RECEIVED
Feb 22 2022
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In Supreme Court

On Petition for Writ of Certiorari to the Court of Appeals
APPEAL FROM HORRY COUNTY
The Honorable Steven H. John, Circuit Court Judge

Opinion No. 2021-UP-384 (S.C. Ct. App. filed November 3, 2021)

THE STATE..RESPONDENT

v.

ROGER D. GRATE..PETITIONER

RETURN TO PETITION FOR WRIT OF CERTIORARI
Appellate Case No. 2019-000472

ALAN WILSON
Attorney General

W. JEFFERY YOUNG
Chief Deputy Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
S.C. Bar No. 14244

W. JOSEPH MAYE
Assistant Attorney General
S.C. Bar No. 100851

P.O. Box 11549
Columbia, South Carolina 29211-1529
(803) 734-6305

JIMMY H. RICHARDSON, III
Solicitor, Fifteenth Judicial Circuit

TABLE OF CONTENTS

PETITIONER'S QUESTION PRESENTED 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

ISSUE AS IT WAS PRESENTED AT TRIAL 5

STANDARD OF REVIEW 9

ARGUMENTS

I. The Court of Appeals did not err in affirming Petitioner's conviction and sentence on the basis that any potential error from Terri's testimony would be harmless in light of the evidence presented at trial. 9

a. Harmless Error 10

b. Admissibility Under Rule 406 13

c. Admissibility Under Rule 404(b) 14

CONCLUSION 16

CERTIFICATE OF SERVICE

PETITIONER'S QUESTION PRESENTED

I. Did the trial judge's error in allowing the state to call a witness to testify that approximately one year prior to the shooting for which Petitioner stood trial, Petitioner was angry at another individual with whom he was playing cards and as a result of that anger, Petitioner drew his gun and pointed it at the individual affect the jury's verdict?

STATEMENT OF THE CASE

Roger D. Grate (hereinafter "Petitioner") 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. Petitioner 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 Petitioner guilty on both charges. (R. p. 353, lines 8-19). Judge John sentenced Petitioner 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).

Petitioner filed a Notice of Appeal on March 20, 2019. Attorney Susan B. Hackett filed the Final Brief of Appellant on June 3, 2020. The State filed its Final Brief of Respondent on June 3, 2020, as well. The Court of Appeals filed its unpublished per curium opinion affirming Petitioner's conviction and sentence on November 3, 2021. (App. p. 1-3); *State v. Grate*, No. 2021-UP-384 (S.C. Ct. App. November 3, 2021). Appellate Counsel for Petitioner filed a Petition for Rehearing on November 18, 2021. (App. p. 4-16). The Court of Appeals denied the Petition for Rehearing on

December 16, 2021. (App. p. 17-18). Appellate Counsel filed a Petition for Writ of Certiorari to the Court of Appeals on behalf of Petitioner on January 18, 2022. This Return now follows.

STATEMENT OF FACTS

The Crime

Petitioner was hosting a Christmas party with various family members on December 25th, 2016, in Horry County. One of the attendees was Darrell Doctor (hereinafter "Victim"), to whom Petitioner was related by marriage; Victim was Petitioner's nephew. (R. p. 79, line 25 through p. 80, line 6; p. 272). At some point between 11:00PM and 11:30PM, Petitioner 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 heard the commotion and attempted to interject to see why they were arguing. He was told to stay out of it and to leave the property. Moments later Victim was walking toward his truck and toward Petitioner's general direction. Without hearing a threat and without seeing Victim with a weapon of any kind, Petitioner 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).

Testimony Presented at Trial

Police approached Petitioner after arriving on the scene. Petitioner was calmly leaning against a truck, confessed to being the shooter, and surrendered his handgun. Petitioner initially claimed to police "he didn't know what happened" (R. p. 29, line 17 through p. 31, line 3). 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 Hemingway testified that Petitioner's communications to police indicated Victim was *walking* toward him prior to the shooting. He also confirmed that Petitioner used the phrase "came at me" to describe Victim's approach, but that Victim did not produce a weapon or

threaten Petitioner. (R. p. 106, lines 1-16; p. 112, lines 5-16; p. 116, lines 1-16; p. 121, lines 13-19).

Witness James Grate testified that he witnessed the argument between Petitioner and Gregory and confirmed that it escalated to the point that Petitioner threw 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 Petitioner 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 Petitioner yell at Victim to "get the fuck out of my yard."* (R. p. 152, line 1 through p. 153, line 9). Petitioner then walked away from Gregory back toward the middle of the street. James testified that Victim responded to Petitioner 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, Petitioner 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).

James testified that Victim did not charge Petitioner, was not challenging Petitioner, did not threaten Petitioner, and was not acting aggressively in any way. (R. p. 155, lines 6-21). He testified that Victim did not give any reason for Petitioner 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).

Petitioner's next-door neighbor, Naquishe Gause, 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 Petitioner pull out his gun and point it at Victim while

Victim had his hands up. She testified that Petitioner 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 Petitioner 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).

Petitioner testified at trial that Victim attempted to defuse the argument he was having with Gregory, but that he told Victim that the dispute did not involve him and instructed him to leave. (R. p. 251, lines 8-14). He and Gregory then separated, and Petitioner testified that soon after Victim "came at [him]" and described his approach as "aggressive". He saw Victim put his hand in his pocket and testified that he believed Victim had a gun, but based this assumption solely on having sold Petitioner a gun in the past. (R. p. 252, line 12 through p. 254, line 14). Petitioner testified that Victim did not mention having a gun, did not display a gun, was not running at him, did not attempt to tackle, punch, or push him, and did not even reach for him prior to Petitioner's decision to fire. (R. p. 266, line 25 through p. 267, line 10). Petitioner testified that he believed he heard Victim mumbling, but confirmed that he could not hear what he was saying. Petitioner testified he believed Victim was drunk and slurring, but had no explanation for how he came to that conclusion if he could not hear what Victim was saying. (R. p. 114, lines 1-17; p. 276, lines 1-4). Petitioner testified that he was only trying to scare victim, not actually hit him. But, in light of such testimony, Petitioner could only argue vaguely that "he knew what Victim was capable of" as to why he felt threatened enough to actually shoot and agreed that he had never once had so much as a cross word with Victim. (R. p. 261, lines 12-20).

Gregory Grate testified that he tried to get Victim to leave with him since everyone had been drinking, but Victim would not agree. He saw Victim walk back towards Petitioner. (R. p. 225, lines 4-14; p. 228, line 1 through p. 229, line 11; p. 241, lines 2-12). 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). 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).

ISSUE AS IT WAS PRESENTED AT TRIAL

During pretrial motions the State made the trial court aware that Petitioner 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 Petitioner's habit to pull a gun on people during an argument. (R. p. 2, line 12 through p. 3, line 3). Also before the court was conflicting interplay between Rule 406 and Rule 404(b), and the question of whether the evidence would be admissible under Rule 404(b) to show a lack of mistake or accident.

In light of Petitioner'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). Petitioner 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 Petitioner is her Aunt's husband. She testified that she knew Petitioner to carry a gun. She also testified that during a card game with her and other relatives, Petitioner was losing money and became angry. Terri testified that without provocation, Petitioner pulled out his handgun and pointed it at her cousin, Kentrez Hilton. Petitioner 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 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 Petitioner through his marriage to her aunt. She testified that she had known Petitioner to normally carry a gun; she agreed that it was common knowledge that he carried a gun and that Petitioner 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 Petitioner pull out a handgun on her uncle while in her grandmother's home. She testified that they were arguing, and things became heated. Petitioner told the uncle to stay where he was, Petitioner 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 Petitioner. She testified that three years prior to trial, she and Petitioner got into an argument about her dog chewing Petitioner's shoe. She testified that Petitioner 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 Petitioner walked back across to his yard and Ms. Parker called the cops. Petitioner 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 Petitioner 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 Petitioner 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 trial court did find the testimony of Terri Doctor sufficiently similar and proximate, in that Petitioner'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 trial court ruled that the State could admit in its case-in-chief the testimony of Terri Doctor, but not the testimony of the other two witnesses due to the age of the events and the variance in circumstances.[1] (R. p. 95, lines 12-18). The pertinent testimony presented at trial is as follows:

[1] The trial court also ruled that such evidence would be fully admissible by the state in reply, if Petitioner were to testify at trial that he had never pulled a weapon on someone prior to Victim. (R. p. 4, lines 7-13).

Terri Doctor

Terri Doctor (hereinafter "Terri") is the first cousin of Victim and related to Petitioner by marriage. (R. p. 122, lines 8-17). She testified at trial that she knew Petitioner 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, Petitioner was gambling and playing cards on his front porch with family members. Petitioner 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 Petitioner 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 Petitioner's behavior. (R. p. 124, lines 1-15). Terri testified that Mr. Hilton in no way threatened Petitioner during the incident and gave no reason for him to respond by drawing his gun. She testified that Petitioner's reaction was solely because he was arguing and angry. (R. p. 126, lines 2-10).

Kentrez Hilton

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

STANDARD OF REVIEW

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. The South Carolina Appellate Court Rules set forth a nonexclusive list of the circumstances in which review may be granted. Therein, Rule 242(b) continues: "[t]he following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

(1) Where there are novel questions of law.

(2) Where there is a dissent in the decision of the Court of Appeals.

(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

(4) Where substantial constitutional issues are directly involved.

(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court."

Rule 242(b), SCACR.

ARGUMENTS

I. The Court of Appeals did not err in affirming Petitioner's conviction and sentence on the basis that any potential error from Terri's testimony would be harmless in light of the evidence presented at trial.

The Court of Appeals did not err in affirming Petitioner's conviction and sentence. Following its review of the case, the ruling of the Court of Appeals correctly noted that, notwithstanding whether or not the ruling of the trial court was proper, the evidence in question was entirely harmless in light of the evidence presented at trial. Additionally, even in the absence of an explicit ruling by the Court of Appeals as to the 406 and 404(b) issues, these rules provide

additional sustaining grounds for the affirmance. Petitioner conviction was proper, the Court of Appeals' decision was correct, and certiorari in this matter is unwarranted.

a. Harmless Error

The Court of Appeals' ruling on the basis of harmless error is supported on multiple grounds. First, the complained of testimony was directly addressed by the defense at trial by admitting the evidence of Mr. Hilton, the individual supposedly threatened during the poker game. He testified that no such incident with Petitioner ever took place. Consequently, any weight or impact of Terri's testimony would have been drastically reduced due to the conflicting recollections of competing witnesses. This is especially so considering one such witness is the supposed victim of the altercation in question. Second, the evidence at trial provides only one conclusion: Petitioner shot an unarmed individual who had made no threats, declarations, or suggestions of violence against Petitioner. Even Petitioner's own testimony demonstrates that he had no basis to pull a gun on Victim that night, and it leaves no merit to his argument that he pulled the trigger in an attempt to scare Victim from attacking him.

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).

Petitioner's argument lacks requisite prejudice. 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 Petitioner pulled and pointed his gun, and demanded he leave the property. Mr. Hilton testified that he has played cards at Petitioner's home in the past, but had never had Petitioner point a gun at him. As a result, Terri's testimony was essentially nullified. It certainly cannot be said to have a prejudiced Petitioner to the extent that there is a reasonable probability such testimony influenced the jury's verdict in this case.

Second, Petitioner's lack of prejudice is further demonstrated in light of the evidence against Petitioner as to how the shooting took place. Notwithstanding the lack of ruling on the question of actual error by the Court of Appeals, the materiality of Terri's testimony in relation to the case as a whole must be considered in evaluating whether such evidence was harmless. *State v. Brown*, 344 S.C. at 75, 543 S.E.2d at 554–55. Looking at the evidence presented by both parties, there is no factual basis to demonstrate that the Victim provoked any need for violence or self-defense. Petitioner admitted under oath that he never heard or saw any threat from Victim, did not have any bad blood with Victim, and could only rely upon the weak explanation that Victim, though only walking, "came at him" and had his hand in his coat pocket.[2] The fact that Victim was unarmed, and that Petitioner admitted he had never had any prior disputes with the Victim weighed

[2] Petitioner's stepson Gregory, presented as a witness for the defense, was likewise unable to provide any evidence that would demonstrate a threat of violence from Victim. He was also unable to speak to the shooting itself, as he was getting in his car at the time and did not see it take place.

heavily against the tenuous argument that Petitioner was so fearful of Victim that he believed he needed to draw and fire his gun in self-defense.

In addition to Petitioner's concessions at trial, the State presented two witnesses that gave eye witness testimony of the events that took place. James Grate testified to witnessing Petitioner pull out and point his firearm at Victim, and testified that Victim had done absolutely nothing to provoke Petitioner's violence that night. Petitioner's neighbor, Ms. 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. She corroborated James Grate's testimony and provided some additional details that James Grate did not witness due to his decision to duck for cover just prior to Petitioner pulling the trigger. She testified that Victim did not run at Petitioner or attempt to attack him in any way, and that upon Petitioner pulling out a gun, Victim put his hands up and was walking backwards at the time he was shot. The testimony of these two witnesses provides more than sufficient evidence for the jury to conclude that Petitioner 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. Petitioner's argument that he pulled his gun out of fear of imminent death or serious bodily injury and fired it with the intention of scaring Victim from "coming at him" for the purpose of violence is entirely unsupported by eyewitness testimony, including his own. The State's evidence of habit or absence of mistake simply is not material in light of the entire record. *Id.* As such the Court of Appeals' rulings of fact and law were correct and certiorari should be denied.

b. 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, this Court has already 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). This 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 the case at hand, the State initially sought to demonstrate that Petitioner 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. (R. p. 94-95).

However, the trial court could not conclude the same for the far more specific testimony offered by Terri Doctor, which demonstrated that Petitioner 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 Petitioner has demonstrated in the past and, as was found by the trial court, it is precisely the behavior for which the facts of the crime match.

The trial court's admission of the evidence under Rule 406 was proper. Moreover, contrary to Petitioner's arguments that certiorari should be granted for purposes of expounding on questions of "habit evidence", this Court's opinion in *State v. Brown* has already done so with clear and explicit explanation to the trial courts on how to handle what will always be highly unique factual circumstances. Certiorari is not necessary to clarify the law or instruct lower courts on the application of Rule 406.

c. Admissibility under Rule 404(b)

At the conclusion of the trial court's discussion and ruling, the trial court stated that in addition to its 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, and serves as an additional sustaining ground for the Court of Appeals' affirmance.

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). The relevance and purpose for the admission of Terri Doctor's testimony is to directly address Petitioner's claim that Victim's death is the result of accident and mistake. These are two of the permissible grounds for admitting evidence under Rule 404(b). See *State v. Lyle*, 125 S.C. 406, 118 S.E. 803, 807 (1923). Moreover, contrary to Petitioner's arguments, 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. (R. p. 93, line 14 through p. 95, line 18). 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), such as absence of mistake or accident.

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. As such, the trial court properly applied the law and was well within its discretion to alternatively admit the evidence under Rule 404(b). Though the Court of Appeals was able to dispense with the case without addressing this issue, certiorari is not necessary

to address an otherwise properly administered ruling by the trial court. Certiorari should therefore be denied.

CONCLUSION

The Court of Appeals' reasoning and legal basis for affirming the trial court's decisions was well-founded and proper. For all the foregoing reasons, it is respectfully submitted that certiorari be denied in this matter.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

W. JOSEPH MAYE
Assistant Attorney General

Jimmy H. Richardson, III
Solicitor, Fifteenth Judicial Circuit

By:s/ W. Joseph Maye
W. Joseph Maye
S.C. Bar No. 100851

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

ATTORNEYS FOR RESPONDENT

February 22, 2022