 404 (Ct. App. 1996)(testimony of co-defendant that defendant had been involved in prior robberies constituted clear and convincing evidence); Kirton, *supra* (testimony of one witness was clear and convincing evidence of prior bad act). This portion of Petitioner's argument has no merit.

Petitioner claimed at trial that the shootings were in self-defense and defense of others. Petitioner claimed the prior incident as described by State's witnesses did not even occur, and he was not banned from *McCary's*. Petitioner testified he did not hit Assistant Manager Ross in the prior incident, and he did not fire a gun up in the air one to two weeks earlier. Petitioner claimed, as a result, when he entered *McCary's* on the night of the crimes, the patrons and employees had no reason to approach him, argue with him or remove him from the bar. According to Petitioner, he was without fault in bringing on the difficulty, he acted reasonably, and he had no other means of avoiding the difficulty. (App. p. 271 l. 18 – p. 329 l. 23)

The State's evidence showed to the contrary. Petitioner's actions one to two weeks before the crimes are directly relevant to this case because the prior incident was what led to Petitioner being banned from *McCary's* and what directly led to the confrontation just inside the front door on the night of the crimes. On the night of the crimes, Petitioner was told to leave by employees and patrons of *McCary's* because of the prior incident which resulted in him being banned, he refused to leave even when told by employees that he had to leave. Petitioner continued to argue and eventually stuck his hand in the face of Miller. Miller proceeded to throw a drink on Petitioner resulting in the fight between Petitioner and Miller that Jenkins and Martin tried to break up. This led directly to Petitioner being pushed out of the front door of the bar and the door shut. Whereupon

Petitioner fired 7 shots indiscriminately into *McCary's* with the loaded weapon he carried concealed on his person killing two and wounding two others.

The prior incident also showed Petitioner was the aggressor. The evidence of the prior incident showed that Petitioner knew he was banned from *McCary's*, and instead of staying away, he returned to *McCary's* one to two weeks later in a different vehicle carrying a loaded semi-automatic pistol. Petitioner then tried to enter *McCary's* without being caught. Upon being stopped and told by patrons and employees that he must leave because he was banned, Petitioner did not leave but escalated the situation and continued to argue and eventually stuck his hand in the face of a patron instigating a physical conflict. This was especially relevant where Petitioner claimed he acted in self-defense. This evidence negated that Petitioner was without fault in bringing on the difficulty or that he acted reasonably in shooting indiscriminately into a crowded bar, or that he did not have another means of avoiding the difficulty. This evidence showed Petitioner was at fault in bringing on the difficulty, he did not act reasonably, and he had other means of avoiding the difficulty. Petitioner could have simply not returned to an establishment from which he was banned. Petitioner's argument that the prior incident had no relevance to this case is simply untrue. The decision of the Court of Appeals was correct.

The prior wrongful act was also admissible pursuant to Rule 403.

Petitioner also claims the probative value of this evidence was substantially outweighed by the danger of unfair prejudice to him under Rule 403, SCRE. The Respondent disagrees. The prior incident was just *one to two weeks* before the murders and attempted murders in this case. The dispute Petitioner had with patrons and employees immediately before the crimes in this case was directly related to the prior incident resulting in Petitioner being banned from returning to the bar.

In addition to establishing the requirements for admissibility under Rule 404(b), the State must show “the probative force of the evidence when used for this legitimate purpose is not substantially outweighed by the danger of unfair prejudice from the inherent tendency of the evidence to show the defendant's propensity to commit similar crimes.” State v. Perry, 430 S.C. 24, 44, 842 S.E.2d 654, 665 (2020); *see* Rule 403, SCRE (providing a trial court may exclude relevant evidence when the probative value is substantially outweighed by the danger of unfair prejudice). “Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis.” Gilchrist, 329 S.C. at 627, 496 S.E.2d at 427.

A trial judge’s weighing of probative value versus prejudicial effect under Rule 403, SCRE, is reviewed under an abuse of discretion standard and should be reversed only in exceptional circumstances. State v. Gadson, 439 S.C. 278, 886 S.E.2d 719 (Ct. App. 2023)(referencing State v. Brooks, 428 S.C. 618, 635, 837 S.E.2d 236, 245 (Ct App. 2019), *quoting*, State v. Collins, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014); Sweat, *supra*. “A trial [court’s] balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise due to a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence.” State v. Holland, 385 S.C. 159, 682 S.E.2d 898 (Ct. App. 2009); *quoting* State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 593-94 (Ct. App. 2001), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). Only exceptional circumstances justify reversing the Circuit Court Judge’s decision on 403 grounds. State v. Huckabee, 419 S.C. 414, 423, 798 S.E.2d 584, 589 (2017); Hamilton, 344 S.C. at 357, 543 S.E.2d at 593. “If there is any evidence to support the admission of the bad act evidence, the trial [courts]’s ruling will not be disturbed on appeal.” *See* Wilson, 345 S.C. at 6, 545 S.E.2d at 829.

The prior incident and what occurred were necessary for the jury to understand why Petitioner was banned from *McCary's* before the night in question and why everyone acted the way they did on the night of the crimes, i.e. approaching Petitioner and telling him to leave. The challenged evidence also showed without question that Petitioner was not without fault in bringing on the difficulty on the night of the crimes because he had been banned from the bar for previously striking the Assistant Manager of the bar and shooting a gun up in the air. Petitioner returned to the same bar again, after being warned by the victim's sister he should not return to *McCary's* because he was banned, but he did so anyway this time with a loaded semi-automatic pistol. Petitioner proceeded to argue with patron's and management about why he was banned leading again to his expulsion from the club and then Petitioner shooting through the front door seven times. Further, no one contended that Petitioner shot at anyone in the prior incident, but he simply fired the gun up in the air. Nor was he arrested for the prior incident. As a result, there was no unfair prejudice to Petitioner. The Court of Appeals decision was correct. State v. Lyles, 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008)(the determination of whether the danger of unfair prejudice outweighs the probative value of evidence must be based on the entire record and will turn on the facts of each case).

The probative value of bad act evidence may be shown by the similarity of the crime charged, or whether a real connection can be drawn between the two incidents, and whether the evidence is relevant to a material issue. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923); State v. Kennedy, 339 S.C. 243, 528 S.E.2d 700 (Ct. App. 2000). Here, after hearing arguments on the admissibility of the evidence under 404(b) and Rule 403, Judge Newman implicitly found the testimony was relevant and its probative value was not substantially outweighed by the danger of prejudice to Petitioner. The learned trial judge appropriately determined the probative value of

this evidence was not substantially outweighed by the danger of unfair prejudice to Petitioner. Holland, 385 S.C. 159, 682 S.E.2d 898. Petitioner has failed to show Judge Newman abused his discretion in admitting this evidence in this case. Id. Judge Newman's determination was fully supported by the record.² Affirming this decision was correct.

Three (3) different witnesses testified to the prior incident which occurred only *one to two weeks* before the murders and attempted murders. (App. p. 151 l. 15 – p. 157 l. 9). *McCary's* Assistant Manager Kevin Ross testified Petitioner punched him in the face. (App. p. 154 l. 14-15). Ross told Petitioner to leave, and he was banned from returning to *McCary's*. (App. p. 154 l. 15-16). All 3 witnesses saw Petitioner leave *McCary's* after the prior incident. And, one witness, Gregory Martin, then heard gunshots immediately outside the bar. (App. p. 108 l. 1-3). Two other witnesses, Ross and Amiracle Wright, testified Petitioner was holding a firearm [a pistol] in the parking area behind the bar and shooting the gun up into the air after the incident inside *McCary's*. (App. p. 185 l. 15-22). No one testified Petitioner shot anyone on the prior occasion or shot at anyone, Petitioner just shot up in the air. Petitioner returned to *McCary's* from which he was banned armed with a loaded semi-automatic pistol hidden on his person. Before going to *McCary's*, Petitioner had two friends drive him to several other bars. At one of those bars, Amiracle Wright saw Petitioner, where Petitioner stated to her that he was going to *McCary's* bar. (App. p. 186 l. 22 – p. 187 l. 4). Ms. Wright told Petitioner he could not go to *McCary's* because

² Petitioner cites to State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984). However, Gore dealt with the State questioning the defendant on trial for arson and murder, about a prior trailer fire involving another person the defendant lived with, in which the State admitted on appeal there was no probative evidence linking the defendant to the prior fire. The State did not even attempt to prove Gore committed the prior fire, just questioned him about the coincidence of a prior fire in the home of someone he lived with, prejudicing him before the jury. Id. Here, the State proved Petitioner committed the prior incident by the testimony of 3 witnesses; the prior incident was just 1 to 2 weeks prior to the crimes; and the prior incident involved *McCary's* and 1 of its employees.

he was banned because of the prior incident. Petitioner told Wright he was going anyway and would tell employees at *McCary's* it was his twin brother who committed the prior incident in order to get into the bar. (App. p. 187 l. 1-2). Petitioner then had his two friends drive him to *McCary's* where he approached the front door alone and looked inside to see if Assistant Manager Ross was present. When he did not see Ross, he immediately entered the bar and so did his two friends who followed. Petitioner was then confronted by patrons and staff who informed him he would have to leave because he was banned. An argument ensued. The tussle between Petitioner and Miller then ensued where the bartender Jenkins was able to pull Petitioner away from Miller and push Petitioner out of the bar with help from others. Once the door closed, within seconds, Petitioner fired seven shots through the front door killing two and severely wounding two others. Judge Newman did not abuse his discretion in admitting this testimony as its probative value in the case was not substantially outweighed by the danger of unfair prejudice to Petitioner. The prior incident and its details established the *res gestae* of the crime, Petitioner's malice toward *McCary's* and anyone associated with *McCary's* including employees and patrons, prior difficulties between the parties, malice, intent, and showing Petitioner was the aggressor. Petitioner's intent when he fired back into the club indiscriminately was malicious and his motive was retribution for being ejected from the bar, not self-defense. There is no merit to this appellate ground. The decision of the Court of Appeals was correct. The decision of Judge Newman allowing this prior evidence was correctly affirmed.

The evidence of the prior incident was admissible as *res gestae* of the crime evidence.

This is a different basis to admit such evidence than Rule 404(b). See Anderson v. State, 354 S.C. 431, 435, 581 S.E.2d 834, 836 (2003) (holding appellant's threatening statement to victim formed part of the *res gestae* of the crime). "As such[,] the bar against admitting prior bad acts is not

applicable.” Anderson, 354 S.C. at 435, 581 S.E.2d at 836. Evidence of other acts of the defendant or even crimes may be admitted under the *res gestae* of the crime theory:

One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence “furnishes part of the context of the crime” or is necessary to a “full presentation” of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its “environment” that its proof is appropriate in order “to complete the story of the crime on trial by proving its immediate context or the ‘res gestae’ ” or the “uncharged offense is ‘so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ...’ [and is thus] part of the res gestae of the crime charged.” And where evidence is admissible to provide this “full presentation” of the offense, “[t]here is no reason to fragmentize the event under inquiry” by suppressing parts of the “res gestae.”

State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370–71 (1996)(quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir.1980)), *overruled on other grounds*, State v. Giles, 407 S.C. 14, 754 S.E.2d 261 (2014). *Res gestae of the crime* recognizes evidence of other acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred. State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001), *overruled on other grounds* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct. App. 2004); State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). Under this theory, it is important that the temporal proximity of the other act be closely related to the charged crime. State v. Hough, 325 S.C. 88, 480 S.E.2d 77 (1997).

The evidence of Petitioner’s actions during the prior incident one to two weeks before was properly admitted under the *res gestae* of the crime because it provided the whole context of the crimes in this case. *See Adams*, 322 S.C. at 122, 470 S.E.2d at 370–71. Admission of the testimony was necessary and relevant to a full presentation of the evidence in this case. What occurred in the prior incident provided context for the crimes at issue because the prior incident resulted in

Petitioner's being banned from *McCary's*. He chose to return the night of the crimes with a loaded firearm, looked through the front door glass before entering *McCary's* on the night of the crimes, and causing the confrontation just inside the front door, which caused him to be removed from the bar physically, directly leading to the murders and attempted murders. The testimony regarding what occurred in the prior incident was relevant to show the complete, whole, unfragmented story regarding the crimes and why they occurred. *See State v. Simmons*, 352 S.C. 342, 573 S.E.2d 856 (Ct.App.2002).

At trial, Petitioner claimed the prior incident as described by the State's witnesses did not occur at all; therefore, when he entered *McCary's* on the night in question, there was no reason nor cause for an employee or patron to approach him and tell him he was banned and had to leave the bar. He denied he struck Assistant Manager Ross or fired a gun up in the air in the prior incident. According to Petitioner, on the night of the crimes, the employees and patrons of *McCary's* were the aggressors, not him. The prior incident and Petitioner's previous banning from *McCarry's* established Petitioner was not without fault in bringing on the difficulty in a trial where Petitioner claimed self-defense. The prior incident and Petitioner's banning also established Petitioner was the aggressor the night of the crimes and should not have been at *McCary's* on the night of the crimes much less armed with a loaded pistol. The prior incident also established Petitioner's *intent* when he was physically removed from *McCary's* on the night of the crimes, retribution, and the prior incident established Petitioner's *malice* toward *McCary's* and its employees and patrons. The prior incident is so related to actual crimes as to be inextricably intertwined. *See Adams*, 322 S.C. at 122, 470 S.E.2d at 371 ("The use of the cocaine here was inextricably intertwined with the robbery and murder. Under these circumstances, such evidence was properly admitted as part of the *res gestae* of the crime."). Indubitably, Petitioner's prior actions one to two weeks before the

murders and attempted murders were part of the entire scenario regarding the victims' murders and attempted murders. The prior incident at *McCary's* was the very reason Petitioner was removed from *McCary's* the night of the crimes immediately before the shooting started and the four victims were shot. State v. Johnson, 439 S.C. 331, 887 S.E.2d 127 (2023)(defendant's acts in Dillon and Marlboro Counties most definitely provides context under *res gestae* theory to the Marion County domestic violence case); State v. Wood, 362 S.C. 520, 528, 608 S.E.2d 435, 439 (Ct. App. 2004)(defendant's murder of trooper 2 hours earlier was *res gestae* of failure to stop for a blue light and AWIK trial in another county); State v. Hough, 325 S.C. 88, 480 S.E.2d 77 (1997)(defendant's act after the crime of purchasing crack cocaine with money from the armed robbery for which he was on trial was part of the *res gestae* of the crime).

Petitioner's prior actions toward Assistant Manager Ross **and** *McCary's* were admissible as *res gestae* of the crime. Sweat, *supra* (prior CDV was admissible evidence of *res gestae* of the crime of burglary and assault 2 months later after release from jail for CDV); Gillian, 360 S.C. 433, 601 S.E.2d 61 ("Under the *res gestae* theory, evidence other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred.") (citing Owens, 346 S.C. 637, 552 S.E.2d 745; Adams, 354 S.C. 361, 580 S.E.2d 785). Here, Petitioner was on trial for the murder of two patrons of *McCary's* and the attempted murder of two employees of *McCary's* after the victims either asked or told Petitioner to leave because he was banned from *McCary's* because of the prior incident. It was necessary for a full presentation of the case and for context, for the jury to understand the full nature of the relationship between Petitioner **and** the patrons and employees of *McCary's*, including the prior incident that resulted in Petitioner being banned and told not to return to *McCary's* which he did anyway. Because of what occurred in the prior incident, it explained

why the patrons and employees acted as they did on the night of the crimes. As a result, the prior incident was admissible as *res gestae* of the crime, especially where the altercation or dispute the night of the murders was directly related to the prior incident which resulted in Petitioner being banned from the establishment. Adams, 322 S.C. at 122, 470 S.E.2d at 370-71 (1996)(evidence of other crimes is admissible when it furnishes the context of the crime or is necessary for a full presentation of the case and is necessary to complete the story of the crime on trial by proving its context); Sweat (prior act of domestic abuse gave victim opportunity to escape her relationship with defendant; as a result she moved out, and he spent time in jail; he was upset, and eleven days after his release the crimes for which he was on trial occurred; the October abuse and events that followed provided the fact finder with an appropriate context in which to place the later attack).³

Moreover, the probative value of the evidence was not substantially outweighed by the danger of its prejudicial effect. See Owens, 346 S.C. at 653, 552 S.E.2d at 753; State v. Wood, 362 S.C. 520, 527–29, 608 S.E.2d 435, 439–40 (Ct. App. 2004). Petitioner’s actions on the previous occasion are all part of the *res gestae* of these crimes and were intertwined with and fully explained what occurred on the night of the crimes and why each person acted as they did. United States v. Wright, 392 F.3d 1269, 1276 (11th Cir.2004); (“[E]vidence of [defendant's resistance to arrest]

³ See also King, 334 S.C. at 512, 514 S.E.2d at 582 (*res gestae* recognizes evidence of other bad acts may be an integral part of the crime or may be needed to aid the fact finder in understanding the context in which the crime occurred.); Wiles, 383 S.C. at 158-59, 679 S.E.2d at 176 (evidence of other crimes which supplies the context of the crime, or is intimately connected with and explanatory of the crime, is admissible as *res gestae*); State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008)(admission of prior incidents of abuse or neglect was needed to present overall view of the facts and to provide context in which the crime occurred, and demonstrated the culminating impact upon the child; evidence regarding the prior bad acts was relevant to show the complete, whole story relating to the charge of homicide by child abuse; See State v. Bolden 303 S.C. 41, 43, n. 1, 398 S.E.2d 494 (1990) (noting *res gestae* does not fit squarely within any of the 5 categories in Lyle); State v. Smith, 309 S.C. 442, 451, 424 S.E.2d 496, 501 (1996) (Toal, J. dissenting)(although there is some overlap between Lyle and the *res gestae*, *res gestae* is a separate method where other evidence of criminal acts can be admitted).

prior to the discovery of the firearm gives the jury the body of the story, not just the ending. Such evidence was ‘inextricably intertwined’ with the charged offense.”). The prior incident explained why these crimes occurred and everyone’s actions on the night of the crimes, including Petitioner’s, and proved Petitioner’s animus, malice, intent, and motive in perpetrating the shootings, and disproved he was without fault in bringing on the difficulty where he claimed self-defense and defense of others at trial, and the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice where in the prior incident Petitioner did not shoot anyone, was not arrested, and only fired his gun up in the air after being told he was banned from *McCary’s*. See Johnson, 439 S.C. at 342–43, 887 S.E.2d at 132–33 (2023)(“The significant probative value of Johnson's acts in Dillon and Marlboro Counties was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or any other consideration pertinent to a Rule 403 analysis”)

Harmless error

Even assuming *arguendo* error in admitting any of the prior incident, it was harmless and could not have affected the verdict. “Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained.” State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006). This Court will not set aside a conviction for an insubstantial error not affecting the result when guilt is conclusively proven by competent evidence and no other rational conclusion could be reached. State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995); State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989).

The admission of any of the details of the prior incident was harmless. There was overwhelming un-objected to evidence that Petitioner was banned from *McCary’s* because of something he did in a prior incident. There was overwhelming evidence of Petitioner’s guilt

including video surveillance footage of all of the crimes he committed and what occurred inside and outside *McCary's* at the time of the incident down to the second (**State's Ex. 4; State's Ex. 65; State's Ex. 3**), along with eyewitness' testimony of Jenkins, Martin, and Amiracle Wright. Further, ballistics showed Petitioner fired a semi-automatic pistol twelve times indiscriminately into a crowded bar killing two and severely wounding two others. App. p. 206 l. 10-11). Finally, identity was not an issue as Petitioner admitted he was the shooter. State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004), *affirmed*, 373 S.C. 601, 646 S.E.2d 872 (2007)(Although trial judge erred in not limiting the amount of the evidence presented as to bad acts, such error was harmless, where other evidence established defendant's guilt beyond a reasonable doubt). As a result of the overwhelming evidence of Petitioner's guilt, any error in the admission of the challenged evidence was harmless beyond a reasonable doubt on this record. State v. Brown, 424 S.C. 479, 493, 818 S.E.2d 735, 743 (2018)("Where 'guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached,' an insubstantial error that does not affect the result of the trial is considered harmless.") (quoting State v. Byers, 392 S.C. 438, 447, 710 S.E.2d 55, 60 (2011)).

CONCLUSION

For the above stated reasons, Petitioner's convictions and sentences for two counts of murder, two counts of attempted murder, and possession of a weapon during the commission of a violent crime must be affirmed.

Respectfully submitted,

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