

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Perry H. Gravely, Circuit Judge

Appellate Case No. 2017-002539

ORIGINAL

The State,.....Respondent,

v.

John Michael Hughes.....Appellant.

FINAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES	1
ARGUMENT	2
I. The State cannot get around the fact that the LCV testimony and related exhibits are scientific evidence and that the State's presentation fell short of the threshold for admission of scientific evidence.	2
II. The State's inevitable discovery argument does not hold up under scrutiny.	5
III. The State fails to address that Hughes was in the curtilage of his home at the time of the killing and that the trial court believed that the Protection of Persons and Property Act does not apply when a defendant is in the curtilage of his home.	6
IV. The State relies far too much on the evidence it contends was harmlessly admitted.	7
CONCLUSION	8

TABLE OF AUTHORITIES

CASES

<u>Gilmore v. Ivey,</u> 290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986)	6
<u>Graves v. CAS Medical Sys., Inc.,</u> 401 S.C. 63, 735 S.E.2d 650 (2012)	3
<u>Higgins v. MUSC,</u> 326 S.C. 592, 599 S.E.2d 269 (Ct. App. 1997)	4, 6
<u>Historic Charleston Foundation v. Krawcheck,</u> 313 S.C. 500, 443 S.E.2d 401 (Ct. App. 1994)	6
<u>Hodge v. UniHealth Post-Acute Care of Bamberg, LLC,</u> 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018)	4
<u>Smoak v. Seaboard Coast Line R. Co.,</u> 259 S.C. 632, 193 S.E.2d 594 (1972)	2
<u>State v. Brown,</u> 424 S.C. 479, 818 S.E.2d 735 (2018)	4, 5
<u>State v. Council,</u> 335 S.C. 1, 515 S.E.2d 508 (1999)	3
<u>State v. Scott,</u> 424 S.C. 463, 819 S.E.2d 116 (2018)	7
<u>State v. Simpson,</u> 425 S.C. 522, 823 S.E.2d 229 (Ct. App. 2019)	5, 6
<u>State v. Tapp,</u> 398 S.C. 376, 728 S.E.2d 468 (2012)	7
<u>Trivelas v. S.C. Dept. of Transportation,</u> 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001)	6

STATUTES

S.C. Code Ann. § 16-11-410, <i>et seq.</i>	1, 6, 7
S.C. Code Ann. § 16-11-440	6

COURT RULES

Rule 268(d)(2), SCACR	4
Rule 701, SCRE	4
Rule 702, SCRE	4
Rule 703, SCRE	4
Rule 704, SCRE	4
Rule 705, SCRE	4

STATEMENT OF ISSUES

- I. Did the trial court err reversibly in the manner in which it conducted the hearing on whether Appellant was immune from prosecution under the South Carolina Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410, *et seq.*, and in the evidence it allowed in that hearing, entitling Appellant to a new hearing?**
- II. Did the trial court err reversibly in improperly allowing testimony and exhibits concerning leuco crystal violet testing?**
- III. Did the trial court err reversibly in failing to grant a motion to suppress cell phone data evidence obtained through an invalid warrant and in admitting such evidence?**
- IV. Did the trial court err reversibly in allowing the admission of a 911 call recording where the statements made on the recording were hearsay that fell within no exception to the general rule against hearsay?**
- V. Did the trial court err reversibly in failing to direct a verdict as to the conspiracy charge?**
- VI. Did the trial court err reversibly in failing to charge the jury as to a statutory presumption of reasonable fear of death or great bodily injury as provided in the South Carolina Protection of Persons and Property Act?**

ARGUMENT

The State got a conviction of Appellant (hereinafter “Hughes”) and is obviously pleased with that. A problem with the State’s arguments is that they cannot escape that a large portion of the evidence on which the State relied at trial never should have been admitted. Another is that the trial court committed significant legal errors at critical points in the proceedings below. While Hughes “is not entitled to a perfect trial,” he is entitled to a “fair trial.” Smoak v. Seaboard Coast Line R. Co., 259 S.C. 632, 640, 193 S.E.2d 594, 598 (1972). Hughes did not receive that here.

Hughes will not attempt in this brief to rehash all of his arguments from his appellant’s brief, as that is not what a reply brief is for. Instead, this reply brief is aimed at pointing out flaws in the reasoning advanced in the State’s arguments in its brief.

I. The State cannot get around the fact that the LCV testimony and related exhibits are scientific evidence and that the State’s presentation fell short of the threshold for admission of scientific evidence.

In an attempt to get around the fact that it never met the requirements for the admission of the leuco crystal violet (LCV) evidence, the State tries to argue in its brief that Officer Robert Parker’s testimony, the results of the LCV testing, and the photographs showing the results of spraying LCV (or at least what Parker believed was LCV) were not scientific evidence. (Final Brief of Respondent p. 23.) As discussed in Hughes’ brief, though, that is not true. Per Parker, someone spraying LCV in an effort to detect blood residue is conducting a scientific test. Parker testified that the LCV is used “for science purposes[.]” (R. p. 145 ln. 17.) He testified that LCV is “a reagent and a presumptive test. It reacts to hemoglobin in blood. When you get a positive result, it will turn a violet color when sprayed and it makes contact with the suspected

blood.” (R. p. 137 ln. 4-8.) The words of the assistant solicitor below similarly reveal that the state was relying on the LCV testing results as scientific evidence. He stated to the trial court that “the chemical itself” was what had “the testimonial value in this case[.]” (R. p. 143 ln. 9-10.)

The State concedes that Parker could not and did not give testimony regarding peer reviewed publications, the overall consistency of the method, or whether those quality control procedures were performed properly. (Final Brief of Respondent p. 23.) As our Supreme Court stated in Graves v. CAS Medical Systems, Inc., peer review, overall consistency of the method, and proper performance of quality control procedures are among what “the court *must* consider” in deciding whether to admit scientific opinion evidence. 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012) (citing State v. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999)) (emphasis added). One of the things the trial court must find is that “the underlying science is reliable.” Council, 335 S.C. at 19.

The State also concedes that Parker was not an expert in LCV’s mixture or creation, that his duties did not include awareness of LCV’s expiration date (which would seem to be vital to its effective use), and that he had only used the mixture “on *a few cases over the past three years.*” (Final Brief of Respondent pp. 19-20) (emphasis added). The State contends, however, that Parker’s inability to answer certain questions and his overall shortcomings and weaknesses as an “expert witness” were “of minimum probative value in determining [the test’s] reliability . . . *because the test was presented at each proffer as being merely presumptive.*” (Final Brief of Respondent p. 23) (emphasis in original). This seems to suggest, without the State

offering any legal support for this position, that the standard for qualification of experts is somehow lessened in the event of a presumptive test. Nothing in the South Carolina Rules of Evidence or in South Carolina case law suggests that, however. See Rules 701-05, SCRE.

While the State contends that there has been a general acceptance of LCV technology, 1) that, if true, does not obviate the need to lay an appropriate foundation for admission of LCV evidence and 2) that contention appears to lack significant support outside of unpublished opinions cited by the State in its brief. If LCV technology is generally accepted, as observed in State v. Brown, “the general acceptance of [LCV] technology does not . . . translate to the State getting a pass from making a minimum showing that the [LCV test] it seeks to introduce into evidence is accurate.” 424 S.C. at 489. As for the State’s use of unpublished opinions to support this contention, citing unpublished opinions is illegal and improper. See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 554-56, 813 S.E.2d 292, 297-99 (Ct. App. 2018); Higgins v. MUSC, 326 S.C. 592, 601, 486 S.E.2d 269, 273 (Ct. App. 1997). “Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved.” Rule 268(d)(2), SCACR. There is a reason an unpublished opinion is unpublished.

The State tries to say that Parker’s testimony was not scientific evidence because he was only qualified in the *use* of LCV. (Final Brief of Respondent pp. 17, 19) (citing R. p. 321, ln. 4-9, p. 331, ln. 5-6). This argument, however, falls flat. Had Parker testified only as to the use of LCV, and not its scientific properties, his testimony

would have been limited to saying that he used the spray bottle and nothing more – testimony that would hardly have had any relevance to the issues in the trial. Parker testified, though, about the science of LCV – about how it works, even though he did not really know how it works – and the State acknowledges that Parker testified that “if the chemical was expired or improperly mixed then there would simply be no reaction, meaning no visible results.” (Final Brief of Respondent p. 26.) If the trial court only allowed Parker to testify as an expert in the “use” of LCV and not its mixture, creation, or expiration, it is hard to see how he could have testified to this. Sure, Parker performed the test and photographed the results, but admission of his testimony completely dodged the possibility that the LCV was expired or improperly made and thus does not hold up as authentication of this plainly scientific evidence. Brown, 424 S.C. at 489. The undersigned used a bottle of Windex the other day, which “was applied simply by misting it from a spray bottle onto the desired surface.” (Final Brief of Respondent p. 19.) That does not make him qualified to testify about how 2-hexoxyethanol, isopropanolamine, sodium dodecylbenzene sulfonate, lauramine oxide, and ammonium hydroxide react with dirt on glass.

II. The State’s inevitable discovery argument does not hold up under scrutiny.

The State quotes this court’s recent opinion in State v. Simpson, 425 S.C. 522, 540, 823 S.E.2d 229, 239 (Ct. App. 2019), in which this court wrote that “if the prosecution can establish *by a preponderance of the evidence* that the information ultimately or inevitably would have been discovered by lawful means, . . . then the deterrence rationale has so little basis that the evidence should be received.” (Emphasis added.) The State did not, however, adduce any evidence to support the facts that it

claimed supported its inevitable discovery position. (R. p. 420 ln. 20-24.) The State made it plain that “we would not be introducing those other records in the trial. We are just relying on that to establish that there was, in fact, another avenue to get these records, that it was inevitable.” (R. p. 420 ln. 20-24.) At no point was the factual material that the State contended supported its assertion of inevitable discovery ever presented to the trial court. All that was presented in support of the inevitability of discovery was argument by the State’s lawyer. (R. p. 420 ln. 20-24.) As discussed in Hughes’ appellant’s brief, argument of counsel is not evidence. Trivelas v. S.C. Dept. of Transportation, 348 S.C. 125, 141, 558 S.E.2d 271, 279 (Ct. App. 2001); Higgins, 326 S.C. at 601; Historic Charleston Foundation v. Krawcheck, 313 S.C. 500, 508 n. 7, 443 S.E.2d 401, 406 n. 7 (Ct. App. 1994); Gilmore v. Ivey, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986).

It is not as though there was competing evidence on this point. The State did not offer any evidence tending to indicate discovery of the evidence it procured through its defective warrant was inevitable. Where there is no evidence, there is no preponderance of the evidence. Simpson, 425 S.C. at 540.

III. The State fails to address that Hughes was in the curtilage of his home at the time of the killing and that the trial court believed that the Protection of Persons and Property Act does not apply when a defendant is in the curtilage of his home.

The fact that Hughes was in the curtilage of his home rather than inside when he shot Ferrell is of no moment, as the South Carolina Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410, *et seq.* (hereinafter “the Act”) and, thus, the presumption in S.C. Code Ann. § 16-11-440, applies with equal force when the

person using deadly force is in the curtilage of his home as it does when he is inside its walls. See State v. Scott, 424 S.C. 463, 470-74, 819 S.E.2d 116, 119-21 (2018).

The State fails to address in its brief that the trial court apparently made its decision to deny immunity under the assumption that the Act does not apply when a person is in the curtilage of his home. (R. p. 652 ln. 16-23.) That is an incorrect assumption, as discussed above. See Scott, 424 S.C. at 470-74. That is error, and, particularly given the additional problems with the reception of LCV evidence at the immunity hearing, this court can see that the trial court's errors in conducting the immunity hearing prejudiced Hughes and are reversible.

IV. The State relies far too much on the evidence it contends was harmlessly admitted.

The State trumpets the harmless error rule throughout its brief, but the fact that the State bases so much of its position that Hughes is guilty on the very evidence it claims was harmlessly admitted belies this position. "The key factor for determining whether a trial error constitutes reversible error is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." State v. Tapp, 398 S.C. 376, 390, 728 S.E.2d 468, 475 (2012) (internal quotation marks omitted).

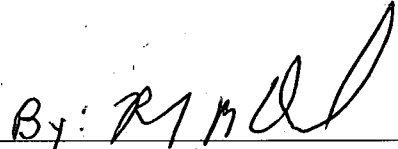
The State relied on the improperly admitted evidence throughout the trial and relies on it now, citing heavily to it throughout its 16-page statement of facts in its brief. The State's own arguments undercut the idea that admission of any of the challenged evidence was harmless. For example, the State "submits the LCV testimony was more probative than prejudicial[.]" stating that "positive results of the presumptive test for blood inside the home was probative of the Hughes family's clean-up after attacking

the victim (i.e. the conspiracy charge) and further probative of the veracity of Martin's testimony, Jane's call to 911, and [Hughes'] eventual self-defense claim." (Final Brief of Respondent p. 21.) The State has essentially conceded that it cannot prevail on a harmless error argument and, given this record, it could not.

CONCLUSION

This court should reverse the denial of the directed verdict on the conspiracy charge outright. This court should reverse and remand the remaining issues for a new immunity hearing and, should the murder and weapon possession charges still be pending at the conclusion of that hearing, a new trial on those charges. If the State's case is really as strong it claims, it should have no problem with the case being remanded to see if Hughes can be convicted when the rules are followed.

Respectfully submitted,

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