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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable Eugene Griffith, Jr., Circuit Court Judge

Appellate Case No. 2018-002254

THE STATE, ...RESPONDENT,

v.

JOSHUA CW REHER,.....APPELLANT.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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II. The trial judge properly allowed a witness to testify regarding Appellant's threats towards one of his witnesses following the shooting because the State submitted the testimony as res gestae evidence; a ground unchallenged at trial. Further, such evidence was important res gestae evidence relevant to determining Appellant's state-of-mind immediately following the shooting.

STATEMENT OF THE CASE

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

Appellant timely filed a notice of appeal and an initial brief. This brief of Respondent now follows.

STATEMENT OF FACTS

Prior to trial, Appellant sought immunity from prosecution pursuant to the Protection of Persons and Property Act. All of the witnesses who testified at the hearing also testified at trial. As explained below, many of Appellant's witnesses provided testimony at trial inconsistent with, and sometimes completely contradicting, their testimony at the immunity hearing as well as the statements provided to law enforcement immediately after the shooting.

The State's Evidence

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

Keith Sprinkle, the crime scene investigator for the shooting, searched the crime scene shortly after Appellant was apprehended and officers obtained a search warrant. He located, identified, marked, photographed, and collected all the physical evidence at the scene, including Appellant's AR-15 weapon. He found that the doorway between the kitchen of the home and its

garage consisted of two doors; a storm door with a hydraulic closer which, without force applied to the door, would shut the door as well as a primary wooden door with a deadbolt lock. Neither door showed any indication stress or damage. The metal toolbox in the garage had been shot with four separate bullets. On the floor of the garage, he found a hair band with a lock of hair still in it, along with four shell casings below the doorway to the garage. One shell casing was located immediately inside the residence, on the other side of the garage doorway. An unfired bullet was found inside the kitchen area of the residence. No blood was found anywhere inside or outside the residence. (R.p.56, line 11–R.p.93, line 14)

Victim testified about his interactions with Appellant leading up to the shooting. In the months leading up to it, Victim and Appellant worked together as welders for Agnew Lake Service and through the experience became fast friends. On a daily basis, Victim picked up for and drove him home from work. Often, they would hang out and drink together. On August 21, 2015, the men attended a 12:00 p.m. company meeting to learn about new policies and protocols for their company, during which both men began drinking beers. Around 5:00 p.m., the two men went to a bar called Hemingway's to continue drinking and play pool. Victim continued drinking beer, but Appellant switched to consuming liquor cocktails. Between 7:30 and 8:00 p.m., the men left the bar to return to Appellant's house. (R.p.115, line 18–R.p.124, line 6)

When the men arrived, they found "kids" sitting on a car outside the house. Prior to that night, Appellant complained daily about the kids gathering at his house and drinking alcohol underage, which was given to them by Appellant's girlfriend, Brooke. Brooke's son, Jacob, was friends with the teenagers and the primary reason they began hanging out at the house. Brooke was also the source of Appellant's other major frustration; she had a "pills" addiction. Appellant yelled at the kids, but they did not respond. Victim joined in, and the kids finally left the

property. After the kids departed, Appellant went into the home and began yelling at Brooke. Brooke exited the home, crying, and left with her son's friend Ian, who also supplied her pill addiction. Ian's presence at the home was another sore spot for Appellant, and after Ian and Brooke left Appellant became even more agitated. (R.p.124, line 7–R.p.129, line 13)

In the garage, Appellant began complaining that he had given Brooke money before she left. Victim called Appellant a "dumbass" for giving Brooke the money because she would likely use it to purchase more pills, at which point Appellant went "ballistic" and tackled Victim out of the chair he was sitting in. The men began fighting, which spilled over from the garage to the driveway. As they rolled around fighting, Appellant pulled on Victim's hair. Eventually, victim was able to get on top of Appellant and hit him with his elbow. Appellant stopped fighting and requested to be let off the ground, and Victim allowed him to get up. Appellant ran into the house, and Victim started to gather his things. The next thing Victim remembered, he was standing by Appellant's toolbox when he heard a loud "bang" and turned around. Following the shooting, Victim recalls Jacob exiting the home and helping him find his car keys. Victim then drove home, barely able to breathe, where he stayed until EMS eventually arrived. Vito Cosola, an EMS technician, found Victim bleeding from a gunshot wound to his stomach. Cosola observed Victim was in great pain and appeared to be in shock. (R.p.129, line 14–R.p.134, line 19; R.p.162, line 11–R.p.171, line 11)

Detective Brannon Marthers spoke with Appellant after he had been taken to the hospital and evaluated by hospital staff. Notably, Appellant's discharge paperwork had already been processed and his only observable injuries were cuts on his face, which a nurse helped him clean while Detective Marthers waited. Detective Marthers sought to obtain information about the shooting from Appellant, because he had yet to provide officers with his account of the night's

events. After other witnesses began providing their statements to police, Detective Marthers advised Appellant of his Miranda rights and obtained a written statement from him. In his statement, Appellant claims the fight began with the two men wrestling. During this struggle, Victim hit Appellant in the face. Eventually, Appellant escape into the home and locked the door. Between ten to twenty minutes later, Appellant opens the door to the garage and Victim barges into the home and Appellant shoots at him "three to four times" while the latter is in the house. Appellant claims he fired the shots while standing near the island in his kitchen. They then fight more outside the garage, Appellant eventually tells Victim to leave, and then Victim got into his truck and left. Appellant claimed he was unsure as to whether Johnny or Jacob were at the house at the time of the shooting. He also stated he and Victim had never had any fights or issues prior to that night and acknowledged he could have called the police while he was in the home but did not have his own personal cell phone. (R.p.174, line 18–R.p.196, line 6)

Michael All, Jacob's friend who was approximately sixteen years' old at the time on the day of the crime, testified about what he witnessed the night of the crime. Prior to Appellant and Victim arriving at the home, Jacob was at the home with Johnny, Ian, and Brooke. Jacob was in asleep in a bedroom of the house. After Appellant and Victim ordered the teenagers outside the home to leave, Appellant entered the house and yelled at Brooke, blaming her for the teenagers on the property. Appellant exited the home and Victim apologized for bringing him home drunk before also going outside. After Brooke and Ian left, Michael and Johnny decided to watch TV in the living room until they returned. After a bit, Michael heard yelling outside and walked to the kitchen window, where he saw Appellant and Victim fighting; when he first observed them, Victim had Appellant pinned to the ground but was not hitting or choking him. Appellant did not request for anyone to call 9-1-1 but was yelling at Victim and demanding he get off him.

Johnny eventually entered the kitchen, but before he could look out the window Michael sent him back into the living room. Michael also returned to the living room. Shortly thereafter, Appellant entered the home and grabbed his gun. Michael tried to get Appellant to "slow down," but Appellant, angry, replied by telling Michael to "get the f--k out of his way." Appellant did not ask Michael to call 9-1-1 or seek any help. (R.p.223, line 12–R.p.233, line 3)

After grabbing the gun, Appellant opened the garage doors, stood in the doorway, propped the storm door open, and fired four or five shots. Michael could not see where Appellant fired the shots; Johnny was in the living room and could not have seen them at all. After the shots, Victim never entered the house; no struggle ever occurred inside the home. Appellant shut the doors, went into the kitchen, dropped the gun, and sat down. Jacob, finally awake, entered the kitchen and asked what happened. Michael testified that as Jacob went towards the door, Appellant grabbed the gun and pointed it at him and asked a rhetorical question: "[Y]ou're on [Victim's] side, aren't you?" Trial counsel objected to Michael's testimony regarding where Appellant pointed the gun, claiming it was "improper under 404(b) [SCRE]." The State countered by explaining that the statement was res gestae evidence which demonstrated intent. After an off-the-record bench conference, the State asked the question again without an objection by the State. (R.p.233, line 4– R.p.237, line 21)

James Sullivan, a crime investigator for the State with prior experience as a marine, patrol officer, and SWAT team member[1] testified about test firing an AR-15 of the same make and model as the one used by Appellant using the same brand and type of ammunition at an indoor firing range. Recording his results using photographs and video, Sullivan fired set of rounds in the open and then a set of rounds next to a wall, recreating Appellant's experience of

[1] Despite exploring Sullivan's extensive experience with weapons, specifically the AR-15 and similar weapons, the State did not tender Sullivan as an expert witness.

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

After the State rested its case, trial counsel revisited his objection to Michael's testimony regarding Appellant pointing the gun at Jacob. Trial counsel noted Appellant was charged with pointing and presenting a firearm for his behavior and believed the State was trying to "backdoor-in" the charge without going forward with it. The trial judge found Michael's testimony was proper because the State did not elicit any information from Michael that the behavior was the basis of a charged crime and that it was submitted solely to demonstrate Appellant's behavior and state-of-mind immediately after the crime. (R.p.265, line 19–R.p.266, line 24)

The Defense's Evidence

William Miller, Appellant's neighbor, witnesses many of the outdoor interactions that night. Notably he witnessed the fistfight between Appellant and Victim and noted is was not a one-sided struggle but a mutual engagement. Further, neither man shouted for help during the skirmish. Before long, the men stopped fighting and Appellant entered his home through the garage. (R.p.287, line 2–R.p.291, line 15)

Helen Bradberry, Brooke's mother, admitted she did not witness the events of the shooting and that she had told Brooke and Jacob to change and redact the statements they had provided to police despite the fact she had not witnessed the events surrounding the shooting. She also testified she had never spoken with Johnny or Michael about the shooting, but admitted she testified to the opposite during the immunity hearing. (R.p.320, line 25–R.p.339, line 11)

Johnny testified Victim, not Appellant, entered the house and screamed at Brooke about the teenagers outside, upsetting her. Then, after Appellant and Victim went outside, he heard the former screaming for help and for Michael to call the police. Looking out a window, Johnny saw Victim on top of Appellant, punching him in the face while Appellant only tried to push Victim away. When Appellant entered the house, he used his body to block the garage door which did not lock. Victim pounded on the door, and eventually got through it. Appellant then fired off three warning shots above Victim, into the garage wall, while Victim was outside. Johnny claimed he saw all these events because he was by the door frame in the kitchen. After Appellant shot Victim, he went into the kitchen and cried. (R.p.342, line 14–R.p.361, line 19)

On cross-examination, Johnny's trial testimony fell apart. Johnny claimed to have never spoken about the case with Bradberry, and that the only person to whom he ever spoke about the case was the defense attorney. Johnny remembered meeting with officers after the crime, but did not remember telling them that Victim never attempted to enter the house. He claimed no one was in the car with him when he spoke with detectives, despite his immunity hearing testimony in which he admitted his mother was with him while he spoke with the officers. When asked to again describe the events of the night, Johnny suddenly added the detail that he had spent a portion of the time in a back-bedroom of the home. Johnny then changed his testimony to state the wooden door to the garage did have a lock, but it did not work and again changed his

testimony to claim Appellant did not have time to lock the door. Johnny also changed his testimony about Victim entering the home; he claimed that Victim backed up from the door upon threats from Appellant, but Appellant still opened the door and fired several shots above Victim. Johnny did not recall testifying at the immunity hearing that he observed Appellant fire warning shots into the toolbox in the garage or that Victim was not near the door, but by his truck outside the garage when the shots were fired. Johnny also claimed the storm door did not close on its own, and that no one had to hold it open. When asked about the various changes in his testimony, Johnny claimed he did not want to remember or relive the events of the shooting. Johnny claimed Appellant also had significant injuries to his head, including a black eye, but when showed a picture of Appellant's face from that night, lacking a black eye and any significant injuries, Johnny conceded the injuries were not consistent with what he testified to. (R.p.361, line 22–R.p.386, line 24)

Jacob testified that the night of the shooting, he had arrived at home around 7:00 p.m. and went to bed because he had felt ill. After waking to the commotion created by the shooting, he encountered Appellant in the kitchen, heard his summary of events, and then went outside to help Victim find the keys to his truck. Jacob, like Johnny, initially testified he had not spoken with other people about the case, but when confronted with his testimony from the immunity hearing he admitted that he previously testified he had spoken about the crime with Bradberry and Appellant. Jacob stated he did not initially recall those conversations because he did not have a great memory. However, he admitted to previously testifying that he had a "photographic memory." Jacob also could not recall the information he wrote in his police statement that night, including his claim that Appellant pointed the gun at Jacob and threatened to "blow [him] the

f--k away" if he helped Victim. Jacob then claimed he lied about the statement because it was mad, but then pivoted on the issue admitting the gun "looked like" it was pointed at him. Further Jacob acknowledged in his police statement that Appellant was not acting in self-defense that night and that Victim would not do anything to hurt Appellant. Jacob noted Appellant was not scared or crying after the shooting, but enraged. (R.p.391, line 25–R.p.412, line 1)

Appellant elected to testify in his own defense. He claimed that at the time of the shooting, Victim was drunk off of six beers he drank since noon, but Appellant himself was not drunk from the combination of three beers and two liquor drinks he had consumed during the day and evening. Victim, not Appellant, went inside the house and yelled at Brooke about the teenagers hanging around Victim's home. Then, Victim became even angrier because Appellant gave Brooke money to go to the store. After Brooke and Ian left, Victim "charged" Appellant, starting the confrontation. Appellant claimed he was punched and choked and later developed black eyes from the incident; however, the black eyes did not appear until the following day. While struggling, Appellant claimed he saw both Michael and Johnny in the window and that he yelled to them to call 9-1-1. Appellant eventually got free and ran to the back of the house and entered. He found Michael in the kitchen, not on the phone. Appellant looked outside and saw Victim getting a beer from the cooler in the back of his truck, while "ranting and raving." Appellant then grabbed his gun, opened the kitchen doors, propped open the storm door, and fired several "warning shots" into his tool box. Victim exclaimed that Appellant was trying to shoot him and then charged the door. Appellant claimed he then tried to shut the wooden door, but Victim kept pushing it and the door's deadbolt was not easy to use. The pushing stopped, so Appellant opened door. Victim immediately pushed his way into the home, and Appellant put

his hand on Victim's shoulder and shot him point-blank in the stomach. Appellant then collapsed on his kitchen floor, hyper-ventilating. (R.p.417, line 4–R.p.448, line 17)

On cross-examination, Appellant's testimony was challenged by the changing and often contradictory versions of events he provided throughout the investigative and judicial processes. Appellant admitted that he never told Detective Marthers he fired warning shots at Victim or that any of his shots were into his toolbox. Further, he told the detective he fired all the shots while standing next to the island in the kitchen, not doorway into the garage. When asked what versions of his various stories were lies, Appellant claimed that his initial statements to law enforcement were incorrect because he "could have" suffered from "traumatic brain injury," a claim entirely unsupported by the medical evaluation performed on him after the shooting; hospital staff found only minor abrasions and scratches on Appellant's face. (R.p.458, line 15–R.p.467, line 10)

Throughout the remainder of cross-examination, Appellant conceded he told Detective Marthers numerous things inconsistent with his trial testimony: (1) he wrestled with Victim in the garage after shooting him; (2) after retreating into the house, he waited between ten and twenty minutes before looking into the garage; (3) he did not know Victim was in the garage when he opened the door; (4) Victim did not yell at anybody or have an argument with anybody at the house other than Appellant; (5) he never asked anyone to call 9-1-1. Appellant also admitted his testimony at the immunity hearing was different than what he claimed at trial: at the immunity hearing, Appellant claimed he had never had a prior argument or dispute with Victim, but at trial claimed he and Victim had clashed prior to the shooting. Further, at the immunity hearing Appellant claimed he started drinking around 4:00 p.m. and consumed all his drinks

between then and the shooting; at trial, Appellant claimed he actually began drinking at 12:00 p.m. and consumed his beers at that time. (R.p.467, line 16–R.p.486, line 2)

The State also explored Appellant's frustrations with Brooke during cross-examination. Appellant admitted Brooke allowing teenagers to hang out at their home and her consumption of pills was a source of anger and frustration for him; in fact, Brooke's pill consumption was the reason they were not together at the time of trial. However, Appellant was unable to come up with a reason why Brooke's actions would have enraged Victim. (R.p.487, line 7–R.p.493, line 16)

When asked why Appellant, when safely in the house, did not call or wait for police, he could not could not come up with a reason that necessitated him shooting into the garage; Appellant claimed Victim was just sitting in the back of his truck, drinking a beer. According to Appellant, Victim was "threatening" him by "parading and doing a little victory lap" outside. Appellant admitted these "threats" against him, like many details, were not included in his statement to police or his testimony at the immunity hearing. (R.p.493, line 17–R.p.497, line 16)

When asked about his recollection of Johnny and Jacob, Appellant admitted that he originally told police he did not remember their presence in the home or saw any of the shooting's events; in fact, Appellant previously told his mother he thought Johnny had been in a back room of the home the whole time. However, Appellant, in all his versions of events, recalled Michael's presence and that he was in a position to observe most of the events surrounding the shooting. (R.p.497, line 17–R.p.500, line 17)

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001) (citing State v. Cutter, 261 S.C. 140, 199 S.E.2d 61 (1973). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Wilson, 345 S.C. at 6, 545 S.E.2d at 829. Review is limited to determining whether the trial judge abused his discretion. Id. The appellate court may not re-evaluate the facts based on its own view of the preponderance of the evidence, but must determine whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 6, 545 S.E.2d at 829; see generally Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991) ("In law actions, the lower court must be affirmed where there is 'any evidence' to support its findings.").

ARGUMENT

I.

The trial judge properly allowed the State to introduce photographs and video recordings of firearm experiments performed by an investigator because the items were demonstrative evidence supporting the witness's testimony. Further, even if the exhibits were improperly admitted the error of such is harmless given they were cumulative to the witness's testimony and the overwhelming evidence of Appellant's guilt.

Appellant argues the trial judge erred in permitting the State to introduce the video recordings and photographs memorializing his firearm experiments because Sullivan did not use Appellant's gun for his tests and the results of the experiment were inconclusive; thus, any probative value from the exhibits was substantially outweighed by the danger of unfair prejudice to Appellant. The State disagrees with these allegations of error. First, the tests were not inconclusive: Sullivan, using the exact make and model of Appellant's gun along with the exact same type of ammunition, found the bullets behaved differently and ended up in different locations when the gun was fired next to a wall or door (as proposed by the State's theory of the case) versus the gun being fired in an open space (as claimed by Appellant). Second, even if the exhibits were improperly admitted, any error in doing so was harmless given the evidence was cumulative to Sullivan's testimony, to which no objections were made. Finally, any alleged error could not have impacted the ultimate determination of Appellant's guilt, given the overwhelming evidence of such.

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "An abuse of discretion occurs when the trial court's

ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Jennings, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011).

"Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see Rule 401, SCRE (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). If a piece of evidence could assist the jury in arriving at the truth of an issue, it is relevant and should be admitted during trial. State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986). However, even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

In State v. Stephens, 398 S.C. 314, 728 S.E.2d 68 (2012), the named defendant challenged his conviction for murder claiming the trial court erred in admitting a photographic lineup of him because his "mug shot" unfairly prejudiced him, especially because introduction of the photo was "needlessly cumulative" given the witness who identified him in the line-up also identified him during trial. Id. at 319–320, 728 S.E.2d at 71–72. Ultimately, the Supreme Court of South Carolina found introduction of the line-up was not error for several reasons. First Stephens's trial strategy, seen through cross-examination and in his attorney's closing arguments, was focused on discrediting the witness and her identification of him. As explained by the court, this strategy made it important for the jury to review the lineup to determine for itself whether the allegedly poor picture quality and other issues with the lineup influenced the

witness's identification. Thus, the defendant's actions increased the lineup's probative value and made it so that its introduction was not "needlessly" cumulative. Id. at 320–21, 728 S.E.2d at 72.

Second, Stephens failed to show that the admission of the lineup caused him unfair prejudice which outweighed the lineup's probative value; his argument that the photo implied he had a prior criminal record was unpersuasive on its face because: (1) photographic lineups have been regularly deemed admissible evidence, including photos suggestive of a criminal background; and (2) Stephens's photo did not suggest a criminal history. Notably, Stephens's photo was included in a lineup in which he and the other subjects were each wearing street clothes and each of the photographs could have been obtained from driver's licenses, identification badges, or other sources. Id. at 321–22, 728 S.E.2d at 72.

Analysis

Admission of the video and photographs of Sullivan's weapons tests were admissible because they were directly relevant to determination of the issues in this case. Pursuant to Rule 401, SCRE, evidence is relevant if it demonstrates that a fact of consequence to the case is more or less probable. Sullivan's tests were important evidence of a key fact in the case against Appellant: his location when he shot Victim. If, as Appellant alleged, he backed up from the door and shot Victim as the latter entered the house, that shell casing would most likely have ended up behind him and in the kitchen. However, the location of the shell casing so close to the doorway made the State's theory of the case, that Appellant shot Victim while he was in the garage and not a threat, more probable.

Appellant's naked attempts to discredit Sullivan's experiments ignore the testimony he provided and further evidenced in the video recordings. First, the experiment did show a particular pattern of ejection: when fired in an open space, shell casings were ejected to the right

and behind the weapons and shooter. Further, Sullivan used the exact same model of weapon, ammunition, and powder in his tests. Appellant then tested the weapon in two different situations: one in which it is fired in the open designed to replicate the open kitchen of Appellant's home, and the second situation saw the weapon fired next to a wall, used to replicate the experience of Appellant shooting the gun while propping the storm door open.

At trial, trial counsel did not object to the admission of this testimony, including its methodology, description, or reliability of its results; only the admission of the photographs and videos.

Harmless Error

Even if the admission of the video and photographs were improper, their admissions were harmless error.

Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006); State v. Heller, 399 S.C. 157, 171, 731 S.E.2d 312, 320 (Ct. App. 2012). Thus, an insubstantial error not affecting the result of the trial is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. Bryant at 518, 633 S.E.2d at 156. "A harmless error analysis is contextual and specific to the circumstances of the case: No definite rule of law governs a finding of harmless error; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Further, it is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence. Heller, 399 S.C. at 171, 731 S.E.2d at 320.

First, admission of the video and photographs were harmless because they were cumulative to Sullivan's testimony. Appellant never objected to Sullivan's testimony regarding

the results of the weapon's testing, so the jury would have, regardless of the objection, been exposed to the cumulative information. See Heller, 399 S.C. at 171, 731 S.E.2d at 320. Second, and most importantly, the overwhelming evidence presented at trial demonstrated Appellant's guilt of the crime. The State presented substantial evidence of Appellant's guilt, including Michael's eyewitness testimony. Appellant's defense focused on his own testimony along with that of Jacob and Johnny. However, all three were forced to admit that they were testifying to drastically different versions of the shooting than what was originally reported to police and even to what they testified to at the immunity hearing approximately a year before trial. Ultimately, all three proved to be incredible witnesses who provided testimonies which even contradicted each other at trial. Accordingly, and beyond a reasonable doubt, admission of the photographs and videos did not impact Appellant's conviction.

II.

The trial judge properly allowed a witness to testify regarding Appellant's threats towards one of his witnesses following the shooting because the State submitted the testimony as res gestae evidence; a ground unchallenged at trial. Further, such evidence was important res gestae evidence relevant to determining Appellant's state-of-mind immediately following the shooting.

Appellant argues the trial judge improperly allowed Michael to testify that Appellant pointed a gun at Jacob immediately after the shooting because it was not proper evidence of a prior/other bad act pursuant to Rule 404(b), SCRE. Notably, Appellant's argument completely ignores that the State did not submit the evidence pursuant to Rule 404(b), SCRE; the State submitted the testimony as res gestae evidence, to which trial counsel offered no rebuttal at trial. The State properly submitted the testimony as res gestae evidence because Appellant's threat, which occurred immediately after shooting Victim, was relevant to determining Appellant's state

of mind when he shot Victim and whether he was in or believed himself to be in such a degree of danger necessitating he shoot Victim in self-defense.

Issue Preservation

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912–13 (Ct. App. 2004); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). "If a party fails to properly object, the party is procedurally barred from raising the issue on appeal." State v. Johnson, 363 S.C. 53, 58-59, 609 S.E.2d 520, 523 (2005).

Initially, the State notes this issue is not preserved for review. Trial counsel objected to the admission of the challenged statements pursuant to Rule 404(b), SCRE. However, the State immediately clarified the statements were being submitted not pursuant to Rule 404(b), but as res gestae evidence. Trial counsel failed to lodge any objection to its use as res gestae evidence. At the conclusion of the State's evidence, trial counsel again referenced Michael's testimony about Appellant pointing the gun at Jacob and, again, objected to the statement pursuant to Rule 404(b) without any acknowledgement of the State's use of the evidence as res gestae evidence, not Rule 404(b), SCRE evidence. Accordingly, because the trial judge was never challenged on the admissibility of the statements pursuant to the res gestae rule, this issue is not preserved for Appellate review.

Analysis

Evidence of other bad acts is admissible when it furnishes part of the context of the crime or is necessary to a full presentation of the case. State v. Adams, 322 S.C. 114, 470 S.E.2d 366

(1996); State v. Fletcher, 363 S.C. 221, 246, 609 S.E.2d 572, 585 (Ct. App. 2005). "The res gestae theory recognizes that evidence of 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." Fletcher, 363 S.C. at 246, 609 S.E.2d at 585 (citing State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004).

This evidence of other crimes is admissible:

> 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. at 122, 470 S.E.2d at 370-71 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir.1980) (citations omitted)).

In State v. Dennis, 402 S.C. 627, 742 S.E.2d 21 (2013), the defendant was convicted of ABWIK and possession of a firearm during the commission of a violent crime. During the trial, the State introduced testimony from a witness describing the defendant's actions that day, including an incident earlier in the day in which defendant surprised witnesses when he produced a stolen gun and offered to sell it to them for fifty dollars which he would use to purchase crack cocaine and soon after suggested robbing the victim. Id. at 632, 742 S.E.2d at 24. The defendant objected to the evidence, arguing the evidence was not relevant to his case because: (1) motive was not an element of the crimes charged, (2) he was not charged with possession of a stolen

gun; and (3) no other evidence suggested he was under the influence of drugs at the time of the crime. Id. at 632–33, 742 S.E.2d at 24. The trial court admitted the challenged testimony, finding it rebutted defendant's "very different account" of the day's event and that it established the motive for Appellant's actions. Id. Ultimately, this Court upheld the admission of the challenged evidence under the res gestae theory, noting the "why" of the defendant's actions was important for the jury in understanding his actions and provided context for his actions. Id. at 635–37, 742 S.E.2d at 25–26.

The State notes Appellant's argument, even on appeal, focuses on the admissibility of Appellant's argument pursuant to Rule 404(b), SCRE. See, e.g. (Br. of Appellant, p. 17, "The trial judge erred in allowing this bad character testimony over defense counsel's Rule 404(b), SCRE objection because the testimony did not fall within one of the recognized exceptions.") Again, the State emphasizes the disputed statements were not submitted pursuant to Rule 404(b), SCRE; the State did not believe they were admissible pursuant to that rule. Instead, the State submitted the statements pursuant to the res gestae rule, a fact almost entirely ignored in Appellant's brief. Appellant's sole argument as to admission pursuant to the res gestae rule is that the statements occurred after the shooting and thus could not be characterized as such. However, South Carolina courts have consistently found that statements and actions occurring hours before and hours after a crime are proper res gestae evidence. See State v. Blackburn, 271 S.C. 324, 327–28, 247 S.E.2d 334, 336 (1978) (stating excited utterances, made in excess of one hour, can be used as evidence of res gestae); State v. Quillien, 263 S.C. 87, 97, 207 S.E.2d 814, 819 (1974) (explaining excited utterances must be "substantially contemporaneous with the litigated transaction, and finding the trial court did not err in concluding a victim's statements made in the emergency room after her rape qualified as such an exception).

Further Appellant's claim that his actions towards Jacob were not relevant is simply incorrect; similar to the defendant in Dennis, the res gestae evidence offered by the State rebutted Appellant's version of the events of the shooting, including his state of mind immediately thereafter. The defense attempted to portray Appellant as a crying, emotional train-wreck forced to shoot Appellant out of necessity. Michael's testimony portrayed a very version of events; one in which Appellant, intoxicated, shot his friend in a blind rage after losing a fight he, himself, started. Thus, Michael's provided key insight into Appellant's state of mind throughout the ordeal and was additional evidence Appellant did not shoot Victim out of a belief that he was in serious danger.

Accordingly, the trial judge did not err in allowing Michael to testify about these actions.

Harmless Error

Finally, even if the trial judge erred in admitting the contested statements, such alleged error was harmless. As argued supra, in Issue I, the State presented overwhelming evidence of Appellant's guilt. All of Appellant's witnesses, close family and friends, were forced to confess that the testimony they gave was drastically different than the official statements they provided to law enforcement. Further their testimonies, notably Johnny's claim that Appellant shot into the wall above Victim's head, were not supported by the physical evidence collected at the scene. Because Appellant's identity as the shooter was not in dispute, the only plausible verdict, given the totality of the State's case, was to find Appellant guilty of attempted murder or a lesser-included charge of it.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable Eugene Griffith, Jr., Circuit Court Judge

Appellate Case No. 2018-002254

THE STATE, ...RESPONDENT,

v.

JOSHUA CW REHER,.....APPELLANT.

CERTIFICATE OF COUNSEL

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

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