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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS
Appeal from Lexington County
Court of General Sessions
The Honorable Eugene Griffith Jr., Circuit Court Judge

Appellate Case No. 2021-001052

THE STATE,RESPONDENT,

v.

JOSHUA CW REHER, PETITIONER.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON APPEAL

The Court of Appeals properly affirmed the trial judge's admission of 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 Petitioner's guilt.

STATEMENT OF THE CASE

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

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 On June 30, 2021, the South Carolina Court of Appeals affirmed Petitioner’s conviction in an unpublished opinion.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

STATEMENT OF FACTS

Prior to trial, Petitioner 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 Petitioner'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 Petitioner's home to investigate the shooting. After he arrived, Petitioner exited the home and Deputy Senn, along with other officers, handcuffed Petitioner. Deputy Senn immediately noticed a strong odor of alcohol from Petitioner's breath and person along with slurred rambling from him. Deputy Senn also observed that Petitioner had only minor injuries and did not appear to be in a state of shock. However, Petitioner requested medical attention for his injuries so the deputies arranged for transportation for him to the hospital. Deputy Senn accompanied Petitioner to the hospital and allowed medical staff to treat him. Eventually, the hospital staff discharged him after finding Petitioner had only minor injuries. At all points of his interacting with Petitioner, 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 Petitioner was apprehended and officers obtained a search warrant. He

located, identified, marked, photographed, and collected all the physical evidence at the scene, including Petitioner'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 it, as well as a primary wooden door with a deadbolt lock. Neither door showed any indication of 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 Petitioner leading up to the shooting. In the months leading up to it, Victim and Petitioner worked together as welders for Agnew Lake Service and through the experience became fast friends. On a daily basis, Victim picked up 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 Petitioner switched to consuming liquor cocktails. Between 7:30 and 8:00 p.m., the men left the bar to return to Petitioner's house. (R.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, Petitioner complained daily about the kids gathering at his house and drinking

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

In the garage, Petitioner began complaining that he had given Brooke money before she left. Victim called Petitioner a "dumbass" for giving Brooke the money because she would likely use it to purchase more pills, at which point Petitioner 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, Petitioner pulled on Victim's hair. Eventually, victim was able to get on top of Petitioner and hit him with his elbow. Petitioner stopped fighting and requested to be let off the ground, and Victim allowed him to get up. Petitioner ran into the house, and Victim started to gather his things. The next thing Victim remembered, he was standing by Petitioner'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 Petitioner after he had been taken to the hospital and evaluated by hospital staff. Notably, Petitioner's discharge paperwork had already been processed and his only observable injuries were cuts on his face, which a nurse helped him clean while Detective Marthers waited. Detective Marthers sought to obtain information about the shooting from Petitioner, because he had yet to provide officers with his account of the night's events. After other witnesses began providing their statements to police, Detective Marthers advised Petitioner of his Miranda rights and obtained a written statement from him. In his statement, Petitioner claims the fight began with the two men wrestling. During this struggle, Victim hit Petitioner in the face. Eventually, Petitioner escape into the home and locked the door. Between ten to twenty minutes later, Petitioner opens the door to the garage and Victim barges into the home and Petitioner shoots at him "three to four times" while the latter is in the house. Petitioner claims he fired the shots while standing near the island in his kitchen. They then fought more outside the garage, Petitioner eventually tells Victim to leave, and then Victim got into his truck and left. Petitioner 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 Petitioner 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 Petitioner and Victim ordered

the teenagers outside the home to leave, Petitioner entered the house and yelled at Brooke, blaming her for the teenagers on the property. Petitioner exited the home and 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 Petitioner and Victim fighting; when he first observed them, Victim had Petitioner pinned to the ground but was not hitting or choking him. Petitioner did not request for anyone to call 9-1-1 but was yelling at 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, Petitioner entered the home and grabbed his gun. Michael tried to get Petitioner to “slow down,” but Petitioner, angrily replied by telling Michael to “get the f--k out of his way.” Petitioner did not ask Michael to call 9-1-1 or seek any help. (R.p.223, line 12–R.p.233, line 3)

After grabbing the gun, Petitioner opened the garage doors, stood in the doorway, propped the storm door open, and fired four or five shots. Michael could not see where Petitioner fired the shots; Johnny was in the living room and could not have seen them at all. After the shots, Victim never entered the house; no struggle ever occurred inside the home. Petitioner shut the doors, went into the kitchen, dropped the gun, and sat down. Jacob, finally awake, entered the kitchen and asked what happened. Michael testified that as Jacob went towards the door, Petitioner grabbed the gun and pointed it at him and asked a rhetorical question: “[Y]ou’re on [Victim’s] side, aren’t you?” Trial counsel objected to Michael’s testimony regarding where Petitioner 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 trial counsel. (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 member¹ testified about test firing an AR-15 of the same make and model as the one used by Petitioner using the same brand and type of ammunition at an indoor firing range. Recording his results using photographs and video, Sullivan fired set of rounds in the open and then a set of rounds next to a wall, recreating Petitioner’s experience of firing out the garage doors with the storm door propped open to his right. Bullets fired next to the wall had their shell casings bounce off the wall and go a variety of directions, including to the shooter’s left. Without a wall, the bullets were ejected to the right of the gun. Additionally, without a wall, most of the shell casings ended up behind the weapon and shooter. However, Sullivan emphasized on both direct and cross-examination that when the bullets hit the ground, they could bounce in a variety of directions and there was “no particular pattern” as to where they would come to rest. Trial counsel did not object to Sullivan’s testimony, but did object to the introduction of the photographs and video he collected. (R.p.254, line 12–R.p.265, line 8; State’s Exhibits 73–76)

After the State rested its case, trial counsel revisited his objection to Michael’s testimony regarding Petitioner pointing the gun at Jacob. Trial counsel noted Petitioner 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 Petitioner'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, Petitioner's neighbor, witnesses many of the outdoor interactions that night. Notably he witnessed the fistfight between Petitioner and Victim and noted it 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 Petitioner 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 Petitioner, entered the house and screamed at Brooke about the teenagers outside, upsetting her. Then, after Petitioner 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 Petitioner, punching him in the face while Petitioner only tried to push Victim away. When Petitioner 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. Petitioner 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 Petitioner 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 Petitioner 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 Petitioner, but Petitioner still opened the door and fired several shots above Victim. Johnny did not recall testifying at the immunity hearing that he observed Petitioner 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 Petitioner also had significant injuries to his head, including a black eye, but when showed a picture of Petitioner’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 Petitioner 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 Petitioner. 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 Petitioner 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 Petitioner was not acting in self-defense that night and that Victim would not do anything to hurt Petitioner. Jacob noted Petitioner was not scared or crying after the shooting, but enraged. (R.p.391, line 25–R.p.412, line 1)

Petitioner 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 Petitioner himself was not drunk from the combination of three beers and two liquor drinks he had consumed during the day and evening. Victim, not Petitioner, went inside the house and yelled at Brooke about the teenagers hanging around Victim’s home. Then, Victim became even angrier because Petitioner gave Brooke money to go to the store. After Brooke and Ian left, Victim “charged” Petitioner, starting the confrontation. Petitioner 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, Petitioner claimed he saw both Michael and Johnny in the window and that he yelled to them to call 9-1-1. Petitioner eventually got free and ran to the back of the house and entered. He found Michael in the kitchen, not on the phone. Petitioner looked outside and saw Victim getting a beer from the cooler in the back of his truck, while “ranting and raving.” Petitioner 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 Petitioner was trying to shoot him and then charged the door. Petitioner 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 Petitioner opened door. Victim immediately pushed his way into the home, and Petitioner put his hand on Victim’s shoulder and shot him point-blank in the stomach. Petitioner then collapsed on his kitchen floor, hyper-ventilating. (R.p.417, line 4–R.p.448, line 17)

On cross-examination, Petitioner’s testimony was challenged by the changing and often contradictory versions of events he provided throughout the investigative and judicial processes. Petitioner 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, Petitioner 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

Petitioner's face. (R.p.458, line 15– R.p.467, line 10)

Throughout the remainder of cross-examination, Petitioner 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 Petitioner; (5) he never asked anyone to call 9-1-1. Petitioner also admitted his testimony at the immunity hearing was different than what he claimed at trial: at the immunity hearing, Petitioner 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 Petitioner claimed he started drinking around 4:00 p.m. and consumed all his drinks between then and the shooting; at trial, Petitioner 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 Petitioner's frustrations with Brooke during cross-examination. Petitioner 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, Petitioner 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 Petitioner, when safely in the house, did not call or wait for police, he could not come up with a reason that necessitated him shooting into the garage; Petitioner claimed Victim was just sitting in the back of his truck, drinking a beer.

According to Petitioner, Victim was “threatening” him by “parading and doing a little victory lap” outside. Petitioner 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, Petitioner 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, Petitioner previously told his mother he thought Johnny had been in a back room of the home the whole time. However, Petitioner, 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)

CERTIORARI

Petitioner argues this Court should grant certiorari, but fails to articulate any “special and important” reasons for the Court to do so. Rule 242(b), SCACR states that a writ of certiorari is not a “matter of right,” but should be granted only where special and important reasons merit this Court’s review. In the instant case, Petitioner fails to articulate any “special and important reasons” for this Court to exercise its discretion to grant review of the decision of the Court of Appeals. Indeed, the Court of Appeals’ decision was a straightforward exercise of reviewing and affirming the trial court’s application of established precedent, logic, and practical consideration of the particular facts and circumstances of Petitioner’s case. Thus, the State respectfully requests that Petitioner’s petition for a writ of certiorari be denied and dismissed.

STANDARD OF REVIEW

“In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous.” State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). “The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. Id. “An abuse of discretion occurs when a trial court’s decision is unsupported by the evidence or controlled by an error of law.” Id.

ARGUMENT

The Court of Appeals properly affirmed the trial judge's admission of 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 Petitioner's guilt.

Petitioner argues the Court of Appeals erred in affirming the trial judge's admission of the video recordings and photographs memorializing his firearm experiments because Sullivan did not use Petitioner'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 Petitioner. The State disagrees with these allegations of error. First, the tests were not inconclusive: Sullivan, using the exact make and model of Petitioner'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 Petitioner). 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 Petitioner'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 weapon 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 Petitioner: his location when he shot Victim. If, as Petitioner 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 Petitioner shot Victim while he was in the garage and not a threat, more probable.

Petitioner'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. Petitioner then tested the weapon in two different situations: one in which it is fired in the open designed to replicate the open kitchen of Petitioner's home, and the second situation saw the weapon fired next to a wall, used to replicate the experience of Petitioner 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.

Admission of the video and photographs were harmless because they were cumulative to Sullivan's testimony. Petitioner 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 Petitioner's guilt of the crime. The State presented substantial evidence of Petitioner's guilt, including Michael's eyewitness testimony. Petitioner'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 Petitioner's conviction.

CONCLUSION

Based on the foregoing reasons, Respondent submits this Court should deny the petition for a writ of certiorari and let stand the decision of the Court of Appeals affirming the trial court. If the Court grants the petition for a writ of certiorari, Respondent would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

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