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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MASON YARBOROUGH,

APPELLANT

APPELLATE CASE NO. 2023-000694

INITIAL BRIEF OF APPELLANT

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2.

Whether the court erred by refusing to admit the testimony of the decedent's ex-wife, Lynn Yarborough, about violent acts that the decedent committed against her in appellant's presence, since the decedent's violent history and reputation were an essential element of appellant's defense pursuant to Rule 405(b), SCRE, and probative of appellant's state of mind at the time of the fatal shooting?

3.

Whether the court erred by refusing to instruct the jury on the lesser-included offense of involuntary manslaughter, where there was evidence appellant handled the weapon with reckless disregard for the safety of others and evidence that the that the gun accidentally discharged when the decedent grabbed the barrel of the gun or went for the gun since appellant was entitled to an involuntary manslaughter instruction given these facts?

4.

Whether the court erred by qualifying Scott Ballard an expert only in firearms and by ruling Ballard was not qualified by education, training or experience to testify about the injuries to the decedent's thumb or hand which suggested the decedent was grasping the barrel of the gun

when it discharged, and by also refusing to allow his psychological trauma of a shooting testimony which explained why eyewitness statements being taken close in time to the shooting or when the eyewitness was sleep deprived were not advisable for law enforcement since this testimony was relevant and Ballard was qualified under Rule 702, SCRE, to give these expert opinions which would have assisted the trier of fact in this case?

STATEMENT OF THE CASE

Appellant was indicted at the November 23, 2021, term of the Florence County grand jury for the offense murder. R. *. His case was called to trial on April 17, 2023, before the Honorable D. Craig Brown, and a jury. Matthew Swilley and J. R. Joyner represented appellant. J. Ryan White and Todd Tucker were the assistant solicitors. Tr. 1.

On April 21, 2023, the jury found appellant guilty of murder. Tr. 602, ll. 18-24. Judge Brown sentenced appellant to life imprisonment. Tr. 615, ll. 17-22.

This appeal follows.

STANDARD OF REVIEW

Issue one – impeachment and extrinsic evidence of a prior statement:

Generally, "[i]n criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). Rulings on the admission of evidence are within the trial court's discretion and will not be reversed absent an abuse of discretion. State v. Stokes, 381 S.C. 390, 398, 673 S.E.2d 434, 438 (2009).

Issue two – Rule 405 – Specific acts of violence evidence:

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001); State v. Wood, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). Appellate courts are bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 454, 527 S.E.2d 105, 111 (2000); State v. Williams, 326 S.C. 130, 135, 485 S.E.2d 99, 102 (1997); State v. Patterson, 367 S.C. 219, 224, 625 S.E.2d 239, 241 (Ct. App. 2006); State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 505 (Ct. App. 2004).

The admissibility of evidence is within the sound discretion of the trial judge. State v. Mansfield, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. app. 2000); State v. Patterson, 337 S.C. 215, 228, 522 S.E.2d 845, 851 (Ct. App. 1999). Evidentiary rulings of the trial court will not be reversed on appeal absent an abuse of discretion of the commission of legal error which results in prejudice to the defendant. Mansfield, 343 S.C. at 77, 538 S.E.2d at 263.

Issue three – Involuntary manslaughter instruction:

"The law to be charged to the jury is determined by the evidence presented at trial." State v. Hill, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "The trial court is required to charge

a jury on a lesser-included offense if there is evidence from which it could be inferred that the defendant committed the lesser, rather than the greater, offense." See State v. Drafts, 288 S.C. 30, 340 S.E.2d 784 (1986); State v. Gourdine, 322 S.C. 396, 472 S.E.2d 241 (1996).

"An appellate court will not reverse the trial [court]'s decision absent an abuse of discretion." State v. Pittman, 373 S.C. 527, 570, 647 S.E.2d 144, 166 (2007). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id. at 570, 647 S.E.2d at 166–67. "The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law." Id. at 570, 647 S.E.2d at 167.

"In determining whether the evidence requires a charge on a lesser-included offense, the [appellate court] must view the facts in the light most favorable to the defendant." State v. Cole, 338 S.C. 97, 525 S.E.2d 511 (2000)). "The charge request is properly rejected when there is no evidence tending to show the defendant was guilty of the lesser offense." Id. (citing State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996); State v. Cooney, 320 S.C. 107, 463 S.E.2d 597 (1995); State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994)).

Issue Four – admission of expert testimony:

The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted). The circuit court's decision to admit expert testimony will not be reversed on appeal absent "a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006) (citations omitted). An abuse of discretion occurs when the circuit court's conclusions "either lack evidentiary support or are controlled by an error of law." State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 495

(2013) (quoting Douglas, 369 S.C. at 429–30, 632 S.E.2d at 848) (internal quotation marks omitted).

"A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." State v. Grubbs, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing Means v. Gates, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct.App.2001)). To show prejudice, the appellant must prove "that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citing Means, 348 S.C. at 166, 558 S.E.2d at 924).

ARGUMENT

1.

The court erred by allowing the extrinsic evidence of witness Emerson Yarborough's forensic interview with Meg Temple to be played for the jury where Emerson admitted to making the prior statements, and simply testified at trial that the prior statements were not true, since extrinsic evidence of Emerson's prior statement was not admissible under Rule 613(b), SCRE, where he admitted making the prior statements.

Introduction

Appellant, Mason Yarborough, was the nineteen year-old adult son of the decedent, Chris Yarborough. Emerson Yarborough was appellant's twelve-year-old brother at the time of the fatal shooting. Appellant lived in a converted apartment or shed in the decedent's garage area, which included a pool table which Emerson and appellant were playing on that night. Emerson lived in the house with his father, their cousin Roger Cox, and Emerson's younger brother.

Relevant facts

Florence County Sheriff's Deputy Justin Bostick remembered being dispatched to a call at the decedent's Lake City Highway address that night regarding "an incident that took place at that location involving Mr. Yarborough and his father." Tr. 124, l. 18 – Tr. 125, l. 21. The dispatch was for a shooting. Tr. 125, l. 14 – Tr. 127, l. 19. When Bostick arrived on the scene, he found the decedent in the back half of the garage. He remembered that appellant was not in the garage, but Bostick saw appellant being placed into a patrol car by other police officers a short time after he arrived. Bostick described appellant as being "frantic." Tr. 129, l. 13 – Tr. 131, l. 4.

Investigator Chase McDaniel recalled that one shell casing was found during the search of the garage. His investigation revealed that only one shot had been fired that evening. Tr. 161, ll. 11-18.

Appellant's statement

Appellant's statement was played for the jury and is now before this Court for review. See State's Exhibit #75. In this statement, appellant told the police that he was with his brother, Emerson, and his girlfriend, Melia Steele that night. Appellant and Steele got into an argument. Appellant admitted that he grabbed a revolver and put it in his mouth, threatening suicide, during the argument. Steele was angry and she left. This left appellant and his brother, Emerson, alone in the shop to continue playing pool.

Appellant remembered that his father came into the shop yelling: "Stop this shit." Apparently, Steele had called the decedent about the argument. Appellant related that he already had his rifle out when the decedent entered the shop. Appellant grabbed the assault rifle because he was scared of his father. Appellant told the police that the gun went off accidently when his father reached for the gun. Tape at 20:00 – 21:05; tape at 29:18.

Appellant also explained that his father, the decedent, had always been abusive and violent towards him and he routinely approached him with an open pocketknife. Appellant said that he did not know if the decedent had his pocketknife at the time of the shooting. Appellant also related that he was looking out for his little brother Emerson and trying to protect him from going through a similar experience with the decedent. Appellant never wanted the fatal accidental shooting to occur. Tape at 30:00.

As will be seen infra, the court ruled that appellant's mother and the decedent's ex-wife, Lynn Yarborough, could testify about the decedent being violent towards appellant but that she could not testify about the decedent's violent abuse of her that was witnessed by appellant.

As stated, Melia Steele was appellant's girlfriend at the time. Steele remembered on October 29, 2020, that she was with appellant in the shed and that Emerson, and his younger brother Corbin Yarborough, and their Uncle Dickey (Roger Cox) were also present. Tr. 164, l. 1 – Tr. 166, l. 17.

Steele claimed that during her argument with appellant that night, he hit her with a pool stick. She maintained that appellant also choked her and appellant "held a gun to his head and threatened to kill himself." Steele also claimed that appellant threatened to kill their dog, and to kill her. She recalled that Emerson was going to the house to get ready for bed, but he returned to the shop when he heard them arguing. Tr. 167, l. 3 – Tr. 169, l. 10.

Steele testified that appellant told her that she was the reason he was "miserable. That I was like the problem in his life." Tr. 169, l. 1 – Tr. 170, l. 6. Steele offered that she was afraid at the time and she text messaged her grandmother to pick her up from the decedent's house. Tr. 170, ll. 3-25. Steele also texted the decedent to tell him about the argument. Tr. 171, ll. 1-8. Steele was not present when the incident between appellant occurred.

Emerson Yarborough was going to Johnsonville High School at the time of appellant's trial. Tr. 235, ll. 5-6. He had been living with the decedent, appellant, his little brother Corbin, and his cousin or uncle, Roger Cox, on October 29, 2020. Tr. 236, ll. 1-20.

Emerson testified that appellant and his girlfriend, Steele, got into an argument that night. Steele left angry, and appellant calmed down after she left. Tr. 236, l. 1 – Tr. 239, l. 6. Emerson remembered talking to investigator Chris Owens in the early morning hours of October 30, 2020

after the shooting. Emerson told Owens that he was in the garage with appellant and Steele that night. Tr. 239, ll. 12-23. Emerson testified that he did not recall telling Owens that appellant became visibly upset when the decedent came to the garage. He also did not remember if appellant asked the decedent if Steele had called the decedent. Tr. 239, l. 21 – Tr. 240, l. 6. In addition, Emerson did not remember if he told Owens that he did not see the decedent make an attempt to grab appellant's gun. Tr. 240, l. 2 – Tr. 241, l. 4.

Emerson did remember going to an interview at the Care House and giving a statement to Meg Temple. Emerson also recalled getting "choked up" when Temple asked him about the shooting incident. Tr. 241, ll. 8-24.

Emerson did not remember telling Temple that appellant's girlfriend, Steele, was doing schoolwork that night. He did remember telling Temple that appellant and Steele started to argue. Emerson could not recall certain other portions of the interview, stating: "It was all a blur." Tr. 242, l. 5 – Tr. 243, l. 5.

Jury out

The solicitor told the judge that he had a matter of law, and the jury was sent out of the courtroom. The solicitor asked to play the entire forensic interview with Meg Temple and Emerson to the jury since he would not admit the contents of the interview. The solicitor said that he was allowed to play this extrinsic evidence under Rule 613(c), SCRE. Tr. 243, l. 21 – Tr. 244, l. 10.

Defense counsel Joyner argued that Emerson was only testifying that he did not specifically remember certain items that the solicitor was asking about the interview. Rule 613(c) did not allow the interview to be played as a prior inconsistent statement under these circumstances. Tr. 244, l. 11 – Tr. 247, l. 13.

Jury returns

When the jury returned to the courtroom, Emerson answered the solicitor that he did not remember telling Meg Temple that appellant hit his girlfriend that evening. Tr. 248, l. 1 – Tr. 249, l. 14. Emerson thought he did tell Temple that appellant was acting "really dumb" that evening, and he also remembered telling Temple that after Steele left, he was trying to talk to appellant. Tr. 249, ll. 9-25. Emerson also thought that he told Temple that he remembered Steele calling the decedent to check on him. In addition, he recalled getting his dog and younger brother together for protection that evening. Emerson remembered telling Temple that when the argument occurred that the decedent, his younger brother Corbin, and Roger Cox were all in the house asleep. Tr. 250, l. 3 – Tr. 251, l. 14.

Emerson did not remember telling Temple that appellant and Melia got into an argument, and that appellant hit her. Tr. 251, l. 4 – Tr. 252, l. 21. This examination by the solicitor continued and Emerson admitted recalling certain items in his interview with Temple, and stating he did not remember telling her other items the solicitor asked him to admit. Tr. 256, l. 14 – Tr. 268, l. 10. Emerson did remember telling Temple that appellant got his revolver that night and he was "just acting psycho." Tr. 254, ll. 4-6.

On cross-examination by the defense, Emerson testified that he gave his statement about twelve hours after his father was shot, and that he was very angry at the time. He had only had a couple hours of sleep. Emerson said that he wanted to incriminate appellant as much as he could at that time because he was angry and upset with appellant who had earlier been "acting psycho." Tr. 254, ll. 4-6.

On continued cross-examination, Emerson testified that appellant never tried to get him to lie, but that the solicitor conversely had threatened and intimidated Emerson with perjury if "he didn't tell the story" the solicitor wanted to hear. Tr. 290, l. 2 – Tr. 291, l. 19.

Emerson said that he told the truth to the jury at trial that day under oath, but that he had lied before the trial at the behest of the solicitor. On redirect examination, Emerson told the solicitor "You wanted me to say the same lies that I said in the [forensic] video." Tr. 292, l. 17 – Tr. 293, l. 18.

Arguments of counsel

The solicitor then argued that under a combination of Rule 613(b), SCRE and Rule 608 (c), SCRE, that the state should be allowed to show the forensic interview to the jury to impeach Emerson. Tr. 296, l. 5 – Tr. 297, l. 13.

Defense counsel Swilley argued that Emerson had testified that he was mad at appellant at the time he made his statements, and he had *now admitted making the prior statements* but Emerson stated that they were not true. Counsel noted that Emerson had admitted making the prior statements and that therefore forensic evidence of the prior statements was not admissible given Emerson's admission that he made the prior statements. Tr. 296, l. 5 – Tr. 301, l. 23. "There is no inconsistency or no - - there is none of that. [The Rule] specifically says however if a witness admits making the prior statement, extrinsic evidence that the prior statement was made - - is inadmissible." Tr. 301, l. 16 – Tr. 302, l. 6. Counsel argued that Rule 613 (c), SCRE, was clear that if the witness admitted to making the statements, extrinsic evidence of that statement could not be admitted. Here, Emerson admitted making the statement but he simply said those statements were a lie. Tr. 301, l. 16 – Tr. 303, l. 4.

The judge ruled that Emerson's prior statements during the forensic interview were admissible once Emerson said the solicitor wanted him to tell the same lie as he was telling on the forensic video. Tr. 299, l. 11 – Tr. 303, l. 3.

The forensic interview

When the forensic interview was played for the jury, Emerson said on tape that appellant had hit Steele that evening and that he was "going crazy." Steele left, and she called the decedent to make sure Emerson was okay. Emerson said appellant had been beaten by the decedent in the past. However, Emerson also said during the forensic interview that the appellant grabbed the gun that night, shot the decedent and then stood over him and said: "How was that Dad?" Interview at 13:36. See State's Exhibit #89, Emerson Yarborough forensic interview.

Emerson told Temple during the interview that he talked to his mother on the phone and told her not to come to their house until the police arrived. He said that his mother stopped at the Church near their house to wait for the police to arrive. Appellant in the meantime had run to another girl's house. See State's Exhibit #89, Emerson Yarborough forensic interview.

Discussion

Rule 613(b), SCRE states: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of said statement is admissible. However, if a witness admits to making the prior statement, extrinsic evidence that the prior statement was made is inadmissible…" (emphasis added).

Defense counsel correctly argued that Emerson admitted to making the statements at issue to Meg Temple during the forensic interview, but Emerson simply stated that those prior statements were not true. They were a lie because Emerson was very angry at appellant at the time and he wanted to hurt appellant as much as possible.

The fact that Emerson testified at trial that the solicitor was attempting to get him to "say the same lies" during his in court testimony did not make extrinsic evidence of the prior statements he admitted admissible under Rule 613(b), SCRE. Extrinsic evidence of the admitted statements was not admissible under Rule 613 (b), SCRE. The judge erred in ruling otherwise.

Further, the solicitor's contention that because cross-examination in South Carolina was broad and allows any fact tending to show the bias, interest or partiality on behalf of the witness under State v. Brewington, 267 S.C. 97, 226 S.E.2d 249 (1976), did not mean that extrinsic evidence of a prior statement could be admitted at trial to impeach the witness where that statement was not inconsistent or denied. Under Rule 613, SCRE Emerson's statements were not prior inconsistent statements under Rule 613(b), SCRE once he admitted making them.

Emerson admitted to making the statements during the forensic interview but testified at trial that the specific items he was questioned about at trial by the solicitor -- *which he admitted saying -- were not true*. The solicitor could not introduce extrinsic evidence of a prior statement under Rule 613(b), SCRE, in the manner that the judge allowed in this case because the prior statement was not inconsistent – the witness, Emerson, admitted to making the statement.

The solicitor then skillfully took advantage of the prior statements Emerson made in the forensic interview, using them as prior consistent statements of the state's theory of the case, even though Emerson admitted to making the statements before he was improperly "impeached" with the statements he admitted making. Tr. 556. The solicitor repeatedly played portions of the

forensic interview during his closing statements to emphasize those damaging statements Emerson made about appellant during the interview. Tr. 565-566; Tr. 590; Tr. 592.

The court erred in admitting the forensic interview as extrinsic evidence and the state greatly capitalized on that legal error during its closing argument to the jury. Once Emerson admitted to making the statements, the solicitor had to accept those admissions which were to the state's advantage. Rule 613(b), SCRE was fundamentally violated in this case as shown above, and this abuse of this rule of evidence greatly prejudiced appellant, particularly in the manner the solicitor exploited it at trial.

Appellant should be granted a new trial.

2.

The court erred by refusing to admit the testimony of the decedent's ex-wife, Lynn Yarborough, about violent acts that the decedent committed against her in appellant's presence, since the decedent's violent history and reputation were an essential element of appellant's defense pursuant to Rule 405(b), SCRE, and appellant's state of mind at the time of the fatal shooting was also important.

Relevant Facts

The defense called the decedent's former wife, and the mother of appellant and Emerson, as a witness. Lynn Yarborough was fifty years old at the time of appellant's trial. Tr. 485, l. 20 – Tr. 486, l. 17.

Lynn testified that she had been married to the decedent for over fifteen years, but that they had divorced in 2013. When Lynn began to testify about the divorce being caused by problems and a text message she received from a co-worker, the solicitor asked that the jury be removed. The judge then instructed defense counsel to proffer Lynn's testimony. Tr. 486, l. 14 – Tr. 487, l. 24.

Proffer

During the proffer, Lynn testified that she had witnessed the decedent's violent behavior and his violence against appellant. Tr. 488, ll. 2-5. Lynn testified about a specific instance when the decedent whipped appellant with a belt after he got into trouble. Lynn said that this punishment was extreme, and she burst into appellant's bedroom in the middle of it "and I told him that was enough. He stopped. And I got Mason brought out. And he had strips on him. He had a belt bucket from the belt on his back [it left] a mark." Tr. 488, l. 16 – Tr. 489, l. 6.

Lynn described another incident where the decedent came home and he drank a couple of beers. He demanded to talk to her outside. The decedent then began choking Lynn, and appellant came outside and said: "Dad, please get off my mama, leave my mama alone. And he [the decedent] told him [appellant] if he didn't get back in, he would beat his ass." Lynn testified that the decedent kicked her chair over, scrapped her face and her arm. He also "busted my toe on the cement." Tr. 489, l. 10 – Tr. 490, l. 10.

As will be seen infra, the judge ruled that only the violent acts committed by the decedent against appellant could be heard by the jury. The acts of violence -- such as the ones described above where the decedent choked his mother in appellant's presence -- were not allowed to be heard by the jury.

Lynn also testified during her proffer that the decedent had come inside after drinking on another occasion and "he wanted to be intimate." When Lynn told him she did not want to have sex, the decedent threw a remote which hit her in the back "and I had the remote mark on my back." This violent act against Lynn was also not admissible pursuant to the judge's ruling.

On another date, the decedent picked up a plate of hot food and threw it at Lynn. He hit her in the back of the head in the presence of appellant and Emerson. Tr. 490, l. 11 – Tr. 491, l. 6. This incident was also not allowed to be heard by the jury even though appellant had witnessed it.

On another occasion, the decedent came home and had was drinking. The decedent became angry about text messages that Lynn was receiving from a co-worker. In the presence of appellant, the decedent demanded that Lynn find the text messages and he put a gun to her head while appellant watched. Tr. 491, l. 17 – Tr. 492, l. 8. The jury was also not permitted to hear the evidence of this act of violence.

Lynn confirmed that appellant was present for each of these acts of violence and that appellant was afraid of the decedent "to a certain point." Tr. 493, ll. 1-3.

On cross-examination, Lynn testified that the incidents of violence that had been proffered had occurred during 2010 and 2011 which were about nine years before the shooting in this case. Tr. 493, ll. 11-19.

Arguments and ruling

Defense counsel and the judge then discussed the admission of these violence incidents pursuant to Rule 405, SCRE, and State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000). Tr. 493, l. 23 – Tr. 497, l. 18. Defense counsel argued that these incidents of violence against appellant and putting a gun to his mother's head in appellant's presence all contributed to appellant's fear of the decedent because of a lifetime of these violent incidents, and that the proffered violent incidents were admissible under Rule 405(b), SCRE, and State v. Day. Tr. 494, l. 21 – Tr. 497, l. 18. This evidence was admissible to show why it was reasonable for appellant to pick up the gun that evening, because he was afraid of what his decedent father was going to do to him. This made this evidence admissible even though appellant did not intentionally pull the trigger that evening. Tr. 494, l. 21 – Tr. 497, l. 18.

The judge ruled that the acts of violence directed at appellant were admissible and that the acts of violence perpetrated by the decedent against Lynn Yarborough were not admissible. The judge noted that the evidence had been proffered for the record. Tr. 497, ll. 13-18.

Jury in

The jury was only allowed to hear evidence of the one incident where appellant got in trouble and was punished by being whipped with a belt by the decedent. Tr. 498, ll. 4-22. During cross-examination, the solicitor elicited from Lynn that appellant chose to live with the

decedent once he turned eighteen. The solicitor also had Lynn acknowledge that she could not testify whether appellant accidentally pulled the trigger that fatal evening or whether he shot the decedent "with hatred in his heart." The solicitor also got Lynn to admit that appellant was nine or ten years old "when Mason was a little boy, he got a spanking with a belt..." Tr. 512, l. 12 – Tr. 513, l. 24.

Discussion

The judge erred by refusing to allow the proffered acts of violence against Lynn Yarborough that were witnessed by appellant into evidence before the jury. Defense counsel correctly argued that these specific acts of violence were admissible because they occurred over a long period of time, and they helped explain appellant's deeply engrained fear of the decedent. Tr. 494, l. 13 – Tr. 495, l. 9. Defense counsel also argued urged that this evidence was "an essential element of the case" under Rule 405, SCRE, and this proffered evidence of the decedent's violent acts was admissible. Tr. 494, l. 13 – Tr. 495, l. 9.

Rule 405(a), SCRE: states "in all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation, or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific incidents of conduct."

Rule 405(b), SCRE states: "In all cases in which character or a trait of character of a person is an essential element of a charge, claim, or a defense, proof may also be made of specific incidents of that person's conduct."

Here, defense counsel correctly argued that an essential element of appellant's defense was appellant's state of mind which formed from the deeply engrained acts of violence that appellant had witnessed the decedent committing against his mother or those acts of violence

aimed directly against appellant. The proffered violent acts evidence was admissible under Rule 405(b), SCRE, because it was an essential element of appellant's defense which was his state of mind at the time of the fatal encounter with the decedent.

Appellant's defense was accident which the judge charged the jury. However, the solicitor strongly questioned why appellant armed himself with the assault rifle upon seeing the decedent that night. Further, the single act of violence involving appellant being spanked or whipped with a belt was explained away by the solicitor as punishment for wrongdoing on the part of a child or teenager during his closing argument. Tr. 565, ll. 3-17.

Further, the solicitor misled the jury by telling them during his closing argument that the only act of violence by the decedent was his punishment of appellant with a belt. "The only thing that she [Lynn] can point to as far as this allegation of abuse, you know, Chris sees red. He just sees red. The only thing she could say was he was little, nine, he got a spanking with a belt." Tr. 565, ll. 3-17.

In fact, as seen above, Lynn Yarborough had testified during her proffer about various acts of violence committed against her which appellant witnessed. These included her being choked by the decedent, the decedent having put a gun to her head, the decedent throwing a plate of hot food which hit her, and her being hit with a TV remote by the decedent which left a mark.

The solicitor added that while he was not advocating the jurors beat their children with a belt, that this one punishment of appellant by the decedent did not justify murder twelve years later. "It's insane." Tr. 565, ll. 3-17. In short, the solicitor capitalized on the trial judge's error in excluding this proffered evidence, and he misled the jury about it to appellant's prejudice.

In State v. Day, our Supreme Court noted that prior acts of violence of which the defendant is aware can be admissible where they go to the defendant's state of mind at the time

of the fatal encounter. Here, as defense counsel Joyner explained, these acts of violence that were proffered were deeply engrained into appellant's mind, burned into his memory.

It was prejudicial error for the court to exclude these specific acts of violence that were proffered, where appellant witnessed those acts of violence committed by his decedent father against his mother. The solicitor took advantage of the legal error as shown above by telling the jurors that this was the only act of violence, and even that violence was just a spanking by a father of his son. This made their defense "insane" -- where in reality this evidence was admissible under Rule 405(b), as it went to an essential element of appellant's defense. It was also admissible pursuant to the holding of State v. Day 341 S.C. 410, 535 S.E.2d 431 (2000). Appellant should be granted a new trial.

3.

The court erred by refusing to instruct the jury on the lesser-included offense of involuntary manslaughter, where there was evidence appellant handled the weapon with reckless disregard for the safety of others and evidence that the that the gun accidentally discharged when the decedent grabbed the barrel of the gun or went for the gun since appellant was entitled to an involuntary manslaughter instruction given these facts.

Relevant Facts

In appellant's statement to the police, State's Exhibit #75 which is on file with this Court, appellant told the investigator that he was very scared of his decedent father. Appellant said that he was scared of the decedent all the time. "He scares me." Tape at 20:00.

Appellant confirmed that he grabbed the gun because his father was coming to the garage, and he was scared of him. Tape at 20:30. His father came in yelling: "Stop this shit." Tape at 19:20. Appellant said that he pointed it, but he did not shoot it [the gun]. Tape at 20:41. Appellant repeatedly told the investigator that he did not mean to pull the trigger. Tape at 20:15.

Appellant said that his father had raised him around guns his entire life. He was in the Army, and he knew about gun safety. Tape at 20:39. He hit the safety down. He started to back up and take a breath and then he heard the "bang" Tape at 21:45-21:52. Appellant indicated that he had thought about it a thousand times and he still did not understand [how the gun went off]. Tape at 22:06. Appellant said that while he did not understand how it happened -- that it was an accident. Tape at 29:16-29:22.

When the investigator told appellant that the first rule of gun safety was never to point a gun at anyone, appellant responded that his father always approached him with an open

pocketknife, and appellant did not know if his father had a pocketknife at the time of the shooting or not. Appellant told the investigator: "He scares me." Tape at 29:51-29:55.

When the investigator asked appellant: "Why didn't you just go and stay with your mama?" Appellant's answer was not intelligible on the tape. Tape at 30:08. Appellant said he was trying to look out for Emerson though, and he did not want Emerson to go through the "junk I went through" with their father. Tape at 30:25-30:32. "I never meant this," appellant repeated and the investigator then thanked appellant for being honest with him. Tape at 30:25-30:32, end of tape.

The jury also heard the testimony of Dr. Thomas Owens, who was qualified as an expert in forensic pathology, testify that the injury to the decedent's hand was consistent with it being a contact wound where the decedent had his hand on the barrel of the weapon when it discharged. "I mean, that's pretty definite that the hand – those fingers were in contact with the end of the weapon." Tr. 395, ll. 6-24; Tr. 410, l. 24 – 414, l. 3.

Further, in the 911 call from appellant immediately following the shooting he told the 911 operator the decedent was very angry and attacked him, and that the decedent grabbed the gun and "it went off." See State's exhibit 6 (Mason Yarborough 911 call). Tr. 120, ll. 2-16.

Request to charge

Defense counsel Swilley requested a jury instruction on involuntary manslaughter noting appellant's "negligent handling of a loaded gun." Counsel argued that the jail calls and "copious amounts of assertions" that the gun discharged by accident supported this instruction. Those jail calls are on file for this Court. See State's exhibit 6 & 7 and Defendant's exhibit 28.

Counsel cited Casey v. State, 305 S.C. 447, 409 S.E.2d 391 (1991) and State v. Patrick 389 S.C. 301, 345 S.E.2d 481 (1986) in support of his request to charge. Counsel said that evidence of a struggle over a gun alone was sufficient to warrant the jury instruction. Further, there was evidence that as the decedent grabbed the gun that it accidentally discharged. Tr. 519, l. 6 – 535, l. 24.

The solicitor argued that appellant committed the crime of pointing and presenting a firearm, which was a felony pursuant to S.C. Code Section 16-23-40, and therefore he was not entitled to a jury instruction on involuntary manslaughter. Tr. 527, l. 25 – 529, l. 6. Defense counsel Swilley argued that appellant handling the weapon in a negligent, careless manner when the decedent attempted to grab the gun, causing the gun to discharge, constituted a reckless disregard for the safety of others warranting the involuntary manslaughter instruction. Counsel noted the 911 call where appellant said the decedent attacked him, and counsel again cited to an abundance of evidence of involuntary manslaughter in this case. Tr. 524, l. 23 – 527, l. 22.

The judge denied the defense request to charge involuntary manslaughter. Tr. 529, l. 7 – 535, l. 10. Accident was charged to the jury but accident is a complete defense and involuntary manslaughter is a lesser-included offense of murder, and the two are not mutually exclusive. Tr. 552, ll. 8-23. See State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003).

Discussion

Defense counsel correctly argued that appellant was entitled a jury instruction on involuntary manslaughter pursuant to Casey v. State 305 S.C. 445, 409 S.E.2d 391 (1991). In Casey there was evidence that the defendant and the victim struggled over a gun, which was sufficient for an instruction on an involuntary manslaughter verdict option. A defendant, here

appellant, is entitled to an instruction on a lesser-included offense if there is any evidence whatsoever supporting that lesser-included offense instruction. See State v. Light 378 S.C. 641, 649, 664 S.E.2d 465, 469 (2008) *citing* State v. Reese 370 S.C. 31, 633 S.E.2d 898 (2006); State v. Hill 315 S.C. 260, 433 S.E.2d 848 (1993).

Defense counsel also correctly argued that our Supreme Court's holding in State v. Patrick 389 S.C. 301, 345 S.E.2d 481 (1986), warranted an instruction on involuntary manslaughter. In Patrick, the defendant admitted following the shooting that it was intentional. However, at trial, the defendant Patrick repudiated his statement. He testified that the victim grabbed the end of the barrel of his gun causing it to fire. The Supreme Court agreed that this testimony constituted a sufficient ground for submitting the possible verdict of involuntary manslaughter to the jury. State v. Patrick 389 S.C. 301, 306, 345 S.E.2d 481, 484 (1986).[1]

Appellant was also entitled to an instruction on involuntary manslaughter pursuant to State v. Crosby 355 S.C. 47, 584 S.E.2d 110 (2003). In Crosby, the Supreme Court noted that the law to be charged must be determined from the evidence presented at trial. State v. Cole 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000). Our Supreme Court further noted that involuntary manslaughter is: (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending the cause of death or great bodily harm; or (2) the unintentional killing of another without malice, while engaging in an unlawful activity with reckless disregard for the safety of others. *citing* State v. Chapman 336 S.C. 149, 519 S.E.2d 100 (1999) and Casey v. State 305 S.C. 447, 409 S.E.2d 391 (1991); S.C. Code § 16-3-60 (1985)(a person may be convicted of involuntary manslaughter upon a showing of criminal negligence

[1] The Court in State v. Patrick found that the improper blending of the elements of voluntary and involuntary manslaughter did not warrant the invalidating of the murder convictions under the unusual facts of State v. Patrick 389 S.C. 301, 345 S.E.2d 481 (1986).

defined as "the reckless disregard for the safety of others." State v. Crosby 355 S.C. 47, 51-52, 584 S.E.2d 110, 112 (2003). See, also, State v. Mekler, 379 S.C. 12, 15, 664 S.E.2d 477, 478-79 (2008) (The negligent handling of a loaded gun will support a charge on involuntary manslaughter) *citing* State v. White, 253 S.C. 475, 171 S.E.2d 712 (1969).

Appellant was entitled to an involuntary manslaughter instruction under either scenario since the jury could have reasonably concluded appellant was engaged in an unlawful activity in an angry state of mind with his girlfriend that night – he hit her -- or pointed the gun recklessly. This was unlawful activity which would not naturally cause death or great bodily harm. It also could be found to have occurred while appellant was not engaged in unlawful activity but that his lawful actions were done with reckless disregard for the safety of others. State v. Burriss, 334 S.C. 256, 264-265, 513 S.E.2d 104, 109 (1999). Both scenarios would have been reasonable conclusions by the jury based on the evidence in this case, and the standard was *any evidence* of involuntary manslaughter. See State v. Light 378 S.C. 641, 649, 664 S.E.2d 465, 469 (2008) *citing* State v. Reese 370 S.C. 31, 633 S.E.2d 898 (2006); State v. Hill 315 S.C. 260, 433 S.E.2d 848 (1993).

The judge stated that he had done his own research and apparently agreed with the solicitor that appellant pointed the firearm at the decedent was a felony, and erroneously concluded it conclusively disqualified appellant from receiving an involuntary manslaughter instruction. See State v. Sams, 410 S.C. 303, 309, 764 S.E.2d 511, 514 (2024)(including the "not amounting to a felony" language in the definition of involuntary manslaughter); McAninch and Fairey, The Criminal Law of South Carolina, *The Requirement of Criminal Negligence or Recklessness* at pp. 168-173 (3rd ed. 1996) (discussing the statutory "reckless disregard for the safety of others" statutory standard of S.C. Code §16-3-60). See, also, State v. Pittman, 373 S.C.

527, 571, 647 S.E.2d 144, 167 (2007)("Recklessness is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk his or her conduct is creating,").

In Crosby, the defendant maintained after shooting that it was an accident, and that he had not meant to do it. That is what appellant told the police in this case. In Crosby, the defendant testified that he reached into his pocket for his gun, and that the gun discharged. Crosby also stated that "I closed my eyes and pulled the trigger. I didn't even know I pulled the trigger. I was scared. I see my life in danger. I didn't know how to react."

Our Supreme Court reversed this Court's holding that Crosby's statement that he pulled the trigger was conclusive evidence that the shooting was intentional and that all other inferences that could be drawn from the evidence was negated. "`This is not the law of this state." State v. Hill 315 S.C. 260, 433 S.E.2d 848 (1993)(charge must be given if there is any evidence to support it; trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence.) We hold Crosby was entitled to a jury charge on involuntary manslaughter." State v. Crosby 355 S.C. 47, 53, 484 S.E.2d 112, 112-113 (2003).

There was an abundance of evidence in this case that appellant was afraid of the decedent, his father. While much of the evidence of the decedent's violent tendencies and his explosive temper were improperly ruled inadmissible, there still was evidence the jury heard that appellant was afraid of the decedent and that the decedent had been violent towards appellant. Further, appellant maintained that the decedent grabbed the end of the barrel of the gun causing it to accidentally discharge, and there was expert testimony from Dr. Owens supporting that that actually happened. Moreover, the 911 call from appellant also supported the accidental discharge of the weapon assertion in this case. Cf. State v. Pittman, 373 S.C. 527, 572, 647 S.E.2d 144, 167 (2007)(No evidence to support an argument that the shooting was unintentional where Pittman

"deliberately waited until his grandparents retired to bed, retrieved his shotgun, loaded the shotgun, entered their bedroom, and intentionally shot his grandparents.").

This was abundant evidence in this case which entitled appellant to a jury instruction on involuntary manslaughter under the "any evidence whatsoever" standard for charging a lesser-included offense. Appellant should therefore be granted a new trial. See State v. Light; Casey v. State; State v. Patrick; State v. Crosby, supra.

4.

The court erred by qualifying Scott Ballard an expert only in firearms and by ruling Ballard was not qualified by education, training or experience to testify about the injuries to the decedent's thumb or hand which suggested the decedent was grasping the barrel of the gun when it discharged, and by also refusing to allow his psychological trauma of a shooting testimony which explained why eyewitness statements being taken close in time to the shooting or when the eyewitness was sleep deprived were not advisable for law enforcement since this testimony was relevant and Ballard was qualified under Rule 702, SCRE, to give these expert opinions which would have assisted the trier of fact in this case.

Relevant Facts

The defense called Scott Ballard as a witness. Ballard grew up in Biloxi, Mississippi and then went to college at UCLA in Southern California. Tr. 434, ll. 9-21. After college, Ballard did six years of active service in the military, four years in the reserves, and then four years in inactive reserves. Tr. 434, l. 22 – Tr. 435, l. 4.

Ballard then worked at Six Hour Academy, a firearms manufacture, for eight years as a senior instruction, master armor. Tr. 435, l. 22 – Tr. 436, l. 15. Ballard worked in Peru and Colombia where he worked creating standards for the use of force in those countries. Tr. 436, l. 16 – Tr. 443, l. 18. Ballard also had formal education in "criminal psychology" as well as "real life experiences" as to how people act under stressful situations involving firearms and shootings. Tr. 437, l. 21 – Tr. 440, l. 18.

Ballard was a member of the International Association of Law Enforcement Firearm Instructors. The organization has annual meetings and trainings. As a member of the organization, it created industry guidelines and best practices, including after the 1985 Miami

shootout, and then Columbine. Tr. 440, l. 19 – Tr. 443, l. 6. Ballard noted that he had trained both military police officers and private citizens, he had worked in this area for twenty-four years and he reviewed over a thousand individual cases. Tr. 442, l. 24 – Tr. 443, l. 9.

The defense moved to qualify Ballard as an expert in ballistics, firearms, and shooting incidents. The solicitor asked that the jury be excused. Tr. 444, ll. 3-7.

The solicitor then argued that the defense wanted Ballard to opine that the shooting in this case was an accident. The solicitor said that while he respected Ballard's CV and his resume, he maintained that Ballard was not qualified to give that opinion. Tr. 444, l. 13 – Tr. 445, l. 8. Defense counsel Joyner responded that Ballard had the necessary study and experience, knowledge, and skill to be qualified as an expert in these fields. Ballard had seen, studied, and examined over "100 injuries relating specifically to gas release injuries." Tr. 445, l. 20 – Tr. 446, l. 16.

The proffer

The judge stated that he wanted Ballard's testimony proffered before he ruled. Ballard then testified that he had reviewed all discovery, photographs, police, and autopsy reports, as well as the firearm, a SKS Carbine in this case. Tr. 449, l. 19 – Tr. 451, l. 14. Ballard said that it was possible that if a person grabbed the end of the barrel of the gun, it could cause it to discharge if someone's finger was on the trigger. Tr. 450, l. 16 – Tr. 451, l. 24. Ballard also testified that the wound to the decedent's hand *was consistent with his hand being on or near the muzzle of the firearm when it was discharged.* Tr. 452, ll. 3-7. (emphasis added). Ballard had testified in six cases where gas injuries were sustained and he had consulted on another twelve. Tr. 453, l. 21 – Tr. 457, l. 23. Ballard explained and opined why he concluded that the injuries to the decedent's thumb showed his thumb was underneath and around the muzzle in a grabbing

motion when the weapon discharged. "Those gases were controlled on the escape. They were being impeded by the hand based on what I'm looking at with regard to the pictures and the scoring, the scorch of the thumb." Tr. 456, l. 21 – Tr. 457, l. 23.

Ballard also testified that while law enforcement agencies often compel statements immediately, after shortly following a shooting, that this was not a good professional law enforcement practice. Ballard specifically cited to sleep deprivation as affecting memory. Further, the immediate memory after the brain experienced trauma to the unnatural act was not reliable. This counseled strongly against taking a statement from a shooter or eyewitness before that person had adequate time -- forty-eight hours -- for rest from the trauma. Tr. 457, l. 24 – Tr. 461, l. 2.

The state declined cross-examination and argued that Ballard had never conducted an autopsy and that he had no forensic or medical background. The solicitor also urged that Ballard's testimony as to the reaction of a person following the traumatic event of a shooting was irrelevant and that Ballard was not qualified to give an opinion on the matter. The solicitor also argued that the court had ruled that appellant's statement was freely and voluntarily entered. Tr. 461, l. 7 – Tr. 464, l. 6.

Defense counsel Joyner argued that the defense was not arguing that appellant's statement was involuntarily entered. Joyner also noted that appellant's brother, Emerson, had only two hours of sleep and gave another statement only twelve hours after the shooting. Counsel noted that Ballard worked in law enforcement, he had worked in the military, he had a PhD in psychology, he was a master armor, and he had the qualifications to give the expert testimony the defense sought for him to impart to the jury in this case. Tr. 462, l. 14 – Tr. 463, l. 3.

The solicitor argued that Ballard was not qualified to give these opinions and said, "it doesn't pass 404."[2] The solicitor said that the testimony was highly prejudicial and not probative and it would only confuse the issues. Tr. 463, ll. 4-11.

The judge ruled that he would allow Ballard to testify about the effect of grabbing or pulling the barrel of a firearm since "that's pretty much common sense and common knowledge that would result in a firearm expelling a projectile if the finger was on the trigger at the time that the barrel or the muzzle of the weapon [was] pulled." Tr. 471, ll. 4-14. However, the judge said that he would not qualify Ballard as an expert in ballistics. The judge further ruled that Ballard was only qualified as an expert in the field of firearms, and not ballistics and not shooting incident expertise. Tr. 471, ll. 4-14.

Thus, Ballard's testimony as to the victim's gas injury to his hand or thumb would not be allowed as the judge found that Ballard was not qualified by virtue of education, experience, or knowledge to give that opinion. Tr. 472, ll. 6-20. The judge further ruled that he had found appellant's statement freely, voluntarily, and knowingly entered. In addition, Ballard's testimony as to the negative effect of trauma on a person's memory where that person had an eyewitness to a recent shooting -- as Emerson here had been -- would not be allowed. The judge again ruled that Ballard's PhD in psychology from UCLA and his knowledge, experience, and training, did not qualify him to give such an opinion. Tr. 472, l. 6 – Tr. 474, l. 4.

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[2] The solicitor was apparently citing to Rule 403, SCRE.

Jury in

In the presence of the jury, Ballard then testified that it was possible for the gun to discharge if two people were struggling over the gun and if the finger of the person with the gun was anywhere near the trigger, the opposing force could cause the finger to pull the trigger. Tr. 478, l. 1 – Tr. 483, l. 25.

Discussion

In this case, the judge ruled Ballard was not qualified by education or experience to testify regarding the cause of the gas burn injury to the decedent's thumb or hand injury. The judge also found that Ballard was not qualified by education or experience to testify about why it was not being advisable for law enforcement to take the statement of an eyewitness to a very traumatic shooting incident within hours of the shooting, rather than waiting forty-eight hours for the brain to process what had occurred. Thus, Ballard was not allowed to testify that the decedent's hand injuries were inconsistent with defensive wounds and suggested instead that he was grasping or pulling the barrel of the gun. The judge would only allow the "common sense" conclusion that if someone pulled the barrel of the gun it could cause the gun to discharge, but Ballard could not testify that the "muzzle grab" resulted in injuries to the decedent's finger. Tr. 471-473.

Expert testimony is not needed for common sense conclusions. All Ballard was allowed to testify here was that if two people were struggling over the gun and if the finger of the person with the gun was anywhere near the trigger, the opposing force could cause the finger to pull the trigger. Tr. 478, l. 1 – Tr. 483, l. 25. The jury was not allowed to hear Ballard's expert conclusion that the decedent's burn injuries to his hand were likely caused by grabbing the

muzzle of the gun, and that these injuries were not defensive wounds as urged by the state. Tr. 452, ll. 3-7; Tr. 456, l. 21 – Tr. 457, l. 23.

Ballard was also prohibited from testifying about the negative effects on the brain a person suffers from being involved in shooting incident trauma, and how sleep deprivation adversely affects the brain and the need for recovery time before a statement is taken by law enforcement after such trauma. Here, Emerson Yarborough gave a statement only twelve hours after the shooting, much less than forty-eight hours Ballard said in his proffered testimony was needed for reliability. Emerson was also emotional and crying during the forensic interview that is before this Court. See State's exhibit 89. Emerson's trial testimony that he wanted to hurt appellant as much as possible after the shooting also indicated that his statements were based on trauma and emotion rather than reason. Tr. 272, ll. 4-20.

As seen, Emerson admitted at trial that he lied to get even with appellant after the shooting, and he wanted to get even with appellant by essentially exaggerating or drawing all inferences adverse to appellant regarding the shooting. The jury needed the expert testimony from Ballard on this subject in this most unusual case. See State v. Acker, 435 S.C. 716, 869 S.E.2d 873 (Ct. App. 2022)(expert witness's testimony regarding childhood sexual abuse fell within the area of specialized knowledge beyond that of the jury and thus was admissible, and trial judge acted within his discretion in finding the witness was qualified).[3]

Rule 702, SCRE, provides "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Here, Ballard's testimony as to the injuries to the

[3] Acker died after certiorari was granted by our state Supreme Court on March 7, 2023. The Supreme Court denied the motion to vacate this Court's holding.

decedent's hands being inconsistent with defensive wounds and being caused by the muzzle grab would have assisted the jurors as a trier of fact in this case.

Further, Ballard's testimony as to the reason it was not advisable for law enforcement to take a statement from an eyewitness who has seen as very traumatic event, here Emerson, less than forty-eight hours after a shooting was also not common knowledge to the jurors. See State v. Acker, 435 S.C. 716, 869 S.E.2d 873 (Ct. App. 2022). It would have assisted the jurors as the trier of fact in this case in understanding relevant matters and the evidence before them – the injuries to the decedent's hand and the statements given by Emerson only hours rather than days after the shooting.

In Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252–53, 487 S.E.2d 596, 598 (1997), our Supreme Court held it was abuse of discretion to deny an EMT qualification as an expert on intubation. The Court noted that "to be competent to testify as an expert, `a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony." O'Tuel v. Villani, 318 S.C. 24, 28, 455 S.E.2d 698, 701 (Ct.App.1995). A medical practitioner's experience teaching and interacting with persons in the applicable specialty are sufficient to support his qualification as an expert. Qualification depends on the particular witness' reference to the subject." Further, "[A]n expert is not limited to any class of persons acting professionally." Botehlo v. Bycura, 282 S.C. 578, 586, 320 S.E.2d 59, 64 (Ct.App.1984).

In Hamilton v. Reg'l Med. Ctr., 440 S.C. 605, 625, 891 S.E.2d 682, 693 (Ct. App. 2023), reh'g denied (Sept. 21, 2023), this Court held that no grounds existed for the trial court to deny the qualification of a nurse as an expert witness on basis of general (adult) practice rather than

pediatric practice. This Court noted that "Regional's concerns with Stobbs not having experience in pediatric IVs as opposed to general IV knowledge went to the weight of the evidence, not Stobbs's qualification as an expert. Stobbs testified that there was not a difference in the IV treatment for children and adults. Therefore, we affirm the trial court's qualification of her as an expert witness."

Here, after college at UCLA, Ballard served six years of active service in the military, four years in the reserves, and then four years in the inactive reserves. Tr. 434, l. 22 – Tr. 435, l. 4. Ballard then worked at Six Hour Academy, a firearms manufacture, for eight years as a senior instruction and master armor. Tr. 435, l. 22 – Tr. 436, l. 15. Ballard also worked in Peru and Colombia where he worked creating standards for the use of force in those countries. Tr. 436, l. 16 – Tr. 443, l. 18. He had his PhD in "criminal psychology," as well as "real life experiences" as to how people act under stressful situations involving firearms and shootings. He also had specific training and practical experience with gas or heat injuries caused by weapons. Tr. 437, l. 21 – Tr. 440, l. 18.

Ballard was a member of the International Association of Law Enforcement Firearm Instructors, and this organization created industry guidelines and best practices guidelines. Tr. 440, l. 19 – Tr. 443, l. 6. Ballard noted that he had trained both military police officers and private citizens, he had worked in this area for twenty-four years and reviewed over a thousand individual cases. Tr. 442, l. 24 – Tr. 443, l. 9.

The trial judge erred by ruling Ballard was not qualified to testify as to the burn injuries to the decedent's hand. This was important opinion testimony in this case where the state strongly disputed the defense that the decedent grabbed the muzzle of the rifle, and asserted the decedent only suffered a defensive wound to his hand.

Defense counsel correctly argued that Ballard was "a master armer. He understands chamber pressures, understands gas pressures. He certainly should be able to testify to anything about firearm(s). And he has been personally involved in six incidents, but he has evaluated and studied through the course of his training and professionalism over 100 gas induced injuries from firearms And I believe that makes him certainly qualified to discuss it." Tr. 462, l. 14 – 464, l. 6.

Trial counsel also noted that Dr. Owens "[t]estified earlier that the hand would was either caused by significant gas pressure or a projectile. He [Ballard] is an expert in firearms and gas pressure to additionally corroborate Dr. Owens testimony." Tr. 462, l. 14 – 464, l. 6.

Dr. Owens had earlier testified that the "black grey powder to be deposited on the thumb and first finger, they had to be in contact with the tip of a gun either right at the muzzle or in this case looking at this particular weapon, there's some gas exhaust ports near the tip. So [as] if the fingers were kind of wrapped around or right up against the tip of the weapon." Tr. 410, l. 24-412, l. 6.

In State v. Franks, 432 S.C. 58, 76, 849 S.E.2d 580, 590 (Ct. App. 2020), this Court found that a deputy with the sheriff's department was properly qualified as an expert in (phone) call records translation tools based on fifteen years' experience with cell records and cell technology, his observation of "several" seminars about GeoTime (a call record translation tool) and his use of GeoTime in fifty cases over three to four years.

In State v. Wallace, 440 S.C. 537, 546-48, 892 S.E.2d 310, 315-16 (2023), our Supreme Court held that an investigator with solicitor's office was properly qualified as CSLI analysis expert. The investigator's credentials included a SLED internship, "an internship with SLED; a four-week "on-the-job training" at the SLED Fusion Center, including training for basic

knowledge of cell phone forensics and cellular analyses; a one-week 'PenLink' call analysis training school at SLED about how to read and map cell phone records; a two-day course called 'Fundamentals of Call Detail Records Analysis,' which he testified taught him 'how to read the records, how to map them, [and] an understanding of how sectors work'; another one-day training class on mobile forensics; a two-day class through the FBI 'CAST' Unit on historical cell site analysis; and other courses." He had seventy two hours of total training total, in addition to continuing education in this subject matter and he had analyzed over one hundred sets of cell data.

In State v. Prather, 429 S.C. 583, 840 S.E.2d 551 (2020), our Supreme Court held that a witness, Paul LaRosa of SLED, was qualified as an expert in crime scene analysis. In addition, his crime scene analysis testimony as to number of personalities "in there after the crime" was reliable and not criminal profiling. The Court in Prather noted:

> "LaRosa testified before the jury that offenders engage in "staging" to alter "the crime scene from what truly happened. It is to get law enforcement ... on a different idea." He testified the carving and the placement of the dildo were two instances of staging at this crime scene. He concluded the carving was staging "because it doesn't impact the actual murder itself. ... It's the offender's way of saying, hey, look at this guy. Not only is he a bad guy, he's bad enough that somebody's carving rapist in his back. I want the world to know that this guy is a rapist." LaRosa further testified the placement of the dildo underneath Victim's armpit was staging because it "had nothing to do with the murder."

State v. Prather, 429 S.C. 583, 595-96, 840 S.E.2d 55, 557 (2020).

The Supreme Court also found that LaRosa's testimony was reliable, and could not be construed as drawing conclusions regarding the type of person(s) who committed the murder or the type of persons who carved on Victim's back and covered his body. State v. Prather, 429 S.C. 583, 601, 840 S.E.2d 551, 560. (2020).

Further, in Teseniar v. Pro. Plastering & Stucco, Inc., 407 S.C. 83, 91-92, 754 S.E.2d 267, 271 (Ct. App. 2014), this Court held it was an abuse of discretion for the trial judge to refuse to qualify a witness as an expert in engineering and construction where the witness's experience was "satisfactory." His credentials included a bachelor's degree in civil engineering from North Carolina State University and a master's degree in civil engineering with a construction management specialty from Georgia Tech; NC and GA licensure; and nearly thirty years' experience in civil engineering and construction. His current practice typically involved diagnosing problems with buildings.

The witness in Teseniar also said he was familiar with the applicable building code, the International Building Code of 2000, because it was also used in Georgia. He worked in the coastal region of Georgia, and he asserted there was no distinction in his analysis of construction in Georgia versus construction in South Carolina. However, the witness admitted he was not familiar with any local modification to the International Residential Code of 2000.

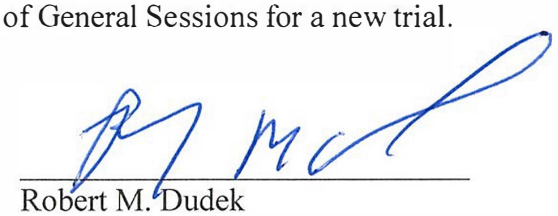
The trial judge erred by ruling that Ballard was not qualified to offer an opinion on the muzzle grabbing cause of the burn injuries to the decedent's hands. This was critical expert testimony against the state's assertion that the decedent's injuries to his hand were mere defensive wounds.

The judge made the same error in not allowing Ballard to testify regarding the psychology of post-incident interviews and why it was not advisable to interview an eyewitness within hours rather than waiting a couple of days before conducting such an interview. This testimony was explanatory of Emerson's emotional assertions after the shooting – in the forensic interview – and should have been permitted. On both subjects this was important defense expert

testimony the jury never heard, and appellant should be granted a new trial for the reasons argued above.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed, and this case remanded to the Florence County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of May, 2024.