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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

On Petition for Writ of Certiorari to the Court of Appeals

Appeal from Greenwood County
The Honorable Frank R. Addy, Circuit Court Judge

Opinion No. 5951 (S.C.Ct.App. filed Nov. 23, 2022)

THE STATE,

Respondent,

v.

XZAREIRA OKEVIS GRAY,

Petitioner.

Appellate Case No. 2023-000253

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the Court of Appeals err by holding the state presented a witness with personal knowledge in order to authenticate a video where the witness did not observe the actual event captured on video, and therefore, the witness could not testify that the video was a fair and accurate depiction of the event? Although not addressed by the Court of Appeals, did the state also fail to present substantial circumstantial evidence to satisfy Rule 901(b)(4), SCRE, and fail to present evidence describing the process or system used to produce the video to satisfy Rule 901(b)(9), SCRE?

II. Did the Court of Appeals erroneously hold that it was not an abuse of discretion to deny Petitioner's motion for a new trial without a hearing where the jury deliberated for over ten consecutive hours during which they received only one meal and subsequently discovered evidence showed that at least one member of the jury believed not only that a verdict must be rendered, but that a verdict had to be rendered that day?

(Pet. 2).

RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. Whether the Court of Appeals properly found no abuse of discretion in the trial judge's allowing admission of a surveillance video of the shooting where a witness with knowledge of the camera's position and use testified to its authenticity.

II. Whether the Court of Appeals properly found no abuse of discretion in the trial judge's denying the motion for a new trial without a hearing where petitioner failed to offer any proper basis to question the jurors.

STATEMENT OF THE CASE

In May 2018, the Greenwood County Grand Jury returned indictments against petitioner, Xzareira Okevis Gray, for the murder of Demetrius "Meatball" Fuller, and possession of a weapon during the commission of a violent crime. (R. 540-41; 543-44). The case went to trial on May 6, 2019, before the Honorable Frank R. Addy. (R. 1). Attorneys Janna Nelson and Shane Goranson represented petitioner. Assistant Solicitors Joshua Thomas and Carson Penney prosecuted the case. Petitioner first sought immunity from prosecution under the Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410, *et. seq.* (R. 4, l. 18-23). After a hearing on the issue, the court denied the motion from the bench. (R. 80, l. 11-12). The jury ultimately found petitioner guilty as charged on both counts. (R. 515, l. 23; 516, l. 1). The court sentenced him to thirty-five years for murder and five years, consecutive for the weapon charge. (R. 524, l. 14-23)

Petitioner subsequently moved for a new trial, alleging the jury may have felt "undue pressure to render a verdict." (R. 535). In support of his motion, he attached a printout of a social media post from one of the jurors. (R. 536). The circuit court denied the motion in a written order finding petitioner had alleged insufficient grounds to warrant a hearing on the matter. (R 539). Petitioner timely served and filed a notice of appeal.

After briefing and argument, the South Carolina Court of Appeals ordered a limited remand for the circuit court judge to make specific findings of fact for its denial of immunity. (App. 1-12). The Court found no abuse of discretion, however, either in the admission of a surveillance video, of the shooting, or in denying petitioner's motion for a new trial without a hearing. (App. 9-11). The Court of Appeals denied rehearing on January 23, 2023. (App. 32-33).

On March 6, 2023, petitioner filed his petition for writ of certiorari in this Court. This return follows.

STATEMENT OF FACTS

Murder of Demetrius "Meatball" Fuller

Officer Kirby Claphan of the Greenwood Police Department was on patrol during the early morning hours of August 26, 2017. (R. 104, l. 11). Near the end of his shift, he pulled into the city maintenance shop to put gas in his patrol car. (R. 104, l. 24-25; 108, l. 8-9). While at the shop, he heard a gunshot that "sounded real close." (R. 105, l. 1). In fact, Officer Claphan believed that the gunshot came from Gray Street, which was "directly behind" him. (R. 105, l. 2-3; 118, l. 1; St. Ex. 6). He and another officer immediately drove towards the sound of gunfire. (R. 105, l. 3-4).

When Officer Claphan drove down Gray Street, he saw four men standing outside a house at 323 Gray Street. (R. 105, l. 16-17; 115, l. 9-20). As he passed by the house, a woman flagged him down and directed him one street over. (R. 105, l. 18-23; St. Ex. 6). Once there, Officer Claphan found Demetrius Fuller (victim) lying on the ground outside an apartment. (R. 106, l. 15-21; St. Ex. 10). The victim was not wearing a shirt and had a gunshot wound to the stomach. (St. Ex. 11-12). He was also wearing a paper wristband indicating he had been to the Getaway Bar and Grill. (R. 152, l. 7-11; St. Ex. 11-12). The victim was asking for water and mumbling something unintelligible. (R. 136, l. 19-22).

Paramedics arrived on scene and realized that the victim was fighting for his life. (R. 158, l. 13-24). As they rushed him to the hospital, he went into cardiac arrest. (R. 159, l. 1-2). The victim died in the emergency room. (R. 263, l. 23-24). An autopsy would later confirm that the cause of death was a single gunshot wound to the abdomen. (R. 282, l. 18). The bullet pierced a major artery leading to the victim's lower body, causing him to bleed to death. (R. 282, l. 6-23). The autopsy also revealed that the victim suffered no other significant injuries.[1] (R. 280, l. 7-8).

[1] The pathologist did note a scrape on the victim's right knee. (R. 280, l. 8-9).

In particular, there was no bruising on the victim's hands, indicating that he had not thrown a punch.[2] (R. 281, l. 12-13). Additionally, there was no alcohol or drugs in the victim's blood, which meant he was not under the influence when he died.[3] (R. 349, l. 20-25; 352, l. 5).

At the hospital, a detective spoke with the victim's family in hopes of identifying people who witnessed the shooting. (R. 287, l. 1-3). The detective learned that Raymond Kennedy, who was at the hospital, saw what happened. (R. 287, l. 6-11). Kennedy explained that on the night of the murder he was hanging out at Ricky Grant's house, which is on Gray Street. (R. 161, l. 5-11). Petitioner, petitioner's brother, and the victim were also there. (R. 161, l. 13-15). Later that evening, petitioner, the victim, and Grant decided to go to a club. (R. 161, l. 18-20). All three men left in the same car. (R. 162, l. 3). Petitioner and Grant subsequently returned to the house without the victim. (R. 162, l. 5-6).

About an hour after they returned, Kennedy saw the victim walking down Gray Street towards the house. (R. 162, l. 15-16). The victim was upset that his gun was missing and went inside. (R. 164, l. 12-16; 165, l. 4-6). When he entered Grant's house, the victim repeatedly asked petitioner if he had his gun. (R. 164, l. 5-23). Petitioner denied having the victim's gun, and the two men began to argue. (R. 164, l. 23; 165, l. 1). Grant told them to take the argument outside, so they did. (R.165, l. 7-9). Petitioner's brother tried to calm everyone down, but the argument continued on the front porch. (R. 167, l. 11-23).

Once they were outside, petitioner pushed the victim off the porch and yelled, "I ain't got your gun." (R. 168, l. 1-6). Nevertheless, the victim "kept asking about the gun," and they started

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[2] According to the forensic pathologist, the absence of any bruises to the hands or fingers also meant that no one had "tight control over his hands." (R. 281, l. 12-13).

[3] The toxicologist noted there was alcohol in the victim's ocular fluid, indicating that the victim was in the "postabsorptive phase of consuming alcohol." (R. 351, l. 4-6).

"tussling" in front of the house. (R. 168, l. 10-20). The two men briefly "locked up" in the front yard before the victim fell to the ground. (R. 169, l. 1-7). Kennedy saw the victim on the ground, heard a gunshot, and looked up at petitioner. (R. 169, l. 5-24). Petitioner was holding a gun and subsequently ran behind the house. (R. 169, l. 24; 170, l. 7). The victim was able to get up and said, "the MF shot me for real." (R. 169, l. 7-8). Although the victim tried to run for help, he collapsed on the next street over. (R. 170, l. 16-18).

After speaking with Kennedy, the detective traveled to Ricky Grant's house to further investigate. (R. 287, l. 18-21). When the detective arrived, he found a shell casing in the front yard. (R. 287, l. 23). Additionally, an individual later reported that a gun was discovered in some bushes behind the house. (R. 231, l. 19-22; 292, l. 12-21). SLED compared the gun to the shell casing found in the yard and the bullet removed during the autopsy. (R. 360, l. 9-22). The gun matched both. (R. 360, l. 11-13; 361, l. 1-5).

While collecting evidence in Grant's yard, the detective noticed that the neighbor across the street had several surveillance cameras. (R. 290, l. 1-10). The neighbor explained that he regularly checks his cameras to ensure they are constantly recording footage. (R. 95, l. 21-25; 96, l. 10-13). One of the cameras points towards Grant's house. (R. 95, l. 11-18; 290, l. 8-10). The neighbor allowed the detective to review the footage captured earlier that morning. (R. 97, l. 15-21). Although the time stamp on the surveillance system was not accurate, the detective compared the time that was showing on the live feed with the time on his cell phone. (R. 290, l. 24-25; 291, l. 1-7). Once he determined how much the time stamp was off, the detective rewound the footage to the approximate time of the murder. (R. 291, l. 2-7). When the detective saw police cars ride through, he realized that the camera captured footage from the murder. (R. 291, l. 2-7).

In addition to obtaining surveillance footage, the detective interviewed Ricky Grant. (R. 295, l. 16). Grant confirmed that he, petitioner, and the victim rode over to The Getaway Bar and Grill. (R. 202, l. 7-22). When they got to the club, the victim hid a firearm in some bushes across the street. (R. 203, 1-5). According to Grant, guns are not allowed inside the Getaway Bar and Grill. (R. 203, l. 25). Although Grant and the victim went inside the club, petitioner stayed in the parking lot. (R. 203, l. 4-10). About an hour later, Grant and petitioner went back to the house. (R. 204, l. 15-18). They left the victim at the club. (R. 204, l. 21).

The victim subsequently returned to Grant's house and said he could not find his gun. (R. 206, l. 10-17). When he asked petitioner about the missing gun, the two got into an argument. (R. 206, l. 13-17). As the argument intensified, Grant told them to take it outside. (R. 206, l. 22-23). Petitioner and the victim went outside, while Grant stayed in the house. (R. 206, l. 25). About a minute later, Grant heard a gunshot and ran to the front door. (R. 207, l. 2). He opened the door and saw the victim running down the street holding his stomach. (R. 207, l. 5-7). Petitioner appeared to be in shock and tried to come inside the house. (R. 207, l. 11-12). Grant refused to let him in and never saw him again that night. (R. 207, l. 15-18).

After interviewing these witnesses, the detective obviously identified petitioner as a suspect in the murder. (R. 293, l. 25). Law enforcement tried to locate petitioner in Greenwood, but could not find him. (R. 294, l. 4-5). Ultimately, law enforcement arrested petitioner at a family member's apartment in Columbia. (R. 294, l. 5-11).

Testifying in his own defense, petitioner told the jury that the victim "swung and he like missed. He swung, but he really missed me." (R. 378, l. 16-17). He testified that he and Grant were laughing at the victim when the victim returned to the house. (R. 374, l. 18). The victim took offense to the laughter and confronted petitioner about the prior altercation. (R. 375, l. 3-4;

394, l. 2-7). Petitioner claimed he wrestled the gun away from the victim, stumbled back, and fired the weapon. (R. 379, l. 1-7). Petitioner claimed that his eyes were closed when he fired, so he was unaware if the victim was hit. (R. 384, l. 1-2). After the shooting, petitioner took a cab all the way to his sister's house in Columbia. (R. 384, l. 4-5; 400, l. 18).

The Time and Length of Deliberations

The jury began deliberations at 12:40 pm. (R. 498, l. 13). At 5:43 pm that same day, the court received a note that "some jurors are concerned about kids at home." (R. 509, l. 1, 23-24; R. 528). The court instructed the jurors that they could call home to check on their families, but otherwise directed them to continue. (R. 511, l. 10-16). At 8:58 pm, the court received another note asking for a break in order to use the phone and smoke. The note also suggested the jury was "getting a little bit deadlocked in the opinion of the foreperson." (R. 513, l. 9-10). Specifically, the note read that "we are pretty deadlocked at 10:2." (R. 529).

The court offered the jury a choice between continuing to deliberate that evening and reconvening the following Monday. (R. 513, l. 23-25; 514, l. 1-11). The jury chose to continue deliberations and reached a verdict almost two hours later. (R. 514, l. 23; 515, l. 1-2). At 10:50 pm, the jury found petitioner guilty as charged on both counts. (R. 514 l. 23; 515, l. 21-25; 516, l. 1). At petitioner's request, the court polled the jurors individually. (R. 516-20). The verdict remained unchanged. (R. 516-20).

Post-Trial Motion

On May 23, 2019, petitioner filed a motion for a new trial. (R. 534). Petitioner alleged that the jury may have been unduly influenced in reaching its verdict. Specifically, petitioner noted that the jury deliberated until almost 11:00 pm without any dinner. (R. 534). Additionally, petitioner offered a Facebook post from one of the jurors that read "Wtf...just getting out of court

frm [sic] all day....14 long hrs!!!" (R. 536). In response to a comment on the post, the juror replied, "general sessions murder trial...just couldn't leave without a verdict." (R. 536). According to petitioner's motion, the juror did not respond to an investigator's attempt to make contact with her. (R. 534-35). Petitioner requested a hearing so that the court could question each juror whether they felt undue pressure to reach a verdict. (R. 535).

The court denied the motion without a hearing. (R. 538). First, the court noted that although the jury suggested it was struggling to reach a verdict, it did not indicate it was deadlocked. (R. 538). The court did not give an *Allen* charge.[4] Second, the court held that a lengthy deliberation, standing alone, was insufficient to warrant an inquiry into the nature of the deliberations. (R. 538). Third, the court assessed that the nature of the inquiry would likely be improper because it would cause the jurors to reveal the subject matter of their deliberations. (R. 539). According to the court, the Facebook post did not provide cause to justify the drastic step of questioning all twelve jurors. (R. 539). Finally, the court noted that it ordered the jury a late lunch. Although supper was not provided, the jury room was stocked with drinks, crackers, and other snacks. (R. 539). The court also declined to eat dinner while the jury deliberated. (R. 539).

STANDARD OF REVIEW

Considerations for Granting a Petition for Writ of Certiorari

"A writ of certiorari is not a matter of right, but of sound discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. Though there is no controlling or discrete definition of "special important reasons," this Court will generally consider whether there are "novel question of law" presented, or "there is a dissent," or conflict between the Court of Appeals resolution and precedent from this Court or the Supreme Court of the United

[4] *Allen v. United States*, 164 U.S. 492 (1896).

States. *Id.* This Court may also consider whether the petition presents a question reflecting a "substantial constitutional issue[]." *Id.*

Admission of Evidence

The standard of review for the admission or exclusion of evidence is an abuse of discretion. *State v. Brown*, 424 S.C. 479, 487, 818 S.E.2d 735, 739–40 (2018). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Anderson*, 386 S.C. 120, 126, 687 S.E.2d 35, 38 (2009) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)).

Denial of Post-Trial Motion

"A trial judge has the discretion to grant or deny a motion for a new trial, and his decision will not be reversed absent a clear abuse of discretion." *State v. Dean*, 427 S.C. 92, 101, 828 S.E.2d 243, 248 (Ct. App. 2019) (quoting *State v. Johnson*, 376 S.C. 8, 11, 654 S.E.2d 835, 836 (2007)).

ARGUMENT

I. The Court of Appeals properly found no abuse of discretion in the trial judge's allowing admission of a surveillance video of the shooting where a witness with knowledge of the camera's position and use testified to its authenticity.

Relevant Facts.

During the immunity hearing, the State introduced the surveillance video through the neighbor. (R. 31-39). The neighbor testified that he has eight security systems installed at his house, all of which feed into a central monitor. (R. 32, l. 23). One of those cameras points towards Gray Street. (R. 33, l. 4-5). According to the neighbor, that camera was working on the morning of the murder, August 26, 2017. (R. 33, l. 10). The neighbor explained that he knew the camera was working properly because he checks it every few days. (R. 33, l. 12-15).

The surveillance footage has a time stamp in the upper right hand corner. (St. Ex. 2). The time stamp reads "2017-08-26 18:10:00" at the start of the video. (St. Ex. 2). Around seven minutes and fourteen seconds into the video,[5] one can see the flash of a gunshot in the bottom left hand quadrant of the video. (St. Ex. 2). Seconds later, an individual runs down Gray Street and out of the picture. (St. Ex. 2). Within two minutes, police cars drive down Gray Street in the same direction as that individual. (St. Ex 2).

Petitioner objected to the introduction of the video at the hearing because the time stamp did not match the time of the murder. (R. 35, l. 1-6). Specifically, petitioner argued the time stamp appeared to be approximately 6:00 pm in military time. (R. 35, l. 4-6). The court responded by permitting the solicitor to lay additional foundation. (R. 35, l. 7-8). The neighbor subsequently explained that when he installed the system, he just plugged it in and did not set the correct time. (R. 37, l. 1-2). In order to review footage from a specific time, he "counts backwards" however far he needs to go. (R. 37, l. 3-6). The court subsequently overruled the objection, noting it went to the weight of the evidence, not its admissibility. (R. 37, l. 18). The court further advised that its ruling only addressed the video's admissibility at the hearing, not during the State's case-in-chief. (R. 37, l. 22-23).

Petitioner subsequently moved *in limine* to bar admission of the video at trial. (R. 82, l. 12-25; 83, l. 1-3). Again, petitioner argued that "the timestamp does not match the actual time of the incident." (R. 82, l. 12-13). Alternatively, petitioner argued the video was inadmissible under Rule 403 because the poor quality of the picture invited speculation from the jury. (R. 82, l. 23-25). The court disagreed, assessing that the State had made a sufficient showing of authenticity and that the video depicted relevant information. (R. 85, l. 23; 86, l. 13-14). After the court

[5] The time stamp reads 18:17:16. (St. Ex. 2).

explained its conditional ruling, the solicitor noted that the lead detective could further clarify how he determined the video was from the time of the shooting. (R. 86, l. 1-3).

The neighbor's testimony during the State's case-in chief was similar to that given pre-trial. He has eight security cameras at his house, one of which faces Gray Street. (R. 95, l. 7-13). The cameras constantly record and feed into a monitor in his room. (R. 96, l. 3-13). (R. 96, l. 20-23). Because he never entered the correct time when he installed the system, if he wants to see a particular point in time, he just counts back as needed and rewinds accordingly. (R. 97, l. 6-14). On August 26, 2017, a police officer came to his house and asked to review footage from that morning. (R. 96, l. 20-23; 97, l. 15-21). The officer rewound the footage back to the "early morning hours" that day. (R. 97, l. 21). The neighbor identified the footage as what he and the officer reviewed that morning. (R. 99, l. l. 1-8). The court admitted the video into evidence. (R. 99, l. 18-19).

After the video was admitted into evidence, the jury heard additional details on its authenticity. For example, the neighbor pointed to Gray Street in the middle of the picture and the city shop in the background. (R. 100, l. 5-13). Later on, the lead detective identified the city shop, Gray Street, Ricky Grant's house, and Ricky Grant's vehicle. (R. 297, l. 25; 298, l. 1-21). The detective also identified on the video where he found the shell casing. (R. 303, l. 1). With respect to the inaccurate time stamp, the detective explained that he simply compared the time on his phone to the time on the live feed. (R. 291, l. 2-3). After he figured out the difference between the two, he rewound the footage to the approximate time of the shooting. (R. 291, l. 3-5). The detective assessed that the shooting appeared on the footage shortly before the police cars drive through. (R. 291, l. 5-7). Furthermore, as discussed above, Raymond Kennedy's description of events matches the footage on the video. Kennedy testified that petitioner fired the weapon, the

victim ran down Gray Street, and the police arrived shortly thereafter. (R. 169, l. 17-24; 170, l. 16-18; 172, l. 19-25). Should the Court find the neighbor provided insufficient testimony to authenticate the video, this subsequent evidence should render any error harmless. See e.g. United States v. Luna, 649 F.3d 91, 103 (1st Cir. 2011)("If evidence is admitted prematurely because it is not yet authenticated, a court of appeals need not remand for a new trial if later testimony cures the error.").

Treatment in the Court of Appeals:

Recognizing "[t]he authentication standard is not high," but does require proper foundation, the Court of Appeals resolved that the video was properly authenticated by the neighbor's "personal knowledge." (App. 9). The explanation on the time stamp issue was likewise addressed by "personal knowledge." (App. 9).

Discussion:

Petitioner has failed show any "special and important reasons" to grant review of any one of his eight questions presented. Such circumstances are not present here, nor are there any like circumstances of broad application and pressing importance presented in this case. In essence, this case shows an ordinary application of law to the facts of the case. Certiorari review is not warranted, and the petition for writ of certiorari should be denied.

The Court of Appeals was correct that the standard is not particularly high. Simply, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Rule 901(a), SCRE. On this, Petitioner agrees with the Court of Appeals. (Pet. 7-8). While Petitioner claims the "bench and bar" could benefit from "guidance" for such decisions, (Pet. 8), sufficient guidance is already set out in the rule. Rule 901 articulates several ways to authenticate various types of evidence. Of note here is the method of authentication by producing

a "witness with knowledge" who may testify "that an item is what it is claimed to be." Rule 901 (b)(1), SCRE. The neighbor's testimony follows that method. As discussed above, the neighbor testified that one of his surveillance cameras faced Gray Street and constantly records footage onto a central monitor. (R. 95, l. 13; 96, l. 3-13). The neighbor routinely checks his equipment to ensure everything is recording properly. (R. 95, l. 23-25; 96, l. 10-11). On the day of the murder, a police officer came to his house and asked to review that camera's footage from earlier that morning. (R. 96, l. 20-23; 97, l. 15-21). According to the neighbor, the police officer rewound the footage "back a few hours to the early morning hours." (R. 97, l. 19-21). The neighbor confirmed that the State's exhibit was the same footage that he and the officer reviewed. (R. 98, l. 9-25; 148, l. 1-8). Based on this testimony alone, a juror could reasonably find that the video was what the State claimed it to be: surveillance footage of the crime scene on the morning of the murder.

Petitioner's argument that the witness could not (or did not) describe the workings of the system, the brand name, how long the video is generally saved, (see Pet. 9-10), suggests requirements greatly exceeding that set out in the Rule. The Court of Appeals, consistent with the direction of the Rule, rejected petitioner's argument that more was necessary. (See App. 9, "it is irrelevant that Vacquec was not contemporaneously watching his monitor or at the scene of the shooting; his personal knowledge sufficiently authenticated the video.").[6] "[A] party need not rule

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[6] To the extent petitioner takes exception to the Court of Appeals' deeming the example "irrelevant," (Pet. at 10), petitioner is limited by his own invitation: he invited the Court of Appeals to address such an example by the argument in his brief that the neighbor was "unable to provide any additional circumstantial evidence to establish the video was from the morning in question or was accurately recorded." (App. Brief 34). He also undermines his own argument. Petitioner has in essence conceded and/or abandoned his prior argument that the working of the machine should be known, understood, and explained before authentication may be established. But, at the end of the day, the position he takes requires a court to abandon the established rule and expand out to harsh and hard requirements to show authentication which is contrary not just to the language of

out any possibility the evidence is not authentic. In the realm of authentication, the law, like science, is content with probabilities." *State v. Green*, 427 S.C. 223, 230, 830 S.E.2d 711, 714 (Ct. App. 2019), *aff'd as modified,* 432 S.C. 97, 851 S.E.2d 440 (2020). Petitioner failed to show an inadequate basis for admissibility and the Court of Appeals properly affirmed.

Additionally, though not addressed, the rule allows another, relevant method: distinctive characteristics, such as appearance, contents, or substance can establish an exhibit's authenticity. Rule 901 (b)(4) SCRE. The date on the video's time stamp was from the day of the murder: August 26, 2017. (St. Ex. 2). Granted, the hour on the time stamp was incorrect because the neighbor did not input the correct time of day when he installed the system. (R. 97, l. 3-5). As such, the neighbor and police officer had to "count back" to ensure they retrieved footage from the time of the murder. (R. 97, l. 6-21). Nevertheless, the video depicts the flash of gunfire, an individual running away, and the arrival of police cars within minutes. This certainly connects the time to the scene and the murder. And the video, though taken at night, was still highly probative.

Even so, Rule 403 provides that even relevant evidence "may be excluded if its probative value is ***substantially outweighed*** by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Rule 403, SCRE (emphasis added). The Court of Appeals properly found that standard cannot be met here. (App. 10). Petitioner asserted and relied on self-defense. (R. 454, l. 14-25; 473, l. 9). Specifically, petitioner claimed that he took the gun from the victim's

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the rule, but also case law and custom. *See State v. Brown,* 424 S.C. 479, 492, 818 S.E.2d 735, 742 (2018) ("the witness need not be an expert"). If such an expansion could ever be required, this would not be the case for it. It remains difficult to see a logical argument that the scene from the surveillance tape was somehow inaccurate when there is no command or subjectivity to a machine's recording for basic surveillance (compare with *Brown* where the authentication was of a system that was utilized specifically to produce a result and applying a different method for authentication under the rule), the neighbor testified to the position, the shooting is capture by the visible muzzle flash, and any block, blurriness or other obscuring element would be visible for consideration in determining weight or value. Petitioner's argument was properly rejected.

waistband, stumbled back, and fired when the victim rushed towards him. (R. 379, l. 1-7). Petitioner also claimed that his brother was not present at the scene. (R. 391, l. 2-7). The video may fairly be said to contradict both of these claims.

Approximately seven minutes and fourteen seconds into the video, a flash from a gun is visible in the bottom left hand quadrant of the video. (St. Ex 2). In front of the shooter, there is an individual who appears to be hit. (St. Ex. 2). In contrast to petitioner's testimony, that individual is stationary immediately before the gunfire. (St. Ex. 2). In other words, the victim is not rushing towards the shooter, as petitioner testified. Additionally, the video reveals the presence of a third-party standing next to the shooter when he fires. (St. Ex. 2). As noted above, Raymond Kennedy testified that petitioner's brother was standing in the front yard when he shot the victim.[7] (R. 166, l. 16).

The Court of Appeals properly and reasonably concluded that the surveillance footage gave the jury an unbiased perspective to assess petitioner's claim that he reasonably feared for his life – "an alternative perspective of the shooting that was objective and neutral." (App. 10). The video is dark, but the Court of Appeals reasoned: "Despite the dark image, the video clearly shows more than two people in and round Grant's yard at the time of the shooting." (App. 10). As such, it "was highly probative." (App. 10). As the circuit court noted, a picture is worth a thousand words. (R. 85, l. 16-17). In sum, Gray failed to show a basis to find an abuse of discretion and his issue could not support relief. Thus, the Court of Appeals did not err in affirming the lower court. Certiorari review should be denied.

[7] During the immunity hearing, Raymond Kennedy testified that petitioner's brother was standing beside petitioner when he fired the weapon. (R. 51, l. 17-25; 91, l. 1-4). At trial, his testimony was that petitioner's brother was in the yard when petitioner fired. (R. 166, l. 16).

II. The Court of Appeals properly found no abuse of discretion in the trial judge's denying the motion for a new trial without a hearing where petitioner failed to offer any proper basis to question the jurors.

Treatment in the Court of Appeals:

The Court of Appeals resolved, in relevant part:

> The trial court did not abuse its discretion in denying Gray's motion for a new trial without a hearing. The trial court aptly recognized that Gray's requested inquiries are prohibited by Rule 606(b), SCRE. The juror's Facebook post did not indicate that any extraneous prejudicial information or outside influence had an impact on the jury's deliberations; it also did not indicate that Gray's verdict was reached as a result of racial or gender intimidation or that the jury began deliberating prematurely. Therefore, Gray's requested inquiries would have involved juror testimony about internal influences unrelated to fundamental fairness. Accordingly, we affirm as to this issue.

(App. 9).

Discussion:

Petitioner has again failed to show any "special and important reasons" to grant review of any one of his eight questions presented. The Court of Appeals correctly affirmed based on a fair reading of the record and the dictates of Rule 606(b), SCRE. Certiorari review is not warranted, and the petition for writ of certiorari should be denied.

Rule 29, SCRCrimP, provides criminal defendants an avenue to file post-trial motions. A post-trial motion under Rule 29 "may in the discretion of the court, be determined on briefs filed by the parties without oral argument." Rule 29(a), SCRCrimP. In other words, the decision to hold an evidentiary hearing on a post-trial motion is within the trial court's discretion.

The circuit court had a reasonable basis to deny petitioner's request for a hearing based on the content of the Facebook post alone. As noted above, the juror posted, "general sessions murder trial ... just couldn't leave without a verdict." (R. 536). The plain text indicates a reflection upon

the juror's sacrifice of time to fulfill the civic obligation of jury service. Contrary to petitioner's argument, it does not mean the juror thought she was *physically barred* from leaving the courthouse. The circuit court was crystal clear in giving the jury a choice between continuing deliberations into the evening and returning the following week to continue. (R. 513, l. 23-25; 514, l. 1-11). Petitioner's strained interpretation to indicate some type of erroneous misunderstanding regarding the return of a verdict is contrary to the record and plain meaning of the post.

Moreover, petitioner did not even present a sworn affidavit to accompany the Facebook post. Thus, the post itself was of little value. At a minimum, the circuit court could insist upon a sworn affidavit before marching the jury back to the courthouse. *See State v. Ziegler*, 364 S.C. 94, 112-13, 610 S.E.2d 859, 869-70 (Ct. App. 2005)(holding the circuit court was not required to take juror testimony regarding alleged misconduct because the defendant only provided unsworn statements from jurors). Furthermore, the juror apparently declined to respond to petitioner's investigator. (R. 535). Had the juror been expressing frustration at being coerced to render a verdict, as petitioner argues, then surely she would have been more forthcoming to petitioner's counsel. But, specifically, petitioner sought testimony on the understanding of the court's instructions, which simply is not allowed:

> a juror may not testify as to **any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict** or indictment **or concerning the juror's mental processes in connection therewith,** except that a juror may testify on the question whether **extraneous prejudicial information** was improperly brought to the jury's attention or whether any **outside influence was improperly brought to bear upon** any juror.

Rule 606(b), SCRE (emphasis added). As the rule makes clear, juror testimony is generally limited to determine whether there was an external influence upon the jury. Id. A case of external

influence arises "where jurors receive information during deliberations from some outside source." *Zeigler*, 364 S.C. at 110, 610 S.E.2d at 867. Additionally, our courts have recognized a "strict" exception to permit juror testimony about internal influences when necessary to ensure "fundamental fairness." *Id.* To date, South Carolina courts have recognized two situations serious enough to fall under this exception: (1) allegations of racial or gender intimidation towards a particular juror, and (2) allegations that the jury began deliberating prematurely. *See State v. Hunter*, 320 S.C. 85, 463 S.E.2d 314 (1995); *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999); *see also Winkler v. State*, 418 S.C. 643, 667-68, 795 S.E.2d 686, 699 (2016) (Hearn, J., concurring) (noting these two exceptions). In contrast, allegations that jurors misunderstood the law are insufficient to implicate fundamental fairness. *State v. Pittman*, 373 S.C. 527, 555, 647 S.E.2d 144, 158 (2007)("a jury's misapprehension of the law is not enough to impeach a verdict"); *State v. Galbreath*, 359 S.C. 398, 597 S.E.2d 845 (Ct. App. 2004) (holding that a juror's decision to convict because she erroneously believed that the defendant would not receive jail time did not affect fundamental fairness).

Here, petitioner seeks to compel testimony surrounding: (1) the impact of the length of deliberations on the jury, (2) the impact of "lack of nourishment" on the jury, and (3) the jury's "understanding of whether a verdict had to be rendered." (Pet. 22). None of these categories involve admissible juror testimony under Rule 608(b) or the limited "fundamental fairness" exceptions.

Additionally, to whatever extent the general concept behind petitioner's request could be entertained (and Respondent maintains it cannot), petitioner failed to offer sufficient basis to do so. The Facebook post, standing alone and without further explanation, should not be sufficient to require the trial judge to compel all twelve jurors to reappear in court for an inquiry. This Court

has said, "trial courts are justified in exercising a degree of caution before entertaining such evidence in an attack on a jury's verdict." *Shumpert v. State*, 378 S.C. 62, 69, 661 S.E.2d 369, 372 (2008). The caution here was warranted as was the denial of a hearing.

Gray failed to show a basis to find an abuse of discretion. Thus, the Court of Appeals did not err in affirming the lower court. Certiorari should be denied.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari to review the Court of Appeals' opinion should be denied.

Respectfully submitted,

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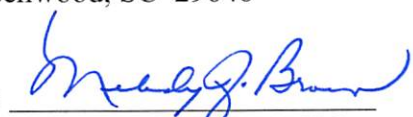
By: 
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