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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Richland County
DeAndrea G. Benjamin, Circuit Court Judge

THE STATE,

PETITIONER-RESPONDENT,

V.

ROBERT XAVIER GETER,

RESPONDENT-PETITIONER.

Opinion No. 5851 (S.C. Ct. App. filed August 18, 2021)

APPELLATE CASE NO. 2021-001408

BRIEF OF PETITIONER

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ISSUE PRESENTED

Whether the Court of Appeals erred by not finding the error in both instances of Richland County Sheriff's investigator Joseph Clarke vouching for the prosecution's case preserved for appellate review, and not harmless error, where Clarke testified defense counsel's opening statement to the jury was the first time he heard of the self-defense case and where he also testified that victim Stone's testimony conversely was absolutely consistent since this inadmissible vouching testimony was very prejudicial?

STATEMENT OF THE CASE

Respondent-Petitioner Robert Xavier Geter (hereinafter "Respondent" for ease of reference) was indicted by the Richland County Grand Jury for the offenses of murder and attempted murder. R. 661. His case came on for trial on April 9, 2018 before the Honorable DeAndrea G. Benjamin, and a jury. Aimee Zmroczek and Ryan Schwartz represented respondent. Richard Cathcart and Jeremiah Shellenberg were the assistant solicitors. R. 1.

On April 12, 2018, the jury found respondent guilty of both charges. R. 613, l. 21 – 614, l. 6. Judge Benjamin sentenced respondent to forty years imprisonment for murder, and she imposed a twenty-year concurrent sentence for attempted murder. R. 623, l. 19 – 624, l. 1.

The Court of Appeals (Konduros, and McDonald, JJ.) affirmed in part, reversed in part, and remanded. (Geathers, J. concurred in part, and dissented in part). The Court reversed respondent's attempted murder conviction given the trial court's erroneous reliance on transferred intent as to that charge.

The Court agreed with respondent that Investigator Clarke's testimony impermissibly bolstered state witness Stone's testimony but found the error harmless. The Court found the other impermissible vouching or bolstering error involving Investigator's Clarke's testimony was not preserved for appellate review. See State v. Geter, 434 S.C. 557, 864 S.E.2d 569 (2021). App. 1-13. Respondent and the state both sought rehearing. App. 14-33. Rehearing was denied for respondent and the state. App. 34-37.

Respondent and the state both filed petitions for a writ of certiorari with this Court. This Court granted the cross petitions for a writ certiorari in its order dated September 7, 2022. This brief of petitioner on behalf of Respondent Robert Geter follows.

STANDARD OF REVIEW

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (*quoting* State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

ARGUMENT

The Court of Appeals erred by not finding the error in both instances of Richland County Sheriff's investigator Joseph Clarke vouching for the prosecution's case preserved for appellate review, and not harmless error. Clarke testified defense counsel's opening statement to the jury was the first time he heard of the self-defense case and he also testified that victim Stone's testimony conversely was absolutely consistent. Both instances constituted inadmissible vouching testimony for the state's case by a law enforcement witness, and both were very prejudicial.

Relevant Facts – An Introduction

This case involves a fight that occurred in a Richland County pool room. It ultimately involved respondent, Decedent James Lewis, and Clarence Stone. However, respondent told the police he thought other men also had participated in beating him during the pool room melee. R. 228, ll. 2-6.

The state contended the fatal fight was between respondent and James Lewis, and that Clarence Stone only joined in for the purpose of stopping the fight. Respondent and Clarence Stone were both injured in the fight. James Lewis tragically died of a stab wound. Respondent was charged with murder in the death of Lewis, and attempted murder involving the injuries to Stone.

Opening Statement

In his opening statement to the jury, Defense Counsel Schwartz told the jurors that: "The defense here is that Robert [Geter] fought back. And he was the prey for no other good reason other than accidentally stepping on somebody's shoes . . . James Lewis was absolutely beating the crap [out] of Robert Geter for no reason other than he stepped on his shoe. The fight breaks out. At some point Robert is hit in the back of the head with a beer bottle. And James Lewis and

his friends continue to pummel him." R. 10, l. 20 – 11, l. 20. Defense counsel also told the jury that respondent tried to get away from the decedent, and instead, "[J]ames Lewis and Clarence Stone come after him swinging." R. 11, l. 21 – 12, l. 19.

Defense counsel continued: "Robert may have defended himself, but he did not murder James or attempt to murder Clarence. Murder requires malice. . . The only intentional act that night was Robert was defending himself." R. 14, ll. 14-20. Defense counsel concluded, "he is not guilty of murder. He is not guilty of attempted murder. James Lewis is dead because of what James Lewis did that night. Mr. Stone lost an eye because of what James Lewis did that night." R. 16, ll. 5-23.

The Investigator's Testimony

The state called Richland County Sheriff's Department investigator, Joseph Clarke, as a witness. R. 200, ll. 3-24. Clarke was the "primary homicide investigator on call" on the night of March 7, 2015. R. 201, ll. 5-22. Clarke offered that, after speaking to witnesses, "At that point they were saying, Boo [respondent] did it, Boo was the one responsible for it, et cetera. And I said, Fine." R. 212, ll. 12-25.

Clarke also testified that after he received word that Lewis had died, he secured a warrant for murder against respondent, and a second warrant for the attempted murder of Stone. R. 224, ll. 2-18. Respondent agreed to meet Clarke at the police station the next day, and Clarke told respondent this was "still his side to the story that we need to know about. And that was truly what I was interested in. This had happened in a bar. It happened early in the morning. And there had been a lot of people there. So we want to hear his side of this thing." R. 227, l. 2 – 228, l. 1.

Respondent handed Clarke the "bloody knife" at the police station, and he told Clarke "there was like five dudes there." R. 228, ll. 2-6. Clarke said he then advised respondent of his

"Miranda[1] rights," he gave respondent the two arrest warrants, and "we transported him to Alvin S. Glenn Detention Center without further incident." R. 228, ll. 2-22.

On cross-examination, defense counsel showed Clarke some photographs showing respondent's injuries. Clarke acknowledged, "There appears to be some swelling to his face, no question." R. 238, l. 11 – 241, l. 17. Defense counsel asked Clarke about his experience in law enforcement and what he had done before taking out the arrest warrants. Clarke was defensive: "I had probable cause for the arrest." R. 232, l. 23 – 237, l. 3. Clarke offered that "evidence is like money, you always want more of it." He also acknowledged that more investigation could lead to more corroboration of one side of the story or the other. R. 237, l. 1 – 244, l. 6.

When questioned about what investigation he did into respondent's self-defense case, Clarke responded that was "not relevant." The following occurred on cross-examination of Clarke:

> Q: [N]ot relevant to you because you had already taken out the warrants, right?
>
> A: Because I had probable cause for the arrest, counselor.
>
> MS. ZMROCZEK: No further questions, Your Honor.

R. 244, ll. 3-8.

On redirect examination by the state, Clarke said, other than respondent telling him he was attacked by five men, there was no one else saying anything other than this was a "one-on-one" fight between respondent and the decedent. R. 244, ll. 13-17. Clarke also stated that he was getting other statements that corroborated what the "the Cullers" told him had occurred. R. 246, ll. 5-15. The Cullers owned the pool room.

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1 Miranda v. Arizona, 384 U.S. 436 (1966).

The following then occurred in redirect examination of Clarke by the solicitor:

Q: *And you were here in opening statements, correct?*

A: Yes.

Q: Is that the first time you heard that story?

A: No. Oh, that story?

Q: ***Yes, the story that he gave about -- in opening statements****?*

MS. ZMROCZEK: Your Honor, I object. Openings are not evidence, so.

THE COURT: Overruled.

BY MR. CATHCART:

Q: His scenario of the facts that Mr. Geter's attorney is now saying happened, ***is that the first time you have ever heard that?***

A: ***Yes.***

Q: And you also, by the time Mr. Geter came, turned himself in, knowing that the police were looking for him, this hand that has no other injuries but is covered in blood wasn't covered in blood by the time you got to it, correct?

A: It did not appear to be covered in blood when he came to me.

Q: The clothes on him that had what appeared to be blood on them, you collected, right?

A: Correct.

Q: Including this gray undershirt, correct?

A: Correct.

Q: *You confirmed that Clarence Stone was also a victim?*

A: I did.

Q: And you spoke with him [Stone] as well?

A: I did. I took a statement at his home.

Q: And he gave a statement of what occurred?

A: He did.

Q: *You saw him testify again today?*

A: I did.

Q: And was that exactly what he told you?

MS. ZMROCZEK: Objection, Your Honor. Improper vouching.

THE COURT: Overruled. You are asking about the testimony that he gave?

MR. CATHCART: Yes. We watched him just a few minutes ago.

THE COURT: Overruled.

BY MR. CATHCART:

Q: The same thing ***he told this jury happened to him is what he told you****?*

A: ***Seems absolutely consistent, correct.***

Q: Thank you. No further questions.

MS. ZMROCZEK: I know. I will be very brief, Your Honor.

THE COURT: Go ahead.

RECROSS-EXAMINATION

BY MS. ZMROCZEK:

Q: Actually, it was not the first time you heard that story because Mr. Geter told you, right, when he turned himself in, that he was jumped by five people?

A: He said, It was like five dudes.

Q: Okay. Five dudes. So that is actually not the first time that you have heard that story in here in opening.

A: *What counselor asked me was what was discussed in trial today or in trial up to this point. And, no, that is not the first -- that would be the first time I heard that story.*

Q: Okay. Let me make it more clear. The first time you heard about Robert Geter being attacked was when he turned himself in six hours after Mr. Lewis had expired, correct?

A: No, I never heard he had been attacked.

R. 247, l. 4 – 249, l. 23. (emphasis added).

Clarke repeated on re-cross examination that "what y'all are putting together as defense, was that the first time I heard it that way. Yes, that was the first time I heard it since I been in court. The only thing Mr. Geter told me was it was like five dudes." R. 250, ll. 9-16.

The Court of Appeals

The Court of Appeals wrote:

> Geter contends the circuit court erred in allowing Investigator Clarke to testify that Geter's opening statement to the jury was the first time he had heard the defense's "scenario of the facts" and that Stone's pretrial statement and testimony were "consistent." We agree in part.
>
> The objection to Investigator Clarke's statement that he first heard Geter's scenario of the facts during opening statements is not preserved for our review. Geter did not object to the question on the ground of bolstering but only noted opening statements are not evidence. Consequently, the point is not preserved. *See* State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground. A party may not argue one ground at trial and an alternate ground on appeal.").
>
> The second statement—that Stone's prior statement to Investigator Clarke was consistent with his trial testimony—is troubling. In Chappell v. State, 429 S.C. 68, 837 S.E.2d 496 (Ct. App. 2019), our supreme court (sic) outlined the elements to be examined when determining whether a witness is improperly bolstering another witness's testimony. This court decided the testimony of a witness is improper bolstering if:

> (1) the witness directly states an opinion about the [other witness]'s credibility; (2) the sole purpose of the testimony is to convey the witness's opinion about the [other witness]'s credibility; or (3) there is no way to interpret the testimony other than to mean the witness believes the [other witness] is telling the truth.

Id. at 77, 837 S.E.2d at 501. App. 11.

> "Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness's veracity[ ] or where a prosecutor implicitly vouches for a witness's veracity by indicating information not presented to the jury supports the testimony." State v. Shuler, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001).
>
> Investigator Clarke did not *directly* comment on the veracity of Stone's testimony. By definition, consistent does not necessarily mean truthful, but it does mean "free from variation or contradiction," thus creating the impression of accuracy and truthfulness. The question serves no other purpose than to bolster Stone's trial testimony and puts an improper imprimatur on Stone's testimony as truthful. Notably, Stone's prior statement would not have been admissible to prove it was consistent with this trial testimony unless Geter had suggested Stone's trial testimony was a recent fabrication. Therefore, it was inappropriate for Investigator Clarke to opine as to the consistency of Stone's testimony with his prior statement.

App. 11-12.

However, the Court found the error was harmless, reasoning, "all of the eyewitness testimony was consistent and the forensic evidence in the case matched a version of events in which Geter was the final aggressor outside on the deck that evening, *acting out of revenge rather than self-defense. . . .*" App. 12. (emphasis added).

Discussion

It was improper for the solicitor to elicit from Investigator Clarke that the defense's opening statement was allegedly the first time he heard the defense scenario or narrative of what occurred. It was likewise improper, as the Court of Appeals held, for Clarke to testify that state's witness and Victim Stone was conversely totally consistent in his statements to the police.

As a fact witness, Investigator Clarke should not have been allowed to draw legal conclusions about the evidence and vouch for the consistency or veracity of one side or the other. As respondent argued in the Court of Appeals, this error was highly unusual since it seems a solicitor would know better, and it was extremely prejudicial.[2] Respondent further submits another reason this Court should reverse is because prosecutors using lay police officer witnesses to comment on the veracity of which witnesses they believed and which witnesses or "side of the story" they did not believe seems to be a much more common improper occurrence in our state.

The Court of Appeals erred in imposing a procedural bar as to Investigator Clarke's testimony that defense counsel's opening statement was the first time he had heard of self-defense being a defense. In fairness to the trial judge, shortly after Clarke's claim, over objection, about the defense opening statement being the first time he had heard of self-defense, he *did it again* -- vouched for the state's case against respondent -- by testifying that Victim Stone conversely had been totally consistent in his statements to the police. The point is that the judge missed the apparent vouching or bolstering objection *both times* so there respectfully was no reason, in the

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2 Further, once these fundamental testimonial errors were elicited by the state, defense counsel cannot be blamed for her attempt to attack or clarify the investigator's testimony. In this case, as seen, Investigator Clarke just "doubled down" on his testimony that the criminal trial was the first time he had heard this self-defense "story," and that Stone, the living victim, conversely had always been consistent in his version of what occurred. The persuasiveness of these impermissible opinions on the evidence before the jury by an experienced criminal police investigator respectfully should not be underestimated.

context of this record, for the Court of Appeals to have held the first objection did not preserve the appellate issue where the second objection did preserve it -- where the trial judge got it *wrong both times in short order.* Procedural bars as an instrument of issue preservation rules are respectfully rules of fairness towards the trial judge, they are not a game of "gotcha." Further, it is "good practice for [the Court] to reach the merits of an issue when error preservation is doubtful." See Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012).

In State v. Westmoreland, 421 S.C. 410, 807 S.E.2d 701 (Ct. App. 2017), the Court held that the trial court erred by allowing the coroner to testify he determined the manner of death was a homicide because it was improper opinion testimony by a lay witness in violation of Rule 701(a), SCRE. Westmoreland's defense was that he accidentally hit the victim with his car. Therefore, the coroner's opinion that the manner of death was "a homicide" excluded Westmoreland's accident defense as being viable, and it was therefore highly prejudicial. The Court of Appeals found that the error was not harmless as to Westmoreland's murder conviction.

Similarly, in State v. Andrews, 424 S.C. 304, 818 S.E.2d 227 (Ct. App. 2018), an EMT paramedic testified that the victim was shot on the porch of Andrews' house.[3] This went against the heart of Andrews' defense that he shot the victim while the victim was inside Andrews' house when the victim refused to leave. The Court of Appeals found this was also an improper opinion testimony by a lay witness, and it reversed. See also State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001) (The conclusion by a law enforcement officer that the victim was riding his bicycle when he was shot exceeded the scope of a crime scene processor's expertise, and it was highly prejudicial to the defendant's defense of self-defense).

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[3] Affirmed as modified on another legal issue, State v. Andrews, 427 S.C. 178, 830 S.E.2d 12 (2019).

Again, Investigator Clarke's conclusion here that the first time he heard the defense's self-defense "story" of what happened that night was during defense counsel's opening argument to the jury was highly improper. Given the *context* of the solicitor's examination it was an opinion that the defense's trial self-defense case was inconsistent with the "corroborated evidence," and that self-defense was an invention. It was a fabrication of the defense attorneys. Solicitors often play on the public's (jurors) perception that defense attorneys will do *anything* to get their clients "off." This is an inaccurate and highly prejudicial ploy since defense attorneys are also bound by "inconvenient" rules of ethics.

Further, Investigator Clarke should not have been allowed to vouch for Stone's testimony in the manner the solicitor asked him to do in this case. Again, Clarke was a lay fact witness, and him signaling his belief that Stone was credible and consistent was error. That opinion from a homicide investigator that the self-defense case was essentially a fabrication of the defense was highly prejudicial, and it was not harmless. Neither a solicitor nor a government law enforcement official witness should be allowed bolster the state's case by vouching for the credibility of a prosecution witness as it invades the province of the jury and places the government's prestige behind that witness as the Court of Appeals stated in this case. See also State v. Kelly, 343 S.C. 350, 367-370, 540 S.E.2d 851, 859-861 (2001)[4] (Because a jury must make its own assessment on the credibility of witnesses, it is improper for the state to assure the jury of a government witness's credibility).

In Chappell v. State, 429 S.C. 68, 837 S.E.2d 496 (Ct. App. 2019),[5] which was cited in the opinion of the Court of Appeals in this case, the Court noted testimony of any witness is improper

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[4] *Rev'd on other grounds*, Kelly v. South Carolina, 534 U.S. 246 (2002).

[5] Certiorari denied by this Court on September 21, 2020.

bolstering if: (1) the witness directly states an opinion about the victim's credibility, (2) the sole purpose of the testimony is to convey the witness's opinion about the victim's credibility, or (3) there is no way to interpret the testimony other than to mean the witness believes the victim is telling the truth. App. 10-11, *citing* Briggs v. State, 421 S.C. 316, 325, 806 S.E.2d 713 (2017); State v. Jennings, 394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011); State v. McKerley, 397 S.C. 461, 465, 725 S.E.2d 139, 142 (2012). See, also, State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013); Gilchrist v. State, 350 S.C. 221, 565 S.E.2d 281 (2002).

Again, it was highly improper for a solicitor to use his chief homicide investigator in a case to testify he had heard the opening statement of the defense, and that was the first time he had ever heard that version of what occurred from the defense, meaning respondent. Nothing could be more damaging to the credibility of a defendant, and it vouched for, and improperly bolstered the credibility of the state's case against respondent. Therefore, this inadmissible testimony of Investigator Clarke violated all three prongs of Chappell v. State, 429 S.C. 68, 837 S.E.2d 496 (Ct. App. 2019) as to bolstering.

Further, to have the chief investigator vouch for Stone's credibility in a self-defense case, where both this Court, and the Court of Appeals, have an admirable history of allowing a defendant's self-defense case to be determined by a jury of his or her peers -- without undue interference or unseemly tactics -- should be, respectfully, condemned. Respondent should be granted a new trial since the solicitor purposefully used the chief homicide investigator to convey to the jury that the self-defense case was a belated fabrication of counsel, and that the living victim was conversely totally consistent, and therefore credible.

In context, both legal errors were preserved and they were not harmless. In contrast to State v. Kelly, 343 S.C. 350, 369-370, 540 S.E.2d 851, 861 (2001), the chief investigating officer's

credibility in this case was not shaken by defense examination since he was an experienced government witness who doubled down on his "fabrication" testimony on re-direct examination that he had never heard of the self-defense case prior to trial. R. 247, l. 4 – 249, l. 23.

Further, respondent testified and subjected himself to cross-examination at trial regarding his self-defense case. He had finished the eleventh grade at Eau Claire High School, and he had worked various jobs. He was apparently working for an electric company at the time of the incident. He was helping "wiring for the dorms at Fort Jackson." He had also worked at Columbia Farms. R. 348, ll. 3-25.

On the day of the poolroom incident, "I had the day off" and "I was selling t-shirts, pocket books, pants, things like that . . . on Monticello Road, right across the street from Culler's Pool Hall." R. 349, ll. 5-20. That evening, respondent left his girlfriend's house after she got home from working at the Babcock Center. He walked to a friend's house where "we played video games and chilled for a minute." They then went to Culler's Pool Hall around eight or nine p.m. that evening. There was a good crowd -- between thirty and forty people – at the pool hall. R. 350, l. 8 – 351, l. 23.

Respondent knew the decedent, James Lewis. He remembered that night he had purchased a beer and was putting money in the juke box when the decedent told him that he had stepped on his foot. "And I was like, Oh, my bad, my bad, my bad, you know what I'm saying. I'm having a good time. I'm like, my bad." R. 356, l. 20 – 357, l. 16.

Respondent testified that Clarence Stone then tried to intervene as if there were a problem. Respondent told Clarence, "Man, you ain't got nothing to do with this. You ain't got nothing to do with this." R. 357, ll. 11-23. Respondent recalled that after he apologized to the decedent for stepping on his foot that "Clarence hit me from behind. He hit me in the back of my head. So I

turned around and I grabbed Clarence's hand to stop him from hitting me, and that's when James jumped in." R. 358, ll. 10-23.

Respondent admitted that the decedent was beating him badly. As he tried to defend himself, "Clarence come and kicked me in the face." Respondent continued to fight, and the decedent ended up getting stabbed during the fight. R. 362, l. 5 – 364, l. 25. Respondent remembered, "My eyes were shut, both my eyes were shut, and it was blurry. All I seen was blur, like two people at the same time. And I still got the knife. So everybody came up to me, like, Man, what happened, what happened, Boo? I was like, Man, they just jumped me, they just jumped me." Respondent recalled the decedent "come out the back door" saying, "Mother fucker, you just stabbed me." R. 365, ll. 1-14.

Respondent told the solicitor on cross-examination that there were a number of men "stomping me, but my only focus was on Clarence and James because they was the closest. They was getting the most licks in. They was the closest." Respondent confirmed he thought there were about five men beating him that evening. R. 401, ll. 1-12.

The conclusion of the Court of Appeals regarding harmless error -- that all of the eyewitness testimony and the forensic evidence matched a version of events in which Respondent Robert Geter was the "[f]inal aggressor on the deck that evening, acting out of revenge rather than self-defense" – was an overstatement. App. 12. This was a confusing bar fight and simply blaming respondent for everything that occurred, respectfully, is not a fair reading of the record. It was also not a justifiable reason to excuse these extremely prejudicial evidentiary errors on the part of the state through the improper use of their Chief Investigating Officer.

The solicitor's use of Investigator Clarke to tell the jury the self-defense case was a fabrication of the defense, and that witness Stone was conversely always consistent and therefore

credible very likely worked. However, respondent's self-defense testimony -- which was subject to cross-examination -- should not have been ignored in the harmless error analysis of the Court of Appeals. The legally vouching for and bolstering errors allowed by the trial court during Investigator Clarke's testimony were very prejudicial in this case. Respondent should be granted a new trial on the murder charge as well.

CONCLUSION

By reason of the foregoing argument, petitioner's murder conviction should be reversed and this case remanded to the Richland County Court of General Sessions for a new trial.

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This 7th day of October, 2022.