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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Horry County
The Honorable Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

ROGER D. GRATE,

APPELLANT.

Appellate Case No. 2019-000472

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

JIMMY A. RICHARDSON, II
15th Circuit Solicitor

W. JOSEPH MAYE
Assistant Attorney General
S.C. Bar No. 100851
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-3131

ATTORNEYS FOR RESPONDENT

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I. Did the trial judge err in allowing the state to call a witness to testify that approximately one year prior to the shooting for which Appellant stood trial, Appellant was angry at another individual with whom he was playing cards and as a result of that anger, Appellant drew his gun and pointed it at the individual where the evidence was not admissible to prove habit and did not fall within any of the exceptions to the prohibition on character evidence?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in finding the testimony of Terri Doctor admissible under either Rule 406 or 404(b) when such testimony demonstrated, in comparable comparison to the facts of the crime, that Defendant always carried a handgun and that on a prior occasion Defendant drew his gun, pointed it at an individual after becoming angry, and demanded the individual leave his property despite the complete lack of violent provocation from the individual?

STATEMENT OF THE CASE

Appellant was charged with murder (2017-GS-26-00930) and possession of a weapon during the commission of a violent crime (2017-GS-26-00931). (R. p. 149, lines 5-8). A four day jury trial was held before the Honorable Steven H. John on March 11 through March 14, 2019. Appellant was represented at trial by attorneys Kia T. Wilson and DeShantell R. Singleton. The State was represented by Assistant Solicitors Christopher D. Helms and Catherine D. Owens. (R. p. 1). At the conclusion of the trial, the jury found Appellant guilty on both charges. (R. p. 353, lines 8-19). Judge John sentenced Appellant to thirty (35) years imprisonment for murder, and a concurrent five (5) years for the possession of a weapon during the commission of a violent crime. (R. p. 354, lines 5-19).

This appeal now follows.

SUMMARY OF ARGUMENT

Appellant's conviction should be affirmed. The trial court correctly admitted the testimony of Terri Doctor under South Carolina Rule of Evidence 406 and Rule 404(b). *State v. Brown* sets forth that habit evidence is a "specific particularized conduct capable of almost identical repetition", in comparison to character evidence, which is a generalized description of a person's disposition or trait. The testimony provided by Terri Doctor demonstrated that she knew Appellant to normally carry a firearm. She then gave eyewitness testimony of an earlier incident where Appellant became angered during a non-violent argument with family, pulled his firearm out, pointed it, and demanded the relative leave his property. The trial court was within its broad discretion to admit this highly specific evidence of habit given its specific repeated occurrence during the crime in question, and there is no error of the court for doing so. The trial court was likewise within its broad discretion to admit the testimony as evidence to prove the absence of

mistake by Appellant, which was the defense's theory of the case at trial. Lastly, even if the Court was in error for admitting the testimony of Terri Doctor, the error was harmless as the defense has failed to show prejudice.

STATEMENT OF FACTS

The Crime

Roger D. Grate (hereinafter "Appellant") was hosting a Christmas get together with family on December 25th, 2016, in Horry County. One of the attendees was Darrell Doctor (hereinafter "Victim"), to whom Appellant was related by marriage; Victim was Appellant's nephew. (R., p. 79, line 25 through p. 80, line 6; p. 272). Sometime between 11:00PM and 11:30PM, Appellant and his stepson, Gregory, walked outside into the neighborhood cul-de-sac to have a private discussion. This discussion soon turned into an argument. (R., pp. 223-224). Victim interjected to see why they were arguing and was told to stay out of it and to leave the property. Moments later Victim was walking toward his truck, and toward Appellant's general direction; without hearing a threat and without seeing Victim with a weapon of any kind Appellant pulled out his pistol and fired a single shot into Victim's head. (R. p. 155, lines 3-12). Responding EMS declared Victim dead at the scene. (R. p. 39).

Evidence and Testimony Presented at Trial

Officer Tomas Santiago

Officer Santiago testified that he responded to a call for "shots fired" between 11pm and 11:30pm on Christmas Eve. When Officer Santiago arrived he saw three people in the culd-de-sac on Kennedy Street; one individual was on the ground with a gunshot wound to the head, another was trying to perform CPR, and the third was standing nearby. Officer Santiago called for backup and began efforts to speak with individuals at the scene. (R. p. 28, line 17 through p.

29, line 13). During his efforts he approached Appellant, whom he described as leaning calmly up against a truck, and asked if Appellant had seen or heard what happened. Appellant informed him "he didn't know what happened", but that he was the one who shot victim. Appellant then surrendered his handgun to Officer Santiago. (R. p. 29, line 17 through p. 31, line 3). Officer Santiago took efforts to control the crowd, preserve the scene, and ultimately arrested and transported Appellant to the Loris Police Department. (R. p. 33-34).

Officer Dennis McClain Lewis

Officer Lewis testified that he worked with the Crime Scene Unit for Horry County Police Department. (R. p. 42). Officer Lewis testified that he responded to the scene at near midnight, photographed the scene, collected a single fired bullet from the center of the roadway, and collected one .45 caliber casing. (R. p. 44, line 9 through p. 47, line 7). Appellant's gun was likewise a .45 caliber pistol. (R. p. 52). Officer Lewis testified that Victim's body was approximately 15 feet away from the blood pool, indicating that the body had been moved from the location where Victim was shot. (R. p. 60, lines 13-20). He photographed victim's hands, and testified that there were no apparent offensive or defensive wounds on Victim, only the through-and-through gunshot wound to the head. (R. p. 61, lines 1-14). Officer Lewis found no knives, guns, or weapons of any kind in victim's pockets. (R. p. 63, line 5 through p. 64, line 3).

Detective King Hemingway

Detective Hemingway interviewed Appellant at approximately midnight on Christmas night. Appellant confirmed that he and his step-son Gregory had gotten into an argument that evening. (R. p. 102, lines 6-14). Detective Hemingway testified that Appellant's statement indicated Victim was *walking* toward him prior to the shooting. He also confirmed that Appellant used the phrase "came at me" to describe Victim's approach. (R. p. 112, lines 5-16). Detective

Hemingway testified that Appellant claimed he drew his gun because he was scared of Victim, who was walking toward him with his hand in his pocket. According to Appellant's interview, Victim did not produce a weapon and did not threaten him. (R. p. 112, lines 5-13; p. 116, lines 1-16; p. 121, lines 13-19). During his interview with Appellant, Detective Hemingway confirmed that Appellant claimed to have never pulled a gun on anyone before and that he had never had any problems or disputes with Victim in the past. (R. p. 106, line 17 through p. 107, line 7).

Terri Doctor

Terri Doctor (hereinafter "Terri") was not present at the scene of the crime. However, she offered testimony at trial regarding her knowledge of Appellant carrying a firearm and a separate incident that occurred approximately 14 months before Victim's death. Terri is the first cousin of Victim and related to Appellant by marriage. (R. p. 122, lines 8-17). She testified at trial that she knew Appellant to both own and carry a gun on his person. She also testified to having seen him draw his gun and point it at someone in anger, without provocation. (R. p. 123, lines 5-15).

Terri testified that in October or November of 2015, Appellant was gambling and playing cards on his front porch with family members. Appellant was losing to her cousin, Kentrez Hilton, and as a result he became angry and started arguing. (R. p. 123, line 13 through p. 124, line 7). During the argument she watched as Appellant pulled out his gun and pointed it at Mr. Hilton. Mr. Hilton got up and left the home before things escalated further. Terri testified that she left as well due to Appellant's behavior. (R. p. 124, lines 1-15). Terri testified that Mr. Hilton in no way threatened Appellant during the incident and gave no reason for him to respond by drawing his gun. She testified that Appellant's reaction was solely because he was arguing and mad. (R. p. 126, lines 2-10).

Dr. Edward Proctor

Dr. Proctor performed Victim's autopsy. He concluded that Victim died as a result of a single gunshot wound to the head. He testified that there was no stippling, which would indicate that the shot was fired from more than 2 feet away. Victim's blood alcohol content was 0.159. He also testified that Victim weighed 250 pounds and was 5'8" tall. (R. p. 132-136).

James Grate

James Grate (hereinafter "James") is a 1st Sergeant in the US Army. He testified that he is a 3rd cousin to Victim and is related to Appellant by marriage; Appellant married James' cousin. James was at the 2016 Christmas party and when he exited the house to head home he saw Gregory and Appellant arguing in the road. He testified that the argument soon escalated and he witnessed Appellant throw Gregory aggressively up against the hood of the nearby car. (R. p. 146, line 23 through p. 147, line 12).

James testified that Victim noticed the commotion, walked up to the Appellant and Gregory during their argument, and asked what was going on. James testified that Victim appeared to be trying to make peace between them. *In response he heard Appellant yell at Victim to "get the fuck out of my yard."* (R. p. 152, line 1 through p. 153, line 9). Appellant then walked away from Gregory back toward the middle of the street. James testified that Victim responded to Appellant by saying that he would get in his truck and leave. (R. p. 172, lines 8-17; p. 152-153). While Victim was walking toward his truck, Appellant stepped in front of Victim, and pulled out his gun. (R. p. 155, lines 3-12; p. 154, lines 12-23). James testified that after seeing the gun drawn and pointed at Victim he ducked behind the car and then heard the gunshot a second later. (R. p. 153, lines 14-24; p. 156, line 21 through p. 157, line 6; p. 181, lines 12-15).

When he looked back up a few seconds after the shot, Victim was on the ground with a gunshot wound to the head. (R. p. 181; p. 170).

After the shooting his cousin Corey and another individual attempted to pick Victim up off the street and carry him to the car so he could be taken to the hospital. James objected saying that instead they should try and perform CPR. He attempted CPR and felt for a pulse, but did not find one. Based on Victim's wound to the head, James concluded that Victim was already gone. (R. p. 148, lines 10-24; p. 157, line 5 through p. 158, line 8).

James testified that Victim did not charge Appellant, was not challenging Appellant, did not threaten Appellant, and was not acting aggressively in any way. (R. p. 155, lines 6-21). He testified that Victim did not give any reason for Appellant to shoot him. (R. p. 156, lines 5-6). James testified that Victim was not stumbling around or slurring his speech, and otherwise did not appear intoxicated. (R. p. 162, lines 6-15).

Naquishe Gause

Ms. Gause testified that she is the next door neighbor of Appellant. (R. p. 187, lines 12-24). Ms. Gause also testified that she was familiar with Victim as well. (R. p. 189, lines 21-24). She testified that on Christmas night in 2016 she heard arguing outside and went to her window to investigate. (R. p. 188, lines 3-15). When she looked out the window she witnessed Appellant pull out his gun and point it at Victim while Victim had his hands up. She testified that Appellant shot Victim and then stood there in shock recognizing that he had shot him. (R. p. 188, lines 15-19; p. 190, line 6 through p. 191, lines 1-19). She testified that she did not see Victim attack or run at Appellant in any way. She described that Victim was backing up and had his hands up when he was shot. (R. p. 191, lines 5-19). Ms. Gause testified that she could see Victim, Appellant, "Little Greg", and one other individual outside at the time of the shooting. (R. p. 206,

line 18 through p. 207, line 11). She testified that she witnessed some of the family trying to pick Victim up, and heard them say that they should put him in the car. (R. p. 192, lines 1-4). Ms. Gause testified that she spoke with a detective that night and told him what she had seen. (R. p. 192, line 24 through p. 193, line 8). On cross-examination, she conceded that although her statement to police did convey that Victim was backing up just prior to the shooting, it did not convey that he had his hands up. (R. p. 195, lines 17-23; p. 211, line 19 through p. 212, line 3). Nevertheless, Ms. Gause testified adamantly that Victim had his hands up prior to being shot. (R. p. 212, lines 10-13).

Kentrez Hilton

Mr. Hilton testified that he knows both Terri Doctor and Appellant. Terri is his cousin and Appellant is related by marriage. (R. p. 214-215; p. 219). Mr. Hilton testified that he has visited Appellant's house in the past to hang out and play cards. However, he denied ever getting in an argument with Appellant and denied that Appellant has ever pulled a gun and pointed it at him. (R. p. 215, lines 8-15). Mr. Hilton confirmed that he had seen Appellant with a gun before. (R. p. 220, lines 6-9).

Gregory Grate

Gregory testified that he is first cousin to Victim, and that Appellant is his step-dad. (R. p. 222, lines 7-14). Gregory confirmed that he and Appellant got into an argument outside behind the green car on Christmas night, but denied that Appellant ever got physical with him. (R. p. 223, lines 8-25; p. 230, lines 1-9). He testified that during their argument Victim came up to him and asked what was going on. Gregory testified that he and Appellant told Victim to stay out of it and that it did not involve him. (R. p. 224, lines 8-22). After concluding his argument with Appellant, Gregory testified that he was trying to get Victim to leave with him, but Victim

persisted with his inquiry about the argument. (R. p. 224, line 25 through p. 225, line 7). Gregory testified that Victim refused to leave with him and walked back towards Appellant. (R. p. 225, lines 4-14; p. 228, line 1 through p. 229, line 11).

Gregory conceded that he did not see the actual shooting, as he was getting into his car at the time. (R. p. 229, lines 12-14). In reaction to hearing the shooting and seeing Victim fall, Gregory testified that out of panic he jumped across the ditch and went behind the next door house. (R. p. 229, lines 15-24). Gregory testified that he refused to provide a statement to police about the incident because of his distrust of police. (R. p. 231, lines 1-14). On cross-examination, Gregory conceded that in response to police asking him questions he responded "nothing happened", but again attributed the statement to his desire not to give a statement. (R. p. 233, line 13 through p. 234, line 17). Gregory testified that he believed Victim was drunk, but that he did not see any weapons on Victim, and Victim did not threaten him. (R. p. 244, lines 10-13; p. 240, lines 1-13).

Roger Grate (Appellant)

At the time of the crime Appellant weighed 275 pounds and was 6'1" tall. (R. p. 119-120). On direct examination, Appellant confirmed that he had an argument with Gregory on Christmas night behind the green Cadillac in the driveway, but denied that the argument ever became physical. (R. p. 250, lines 3-24). The Victim approached and asked what the problem was, and Appellant testified that he told Victim the dispute did not involve him and that he should leave. (R. p. 251, lines 8-14). He testified that he then walked off "to get out of the situation" and Victim and Gregory walked toward Gregory's car. (R. p. 251, lines 16-19). Appellant testified that soon after, Victim left Gregory and "came at [him]". (R. p. 252, lines 12-20). Appellant characterized Victim's approach as "aggressive," and that Victim put his hand into his jacket pocket. (R. p. 253, lines 8-17). Appellant testified that he felt threatened because he believed Victim had a gun in his pocket, but only based this belief on having sold Victim a gun in the

past. (R. p. 253, lines 18 through p. 254, line 11). Appellant testified that he has had a concealed weapons permit for a considerable amount of time, having had to renew that permit in the past, and was carrying his handgun in his side holster at the time. (R. p. 248, lines 14-17; p. 250, line 25 through p. 251, line 4).

In response, Appellant admitted that he drew his gun and shot Victim. However, he testified that he was only trying to scare victim, not actually hit him. (R. p. 255, lines 12-25). Appellant testified that he was in shock after realizing he had shot Victim. (R. p. 256, lines 5-8). He testified that when police arrived, he cooperated and told authorities of his involvement. He also testified that he provided a statement to authorities after arrest that, in his opinion, gives the same explanation as his trial testimony. (R. p. 258, lines 2-11).

On cross-examination, Appellant conceded that Victim did not mention having a gun, did not display a gun, and did not have a gun in his possession. (R. p. 264, line 25 through p. 265, line 8). He testified that he could not recall whether he told police that Victim was just "walking and talking" in his statement. (R. p. 266, lines 21-24). Appellant agreed that Victim was not running at him, did not tackle him, did not punch him, did not push him, and did not even reach him before Appellant shot Victim in the head. (R. p. 266, line 25 through p. 267, line 10). Appellant was asked that if he only felt the need to shoot to scare Victim, then he must not have felt threatened enough to actually shoot Victim. In response, Appellant could only respond that he was trying to keep Victim from coming at him. (R. p. 267, line 15 through p. 269, line 25).

Appellant initially testified that Victim was mumbling and as a result he did not know what Victim was saying prior to the shooting. (R. p. 114, lines 1-17; p. 276, lines 1-4). He later testified that he believed Victim was drunk, and asserted that Victim was "slurring", but Appellant could not respond as to how he knew Victim was slurring if he could not understand him. (R. p. 276, line 11 through p. 277, line 12). Though he knew Victim to own a gun, and after conceding he "got along well" and had never had any dispute with Victim before, Appellant testified vaguely that "he knew what Victim was capable of." Appellant relied upon this answer as his basis for why he fired his gun. (R. p. 269, line 17 through p. 270, line 15; p. 273, lines 19-22).

Veronica Doctor

Veronica is Victim's first cousin. She testified that she has known Victim all her life and would see him frequently during family occasions. She has never known Victim to be violent, never known him to be a trouble maker, never known him to carry a gun, and has never seen him with a gun. (R. p. 278, line 13 through p. 279, line 16).

ISSUE AS IT WAS PRESENTED AT TRIAL

During pretrial motions the State made the trial court aware that Appellant had previously made the statement that he had never had to pull his gun before. The State informed the trial court that there are multiple witnesses that gave statements to law enforcement that contradict that statement. Pursuant to South Carolina Rule of Evidence 406, the State argued that these witnesses would testify that it is Appellant's habit to pull a gun on people during an argument. (R. p. 2, line 12 through p. 3, line 3). In light of Appellant's statement the State informed the court that it would seek to introduce the habit evidence in its case-in-chief and relied upon *State v. Brown,* 344 S.C. 70, 543 S.E.2d 552 (2001). (R. p. 3, lines 5-15). Appellant argued that *Brown* was distinguishable from this case because the testifying witnesses offering habit evidence were not eyewitnesses to the crime in question. (R. p. 7, lines 2-25). The trial court identified that habit evidence has to reference a specific pattern to a particular event, not a generalized pattern; the court concluded that it could not rule without hearing the proffered testimony. (R. p. 8, line 18 through p. 10, line 12).

The State first proffered the testimony of Terri Doctor. She testified that Appellant is her Aunt's husband. She testified that she knew Appellant to carry a gun. She also testified that during a card game with her and other relatives, Appellant was losing money and became angry. Terri testified that without provocation, Appellant pulled out his handgun and pointed it at her cousin, Kentrez Hilton. Appellant demanded that Mr. Hilton "get out of [his] yard", and otherwise yelled at Mr. Hilton. Both she and Mr. Hilton left after this incident. (R. p. 76, lines 1-5). She was not present at the crime leading to Victim's death. (R. p. 74, lines 12 through p. 78, line 4). She testified that the incident she witnessed took place in October or November of 2015. (R. p. 78, line 20 through p. 79, line 5).

The State next proffered the testimony of Veronica Doctor, who is also related to Appellant through his marriage to her aunt. She testified that she had known Appellant to normally carry a gun; she agreed that it was common knowledge that he carried a gun and that Appellant made no secret of it. (R. p. 80, lines 2-15; p. 81, lines 10-11). She testified that about 10 years prior she witnessed Appellant pull out a handgun on her uncle while in her grandmother's home. She testified that they were arguing, and things became heated. Appellant told the uncle to stay where he was, Appellant walked off and soon came back with a gun and pointed it at the uncle. (R. p. 81, lines 1-7; p. 82, line 24 through p. 83, line 1).

Next, the State proffered the testimony of Romana Parker, the neighbor of Appellant. She testified that three years prior to trial, she and Appellant got into an argument about her dog chewing Appellant's shoe. She testified that Appellant cornered her while she was in her car in the driveway and was angry about the situation. They had an argument about the issue, after which Appellant walked back across to his yard and Ms. Parker called the cops. Appellant came back out moments later carrying "a big gun." (R. p. 83, line 17 through p. 86, line 19).

The State argued that all three witnesses demonstrate the habit that when Appellant gets into an argument he pulls out a gun, and that he does so intentionally without mistake. The State argued that its case is analogous to *State v. Brown* and argued for inclusion of the proffered testimony as evidence of habit. (R. p. 87, line 18 through p. 88, line 18). Defense counsel again argued that the proffered witnesses were not present on the night of the crime, believing this to be a distinguishing factor from *Brown*. (R. p. 88, line 20 through p. 89, line 11). Defense counsel also argued that the testimony is character evidence, citing that evidence consisted of 10 year old and 3 year old events that required Appellant to go get a gun rather than pulling a concealed handgun. (R. p. 89, lines 12-23). Lastly, defense counsel argued that under *Brown* the circumstances required for admitting habit evidence require specific situations and again likened this requirement to the necessity for a connection between the people testifying about those situations and what they witnessed regarding the crime in question. (R. p. 90, lines 3-17).

The trial court disagreed with defense counsel that the proffered witnesses must be witnesses to the crime in question in order to provide evidence of habit. (R. p. 91, lines 6-12). The trial court reviewed

the application of Rules 404 and 406 and noted that "[e]vidence of similar occurrences or conditions may be admitted upon a showing of substantial identity of circumstances and reasonable proximity in time." (R. p. 92, line 24 through p. 94, line 7). However, the trial court found that the incidents testified to by Veronica Doctor and Romana Parker were not so similar as to satisfy "substantial identity of circumstances", nor did the court find them to be reasonably proximate in time. (R. p. 94, line 24 through p. 95, line 4). The court did find the testimony of Terri Doctor sufficiently similar and proximate, in that Appellant's argument led to his response of pulling out a gun, pointing the gun, and ordering someone to leave his property. (R. p. 95, lines 5-11). After evaluating the competing interests of Rule 404 and Rule 406, the court ruled that the State could admit in its case-in-chief the testimony of Terri Doctor, but not the other two witnesses. (R. p. 95, lines 12-18).

STANDARD OF REVIEW

The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion. *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009) "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice. *State v. White*, 372 S.C. 364, 373, 642 S.E.2d 607, 611 (Ct. App. 2007)(citing *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 623 S.E.2d 373 (2005). To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof. *Id.* (citing *Fields v. Regional Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

ARGUMENT

The sole issue on appeal is whether the trial court erred in admitting the testimony of Terri Doctor. Specifically, in admitting her testimony that Appellant was known to carry a handgun, and that in response to a non-violent argument with a family member Appellant has the tendency to pull and point his gun while demanding that the individual he is unhappy with leave his property. The facts of this case demonstrate that this is precisely the circumstance and response by Appellant that occurred immediately before Victim was shot. As the testimony of Terri Doctor demonstrated, her recollection of a card game approximately one year earlier resulted in a nearly identical reaction from Appellant following a specifically non-violent argument. The highly specific nature of the circumstances and Appellant's reaction rendered this testimony admissible under Rule 406. The admission of this testimony was likewise proper under Rule 404(b), as the court provided an alternative basis for its ruling.

I. Admissibility Under Rule 406

South Carolina Rule of Evidence 406 states that "[e]vidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." Rule 406, SCRE. In application of this rule, our Supreme Court has recognized the tension that can exist between Rule 406 evidence of habit, and Rule 404, which prohibits the introduction of prior bad acts as character evidence to then demonstrate conformity with said character. *State v. Brown*, 344 S.C. 70, 74, 543 S.E.2d 552, 554 (2001). The Court in *Brown* then went on to distinguish between impermissible character evidence and evidence establishing conformity with habit. As the court articulated, "the distinguishing feature of 'habit' is its degree of specificity. Habit has been

described as "situation-specific" or "specific, particularized conduct capable of almost identical repetition." *Id.* at 554 (citing *Becker v. ARCO Chem. Co.*, 207 F.3d 176, 204 (3d Cir.2000). In contrast, character constitutes a "generalized description of a person's disposition or a general trait such as honesty, temperance, or peacefulness." *Id.* (citing *State v. Nelson*, 331 S.C. 1, 4, 501 S.E.2d 716, 718 (1998)).

In *State v. Brown* the facts demonstrated that Mr. Brown, on two consecutive days, attacked his grandnephew with a blunt instrument of some kind and ultimately murdered him by gunshot. On the first day, the attack ensued following an argument between the two individuals regarding rent money. Mr. Brown was holding a gun in his other hand at the time of the attack. On the second day, the victim returned to collect his personal belongings and had Mrs. Brown assist in gathering them. Mrs. Brown testified that she saw her husband with a billy club behind his back; she informed him that victim was just collecting his things and that he not get involved. Mrs. Brown returned to find Mr. Brown beating the victim with the billy club. She tried unsuccessfully to get her husband and victim separated, and was forced to flee the house with their grandchild. Once out of the house Mrs. Brown heard two gunshots and saw Mr. Brown exit the home with the gun. Mr. Brown claimed Victim attacked him first and claimed self-defense. *Id.*, 344 S.C. at 72-73, 543 S.E.2d at 553.

The Court in *Brown* concluded that the evidence of Mr. Brown's behavior failed to rise to the level of habit *because it did not identify any "specific conduct". Id.* at 554. Instead, as the testimony of Mrs. Brown demonstrated, when her husband gets in an angry mood, "he gets violent." This was character evidence, deemed by the court impermissible, but ultimately harmless given the other evidence presented. *Id.* In contrast, Mrs. Brown and her grandson also testified that though they had not seen the gun on the night of the crime, they testified that they

both knew Mr. Brown to carry the gun on his person. The Court found this testimony proper under Rule 406, as it demonstrated conformity with a particularized pattern of behavior. *Id.* at 555. It was admitted in contrast to Appellant's testimony that the gun had fallen from the refrigerator during the fight and that a fight for the gun ensued.

In the case at hand, the State initially sought to demonstrate that Appellant has a habit of producing a gun when he becomes involved in an argument. The state provided multiple instances of this behavior through the proffered testimony of three separate witnesses. While such action is more specific than the generally violent nature demonstrated in *Brown*, the trial court still found the criteria to be too generalized for application of Rule 406. In so finding, and in conformity with *Brown*, the trial court excluded the testimony of Veronica and Romana, deeming it too general to satisfy Rule 406 and more akin to improper character evidence that lacked the substantial identity of circumstances and the proximity in time.[1] (R. p. 94-95).

However, the court could not conclude the same for the far more specific testimony offered by Terri Doctor, which demonstrated that Appellant commonly carried a handgun on his person and reacts to non-violent arguments with family by pulling his handgun, pointing his gun, and demanding the family member leave his home. (R. p. 95). This is a far more specified reaction that Appellant has demonstrated in the past and it is precisely the behavior for which the facts of the crime match. The specificity of Appellant's behavior in comparison to his behavior during the crime directed the Court's conclusion. The court ruled,

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[1] Appellant also made the argument that in providing only the testimony of Terri Doctor at trial, the State did not have a sufficient number of instances to constitute habit. First, the State provide three separate witnesses demonstrating Petitioner's habit of pulling a gun in anger during a non-violent argument, but the trial court's desire for a greater degree of specificity resulted in the jury not hearing two of those three witnesses at trial. Logically, the more unusual the circumstances and response, the less opportunity there is for repeat behavior. Second, Appellant's argument relied exclusively on federal court cases. The court's ruling was proper under the law.

> Now, one that I do find to be similar, closeness in proximity of time an similar of occurrence, is testimony of Terri Doctor indicating there's an argument and his response to the argument is to pull out a gun and order somebody to leave. That one is, I do find, of a similar act that shows substantial identity of circumstances and is reasonably close in time and proximity.

(R. p. 95, lines 5-11). As the trial court concluded, this testimony demonstrated a highly specific response that could not be characterized as a mere general character trait, and therefore would satisfy the specified behavior needed for habit.

State v. Brown provides an excellent roadmap for the evaluation of evidence under Rule 406 versus Rule 404, and the tension between the two rules that can exist. In Appellant's case the trial court took great care to consider the content of the proffered testimony and the basis for its admissibility, and likewise acknowledged the tension between the two rules. The trial court laid out the content of both rules, but also discussed the admissibility of "similar acts", noting that:

> case law has indicated that evidence of similar acts is admissible when there is some special relationship between them that would tend to prove or disprove some fact in dispute. Evidence of similar facts, conditions, or occurrences is inadmissible if not pertinent to the issue in the case. Evidence of similar occurrences or conditions may be admitted upon a showing of substantial identity of circumstances and reasonable proximity in time. When the circumstances or conditions depicted by such evidence are so dissimilar that the evidence offered lacks substantial probative value, there arises the danger that the jury's confusion of the issues will outweigh any benefit to be derived from admitting the evidence and, in such a case, the evidence should be excluded.

(R. p. 93, lines 6-19). The trial court did not provide a citation for his discussion of the law in this regard, but his well-crafted articulation of the law was not given by chance either. It is a direct reference to the language and parenthetical citations used in *Johnson v. Sam English Grading*, Inc., 412 S.C. 433, 451, 772 S.E.2d 544, 553 (Ct. App. 2015), as well as a myriad of other cases. See e.g. *Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 483, 609 S.E.2d 286, 300

(2005); *Fountain v. Fred's, Inc.*, No. 2017-000688, 2020 WL 698352, at *12 (S.C. Ct. App. Feb. 12, 2020), reh'g denied (Mar. 30, 2020).

Johnson v. Sam English Grading, Inc. discusses in more general terms the application of habit evidence and the circumstances that can render it properly admissible. The Court of Appeals in *Johnson* quoted a portion of the South Carolina Supreme Court's opinion in *Holcombe v. W.N. Watson Supply Co.*, 171 S.C. 110, 117, 171 S.E. 604, 606 (1933), which states:

> The weight of authority seems to be against admitting evidence of general conduct under proven circumstances to show conduct of the same kind under similar circumstances on a particular occasion, when there were eyewitnesses of the occurrence.... Evidence of habit is frequently rejected when offered for the purpose of showing that a person acted in accordance with such habit on a particular occasion, especially where direct evidence is or can be produced, or the act is otherwise fully proved.

Id. at 553. Of critical importance, however, the court in *Johnson* also resolved that despite this common limitation, "evidence of similar accident, transactions, or happenings is admissible in South Carolina when a special relationship between them would tend to prove or disprove some fact in dispute. *Id.* at 553 (citing *Whaley v. CSX Transp., Inc.*, 362 S.C. 456, 483, 609 S.E.2d 286, 300 (2005); R*eed v. Clark*, 277 S.C. 310, 314, 286 S.E.2d 384, 387 (1982); *Pittman v. Galloway*, 281 S.C. 70, 75, 313 S.E.2d 632, 635 (Ct.App.1984)). The language and law relating to habit referenced in *Johnson* colored the trial court's approach to evaluating the specificity of behavior discussed in *Brown*. All of which was taken into consideration in evaluating whether the State could admit Terri Doctor's testimony as evidence of habit and evidence tending to show absence of mistake and accident. (R. p. 94, lines 1-7).

As articulated by *Johnson*, the presence of direct evidence is an important factor for considering the admissibility of habit. Testimony offered at Appellant's trial demonstrated that

Appellant participated in an argument, demanded Victim leave his property, drew his gun, and pointed his gun at Victim. Thus, there is certainly direct evidence of *the actions* in question. Nevertheless, Terri Doctor's testimony does possess a tendency to prove a disputed and immensely important fact of the case. The evidence provided by Terri Doctor goes toward answering the question of "*why*" Appellant drew his gun. As the trial court correctly identified, the State's desired evidence is both relevant and substantially probative, as it contradicts the Appellant's argument that Victim's death was the result of mistake and accident. (R. p. 94; p. 95); Rule 401, SCRE; *State v. Schmidt*, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986) (holding "[e]vidence is relevant if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears."); *Toole v. Salter*, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967) (holding "[a]ny evidence that assists in getting at the truth of the issue is relevant and admissible, unless because of some legal rule it is incompetent.").

Appellant argued that the only reason he drew his weapon was out of *mistake* because Victim supposedly "came at" him in an aggressive manner that Appellant claimed he interpreted as an attack. Appellant then argues that he fired with the intent of scaring victim, and only struck victim as a result of an accident. According to Appellant, Victim supposedly had his hand in his coat pocket,[2] but was found to be completely unarmed. Appellant's rationale is tenuous, given the testimony of other witnesses, and the evidence that Victim was walking toward his vehicle and had car keys in his pocket. (R. p. 270, lines 20 through p. 271, line 8; p. 63-64; p. 154-155). This evidence makes clear Appellant's actions that night, but the jury must also determine the Appellant's mindset and whether he killed victim out of malice or as a result of "mistake". The trial court noted the importance of the testimony to the state in this regard. As the evidence

[2] It was nighttime and winter at the time of the crime.

addressed a specific fact in dispute, the trial court properly found the evidence of Appellant's similar acts relevant and admissible under Rule 406 as evidence of habit.

II. Admissibility under Rule 404(b)

Appellant's arguments at trial directly relied upon two common exceptions for the admission of prior bad acts provided for under Rule 404(b); this resulted in an overlap of the two rules. At the conclusion of the trial court's discussion and ruling, Judge John stated that in addition to his admission of the evidence under Rule 406, the testimony of Terri Doctor "also could be used under 404 to show the actions [sic] of mistake or accident, which is clearly what the defendant is indicating in his statement . . ." The court's ruling in the alternative was likewise proper.

At trial, the State primarily relied upon Rule 406 for admission of the desired testimony, but Assistant Solicitor Helms also argued: "[a]dditionally, Judge, I have to negate self-defense. I think this goes to his intent in addition to negating a mistake, and I think it would be admissible under the law and if not habit". (R. p. 88, lines 1-8). The state's argument here, along with the proximity between the rules led to the trial court ruling that Terri's testimony would be also admissible to show the absence of mistake or accident under Rule 404(b). (R. p. 91, lines 5-13). As previously discussed, relevance of the evidence is established. (*Supra*). The purpose for the admission of Terri Doctor's testimony is to directly address Appellant's claim that Victim's death is the result of accident and mistake. See *State v. Lyle*, 125 S.C. 406, 118 S.E. 803, 807 (1923).

Appellant also asserts that the ruling failed to consider unfair prejudice and probative value. This argument is likewise mistaken.

The trial court's full discussion and review of the law demonstrates that the court took into consideration the probative value and risk of unfair prejudice in its evaluation of the issue. Alongside its discussion for the need for substantial identity of circumstances to admit two similar acts under Rule 406 and 404, the court noted:

> *When the circumstances or conditions depicted by such evidence are so dissimilar that the evidence offered lacks substantial probative value, there arises the danger that the jury's confusion of the issues will outweigh any benefit to be derived from admitting the evidence and, in such case, the evidence should be excluded.*
>
> . . .
>
> So, trying to reconcile 404 and 406 and what *State v. Brown* has found in 543 S.E.2d 552, 2001 case has to say about it, it's whether or not these incidents that were described by Terri Doctor, Veronica Doctor, and Romana Parker are so similar that – and so fact specific that would show the defendant's actions in conformity therewith and then potentially to alleviate any argument about mistake
>
> . . .
>
> in looking at the competing interest of 404 and 406, I do find that the specific nature of the incident described by Ms. Terri Doctor is proper under 406, habit, routine, and practice, And, also could be used under 404 to show the [absence] of mistake or accident, which is clearly what the defendant is indicating in his statement to Detective King Hemingway.

(R. p. 93, line 14 through p. 95, line 18). In so stating, the court has explicitly referenced the need for weighing the probative value against the unfair prejudice that could arise. The court then demonstrated that the probative value and prejudice is dependent upon the degree of specificity and similarity presented in the desired testimony compared to those leading up to Victim's death. The more specific and similar the comparison, the more probative that evidence is toward demonstrating the conformity with habit and the more probative that evidence is toward demonstrating an applicable exception under Rule 404(b). It is the specificity and similarity that creates the probative value and limits the unfair prejudice. It is not just speculation that the trial court properly weighed the prejudice and probative value of the proffered testimony.

It is blatantly evident given that the court declined to admit the testimony of both Victoria and Romana, which would have been equally applicable to the 404(b) exception of mistake and accident. Their exclusion is due to the lack of similarity, and therefore the lack of probative value. As such, the striking similarity between Terri Doctor's testimony and the crime itself were sufficient to established admissibility under Rule 404(b), and there is no error in the court's ruling.

It is important to remember that *if the only purpose of the proffered testimony were to prove that Appellant commonly carried a handgun*, there would be no 404(b) exception to consider between the two rules. That's not the case here. Instead, the proffered testimony sought to demonstrate that Appellant commonly carries and handgun *and* that under certain circumstances, Appellant responds in a very specific way with his handgun. Add to this the addition of specific Rule 404(b) exceptions serving as the basis for relevancy of the testimony and you get the confluence of both rules. Moreover, Appellant's prior behavior forms part of the *res gestae* of the crime, and as such would be admissible without limiting instruction. See *State v. Johnson*, 306 S.C. 119, 127, 410 S.E.2d 547, 552 (1991); *State v. Adams*, 322 S.C. 114, 119, 470 S.E.2d 366, 369 (1996), overruled on other grounds by *State v. Giles*, 407 S.C. 14, 754 S.E.2d 261 (2014). Ultimately, since Terri's testimony was found to be admissible under both rules of evidence, the question of error by the court in this case is doubly without merit.

III. Harmless Error

In the alternative, even if the admission of Terri Doctor's testimony was in error, such error was harmless. The testimony presented by Kentrez Hilton at trial directly contradicted that of Terri Doctor, and though different in nature, the evidence presented by the State through James Grate and Naquishe Gause supports the finding of malice. Appellant has failed to

demonstrate prejudice in this case, such that jury's verdict was influenced by the alleged improper testimony of Terri Doctor. The admission of her testimony, *if erroneous*, was otherwise harmless.

Whether an error in the admission of evidence is harmless generally depends upon its materiality in relation to the case as a whole. *State v. Brown*, 344 S.C. 70, 75, 543 S.E.2d 552, 554–55 (2001) (citing *State v. Reeves*, 301 S.C. 191, 391 S.E.2d 241 (1990). "The erroneous admission of character evidence is harmless beyond a reasonable doubt if its impact is minimal in the context of the entire record." *Id.* (citing *State v. Forney*, 321 S.C. 353, 468 S.E.2d 641 (1996). "It is settled principle that improperly admitted evidence is harmless where it is merely cumulative to other presented evidence at trial." *State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978); See *State v. Braxton*, 343 S.C. 629, 541 S.E.2d 833 (2001). To warrant reversal based on wrongly admitted evidence, the complaining party must prove resulting prejudice; a showing of prejudice requires that there be a reasonable probability that the wrongly admitted evidence influenced the jury's verdict. *State v. Byers,* 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

First, while the testimony of Terri Doctor was admitted over defense's objection, the defense put forth the testimony of Kentrez Hilton. According to Terri, Mr. Hilton was the family member upon whom Appellant pulled and pointed his gun, and demanded he leave the card game. Mr. Hilton testified that he has played cards at Appellant's home in the past, but had never had Appellant point a gun at him. As a result, Terri's testimony was essentially nullified. Second, the testimony of Mr. James Grate demonstrated that at no time did Victim threaten or behave in such a way as to cause Appellant to draw and fire his gun. Aside from his own testimony, Appellant was unable to provide evidence to contradict James Grate's accounting of

Victim's behavior and the ensuing crime.[3] Additionally, Naquishe Gause witnessed the crime from her bedroom window and accurately testified to the individuals that were present at the time of the shooting, as well as to some of the on-goings immediately following the crime. Of most importance, her testimony revealed that Victim had his hands up and was backing away from Appellant immediately before Appellant shot him. The testimony of these two witnesses provides more than sufficient evidence for the jury to conclude that Appellant killed Victim with malice aforethought, and not out of mistake and accident. See *State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) (holding that improperly admitted evidence is harmless where it is merely cumulative to other presented evidence at trial); See *Brown*, 344 S.C. at 75, 543 S.E.2d at 554–55. Lastly, the fact that Victim was unarmed, and that Appellant admitted he had never had any prior disputes with the Victim also weighed against the tenuous argument that Appellant was so fearful of Victim that he believed he needed to draw and fire his gun in self-defense.

Given the other evidence presented at trial, Appellant cannot demonstrate resulting prejudice from the admission of Terri Doctor's testimony. To the extent the admission of her evidence constitutes error on the part of the trial court, such error is harmless as a matter of law.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgments, convictions, and sentences of the trial court should be affirmed.

[3] Gregory Grate testified about Victim's interjection into their argument and that Victim was walking in Appellant's direction, but he conceded that he was getting in his car and did not see Appellant draw his weapon or shoot Victim. (R. p. 228-229). He also demonstrated an unwillingness to assist in the investigation by refusing to provide a statement to law enforcement about the events of that night.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

W. JOSEPH MAYE
Assistant Attorney General

JIMMY A. RICHARDSON, II
15th Circuit Solicitor
P.O. Box 1276
Conway, SC 29528
(843) 915-8608

By: s/ W. Joseph Maye
W. Joseph Maye

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

June 3, 2020

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Horry County
The Honorable Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

ROGER D. GRATE,

APPELLANT.

Appellate Case No. 2019-000472

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 3rd day of June, 2020.

s/ W. Joseph Maye
W. JOSEPH MAYE
Assistant Attorney General

ATTORNEY FOR RESPONDENT