STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Spartanburg County
Honorable J. Derham Cole, Circuit Court Judge

Opinion No. 5912 (S.C. Ct. App. Filed August 10, 2022)

Lower Court Case No. 2017-GS-42-05579

THE STATE,

RESPONDENT,

V.

LANCE ANTONIO BREWTON,

PETITIONER

APPELLATE CASE NO. 2018-001572

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on September 22, 2022.

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the trial judge's refusal to instruct the jury on the law of involuntary manslaughter and the defense of accident by finding that Petitioner's unlawful possession of a firearm proximately caused the death?

2. Did the Court of Appeals err in affirming the trial judge's limitation on Petitioner's fundamental right to testify by refusing to allow Petitioner to testify as to his belief that the decedent's mother put him under a spell that caused him to hear voices which told him that a cement truck was going to bury his family which caused him to flee the scene after the shooting since this evidence was relevant to rebut the State's argument that Petitioner fled the scene because he had a guilty conscience?

3. Did the Court of Appeals err in finding that the challenge to the trial judge allowing impeachment of Petitioner with a remote conviction was waived and not preserved for appellate review?

STATEMENT OF THE CASE

In October of 2017, the Spartanburg County Grand Jury indicted Petitioner, Lance Antonio Brewton, for murder and possession of a weapon during the commission of a violent crime, indictment #17-GS-42-5579. (R. pp 401-402). In August of 2018, Petitioner proceeded to jury trial before the Honorable J. Derham Cole. Petitioner was represented by Clay Allen and Monier Abusaft of the Spartanburg County Public Defender's Office. The State was represented by Solicitor Barry Barnette and Assistant Solicitor Jennifer Wells. The jury found Petitioner guilty as charged and Judge Cole sentenced him to life imprisonment without the possibility of parole. A timely notice of intent to appeal was served and the direct appeal perfected.

After hearing oral arguments on November 10, 2021, a three-judge panel of the South Carolina Court of Appeals affirmed the convictions and sentences. State v. Brewton, Op. No. 5912 (S.C. Ct. App. filed May 25, 2022) (Howard Adv. Sh. No. 18 at 79). On June 9, 2022, pursuant to Rule 221(a), SCACR, Petitioner filed a petition for rehearing. On June 16, 2022, this Court requested a return from the State. The State filed the return on July 7, 2022. On August 10, 2022, this Court granted the petition for rehearing, withdrew the previous opinion, and substituted with a new refiled opinion. State v. Brewton, Op. No. 5912 (S.C. Ct. App. substituted and refiled August 10, 2022) (Howard Adv. Sh. No. 28 at 30)[1]. On August 17, 2022, Petitioner filed a second petition for rehearing that was denied on September 22, 2022. This petition for writ of certiorari follows.

[1] At the time of the writing the petition the substituted, re-filed opinion was not available on Westlaw.

FACTS OF THE CASE

On the morning of September 25, 2017, Natalie Niemitalo was at her house with her friend, Kevin Schuerman, and Petitioner. R. 92, ll. 14 – 24. Natalie and Petitioner had been in an off and on relationship for "a while." R. 93, ll. 17 – 22. Kevin recalled: "We talked for a little bit, and then it was decided we were going to go to the gas station to go get some drinks and stuff like that." R. 95, ll. 6 – 8.

The three got into Natalie's mother's black Honda Civic that was parked in the driveway. R. 97, ll. 15 – 23. Natalie was in the driver's seat, Kevin was in the front passenger seat and Petitioner was in the back seat. R. 98, ll. 1 – 3. Petitioner then asked Kevin to let him out of the car, so Kevin slid his seat forward so that Petitioner could get out. R. 98, ll. 7 – 25. Petitioner walked around to the driver's side of the car and he and Natalie got into a short argument about who was going to drive. R. 99, ll. 1 – 7.

While Kevin was sitting in the front passenger seat and Petitioner was standing at the driver's side door, Kevin heard a gunshot. R. 99, ll. 11 – 13. Kevin thought he had been shot so he got out of the car and ran behind a garage next to Natalie's house. R. 99, ll. 14 – 24. After Kevin realized that he had not been shot, he went back to the vehicle and saw Natalie on the ground of the driveway and Petitioner getting in the driver's seat of the car and driving away. R. 99, l. 25 – 100, l. 21. Kevin called 9-1-1 and held on to Natalie until law enforcement arrived. R. 101, ll. 5 – 8.

Kevin testified that he never saw Petitioner with a gun and that the argument between Petitioner and Natalie was not out of the ordinary. R. 110, ll. 9 – 16; R. 109, ll. 9 – 14. Kevin Stated that he had seen Natalie and Petitioner in worse arguments before but he had never seen Petitioner be violent towards Natalie. R. 109, l. 18 – 110, l. 1.

While law enforcement officers were on the scene attempting to treat Natalie and gather information, South Carolina Highway Patrolman Christian Stewart observed Petitioner drive by Natalie's house in the black Honda Civic. R. 117, ll. 5 – 14. Trooper Stewart initiated a traffic stop on Petitioner who did not stop but drove back to his residence, which was approximately twenty-three miles away. R. 117, l. 17 – 118, l. 11. Once Petitioner stopped at his residence, he was taken into custody by the officers. R. 175, l. 20 – 176, l. 16. Natalie died from a single gunshot wound which entered her left chest and exited her back. R. 239, l. 22 – 240, l. 11.

REASONS WHY CERTIORAI SHOULD BE GRANTED

This Court should grant the petition for writ of certiorari as to issue one to address the question of whether the unlawful possession of a firearm will always preclude an instruction on voluntary manslaughter and/or the defense of accident when self-defense is not at issue. The Court should grant the petition as to issue two to clarify the importance of the fundamental right of a criminal defendant to testify in his own defense. Rock v. Arkansas, 483 U.S. 44 (1987). Additionally, this Court should grant the petition as to issue three to further clarify the rules of issue preservation.

ARGUMENTS

1. **The Court of Appeals erred in affirming the trial judge's refusal to instruct the jury on the law of involuntary manslaughter and the defense of accident by finding that Petitioner's unlawful possession of a firearm proximately caused the death.**

Under the facts of this case, Petitioner's unlawful possession of a firearm should not preclude a jury instruction on involuntary manslaughter or the defense of accident. The trial judge erred in refusing to allow the jury to decide if Petitioner was guilty of involuntary manslaughter, instead of murder, or not guilty based on the defense of accident. The Court of Appeals erred in finding Petitioner's unlawful possession of a firearm proximately caused the death.

Relevant Facts from Trial

Petitioner testified in his own defense before the jury. R. 287 – 320. His testimony was largely consistent with Kevin Schuerman's regarding the incident. Petitioner testified that when he, Kevin and Natalie got into the car to go to the store that he initially sat in the back seat. R. 292, ll. 13 – 19. After sitting in the car for about five minutes while Natalie was doing her makeup, Petitioner grew impatient, and asked Kevin to let him out of the car so that he could drive. R. 292, l. 22 – 293, l. 2.

As Petitioner was getting out of the car his gun fell out of his pocket onto the back seat. R. 293, ll. 7 – 13. Petitioner picked his gun up and he walked around to the driver's side of the car. R. 294, ll. 8 – 10. Petitioner explained that he did not put the gun back in his pocket because he thought Natalie was going to let him drive and that he generally puts his gun in the center console when he is in the car. R. 294, ll. 11 – 16. Petitioner then testified: "I reach over.

I see Natalie. She's still . . . in the mirror doing her makeup. So I reached to grab the keys. When I reached to grab the keys she forced my hand back, and that's when the gun went off." R. 294, ll. 22 – 25.

Petitioner told the jury that he did not mean to kill Natalie and that he was not mad or angry at her at the time of the incident. R. 295, ll. 1 – 11. Petitioner testified that he never wanted to hurt Natalie. R. 295, ll. 12 – 14. "I regret this every day . . . I'm sorry for the family. I really am. But I did not mean to kill my girlfriend, honestly." R. 295, ll. 23 – 25. Petitioner Stated that he did not intend for the gun to go off and he did not intentionally shoot it. R. 296, ll. 5 – 10.

Chad Smith testified for the State and was qualified as an expert in firearm examination. R. 213, ll. 7 – 18. Smith received and reviewed the firearm that was involved in this case. R. 216, ll. 10 – 14. Smith testified that the trigger pull weight of the firearm was five and a half pounds. R. 217, ll. 3 – 6. Smith admitted that the firearm could discharge accidentally if "it was snagged on something." R. 223, ll. 3 – 8. Smith also acknowledged that there was no external safety mechanism on the firearm that would typically be thought of as a "push-button safety." R. 225, ll. 3 – 13. In other words, once five and a half pounds of pressure was applied to the trigger, the firearm would discharge. R. 225, l. 14 – 226, l. 2.

At the close of the evidence, defense counsel requested the judge to instruct the jury on the lesser included offense of involuntary manslaughter and the defense of accident. R. 322, ll. 5 – 8. The solicitor asked the judge to deny Petitioner's request arguing: "He is not legally able to possess that weapon. He's done an unlawful act with it . . . therefore accident can't apply." R. 322, ll. 12 – 14. The solicitor also argued that Petitioner was not armed in self-defense and

therefore involuntary manslaughter was not applicable and cited to State v. Gibson, 390 S.C. 347, 701 S.E. 2d. 766 (Ct. App. 2010) for support. R. 322, ll. 15 – 20.

Defense counsel responded by citing to State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 and State v. Burris, 334 S.C. 256, 513 S.E.2d 104 (1999) and argued that even though Petitioner's possession of the gun was unlawful, that unlawful possession was not the proximate cause of Natalie's death. R. 323, ll. 9 – 22; R. 327, ll. 16 – 23.

The trial judge ruled that Petitioner was not entitled to either the involuntary manslaughter charge or the accident charge. R. 329, ll. 10 – 16. The court reasoned that Petitioner was acting unlawfully by illegally carrying a firearm and also by trying to take the car from Natalie. R. 328, l. 7 – 329, l. 9. The judge further ruled that Petitioner was not exercising reasonable care in handling the gun. R. 329, ll. 10 – 16. After the jury was charged, defense counsel renewed his requests for involuntary manslaughter and accident charges, which the judge again declined. R. 377, l. 15 – 378, l. 2. The trial judge erred in refusing to instruct the jury with the law on involuntary manslaughter and the defense of accident.

Involuntary Manslaughter

"Involuntary manslaughter is (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others." State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 485 (Ct. App. 2010). "If there is *any* evidence warranting a charge on involuntary manslaughter, then the charge *must* be given." State v. Wharton, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009) (emphasis added).

"To constitute involuntary manslaughter, there must be a finding of criminal negligence, statutorily defined as a reckless disregard of the safety of others." State v. Crosby, 355 S.C. 47, 52, 584 S.E.2d 110, 112 (2003). "Recklessness is a State of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is creating." State v. Pittman, 373 S.C. 527, 571, 647 S.E.2d 144, 167 (2007). Negligent handling of a firearm can be sufficient to warrant a charge on involuntary manslaughter. State v. Mekler, 379 S.C. 12, 15, 664 S.E.2d 477, 478 (2008).

Based on the testimony presented to the jury in this case there was ample evidence for it to find that the shooting was unintentional. Petitioner testified to the jury that the shooting was unintentional and that he was not angry at Natalie at the time the gun went off. R. 295, ll. 1 – 11. Petitioner Stated that he did not intend for the gun to go off and he did not intentionally shoot Natalie. R. 296, ll. 5 – 10.

Kevin Schuerman, the front passenger in the car at the time of the shooting, testified that he never saw Petitioner with a gun and that the argument Petitioner and Natalie were engaged in was nothing out of the ordinary. R. 110, ll. 9 – 16; R. 109, ll. 9 – 14. Kevin said that he had never seen Petitioner be violent towards Natalie. R. 109, l. 18 – 110, l. 1.

"[T]he essence of involuntary manslaughter is the involuntary nature of the killing." State v. Gibson, 390 S.C. 347, 357, 701 S.E.2d 766, 771 (Ct. App. 2010). There have been numerous cases in South Carolina in which our courts have found that an involuntary manslaughter instruction was improper on the basis that the defendant intentionally fired a gun. See, e.g., Douglas v. State, 332 S.C. 67, 504 S.E.2d 307 (1998); State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996); State v. Morris, 307 S.C. 480, 415 S.E.2d 819 (Ct. App. 1991). In the

present case, however, there is evidence in the record to support a finding that Petitioner unintentionally fired the weapon.

The trial judge refused to instruct the jury on involuntary manslaughter finding that Petitioner was acting unlawfully by possessing a firearm and by trying to take the keys to the car from Natalie. R. 328, l. 7 – 329, l. 9. The unlawful possession of a firearm, under the facts of this case, should not preclude an involuntary instruction because the unlawful possession was not the proximate cause of the death. Petitioner's disagreement with Natalie about who was going to drive does not rise to the level of unlawful conduct to preclude an involuntary instruction. There is no testimony in the record to suggest Petitioner was not permitted to drive Natalie's mother's vehicle. Petitioner testified that he expected Natalie to let him drive when he walked around to the driver's side door and there is nothing in the record to suggest that it would have been unlawful for him to drive the car.

In State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994), this Court noted that, in a self-defense case, the unlawful possession of a firearm does not preclude an accident defense writing, ". . . the burden rests upon the State to prove beyond a reasonable doubt that the unlawful act in which the accused was engaged was at least the proximate cause of the homicide." Id. at 278, 440 S.E.2d 370 n.1. When the facts of a case support a finding of an unintentional killing, the defendant cannot be precluded from an involuntary manslaughter charge simply because his possession of the firearm was unlawful. Justice Toal acknowledged this in the context of accident when she wrote: "The unlawful possession of a firearm alone may not in all cases be the proximate cause of the injury." Id. at 282, 440 S.E.2d at 373 (Toal, J., concurring).

In State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (2007), the Supreme Court expounded upon this proximate cause requirement in the context of self-defense. The Slater Court found that the

defendant's unlawful possession of a firearm was the proximate cause of the homicide because "Slater was not merely in unlawful possession of a weapon; he carried the cocked weapon, in open view, into an already violent attack in which he had no prior involvement." Id. at 71, 644 S.E.2d at 53. Slater testified that his initial reason for getting his gun was to shoot it in the air "to cause a commotion." Id. at 68, 644 S.E.2d at 51. Then, Slater approached a group of individuals who were attacking and robbing someone with his gun in hand which caused one of the attackers of the third-party victim to point a gun at Slater. Id. Therefore, Slater's unlawful possession of a firearm escalated a robbery into a deadly shooting.

This Court addressed unlawful possession of a pistol in the context of self-defense in State v. Williams, 427 S.C. 246, 830 S.E.2d 904 (2019). In Williams, the Court held that the defendant's unlawful possession of a firearm, *and his bringing it to an illegal drug transaction*, precluded a charge on self-defense because he was not without fault in bringing on the difficulty. The Williams Court noted the significance of the illegal drug transaction in its analysis: "In addition, intentionally bringing a loaded, unlawfully-possessed pistol to an illegal drug transaction is 'calculated to produce a violent occasion.'" Id. The Court continued: "Williams' pistol was not simply a convenience for him so he could protect himself just in case violence arose. Rather, it is well-documented that the mere presence of guns at illegal drug transactions *produces* the violence." Id.

In Williams, the Court went on to clarify its prior holding in Slater regarding the requirement of proximate cause: "In Slater, we said the question was whether 'the weapon is the proximate cause of the killing.' We should have said the question is whether it is the proximate cause of the 'difficulty' or 'occasion' that led to the killing." Id. at n.4 (internal citations omitted).

While Petitioner did not assert self-defense in the present case, Petitioner's mere possession of a firearm was not the proximate cause of Natalie's death, nor was it the proximate cause of the "difficulty" or "occasion" which led to her death. Rather, the gun was merely incidental to the shooting. Natalie, Kevin and Petitioner were getting ready to drive to the store to get drinks when Petitioner got into the back seat of Natalie's mother's car. When he decided to get out of the back seat his gun fell out of his pocket onto the seat which he then picked up and held in his hand as he walked around to the driver's side of the vehicle. Petitioner did not arm himself with the intention of shooting his gun to cause a commotion like Slater nor did he arm himself for the express purpose of killing someone. Furthermore, unlike in Williams, at the time of the incident here, Petitioner was not armed in furtherance of an illegal drug transaction.

Petitioner carried his gun in his hand around to the driver's seat because he expected Natalie to let him drive and he was planning to put his gun in the center console of the car. Petitioner's possession of the firearm did not escalate the situation between him and Natalie. Kevin testified that the argument was not out of the ordinary and that he was not afraid or worried that anything violent was about to happen. Petitioner's mere unlawful possession of the firearm was not the proximate cause of Natalie's death. The trial judge erred in refusing to instruct the jury on the law of involuntary manslaughter. The error requires reversal.

Accident

"For a homicide to be excusable on the ground of accident, it must be shown the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon." State v. Burriss, 334 S.C. 256, 259, 513 S.E.2d 104, 106 (1999). As discussed above with regard to involuntary manslaughter, in State v. Goodson, this Court noted, in a self-defense case, the unlawful possession of a firearm does not preclude an accident defense. 312

S.C. 278, 440 S.E.2d 370 n.1 (1994). The Court wrote that ". . . the burden rests upon the State to prove beyond a reasonable doubt that the unlawful act in which the accused was engaged was at least the proximate cause of the homicide." Id. Again, the unlawful possession of the firearm was not the proximate cause of the death, as discussed above.

The judge in the present case additionally refused to instruct the jury on the defense of accident because he found that Petitioner was not exercising reasonable care in the handling of the firearm. (R. p. 329, lines 10-13). For Petitioner to be entitled to a jury instruction on accident there must be evidence in the record that could support a jury finding that Petitioner was exercising due care in the handling of the firearm. Burriss, 334 S.C. at 259, 513 S.E.2d at 106. There is evidence in the record that Petitioner was exercising due care in his handling of the firearm. Kevin Schuerman testified that he never saw Petitioner with a gun, which at least created an inference that Petitioner was not wielding the gun in a violent manner. Petitioner was not pointing the gun at anyone or waiving it around in the air. Furthermore, Petitioner testified that the only reason he still had the gun in his hand was because he was anticipating Natalie letting him get in the car to drive and his plan was to place the gun in the center console.

A jury could have reasonably concluded that Petitioner's handling of the firearm was with due care. Under the any evidence standard, the court should have instructed the jury on the defense of accident. State v. Wharton, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009). Because the court refused to instruct the jury on a defense that was supported by the evidence Petitioner's convictions should be reversed. See Tisdale v. State, 378 S.C. 122, 662 S.E.2d 410 (2008); State v. Burriss, 334 S.C. 256, 259, 513 S.E.2d 104, 106 (1999).

Appeal

In holding that Petitioner was not entitled to jury instructions on involuntary manslaughter or accident, the Court of Appeals determined that Petitioner's unlawful possession of a firearm was the proximate cause of Natalie's death. State v. Brewton, Op. No. 5912 (S.C. Ct.App. filed August 10, 2022) (Howard Adv. Sh. No. 28 at 40)

The Court of Appeals compared Petitioner to the defendant in State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994):

> Like the defendant in Goodson, [Petitioner] admitted he was unlawfully handling a loaded firearm while intoxicated. [Petitioner] testified he had been on an illegal drug binge that prevented him from sleeping the three days preceding Niemitalo's death; [Petitioner] also admitted he used illegal drugs the morning of Niemitalo's death. Additionally, [Petitioner] testified the gun fell out of his pocket as he got out of the car, he held the gun in his hand while arguing with Niemitalo, and he still held the gun in his hand when he reached into the car to take its keys. Further, [Petitioner] held a gun that would fire once it had five-and-a-half pounds of pressure applied to its trigger, even if that pressure was unintentional. Finally, like the defendant in Goodson, [Petitioner's] illegally possessed gun fired the shot that killed Niemitalo. Therefore, [Petitioner's] unlawful possession proximately caused Niemitalo's death. Accordingly, we affirm the trial court's decision to refuse to instruct the jury on involuntary manslaughter and accident.

State v. Brewton, Op. No. 5912 (S.C. Ct. App. substituted and refiled August 10, 2022) (Howard Adv. Sh. No. 28 at 40).

The reliance by the Court of Appeals on Goodson for the proposition that Petitioner's unlawful possession of a firearm was the proximate cause of the death is misplaced. While proximate cause is mentioned in the footnote of the Goodson opinion, the issues in Goodson involved whether a self-defense and an accident charge were warranted. This Court in Goodson found that neither charge was warranted because there was no evidence Goodson was acting lawfully in self-defense when the shooting took place. As the Court of Appeals correctly noted, self-defense is not an issue in the present case. In cases where self-defense is not an issue,

unlawful possession of a firearm should not preclude an instruction on involuntary manslaughter and the defense of accident **unless** the unlawful possession is the proximate cause of the homicide.

This Court again addressed the proximate cause issue in the self-defense cases of Slater and Williams. In Slater the unlawful possession of a firearm was the proximate cause of the homicide where the defendant carried the cocked weapon, in open view, into an already violent attack in which he had no involvement. In Williams the unlawful possession of a firearm was the proximate cause of the homicide where the defendant brought the weapon to an illegal drug deal transaction, producing violence. In contrast, Petitioner's act of disagreeing with Natalie about who was going to drive and struggling over the keys did not escalate or produce violence. The unlawful possession of a firearm was not the proximate cause of the homicide. The jury should have been given the option to determine if Petitioner was guilty of involuntary manslaughter or not guilty by the defense of accident.

2. The Court of Appeals erred in affirming the trial judge's limitation on Petitioner's right to testify by refusing to allow Petitioner to testify as to his belief that the decedent's mother put him under a spell that caused him to hear voices which told him that a cement truck was going to bury his family which caused him to flee the scene after the shooting since this evidence was relevant to rebut the State's argument that Petitioner fled the scene because he had a guilty conscience.

Relevant Facts from Trial

The State made a motion in limine to prevent Petitioner from introducing any testimony that he had any kind of mental illness or that he was "hearing voices." R. 4, l. 4 – 5, l. 9. Defense counsel responded to the State's motion arguing: "Your Honor, under due process, under a res gestae theory I think he has . . . the right to tell the jury what was going on in his

mind that day, why he was doing some of those things. Not as an excuse, not as a legal excuse, but as . . . an explanation." R. 5, l. 25 – 6, l. 5.

Defense counsel argued that if the State was going to be permitted to introduce evidence of his flight from the scene and ask the jury to infer a guilty conscience on that basis that Petitioner should be permitted to rebut that inference by giving an alternative explanation for his flight. R. 6, ll. 6 – 18. Counsel agreed that he was not planning on presenting a not guilty by reason of insanity or guilty but mentally ill defense. R. 7, l. 9 – 8, l. 9. However, counsel contended that Petitioner had a right to testify, including to explain why he fled the scene, and that his hearing voices was part of his narrative as to what happened the day of this incident. R. 12, ll. 2 – 11.

The trial judge indicated that it was not inclined to allow the testimony because it was not relevant and would confuse or mislead the jury. R. 16, ll. 5 – 12. The judge did not make a ruling at that time though and Stated that if Petitioner decided to testify, the judge would allow him to proffer his testimony and rule at that time. R. 16, ll. 13 – 17.

After the State rested its case, Petitioner sought to proffer his testimony. R. 260, ll. 16 – 17. Petitioner testified in detail about the events of the incident date.[2] Petitioner testified that he believed Natalie's mother practiced witchcraft and that "she put it on her friend Aaron." R. 261, l. 23 – 262, l. 3. Petitioner's understanding was that Aaron also was a practicing warlock, or the male version of a witch. R. 262, ll. 6 – 13.

Petitioner testified that he believed that either Aaron or Natalie's mother had put him under a spell that was causing him to hear voices. R. 263, ll. 4 – 7. Petitioner Stated that on the day of the incident he was hearing voices that were telling him that his family was being

[2] The State only objected to certain portions of Petitioner's proffered testimony which will be the focus of this section of the brief.

murdered and that he needed to look for them in construction sites. R. 265, ll. 2 – 16. Petitioner testified that there were several construction sites near Natalie's home that he walked to so that he could look for his family. R. 265, ll. 2 – 16.

When Kevin arrived at the house, Petitioner said that he told Kevin he thought Natalie's mom "put a curse on [him]" because he was experiencing "all of these crazy things." R. 265, l. 24 – 266, l. 5. When the three of them got in the car to go to the store Petitioner Stated that he got in the back seat because voices in his head told him that people were trying to kill him. R. 267, ll. 1 – 5. Petitioner said that the voices in his head did not have anything to do with the gun "going off." R. 267, ll. 9 – 11.

When Petitioner was asked why he left Natalie's house after the gun went off, he said: "The only reason I left the scene, because the voices was telling me that cement truck that had just went down the road was going to bury my family alive." R. 268, ll. 2 – 4. Petitioner said that while he was in the back seat of the car, he saw a cement truck drive down the street and the reason he wanted to get out and drive was because Natalie was not moving fast enough, and he wanted to follow the cement truck. R. 268, ll. 5 – 13.

Immediately after the gun went off, Petitioner got in the driver's seat and began to drive to look for the cement truck. R. 269, ll. 6 – 12. When he could not find it, he went back to Natalie's house to check on her. R. 268, ll. 17 – 20. Petitioner Stated that the first time he went back by the house he saw that EMS was already on the scene giving Natalie medical attention, so he kept driving to look for the cement truck some more. R. 270, ll. 2 – 5. Petitioner still could not find the cement truck, so he went back to the scene a second time to check on Natalie and it was at that point he saw police were on the scene. R. 270, ll. 5 – 9. When the police attempted to stop Petitioner, he ran because he had drugs on him. R. 268, ll. 19 – 21.

After Petitioner finished his proffer the State argued that Petitioner had been examined by a doctor and that the "psychosis was drug related." R. 272, ll. 4 – 9. The State also argued that Petitioner's testimony was replete with hearsay. R. 272, ll. 10 – 15. Further, the State argued that the testimony was not relevant and was "highly prejudicial." R. 272, ll. 16 – 17.

Defense counsel agreed that there was some hearsay that Petitioner testified to during his proffer that would not be admissible in front of the jury but still argued:

> He has the absolute right to testify. . . . [A]nd he must testify truthfully. He can't make up reasons that would be more convenient for the defense or easier for the State . . . and so we think that limiting his testimony, especially to these essential factors, would be violating his due process rights and his right to testify in his own trial.
>
> Also, Your Honor, I don't believe the State gets to have it both ways in that they . . . have introduced evidence that they didn't have to about flight, which is an inference they want the State [jury] to draw. They want the jury to draw that he was guilty because he had flight.
>
> This gives an alternative reason for why he left the scene. It is the reason that he left the scene. And . . . since the State has went [gone] down that road, largely, they have opened the door for this testimony.

R. 274, l. 11 – 275, l. 1.

The judge ruled that Petitioner would not be permitted to testify about anything relating to witchcraft or hearing voices in his head about a cement truck burying his family. R. 277, ll. 3 – 9. The judge reasoned that this testimony would confuse the jury by suggesting to them that Petitioner was raising a mental illness defense which he was not in fact raising. R. 276, ll. 2 – 24. The judge also ruled that "what he's testifying to is based largely upon hearsay." R. 276, ll. 13 – 14.

Defense counsel argued that Petitioner's testimony about witchcraft was not hearsay because he was testifying about his own knowledge of Natalie's mother being a witch and her casting a spell on him. R. 277, l. 10 – 278, l. 5. Counsel also further clarified his position on Petitioner's right to testify by arguing that the court was in effect precluding Petitioner from testifying by "stopping him from testifying to something that is so intermingled among his testimony that it is . . . a de facto prevention of his right to testify." R. 278, ll. 8 – 14.

The judge ruled that Petitioner would be allowed to testify but that the voices involved were not relevant to the murder and he would not be allowed to testify about that specifically. R. 278, l. 15 – 279, l. 5. Ultimately, Petitioner chose to testify in front of the jury but was not permitted to explain why he got into the back seat of the car, why he decided he wanted to drive the car, and why he fled from the scene immediately after the gun went off. R. 287 – 320.

Appeal

The Court of Appeals affirmed the trial judge's decision to prohibit Petitioner from testifying about why he initially fled the scene of the incident citing State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013), and writing:

> Here, unlike the defendant in Rivera, Brewton was allowed to testify in his own defense. Also, unlike the defendant in Rivera, Brewton does not argue the trial court misapplied our State's rules of evidence; instead, Brewton conflates testifying in his own defense with "testifying in his own words." That argument has no merit. As the Rivera court made clear, Brewton's right to testify did not prohibit the trial court from limiting his testimony based on a proper application of our State's evidentiary rules. Accordingly, because Brewton does not argue the trial court misapplied the rules of evidence, we affirm the trial court's decision to prohibit Brewton from testifying about witchcraft and hearing voices.

State v. Brewton, Op. No. 5912 (S.C. Ct. App. substituted and refiled August 10, 2022) (Howard Adv. Sh. No. 28 at 41-42). In footnote 8 the Court of Appeals wrote, "Even if Brewton argued the trial court misapplied our State's rules of evidence, unlike the record in Rivera, the record

here supports the trial court's ruling that Brewton's proffered testimony about witchcraft and hearing voices would be unfairly prejudicial. A forensic psychologist found Brewton did not suffer from any mental illness, yet Brewton proffered testimony that voices in his head made him flee the scene of [Natalie's] Niemitalo's shooting." Id. at 42. The Court of Appeals erred.

First, although there was not a complete prohibition in the present case as in Rivera, the limitation in the present case was still improper. Petitioner was still prohibited from testifying about why he left the scene. The Rivera distinction is one without a difference with regard to the limitation on Petitioner's right to explain why he left the scene. Petitioner challenges the application of the evidentiary rule in the present case. The analysis of whether the evidentiary rules justify the limitation on Petitioner's right to testify in his own defense necessarily requires an analysis of whether the evidentiary rule was misapplied. As discussed below, the trial judge failed to conduct a proper Rule 403 balancing test. The State argued Petitioner's leaving the scene showed malice. Petitioner had the right to counter the State's assertion. The proffered testimony was relevant and probative as to lack of malice. The trial judge erred in unconstitutionally limiting Petitioner's testimony based on a misapplication of the evidentiary rules.

Second, Petitioner did not challenge the limitation on any hearsay contained in the proffered testimony. Much of the proffered testimony, however, was not hearsay. The trial judge erred in refusing to admit the non-hearsay portions of the proffered testimony. The State initially objected on hearsay grounds during Petitioner's proffered testimony about Statements made by Natalie. R. 263, l. 10 – 16. After Petitioner finished his proffered testimony, the State argued in part:

> [Y]ou've got numerous hearsays involved in this [sic] – her mother, the victim, everything. . . . There's hearsay all through it. There is no exceptions to those

> hearsays [sic], especially the victim in this case and her mother. Neither one of them testified from that standpoint. That's the majority of it – her father, calling the victim's father and talking to him. . . . I ask to keep that evidence out from the voices, *as well as any kind of hearsay in talking to any other witnesses from that standpoint.*

R. 272, l. 13 – 273, l. 3 (emphasis added). Defense counsel *agreed* that some of Petitioner's testimony was hearsay, e.g., Petitioner's testimony regarding Statements made by Natalie and her mother, and that *he would not be offering that testimony before the jury.* R. 273, ll. 5 – 25.

The trial judge's hearsay ruling appears to refer to Statements made by Natalie and her mother which defense counsel agreed were inadmissible and would not be presented to the jury. In that respect, the hearsay arguments and ruling were not disputed at trial. To the extent the trial judge ruled that Petitioner would not be permitted to testify to hearsay, trial counsel agreed that the hearsay testimony from the proffer would not be presented to the jury. The limitations placed on the non-hearsay portions of Petitioner's proffer, however, amounted to an outright prohibition on Petitioner's testimony because Petitioner needed to explain to the jury why he initially fled the scene. R. 278, ll. 8 – 14. Petitioner's argument at trial was that the judge was preventing Petitioner from testifying to matters that were critical to his defense in violation of the Constitution. R. 278, ll. 8 – 14.

Third, with regard to this Court's reliance on Rule 403, SCRE, as a basis to limit the proffered testimony, the non-hearsay proffered testimony does not become unfairly prejudicial just because the forensic psychologist found Petitioner did not suffer from mental illness. The trial judge erred in limiting Petitioner's testimony because he believed the jury would misinterpret the evidence as suggesting that Petitioner was raising an insanity defense. App. 275, l. 2 – 277, l. 9. Petitioner was not offering a mental health defense. Petitioner's defense at trial was that the shooting was unintentional. The proffered testimony explained why Petitioner

left the scene of the shooting incident and counters the State's argument that he fled the scene of the shooting because he acted with malice. Respectfully, no possible confusion could have resulted in unfair prejudice from the remaining non-hearsay portions of the proffered testimony when Petitioner was not asserting a mental health defense. The jury would not have been instructed about mental health defenses. Petitioner had the right to explain to the jury why he left the scene of the incident. Under the facts of this case, any interest served by the evidentiary rules do not justify the limitation on Petitioner's constitutional right to testify in his own defense.

A criminal defendant has a fundamental right to testify in his own defense. Rock v. Arkansas, 483 U.S. 44 (1987). "[F]undamental to a personal defense . . . is an accused's right to present his own version of the events *in his own words.*" Rock v. Arkansas, 483 U.S. 44, 52 (1987) (emphasis added). In State v. Rivera, 402 S.C. 225, 242, 741 S.E.2d 694, 703 (2013), the South Carolina Supreme Court wrote:

> However, the right to present testimony is not without limitation. "The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.' " Rock, 483 U.S. at 55, 107 S.Ct. 2704 (quoting Chambers, 410 U.S. at 295, 93 S.Ct. 1038). "But restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve." Id. at 55–56, 107 S.Ct. 2704. "In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify." Id. at 56, 107 S.Ct. 2704. Evidence rules which " 'infringe upon a weighty interest of the accused' " but fail to serve any legitimate interest are arbitrary. Holmes v. South Carolina, 547 U.S. 319, 324–26, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (quoting United States v. Scheffer, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998)).

The restriction on Petitioner's right to testify about why he left the scene is disproportionate to any purpose served by the evidentiary rules. Petitioner was denied the right to testify about why he left the scene. The limitation in the present case is not justified by the rules against hearsay because Petitioner did not seek to introduce hearsay testimony. The

limitation in the present case is not justified by Rule 403 as resulting in unfair prejudice by confusing the jury when a mental health defense would not have been an option for the jury to even consider and the probative value of the testimony was great.

3. The Court of Appeals erred in finding that the challenge to the trial judge allowing impeachment of Petitioner with a remote conviction was waived and not preserved for appellate review.

The trial judge erroneously allowed the State to impeach Petitioner with a remote conviction from 1999. The judge made a final – and erroneous – ruling that Petitioner's prior conviction from 1999 was admissible immediately before Petitioner took the witness stand. Critically, *after* the judge made this final ruling, defense counsel asked for clarification as to what the crimes would be referred to as: "Is the Court going to allow the State to impeach on the actual name of the crime or are we going to just refer to it as a crime involving dishonesty?" R. 285, ll. 12 – 15. The judge then asked what the State's position was and Stated: "I don't think I could necessarily require it, but I would strongly suggest that it simply be referred to as crimes of dishonesty as opposed to actual crimes so that it's not too confusing or prejudicial to the jury and they understand the purpose of the admission of the convictions." R. 285, ll. 16 – 25. The judge erred in admitting the remote conviction.

The Court of Appeals determined that Petitioner failed to preserve his objection to the use of his remote conviction against him because, after Petitioner's objection was unsuccessful, defense counsel asked the judge if he was going to allow the State to refer to the prior conviction by name or in the alternative as a "crime of dishonesty" in an apparent attempt to mitigate the unfair prejudice Petitioner would suffer. The Court of Appeals erred in finding that Petitioner

"acquiesced to referring to [the remote conviction] as a crime of dishonesty." State v. Brewton, Op. No. 5912 (S.C. Ct. App. substituted and refiled August 10, 2022) (Howard Adv. Sh. No. 28 at 43). The Court of Appeals erred.

In State v. Mueller, 319 S.C. 266, 460 S.E.2d 409 (Ct. App. 1995), the State argued on appeal that the defendant had waived his objection to the admissibility of a prior criminal conviction for purposes of impeachment. Specifically, the defendant in Mueller called her husband as the first defense witness after the State rested its case. The husband had a prior conviction for possession with the intent to distribute marijuana that the State sought to impeach him with. The trial judge ruled that the conviction was admissible over the defendant's objection. Therefore, "[a]nticipating the State's cross-examination, the defense revealed Mr. Mueller's conviction during direct examination." Mueller, 319 S.C. at 267-68, 460 S.E.2d at 410.

The Court of Appeals held in Mueller that because the judge made its ruling on the admissibility of the prior conviction immediately before the witness took the stand, the ruling was a final ruling and that the defense was not required to renew her objection in order to preserve the issue for appeal. Id. at 268-69, 460 S.E.2d at 410-11. The Court of Appeals further found that the defense did not waive the objection by eliciting the prior conviction on direct examination and that "[t]o force a defendant to choose between challenging an incorrect final ruling on appeal or minimizing the impact damaging evidence would be fundamentally unfair." Id. This Court agreed that "an attorney 'should not be given the Hobson's choice of either mitigating the damage to his witness by introducing impeachment evidence on direct examination, or preserving for review on appeal the error of a ruling already made.'" Mueller, 319 S.C. at 268, 460 S.E.2d at 410.

Petitioner did not waive the objection to the clearly inadmissible remote prior conviction from 1999. Once the judge made his final ruling that the conviction was coming in, defense counsel had a right, and the responsibility, to mitigate the prejudicial impact of that evidence. Issue preservation is not a "gotcha game," and instead of being hyper-technical, this Court should approach issue preservation with a practical eye and find that the trial judge's ruling was final and that Petitioner did not waive his objection by attempting to mitigate the unfair prejudice he would suffer as a result of the judge's erroneous ruling. See State v. Bowers, 428 S.C. 21, 832 S.E.2d 623 (Ct. App. 2019).

CONCLUSION

Based on the above arguments this Court should grant the petition for writ of certiorari to allow further briefing on the issues.

Respectfully Submitted,

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of October, 2022.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Spartanburg County
Honorable J. Derham Cole, Circuit Court Judge

Opinion No. 5912 (S.C. Ct. App. Filed August 10, 2022)

Lower Court Case No. 2017-GS-42-05579

THE STATE,

RESPONDENT,

V.

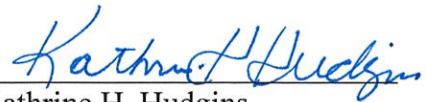
LANCE ANTONIO BREWTON,

PETITIONER

APPELLATE CASE NO. 2018-001572

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the petition for writ of certiorari to the Court of Appeals and appendix in the above-referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and the South Carolina Court of Appeals; and on Lance Antonio Brewton, #272849, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 24th day of October, 2022.



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