STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
The Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

MASON YARBOROUGH,

APPELLANT.

Appellate Case No. 2023-000694

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1.

Whether 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?

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, whether there was evidence appellant handled the weapon with reckless disregard for the safety of others and evidence that the gun accidently 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

On October 29th/30th 2020, appellant Mason Yarborough ("Yarborough"), murdered his father Chris Yarborough in Florence County. Yarborough was indicted at the November 23, 2021, term of the Florence County grand jury for murder. He proceeded to a jury trial on April 17, 2023, before the Honorable D. Craig Brown. Assistant Solicitors Ryan White and Todd Tucker prosecuted the case. Matthew Swilley and J.B. Joyner represented Yarborough. (Tr. 1). On April 21, 2023, the jury found Yarborough guilty of murder. (Tr. 602). Judge Brown sentenced Yarborough to life imprisonment. (Tr. 615). This appeal followed raising four issues. This is the Initial Brief of Respondent.

RESPONDENT'S STATEMENT OF FACTS

On the night of October 29th/30th 2020, appellant Mason Yarborough ("Yarborough"), his brother Emerson, and Yarborough's girlfriend Melia Steele ("Steele") were in a converted garage in which Yarborough lived. The garage was described as "a man cave." The property belonged to Yarborough's father, Chris Yarborough ("Victim"), who lived in the house adjacent to the garage. (Tr. 164-66).

Steele testified Yarborough began arguing with her that night, hit her with a pool stick, choked her, and "held a gun to his head and threatened to kill himself." Yarborough also threatened to kill their dog, and to kill her. Yarborough's younger brother was going into the house to get ready for bed but returned to the garage when he heard the argument. (Tr. 167-169). Yarborough told Steele she was the reason he was "miserable," and she was the problem in his life. (Tr. 169-70). Because of Yarborough's actions, Steele was afraid and texted her grandmother to come pick her up. (Tr. 170). She also texted or called Yarborough's father, Victim, to tell him what had just

occurred and to ask him to check on Yarborough's younger brother who was in the garage with Yarborough. (Tr. 171).

Emerson was present during the argument, when Yarborough hit Steele, and when Yarborough murdered their father. Emerson was interviewed after the crime. Emerson said he and his brother had been out in the garage for a couple of hours playing pool and talking. He said his brother drank some liquor, but he did not know when that was. Emerson stated Yarborough and Steele eventually started arguing and Yarborough hit Steele in the garage and was "going crazy." Yarborough held Steele down on a bed or couch and took her phone away from her. Yarborough also grabbed a revolver and threw it on the pool table. Steele left the premises and called Victim to make sure Emerson was okay in the garage with Yarborough. Yarborough was throwing things in the garage and threw down a cabinet his father had been working on. Emerson calmed Yarborough down and called their mother so she could talk to Yarborough. Yarborough then called his mother a bitch. Yarborough eventually said he could not take it anymore and discussed the recent death of a friend due to suicide. Victim came to garage to check on Emerson. A futon had been placed in front of the door and Yarborough told his father not to come in the garage. Victim entered the garage and said: "what's going on? or "stop this shit." Yarborough told Victim not to go somewhere in the garage. Yarborough said: "I'll show you," picked up an assault rifle lying in the garage and pointed at their father. Victim put up his hand and said: "Woe, Woe, Woe." Yarborough then shot their father with the assault rifle. Yarborough then stood over Victim and said: "How do you like that Dad?" Emerson was afraid of Yarborough, went in the house, got his little brother and his dog and hid in a bedroom. Yarborough fled from the scene. The State introduced the prior interview of Emerson during the trial. (State's Ex. #89, interview of Emerson Yarborough).

During his trial testimony, Emerson stated he either did not see the shooting or could not recall the events of that night, it was too traumatic to try to remember. When asked about his prior video-recorded statement, he admitted some of the things he said, and that some of the things he said in fact occurred. For example, he admitted he told the interviewer and actually witnessed his brother on top of Steele and taking her phone away from her. Other statements he admitted he made during the interview, but he claimed they did not actually occur. For example, he admitted he told the interviewer that his brother stood over his father after shooting him and asked: "How do you like that Dad?" But claimed at trial that did not occur. Numerous other statements he made during the interview he claimed he could not recall making at all. He would not admit the statements, but he would not deny them either. He just said, I can't remember. On cross-examination, he claimed some of the statements he made in the interview were false because he was angry and upset at his brother for killing their father and he wanted to incriminate his brother. He also claimed on cross-examination that the State coerced, threatened, intimidated, and forced him to make false statements before trial and to testify falsely to what was in his video-recorded statement. (Tr. 234-95).

The State's pathologist testified the bullet fired by Yarborough went through Victim's fingers of his hand, which was close to, but not touching, the barrel of the gun, and the bullet then struck Victim on the back of side of his head near and below the ear and came out Victim's face killing him. A portion of Victim's face was shot off. The wound was a grazing wound upon entry that eventually fractured the skull and killed Victim. The injury to the hand was consistent with Victim having his hand out with his palm facing the gun and Victim turning his head away from the gun as the gun was fired. The wound to the hand was not consistent with grabbing or grasping the end of the rifle. (Tr. 338-64).

Yarborough was eventually apprehended and gave a statement to police. (State's Exhibit 75). Yarborough admitted he was with Emerson and Steele in the garage when he and Steele got into an argument. He admitted he grabbed a revolver and put it in his mouth, and threatened suicide. Steele was angry and left. This left Yarborough and his little brother Emerson alone in the garage. Yarborough admitted Steele called his father, Victim, about the argument. Yarborough admitted his father came in the shop yelling: "Stop this shit." Yarborough admitted he already had the assault rifle out when Victim entered the garage. Yarborough claimed he grabbed the assault rifle because he was afraid of his father because his father had been abusive to him during his life. Yarborough claimed the gun went off accidentally when his father reached for the gun. Yarborough claimed he was looking out for his little brother when he pointed the gun at his father. (State's Ex. 75).

In a 911 call to police shortly after the shooting, Yarborough stated he had shot his father. When asked what happened, he stated his father had attacked him, grabbed the gun, and the gun accidentally discharged. (State's Ex. 7, 911 call).

However, the State introduced jail phone calls between Yarborough and his mother, Victim's ex-wife. Yarborough used another inmate's account to make the calls. In the phone calls, some of which were on speaker phone at his mother's home, and made in the presence of Emerson, Yarborough tells his mother to talk to Emerson about his original interview and that Emerson's statement to police is not good for Yarborough. "He f_cked me." It is clear from the phone calls Yarborough is attempting to get Emerson to change his original statement. Yarborough's mother states they need to stop talking about this on the phone. Yarborough states it is alright because he used another inmate's account. Yarborough also told his mother at one point to take Emerson and leave town before the trial; he does not want Emerson at the trial, and if he's not there Emerson's

statement is irrelevant. In the jail calls, Yarborough reminds his mother that he previously told her his father grabbed the gun, and the gun went off accidentally. (State's Ex. # 74, Jail phone calls).[1]

When Emerson testified at trial, he changed his testimony from his original statement. (Tr. 235-47; 248-254). He claimed he did not see the shooting *or* it was too difficult to think about or remember. Emerson claimed he lied in his original statement because Yarborough was acting "psycho" that night and he was angry at Yarborough. Emerson also testified the State [the Solicitor] coerced, threatened, and intimidate him to make false statements before trial and tried to make him testify to something false, his original statement, i.e. the Solicitor attempted to suborn perjury. (Tr. 254, 290-93). After this occurred, Judge Brown admitted Emerson's video recorded interview. (State's Ex. 89). Judge Brown charged the jury on murder and accident. The jury did not accept Emerson's trial testimony or Yarborough's version in his statement to police. Yarborough was found guilty of murder.

ARGUMENT I.

Judge Brown did not abuse his discretion in admitting the prior recorded statement of Emerson Yarborough where Emerson would not admit he made many of the statements in the interview and Emerson made the prior recorded interview relevant and admissible under Rule 608, SCRE, to show bias and motive to lie, and opened the door to the admission of the entire recorded interview when he testified and alleged the Solicitor threatened, intimidated, and coerced him to make false statements and to testify falsely to the prior recorded interview, and claimed he made the prior statement incriminating his brother in anger.

Emerson Yarborough, Yarborough's younger brother, was 12 years old at the time of the murder. Emerson was present and witnessed the murder of his father, Victim. (State's Ex. 89). At

[1] At trial, Yarborough also called his own forensic pathologist who testified in his opinion Victim's injury to his hand indicated his fingers were touching the barrel of the assault rifle or grasping the end of the assault rifle when it fired. Yarborough also called an expert in firearms who testified that grabbing the end of the barrel and pulling on it could cause the gun to discharge accidentally if the person holding the gun also pulled back. (Tr. 394-484).

the time, on certain weekends, Emerson was living with Victim, his little brother Corbin, and his Uncle Roger Cox in the home adjacent to the garage. (Tr. 236).

At trial, Emerson testified he remembered talking to Investigator Chris Owens in the early morning hours of October 30, 2020, after the murder. Emerson told Owens he was in the garage with Yarborough and Steele that night. (Tr. 239). Emerson testified he did not recall telling Owens that Yarborough became visibly upset when Victim came to the garage. He also did not remember if Yarborough asked Victim if Yarborough's girlfriend Steele had called Victim. (Tr. 239, l. 21 -Tr. 240, l. 6). In addition, Emerson did not remember if he told Investigator Owens that he did not see Victim make an attempt to grab Yarborough's assault rifle. (Tr. 240 -241).

Emerson did remember going to an interview at the Care House and giving a statement to Meg Temple. Emerson also recalled getting "choke up" when Temple asked about the murder. (Tr. 241). Emerson did not remember telling Temple that Yarborough and Steele got in an argument. Emerson claimed he could not remember certain portions of the interview. (Tr. 242-243).

The jury was sent out, and the State asked to play the entire interview of Emerson with Temple since Emerson would not admit to the contents of the interview. The State argued it was allowed to play this extrinsic evidence under Rule 613(c), SCRE. (Tr. 243-44). Yarborough argued that Emerson was only testifying that he did not specifically remember certain items that the Solicitor was asking about in the interview. And, that Rule 613(c) did not allow the interview to be played under these circumstances. (Tr. 244-47).

Judge Brown took a break to research the law and resumed the bench. Judge Brown ruled that under Rule 613 (b), SCRE, since the witness had not denied the prior statements but simply could not recall making the prior statements, the State's request to play the prior video-recorded

statement of the witness was denied. (Tr. 246-247). Judge Brown noted he was denying the State's request at this juncture based on the witness' answer to specific questions. (Tr. 246-47).[2]

When the jury returned to the courtroom, the cross-examination of Emerson continued. Emerson stated he did not remember telling Meg Temple that Yarborough hit his girlfriend Steele that night. (Tr. 248-49). Emerson thought he did tell Temple that Yarborough was acting "really dumb" that night, he remembered telling Temple after Steele left, he tried to talk to Yarborough. (Tr. 249). Emerson also thought he told Temple he remembered Steele called Victim to check on Emerson. He also recalled getting his dog and his younger brother together for protection that evening after Yarborough shot Victim. Emerson did remember telling Temple that when Yarborough and Steele argued, Victim, his younger brother Corbin, and Uncle Roger were in the house asleep. (Tr. 250-251).

Emerson claimed he did not remember telling Temple that Yarborough and Steele got into an argument and Yarborough hit her. (Tr. 251-52). Emerson went on to testify he recalled certain things he told Temple but did not remember other things. (Tr. 256-68). Emerson did admit Yarborough got his pistol that night and was "acting psycho." (Tr. 254).

On cross-examination, Emerson testified he gave his statement to Temple about 12 hours after Victim was murdered, and he was angry at the time and only had a couple of hours sleep. Emerson claimed he wanted to incriminate Yarborough at that time because he was angry and upset with Yarborough who had been acting "psycho" earlier. (Tr. 254).

As cross-examination continued, Emerson claimed Yarborough never tried to get him to lie, but the Solicitor had threatened, coerced and intimidated Emerson with perjury charges if he did not tell "the story" the Solicitor wanted to hear. (Tr. 290, ln. 13 -291, ln. 19). Emerson claimed

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[2] This ruling is not mentioned in Yarborough's brief.

he told the truth to the jury at trial, but he had lied before the trial at the behest of the Solicitor. On re-direct, Emerson told the Solicitor: "You wanted me to say the same lies that I said in the video [interview]." (Tr. 292-93).

After Emerson testified, the State renewed its motion to play the prior video-recorded statement of Emerson pursuant to Rule 608(c), SCRE. The State argued it should be permitted to introduce the video recorded interview of Emerson to impeach his testimony and claims at trial that the Solicitor coerced, intimidated, and threatened Emerson to testify falsely, i.e. suborned perjury. (Tr. 296-97). The Solicitor pointed out that defense counsel also brought out that Emerson purportedly made the prior statements because he was upset and angry with his brother. The Solicitor informed the trial court that the prior video-recorded statement showed that Emerson was anything but angry and the video-recorded statement would show the jury the bias and motive of the witness to lie under Rule 608, SCRE. The State also argued that under State v. Brewington, 267 S.C. 97, 226 S.E2d 249 (1976), anything tending to shed light on the truthfulness or accuracy and sincerity of a witness' testimony may be shown and considered in determining the credit to be given to a witness' testimony. The Solicitor also argued that quite frankly the defense had opened the door to the admission of the prior video-recorded statement given his testimony. Yarborough argued he admitted the prior statements and testified they were false so the prior statements should not come in under Rule 613(c) SCRE. (Tr. 296-301).

After hearing argument on the matter, Judge Brown ruled that Emerson's prior statements during the video-recorded interview were now admissible once Emerson said upon cross-examination by defense counsel that the prior statements were false, he made them in anger, and the Solicitor coerced, threatened, and intimidate him and wanted him to tell the same lie as he was telling in the video interview. (Tr. 299-303). Judge Brown noted that prior to cross-examination

Emerson stated he did not remember or recall making the prior statements but did not deny their truth; therefore, they were not admissible under Rule 613, SCRE. However, Judge Brown ruled at the point in the cross-examination where Emerson stated the prior statements were false, he made them in anger or because he was upset, and the State coerced, threatened, and intimidated him, and wanted him to tell the same lie as in the video, the prior statements became inconsistent with this trial testimony under Rule 613, SCRE, and admissible. Judge Brown also ruled that once Emerson claimed the prior statements were false, he made then in anger or was mad, and the State coerced and threatened him and wanted him to testify falsely, the prior video-recorded statement was admissible under Rule 608, SCRE and State v. Brewington 267 S.C. 97, 226 S.E2d 249 (1976), to show bias or motive to falsify because anything tending to shed light on the truthfulness or accuracy and sincerity of a witness' testimony may be shown and considered in determining the credit to be given to a witness' testimony. The jury was entitled to see the video and determine whether Emerson was lying during the interview just 12 hours after the crime, as he claimed, or if Emerson was lying now while on the stand. The jury also was entitled to see the video statement to determine from Emerson's demeanor if he was telling the truth at trial that he made the prior statements falsely in anger against Yarborough. The jury was also entitled to see the prior video recorded statement to determine if the prior statement was made in anger as Yarborough claimed on cross-examination. Judge Brown also impliedly ruled Emerson opened the door to the admission of the prior video recorded interview when he stated the prior statement was false, made in anger, and accused the Solicitor of threatening, coercing, and intimidating him to testify falsely. In fact, Judge Brown informed defense counsel that it was their questioning on cross-examination and Yarborough's answers that now made the prior video-recorded statement admissible in evidence on multiple basis when it was not admissible before. (Tr. 299-303).

The prior video-recorded statement of Emerson was then admitted in evidence. In the video recorded interview played for the jury, Emerson states his brother Yarborough hit Steele that night and Yarborough was "going crazy." Steele left, and she called Victim to make sure Emerson was alright because he was in the garage with Yarborough. Emerson said Yarborough had been beaten by Victim in the past. But, Emerson also said Yarborough grabbed the gun that night, shot Victim, and then stood over him and said: "How was that Dad?" Emerson also said Yarborough then fled to another girl's house. (State's Ex. 89, Emerson interview). In the video, it is clear Emerson is not lying, is not angry, and has not been coerced into giving the statement. (State's Ex. 89).

Standard of Review

The admission of evidence is 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). Appellate courts are bound by the factual findings of the trial court unless they are clearly erroneous. State v. Williams, 326 S.C. 130, 485 S.E.2d 99 (1997).

Whether an attorney opens the door to the admission of otherwise inadmissible evidence during the course of a trial is addressed to the sound discretion of the trial judge. State v. Page, 378, S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008). A trial court's decision to admit evidence pursuant to the doctrine of "opening the door" is reviewed for an abuse of discretion. State v. Simmons, 430 S.C. 1, 841 S.E.2d 845 (2020)(citation omitted).

Law

If a witness makes a statement on a particular issue and then subsequently contradicts that prior statement during the witness' trial testimony, the prior contradictory statement is important evidence tending to discredit the witness' trial testimony. State v. Suber, 82 S.C. 159, 161, 63 S.E.

684, 685 (1909). As a result, a prior inconsistent statement can be admitted as evidence to impeach the declarant of the statement. *See, e.g.,* State v. Lynn, 277 S.C. 222, 224, 284 S.E.2d 786, 788 (1981) ("If a witness admits a prior inconsistent statement, he has impeached himself, and further evidence is inadmissible."). Furthermore, such a statement can also be "admitted as substantive evidence when the declarant testifies at trial and is subject to cross-examination." State v. Stokes, 381 S.C. 390, 398-399, 673 S.E.2d 434, 438 (2009); *see* State v. Copeland, 278 S.C. 572, 581, 300 S.E.2d 63, 69 (1982) ("Henceforth from today, we will allow testimony of prior inconsistent statements to be used as substantive evidence when the declarant testifies at trial and is subject to cross examination. . . . We believe the adoption of this rule will more effectively aid in the discovery of the truth, and more adequately insure the freedom of the innocent and the conviction of the guilty.").

Rule 613 of the South Carolina Rules of Evidence governs issues involving the admissibility of prior inconsistent statements. State v. Carmack, 388 S.C. 190, 201, 694 S.E.2d 224, 229 (Ct. App. 2010). Pursuant to the rule, extrinsic evidence of a prior inconsistent statement is admissible if a witness – after being advised of the substance of the statement, the time and place the statement was made, and the person to whom it was made – **does not admit** making the statement after being given an opportunity to explain or deny it. Rule 613(b), SCRE; see State v. Galloway, 263 S.C. 585, 591, 211 S.E.2d 885, 888 (1975) ("The requirement of notice is met when the cross-examiner advises the witness of the substance of the prior statement and the time when, the place where and the person to whom it was made."). "However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible." Rule 613(b), SCRE.

"When the issue is whether the witness admitted making the prior inconsistent statement, the admission **must be unequivocal.**" Carmack, 388 S.C. at 201, 694 S.E.2d at 229 (emphasis added); *see* State v. Blalock, 357 S.C. 74, 80, 591 S.E.2d 632, 635 (Ct. App. 2004) ("In determining whether a witness has admitted making a prior inconsistent statement and thereby obviated the need for extrinsic proof, the courts of our state and other jurisdictions have held that the witness must admit making the prior statement unequivocally and without qualification."). Significantly, "where the witness has responded with anything less than an unequivocal admission, trial courts have been granted wide latitude to allow extrinsic evidence proving the statement." Blalock, 357 S.C. at 80, 591 S.E.2d at 636. Moreover, a trial judge's decision as to whether to admit such extrinsic evidence will not be reversed absent a manifest abuse of discretion resulting in prejudice to the defendant. Carmack, 388 S.C. at 201, 694 S.E.2d at 229.

Further, evidence is also admissible to show bias of a witness or the motive to falsify. Rule 608, SCRE; State v. Brewington, 267 S.C. 97, 226 S.E2d 249 (1976). Evidence is admissible to show bias or motive to falsify because anything tending to shed light on the truthfulness or accuracy and sincerity of a witness' testimony may be shown and considered in determining the credit to be given to a witness' testimony. Rule 608 and Brewington, 267 S.C. 97, 226 S.E2d 249.

Finally, as a matter of law, a party cannot complain as to matters brought out in response to his questions, where such prejudicial comments were solicited by his questioning, thus "opening the door" for the witness to then answer the question. State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991); State v. Culbreath, 377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008). "It is firmly established, that otherwise inadmissible evidence, may be properly admitted when opposing counsel opens the door to that evidence." Page, 378 S.C. at 482, 663 S.E.2d at 360. This Court has held "[w]hen a party introduces evidence about a particular matter, the other party is entitled

to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." State v. Jackson, 364 S.C. 329, 336, 613 S.E.2d 374, 377 (2005). "A party may introduce inadmissible evidence in rebuttal, when the opponent places a fact in issue." Simmons, 430 S.C. at 14, 841 S.E.2d at 852. Further, once the defendant opens the door, the solicitor's invited response is appropriate, so long as it is proportional. Simmons, 430 S.C. at 14-15, 841 S.E.2d at 852, *quoting* Ellenburg v. State, 366 S.C. 66, 69, 635 S.E.2d 224, 226 (2006). *See* Bowman v. State, 422 S.C. 19, 42, 809 S.E.2d 232, 244 (2018)(affirmed in part because the State responded proportionally when defendant "opened the door."). The Supreme Court has made clear it will allow introduction of evidence through the "opening the door" doctrine to rebut a false impression conveyed to the jury. State v. Northcutt, 372 S.C. 207, 221, 641 S.E.2d 873 (2007).

Analysis

Emerson was called by the State as a witness at trial. On direct examination, Emerson admitted he was interviewed by Investigator Owen shortly after the crime and then approximately 12 hours later interviewed again by Meg Temple, which was video-recorded. (State's Ex. 89). As previously shown, on direct examination, Emerson admitted remembering a few things that he said when interviewed, and that some of the things he said were true, but claimed he could not remember the majority of the things he said when interviewed. Emerson claimed at trial, contrary to his prior statements, that he did not witness the murder of his father or could not force himself to remember what he witnessed.

On cross-examination by his brother's attorney, Emerson claimed before the jury, that portions of his prior video-recorded statement were false, he made them in anger at his brother, and that the Solicitor coached, coerced, threatened and intimidated him into making false statements before trial consistent with his prior statement and attempted to get him to testify falsely

to what was in his video-recorded statement, i.e. the State attempted to suborn perjury and intimidated a witness. (Tr. 290-293).

As Judge Brown correctly found, Emerson's prior statement which was video-recorded was inconsistent with his trial testimony and admissible under Rule 613, SCRE. "When the issue is whether the witness admitted making the prior inconsistent statement, the admission **must be unequivocal.**" Carmack, 388 S.C. at 201, 694 S.E.2d at 229 (emphasis added); see State v. Blalock, 357 S.C. 74, 80, 591 S.E.2d 632, 635 (Ct. App. 2004) ("In determining whether a witness has admitted making a prior inconsistent statement and thereby obviated the need for extrinsic proof, the courts of our state and other jurisdictions have held that the witness must admit making the prior statement unequivocally and without qualification."). Significantly, "where the witness has responded with anything less than an unequivocal admission, trial courts have been granted wide latitude to allow extrinsic evidence proving the statement." Blalock, 357 S.C. at 80, 591 S.E.2d at 636. Moreover, a trial judge's decision as to whether to admit such extrinsic evidence will not be reversed absent a manifest abuse of discretion resulting in prejudice to the defendant. Carmack, 388 S.C. at 201, 694 S.E.2d at 229.

As previously stated, Emerson was repeatedly questioned about what he said in his prior statement. While he admitted he made a few of the statements in his prior interview, in the majority of the questions he was asked he claimed he could not remember whether he made the statement or not. As a result, the prior statement was admissible. *Cf.* State v. Miller, 262 S.C. 369, 371, 204 S.E.2d 738, 738-739 (1974) (holding extrinsic evidence of a witness' prior inconsistent statement was admissible where the witness admitted he signed the prior statement but stated he did not remember when asked about the contents of the statement); *See* Blalock, 357 S.C. at 80, 591 S.E.2d at 636 ("[A] witness's failure to **fully** recall her prior statement has been found to be

sufficient denial to allow extrinsic evidence." (emphasis added)); State v. Moses, 390 S.C. 502, 522, 702 S.E.2d 395, 406 (Ct. App. 2010) ("This wide latitude [to allow extrinsic evidence proving a prior inconsistent statement] extends to a witness indicating an inability to recall or to remember a previous statement[.]"); Blalock, 357 S.C. at 80, 591 S.E.2d at 636 (where the witness has responded with anything less than an unequivocal admission, trial courts have been granted wide latitude to allow extrinsic evidence proving the statement."); Carmack, 388 S.C. at 201, 694 S.E.2d at 229 (moreover, a trial judge's decision as to whether to admit such extrinsic evidence will not be reversed absent a manifest abuse of discretion resulting in prejudice to the defendant).

Furthermore, the prior video recorded statement of Emerson was admissible for another reason addressed by Judge Brown. The prior statement was admissible to show bias and motive to falsify under Rule 608 and Brewington, 267 S.C. 97, 226 S.E2d 249. The State introduced two jail phone calls from Yarborough to his mother, the ex-wife of Victim. (Tr. 306-11; State's Ex. 74). The calls were received at the mother's residence and Emerson was present during some of the phone calls which were on speaker phone. In the phone calls, Yarborough tells his mother that she needs to speak to Emerson **about his prior statement** in this case and that it is hurting Yarborough's case. (State's Ex. 74; Tr. 306-11). There was clear evidence of attempted witness' tampering by Yarborough. Yarborough specifically references Emerson's prior statement in the phone call, and he asks his mother to talk to Emerson about the prior statement. (State's Ex. 74; Tr. 306-11). Emerson then testified at trial differently than his original statement. (Compare State's Ex. 89 to Emerson's trial testimony Tr. 234-95). The jury was entitled to hear and see the video-recorded statement to determine if Emerson's trial testimony was the result of witness' tampering or not, bias in favor of his brother, and his motive to falsify. Evidence is admissible to show bias or motive to falsify because anything tending to shed light on the truthfulness or accuracy and

sincerity of a witness' testimony may be shown and considered in determining the credit to be given to a witness' testimony. Rule 608 and Brewington, 267 S.C. 97, 226 S.E2d 249.

Finally, as the learned trial judge implicitly found, Yarborough's testimony on cross-examination "opened the door" to the admission of the prior recorded video interview of Emerson made just 12 hours after the murder and before the Solicitor had ever met with Emerson. State v. Robinson, 305 S.C. 469, 409 S.E.2d 404 (1991); Vaughn v. State, 362 S.C. 163, 607 S.E.2d 72 (2004); State v. Culbreath, 377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008); State v. Young, 378 S.C. 101, 661 S.E.2d 387 (2008) and State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984), *overruled on other grounds*, State v. Davis-Kocsis, 443 S.C. 127, 903 S.E.2d 491(2024); Ellenburg v. State, 366 S.C. 66, 69, 635 S.E.2d 224, 226 (2006). *See* Bowman v. State, 422 S.C. 19, 42, 809 S.E.2d 232, 244 (2018).

Once Yarborough claimed the State threatened, intimidated, coerced and intimidated him, i.e. attempted to suborn perjury, the jury was entitled to see the entire video statement of Emerson to determine, based on its view of Emerson during the interview and during the trial, whether Emerson was lying during the interview or during the trial, whether Emerson was telling the truth in the video or telling the truth at trial, and resultingly whether the State threatened, coerced, or intimidated him to make false statements or testify falsely. (Tr. 290-93). Briggs v. State, 421 S.C. 316, 806 S.E.2d 713 (2017)(where defense stated in opening and during cross-examination, victim had been told what to say, it was proper for the State to address the issue of witness-coaching during the forensic interviewer's testimony. When the defense raises coaching of a witness, testimony addressing the absence of witness coaching, although normally deemed to be improperly bolstering of a witness' credibility, is admissible). Judge Brown was correct and did not abuse his discretion. Briggs v. State, 421 S.C. 316, 806 S.E.2d 713.

Further, when Emerson testified that he lied in the prior video recorded statement because he was angry at his brother, it opened the door to admission of the prior video recorded statement so the jury could determine from viewing the video recorded statement whether Emerson made the prior statement in anger or he was actually telling the truth. Briggs v. State, 421 S.C. 316, 806 S.E.2d 713. He cannot now complain. Robinson, 305 S.C. 469, 409 S.E.2d 404; Culbreath, 377 S.C. 326, 659 S.E.2d 268. In Stroman, 281 S.C. 508, 316 S.E.2d 395, the defense in seeking to impeach a key state's witness asked him about prior thefts he had committed. He testified he had been involved in several burglaries. The State sought to bring out from the witness that Stroman was involved in several of those burglaries. The trial court held Stroman opened the door to his participation in the prior burglaries by asking the witness about his prior thefts. Our Supreme Court agreed finding Stroman opened the door to admission of the details of the prior thefts including his participation in the prior burglaries by questioning the witness about his prior thefts. Stroman, 281 S.C. at 512-13, 316 S.E.2d at 398-99. It held: "Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially." Id. at 513, 316 S.E.2d at 399. *See also* Culbreath, *supra* (finding where the defense asked witness if drugs he sold before were fronted to him and he replied by defendant. When they further asked him if he had checked the drugs received from defendant, and if not, why, the witness stated he had dealt with defendant before, and never had to check them. The defense "opened the door" on this issue by its cross-examination of the witness on the subject); State v. Bryant, 356 S.C. 485, 589 S.E.2d 775 (Ct. App. 2003), *reversed on other grounds*, 369 S.C. 511, 633 S.E.2d 152 (2006)(where defense attacked a bouncer's credibility he kept a close eye on defendant the night of the murder, it was permissible to elicit on re-direct, in a prior incident,

defendant threatened the bouncer, to explain why the bouncer kept a close eye on defendant the night of the murder to rehabilitate witness); Northcutt, 372 S.C. 207, 221, 641 S.E.2d 873 (the Court will allow introduction of evidence through the "opening the door" doctrine to rebut a false impression conveyed to the jury.); Simmons, 430 S.C. at 14, 841 S.E.2d at 852 ("A party may introduce inadmissible evidence in rebuttal, when the opponent places a fact in issue."). Again, Judge Brown's ruling was not an abuse of discretion. Briggs v. State, 421 S.C. 316, 806 S.E.2d 713; Northcutt.

After counsel specifically questioned Emerson about whether he had been coached, coerced, threatened or told what to say by Yarborough, his mother, or defense counsel, defense then specifically went into questioning the witness about whether anyone else had threatened, coerced, intimidated or coached him what to say, and intentionally elicited extensive testimony from Emerson alleging the Solicitor coached, coerced, threatened, and intimidated Emerson into making false statements and to testify falsely. Counsel also intentionally elicited from Emerson that some of his statements in his prior statement, those incriminating his brother, were made in anger. Judge Brown informed defense counsel during the argument on this issue, that what counsel specifically elicited on cross-examination caused the prior statement of the witness to be admissible in evidence. (Tr. 299-303). Yarborough clearly opened the door to the admission of the prior statement on cross-examination.

ARGUMENT II.

Judge Brown did not abuse his discretion in refusing to admit the testimony of Victim's ex-wife about violent acts Victim allegedly committed against her 9-10 years before Victim's murder as they were not admissible under rule 405(b), SCRE

What Occurred Below

Yarborough called Victim's ex-wife and his mother as a witness. She was 50 years old at the time of trial. (485-86). She testified she had been married to Victim for over 15 years, but they divorced in 2013. When she began testifying about the divorce in 2013 being caused by problems in the marriage and a text message she received from a co-worker, the State asked that the jury be excused. Judge Brown then instructed Yarborough to proffer Victim's ex-wife's testimony. (Tr. 486-87).

Victim's ex-wife then proffered that she had witnessed Victim's violent behavior and his violence against Yarborough. (Tr. 488, ll. 2-5). She testified about a specific incident where Yarborough was young, and Victim whipped Yarborough with a belt after he got into trouble. She testified this punishment was extreme, and she claimed she stopped the whipping and told Victim that was enough. Victim stopped. She took Yarborough out of his room and "he had strips on him. He had a belt bucket from the belt on his back [it left] a mark." (Tr. 488, ln. 16 -489, ln. 6). Judge Brown later ruled this and any other evidence of abuse against Yarborough was admissible.

Victim's ex-wife then proffered another incident where Victim came home and drank a couple of beers. He demanded to talk to her outside. Victim then began choking her, and Yarborough came outside and said: "Dad, please get of my mama, leave my mama alone. And he [Victim] told him [Yarborough] if he didn't get back in, he would beat his ass." She bit Victim's finger, and he stopped. Victim's ex-wife testified that Victim kicked her chair over, and she scrapped her face and arm. He also "busted my toe on the cement." (Tr. 489, 1. 10 – Tr. 490, l.

10). Victim's ex-wife also testified Victim had come inside after drinking on another occasion and "he wanted to be intimate." When Victim's ex-wife said no, Victim threw a remote which hit her in the back which left a mark on her back. On another date, Victim picked up a plate of hot food and threw it at his ex-wife hitting her in the back of the head in the presence of Emerson and Yarborough. (Tr. 490-491). On another occasion Victim came home and had been drinking. Victim became angry about text messages the ex-wife had received from a co-worker. In the presence of Yarborough, Victim put a gun to his ex-wife's head and demanded she find the text messages. (Tr. 491-492). Victim's ex-wife confirmed Yarborough was present for each of these acts and Yarborough was afraid of Victim "to a certain point." (Tr. 493). On cross-examination, Victim's ex-wife admitted that all of these incidents occurred during 2010 and 2011, which was nine (9) to ten (10) years before the murder in this case. (Tr. 493, ll. 11-19). She admitted she finally left in 2011/2012, and up to that point it had become mostly mental and verbal abuse. (Tr. 492, ll. 11-14). Victim's ex-wife admitted she had not witnessed any acts of violence or abuse of Mason since the divorce. (Tr. 492, ll. 22-25).

Judge Brown and defense counsel then discussed the admissibility of these prior incidents pursuant to Rule 405, SCRE, and State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000). (Tr. 493-97). Judge Young specifically stated on the record that the law holds that: "...other specific instances of violence by the victim are not admissible unless they were directed against the defendant or were so closely connected at the point of time of the occasion which the homicide to produce a reasonable apprehension of great bodily harm." (Tr. 495, ln. 23-496, ln. 3). Judge Brown specifically asked that pursuant to State v. Day, 341 S.C. 410, 535 S.E.2d 431, Rule 405, SCRE, and State v. McCray, 413 S.C. 76, 92-95, 773 S.E.2d 914 (Ct. App. 2015), since most of these incidents were directed against the witness [Victim's ex-wife], but not Yarborough, does not the

law require that they have to be more closely connected in time to the incident for which someone is charged? Defense counsel argued these prior incidents against Yarborough and putting a gun to his mother's head in his presence all contributed to Yarborough's fear of Victim and the incidents were admissible under Rule 405(b), SCRE and State v. Day. (Tr. 494-97). Defense counsel argued the evidence was admissible to show why it was reasonable for Yarborough to pick up the gun that evening, because he was afraid of what his father was going to do to him. (Tr. 494-97).

The State argued pursuant to Day, 341 S.C. 410, 535 S.E.2d 43, that the prior instances were too remote in time to be admissible. The murder on trial took place almost 10 years after the conduct the defense wanted to introduce.

Judge Brown ruled that, pursuant to South Carolina law, the acts of violence directed at Yarborough were admissible, but the acts of violence against Victim's ex-wife were not admissible. (Tr. 493-97).

Standard of Review

The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion and prejudice to the accused. State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011); State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.: *see also* State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013). "Whether a specific instance of conduct by the deceased is closely connected in point of time or occasion to the homicide so as to be admissible is in the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the accused." Day, 341 S.C. at 420, 535 S.E.2d at 436.

Law/Analysis

In Day, Day argued the trial judge erred by excluding testimony of Marva Szumowicz ("Szumowicz") concerning a past act of violence of the victim four months before the murder, that Day alleged was closely related in time and occasion to the homicide and served as strong corroborating evidence that the victim was a vengeful person. The Court held as follows:

> In the murder prosecution of one pleading self-defense against an attack by the deceased, evidence of other specific instances of violence on the part of the deceased are not admissible unless they were directed against the defendant or, if directed against others, were so closely connected at point of time or occasion with the homicide as reasonably to indicate the state of mind of the deceased at the time of the homicide, or to produce reasonable apprehension of great bodily harm. State v. Brown, 321 S.C. 184, 467 S.E.2d 922 (1996); State v. Amburgey, 206 S.C. 426, 34 S.E.2d 779 (1945). Whether a specific instance of conduct by the deceased is closely connected in point of time or occasion to the homicide so as to be admissible is in the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the accused. Id. (citing State v. Peak, 134 S.C. 329, 133 S.E. 31 (1926)).

Day, 341 S.C. at 419–20, 535 S.E.2d at 436; State v. Mekler, 368 S.C. 1, 626 S.E.2d 890 (Ct. App. 2005), *affirmed on other grounds*, 379 S.C. 12, 664 S.E.2d 477 (2008)(same); State v. Douglas, 411 S.C. 307. 324, 768 S.E.2d 232, 242 (Ct. App. 2014)(exact same).[3]

In Day, to support his theory of self-defense, Day wanted to cross-examine Szumowicz concerning a past act of violence by the victim four months before the crime on trial. At an *in camera* hearing prior to trial, Day argued he should be allowed to present testimony from Szumowicz concerning a November 30, 1995 incident where the victim held a double-barreled

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[3] This has been the rule both before and after the adoption of the SCRE. Day, 341 S.C. at 420, 535 S.E.2d at 436; State v. McCray, 413 S.C. 76, 92-95, 773 S.E.2d 914 (Ct. App. 2015); State v. Douglas, 411 S.C. 307, 768 S.E.2d 232, 242 (Ct. App. 2014); State v. Mekler, 368 S.C. 1, 626 S.E.2d 890 (Ct. App. 2005); State v. Brown, 321 S.C. 184, 467 S.E.2d 922 (1996); State v. Amburgey, 206 S.C. 426, 34 S.E.2d 779 (1945); State v. Hill, 129 S.C. 166, 123 S.E. 817 (1924); State v. Moody, 94 S.C. 26, 78 S.E. 737 (1913); State v. Andrews, 73 S.C. 257, 53 S.E. 423 (1906); State v. Thrailkill, 71 S.C. 142, 50 S.E. 551 (1905); State v. Dill, 48 S.C. 249, 26 S.E. 567 (1897).

shotgun to her head for eighteen hours as he drove around Aiken County and accused her of being involved with others in a drug trafficking scheme in his residence. According to Szumowicz, "He thought that there was drug trafficking going on in his ... yard or his premises there and that he was not getting any benefit from what was going on and that I was to produce at least a thousand dollars on his table by that night which he then continued until twelve o'clock ... the next day." Day, *supra.*

The trial judge ruled that specific instances of victim's conduct were inadmissible under Rule 405, SCRE[4] and State v. Brown, *supra,* but allowed Day to present Szumowicz's opinion as to whether victim was a violent person. In Brown, the South Carolina Supreme Court found that the trial judge did not abuse his discretion in refusing to admit a prior act of violence by the deceased in support of a self-defense charge because of the remoteness of the specific act of violence, which occurred twenty-three years prior to the incident in question. Brown, 321 S.C. at 187, 467 S.E.2d at 924; *see also* State v. Evans, 112 S.C. 43, 99 S.E. 751 (1919) (holding trial judge in a manslaughter trial did not abuse discretion in excluding record of indictment of deceased for burglary where burglary charge was not sufficiently connected in time and circumstances to be submitted as evidence affecting self-defense). Day, 341 S.C. at 421, 535 S.E.2d at 437.

The Day Court held that the prior act of violence against Szumowicz occurred **only four months** prior to the victim's death and was admissible to prove Day had a reasonable apprehension

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[4] Rule 405, SCRE states:

(a) **Reputation or Opinion.** In all cases in which evidence of character or a trait 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 instances of conduct.
(b) **Specific Instances of Conduct.** In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

of violence from the victim, an essential element of his self-defense claim. Szumowicz's testimony demonstrated that the victim acted very violently when he felt he had been deceived or double-crossed by a confidant. This evidence was relevant to Day's theory of self-defense because he claimed he thought the victim may pull a gun on him if he thought Day had deceived him by allowing Bouchillon to hide in the back seat of the car. The victim's conduct in holding a gun to Szumowicz's head because he was suspicious of her is also further evidence of the continuous and consistent pattern of the victim's drug-induced, violent paranoia, which the defense attempted to establish during trial. Id.

In State v. Mekler, 368 S.C. 1, 14, 626 S.E.2d 890, 897 (Ct. App. 2005), this Court determined evidence of the victim's prior act of violence against a third-party, which occurred **less than three months** prior to the victim's death, was admissible because it "was so closely connected at point of time to indicate [the victim's] state of mind at the time of the shooting".

In State v. McCray, 413 S.C. 76, 94, 773 S.E.2d 914, 923 (Ct. App. 2015), McCray argued the testimonies of Jackson and Brabham about prior acts of the defendant 7 years and 9 years earlier were admissible because the specific incidents described were so closely connected to the homicide as to reasonably indicate the state of mind. This Court disagreed and upheld the trial judge's refusal to admit the testimony.

In State v. Amburgey, 206 S.C. 426, 429, 34 S.E.2d 779, 780 (1945), the Court stated:

> The rule has long been established in this State that evidence of other specific instances of violence on the part of the deceased are not admissible unless they were directed against the defendant, or if directed against others, were so closely connected in point of time or occasion with the homicide as reasonably to indicate the state of mind of the deceased at the time of the homicide, or to produce reasonable apprehension of great bodily harm.

206 S.C. 426, 429, 34 S.E.2d 779, 780 (1945). Whether a specific instance of conduct by the deceased is closely connected in point of time or occasion to the homicide so as to be admissible is in the judge's discretion and will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the accused. Brown, 321 S.C. at 187, 467 S.E.2d at 924; Peak, 134 S.C. 329, 133 S.E. 31.

Here, Yarborough sought to introduce actions of Victim against Victim's ex-wife that occurred almost 10 years before the crime. Judge Brown did not abuse his discretion. Brown, 321 S.C. at 187, 467 S.E.2d at 924 (1996) (holding the trial court did not abuse its discretion in refusing to admit the victim's 23 year old manslaughter conviction as evidence that the appellant had a reasonable apprehension of violence from the victim). "Young's voluntary manslaughter conviction occurred in 1971, twenty-three years before he was shot by Brown. Based on the remoteness of this specific act of violence, we find that the trial judge did not abuse his discretion in refusing to admit the conviction into evidence and, therefore, committed no error." Brown, 321 S.C. at 187, 467 S.E.2d at 924.

The evidence at trial established Yarborough attacked his girlfriend Steele, hit her with a pool stick, got on top of her and choked her and took her phone away from her. Yarborough also picked up a gun, put it in his mouth or to his head and threatened to kill himself. Steele left because of Yarboroughs actions and called or texted Victim to check on Emerson, Yarborough's little brother because Emerson was in the garage with Yarborough who was acting "psycho." Victim went to the garage to check on Emerson and told Yarborough to stop what he was doing. Yarborough picked up a loaded assault rifle, pointed it at Victim, and shot Victim in the head. He then walked over to Victim and stated: "How do you like that, dad?" Victim's actions 10 years earlier against Victim's ex-wife were not so closely connected at point of time or occasion with

the homicide as reasonably to indicate the state of mind of the deceased or Yarborough at the time of the homicide, or to produce reasonable apprehension of great bodily harm. Day, *supra*. Judge Brown must be affirmed because he acted in his sound discretion and did not abuse the same. Brown; Peake.

Harmless Error

Even assuming *arguendo* any error, it was harmless. The State admitted Yarborough's statement to police the day after the crime where Yarborough stated he was afraid of his father all of the time. (State's Ex. 75). Yarborough also stated that he picked up the gun because he was afraid of his father because of prior abuse. (State's Ex. 75). When told by Investigator Owen that he had heard the abuse between Victim and Yarborough went both ways, Yarborough recounted that he only hit Victim in the head in the past with a vase because Victim had choked Petitioner with both hands around Yarborough's neck until Yarborough's face turned blue and he had no choice but to hit Victim. (State's Ex. 75). The State introduced Emerson's prior recorded statement in which Emerson informed police that Victim had abused Yarborough during his lifetime, there was a prior incident that could have led to the shooting, and Yarborough was afraid of his father. (State's Ex. 89). And, Judge Brown admitted the testimony of Yarborough's mother that Victim had abused Yarborough physically in the past, and Victim was in a foul mood that day. (Tr. 498, 500). And, Yarborough called his mother after the shooting and stated I accidentally shot dad and it was an accident. He grabbed the gun. (Tr. 503). Finally, the State admitted the 911 call from Yarborough in which he stated that Victim had been on blood pressure medication and was very angry and attacked him, and decedent grabbed the gun and "it went off." (State's Ex. 6, 911 call). (Tr. 120, ll2-16). The evidence closely connected at point of time or occasion with the homicide as reasonably to indicate the state of mind of the deceased or Yarborough at the time of the

homicide, or to produce reasonable apprehension of great bodily harm was admitted. Day, *supra*. What was not admitted was extraneous evidence from 10 years earlier which was cumulative to that admitted. Therefore, any error was harmless.

ARGUMENT III.

Judge Brown did not err in declining to charge involuntary manslaughter.

The testimony at trial was undisputed that Yarborough was in the garage with his girlfriend Steele and his little brother Emerson. Yarborough had been drinking Crown Royal and had a couple of beers, but he was not drunk. (State's Ex. 75, recorded statement of Yarborough). He began arguing with his girlfriend and then attacked her. He hit her with a pool stick and then got on top of her and choked her with his hands around her neck and took her phone away from her. He also told her she was not going to leave. Eventually, he picked up a pistol, put it in his mouth or to his head, and threatened to kill himself. Steele left the garage and later phoned or texted Victim and told him what had occurred and asked him to check on Emerson who was in the garage with Yarborough. Victim went out to the garage and stated: "what's going on?" or told Yarborough to "stop this shit."

Emerson in his statement, admitted in evidence, stated when his father entered the garage Yarborough picked up the assault rifle pointed at his father and intentionally shot him. (State's Ex. 89). Emerson said after Yarborough shot his father, he walked over and said to his father: "How do you like that dad? (State's Ex. 89).

In Yarborough's statement to police, Yarborough told the investigator he was very scared of Victim. He said he was scared of Victim all the time. (State's Ex. 75). Yarborough stated he, Yarborough, grabbed the gun because his father was coming to the garage, and he was scared of him. He stated he was afraid of his father because of prior abuse. (State's Ex. 75). Yarborough

stated his father came in the garage yelling: "Stop this shit." Yarborough stated he pointed the gun, but he did not shoot it. He claimed his father reached for the gun. Yarborough stated he hit the safety down and moved his finger over to the trigger. He started to back up and take a breath, and the gun went off. Yarborough stated he had thought about it a thousand times and he still did not understand how the gun went off. He stated it was an accident. (State's Ex 75.). Yarborough stated he was just trying to look out for Emerson, and he didn't want Emerson to go through the junk he went through with their father. Yarborough stated I never meant this. (State's 75).

Dr. Thomas Owens, a defense expert, who was qualified as an expert in forensic pathology testified that the injury to Victim's hand was consistent with the fingers being in contact with the end of the barrel or grasping the end of the barrel. (Tr. 395; 410). The State also introduced the 911 call from Yarborough in which he told the 911 operator that his dad was on blood pressure medicine and had been very angry, attacked him, and grabbed the gun and "it went off." (State's Ex. 6, 911 call; Tr. 120). The State also introduced jail phone calls between Yarborough and his mother in which Yarborough tells his mother, remember how I told you dad grabbed the end of the gun and it went off. (State's 74). Defendant also introduced a jail call where he claimed the gun accidentally discharged. (Def. Ex. 38).

What Occurred Below

Yarborough requested jury instructions on the defense of accident and on involuntary manslaughter. Defense counsel argued Yarborough's negligent handling of a loaded gun. Yarborough 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 evidence of a struggle over a gun alone was sufficient to warrant the jury instruction and there was also evidence Victim grabbed the gun, and it accidentally discharged. (Tr. 519). Counsel argued the shooting

was unintentional, (Tr. 519), and the defendant had previously recklessly handled a handgun and consumed alcohol. (Tr. 520). Counsel argued there was "evidence of a struggle over the gun" because Victim grabbed the gun. (Tr. 520).

The State argued involuntary manslaughter was not appropriate under the evidence. Yarborough was pointing and presenting a firearm, which was a felony pursuant to S.C. Code Ann. Section 16-23-410, and therefore he was not entitled to an instruction on involuntary manslaughter under the first definition of involuntary manslaughter. (Tr. 527-29). The State also argued that Yarborough was not entitled to an involuntary manslaughter instruction under the second definition of the same as according to his testimony he was armed in self-defense and there was no evidence he handled the rifle with reckless disregard for the lives and safety of others. (Tr. 521, 528). The State argued the only evidence that came in about the handling of the firearm was from Emerson in his recorded statement or statement to Investigator Owen. Emerson stated Yarborough picked up the gun, pointed it at his father, and shot him, and there was nothing to refute it. The State also argued there was not testimony of an actual "struggle over this gun." (Tr. 523).

The defense argued Yarborough handled the weapon in a negligent and careless manner when Victim attempted to grab the gun, causing the gun to discharge, and constituted a reckless disregard for the safety of others warranting the instruction. Counsel cited to the 911 tape where Yarborough said his father attacked him, and cited to other testimony he claimed justified an involuntary manslaughter charge. (Tr. 524-527).

Judge Brown stated that he wanted his reasoning set forth in the record for any appellate court reviewing his decision. (Tr. 535). Judge Brown agreed to instruct the jury on the defense of accident but declined to charge involuntary manslaughter. (Tr. 523-24; 529-535). Judge Brown reviewed the case authority submitted by defense counsel, **and** also conducted his own research.

(Tr. 523-24; 529-35). Judge Brown reviewed State v. White, 253 S.C. 475, 171 S.E.2d 712 (1969); Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991); Tisdale v. State, 378 S.C. 122, 661 S.E.2d 410 (2008) State v. Meckler, 379 S.C. 12, 664 S.E.2d 477 (2008). Judge Brown noted in Casey, there was evidence of a struggle, and that case held evidence of a struggle is sufficient for submission of involuntary manslaughter. (Tr. 530). In Tisdale, the court noted the defendant was punched in the face, and the victim pulled a gun and shot at the defendant. The defendant and victim fought over the gun and one or two shots were fired. Judge Brown correctly found in this case there was no evidence that the victim was yelling or punched the victim, there was no evidence the victim in this case was in possession of a firearm, knife or any weapon. The court also noted in Tisdale, the gun was in the victim's hand when it went off. And, in Tisdale, the defendant testified he never had the gun in his hand. (Tr. 530). Judge Brown also noted that in Meckler, the Court held the trial judge erred in not charging involuntary manslaughter. But the facts in Meckler were that the victim had a knife and after Meckler observed the knife, Meckler armed herself with a shotgun. The victim threatened to come up on the porch. Meckler testified she pulled the hammer back on the shotgun and positioned it on her hip. When she cocked the gun, the victim leaned, and the gun fired, but she did not remember pulling the trigger. Judge Brown noted that defense counsel or stated that the victim grabbed the gun. Judge Brown found there was nothing in the evidence of a struggle over a gun. (Tr. 530-31).

Judge Brown also looked at State v. Smith, 391 S.C. 408, 706 S.E.2d 12 (2011) and stated that this case is where he found the law [definition] as to involuntary manslaughter he stated earlier. Judge Brown also noted that in Smith, Smith entered a home to sell drugs to the victim. Smith brandished a firearm and used it to pistol whip the victim. According to Smith, he pistol whipped the victim because the victim approached him in serious or threatening manner. The victim in

Smith was unarmed. The door to the victim's trailer was unlocked and there was no evidence Smith was unable to retreat from the dangerous situation he created. Judge Brown noted that in this case, the victim was unarmed. The shooting occurred in the garage behind the defendant's house and there was no testimony that the defendant was unable to retreat. There was further testimony that the situation created that resulted in Victim's death was a dangerous situation created by the defendant Yarborough. (Tr. 531).

Judge Brown noted that in the Smith case, it directly addressed subsection two of involuntary manslaughter which defense counsel argued in support of the involuntary manslaughter instruction, which is the unintentional killing of another without malice while engaged in a lawful activity with reckless disregard for the safety of others. (Tr. 532). Judge Brown noted that the Court in Smith said that there was no evidence to suggest that Smith was without fault in bringing on the difficulty. (Tr. 532). Judge Brown held: "As in the case before me, there is no evidence in the record that Defendant Yarborough was without fault in bringing on the difficulty." (Tr. 532, ll. 8-11).

Judge Brown also noted that the Court in Smith held there was no evidence Smith believed or actually was in eminent danger of losing his life or sustaining serious bodily injury. (Tr. 532). While there was evidence in the record that Mr. Yarborough was scared, "there was no evidence in the record that he believed or actually was in eminent danger of losing his life or sustaining serious bodily injury or that he had no other probable means of avoiding the danger other than drawing a loaded weapon." (Tr. 532, ll. 15-20).

Judge Brown also reviewed on the record in ruling on this issue State v. Wharton, 381 S.C. 209, 672 S.E.2d 786 (2009). Judge Brown noted that in that case, the Supreme Court found the trial court did not err in refusing or denying the defendant's request for a charge on involuntary

manslaughter. Judge Brown ruled, based on his careful review of the case law, there was no evidence Yarborough fit under either definition of involuntary manslaughter. Judge Brown believed that Wharton was "eerily similar" to the present case. Judge Brown noted that in Wharton, the Court held that even if the defendant did not intentionally fire the weapon, he committed an unlawful act that would naturally tend to cause death or great bodily injury. Therefore, the trial court properly denied the defendant's request for an involuntary manslaughter charge. (Tr. 523-24; 529-535).

Judge Brown noted that defense counsel argued that Yarborough fit under both definition of involuntary manslaughter, i.e. an unintentional killing of another without malice, but while engaged in an unlawful activity not amounting to a felony and not naturally tending to cause death or great bodily harm or an unlawful killing of another without malice while engaged in a lawful activity with reckless disregard for the safety of others. (Tr. 533). Judge Brown noted that he had already addressed the second definition of involuntary, and Yarborough was not entitled to an involuntary manslaughter instruction for the reasons previously stated. In looking at the first definition of involuntary manslaughter, Judge Brown found that in this case there was clearly a killing of another. There was evidence that the killing was unintentional based on the 911 call and Yarborough's phone calls to his family introduced by the defense wherein he claimed the killing was accidental. But, Yarborough could not meet the other element of the first definition of involuntary manslaughter, an unlawful act not amounting to a felony. (Tr. 534). Judge Brown found that pointing and presenting a firearm is a felony under S.C. Code Ann. Section 16-23-410 and thus Yarborough could not fit under the first definition of involuntary manslaughter. Judge Brown found that based on all of the cases submitted to him as well as the applicable statutory

law, 16-23-410, the defendant would not be entitled to a charge of involuntary manslaughter. (Tr. 535). In conclusion, Judge Brown stated as follows:

> Defense counsel's objection is so noted for the record, but I want to make it abundantly clear for any appellate issues as to what this Court's reasoning is in making that decision, okay. All right.

(Tr. 535, 6-10).

Law/Analysis

"The law to be charged must be determined from the evidence presented at trial." State v. Rivera, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010). "In determining whether the evidence requires a charge on a lesser included offense, the court views the facts in a light most favorable to the defendant." State v. Brayboy, 387 S.C. 174, 179, 691 S.E.2d 482, 485 (Ct.App.2010). "A trial court should refuse to charge the lesser-included offense of involuntary manslaughter *only* where there is no evidence the defendant committed the lesser offense." State v. Mekler, 379 S.C. 12, 15, 664 S.E.2d 477, 479 (2008).

Involuntary manslaughter is (1) the unintentional killing of another without malice, but **while engaged in an unlawful activity not naturally tending to cause death or great bodily harm**; or (2) the unintentional killing of another without malice, while engaged in a lawful activity **with reckless disregard for the safety of others**. State v. Chatman, 336 S.C. 149, 152, 519 S.E.2d 100, 101 (1999). If there is any evidence warranting a charge on involuntary manslaughter, then the charge must be given. Wharton, 381 S.C. at 216, 672 S.E.2d at 789. In Wharton, the Court held as follows:

> In our view, there is no evidence supporting an involuntary manslaughter charge. Even assuming Wharton did not intentionally fire the gun at Shaw, by pointing the gun and waiving it in the air, Wharton committed an unlawful act that would naturally tend to cause death or great bodily harm. Accordingly, we hold the trial court properly denied his request for an involuntary manslaughter charge.

Wharton, 381 S.C. at 216, 672 S.E.2d at 789.

In State v. Tucker, the Court defined involuntary manslaughter as:

> (1) the killing of another without malice and unintentionally, but while one is engaged in the commission of some unlawful act **not amounting to a felony** and not tending to cause death or great bodily harm; or (2) the killing of another without malice unintentionally, but while one is acting lawfully **with reckless disregard of the safety of others.**

State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996)(emphasis added).

This Court should affirm Judge Brown's denial of Yarborough's request to charge involuntary manslaughter and reject his argument that he was entitled to this charge because of evidence that he was lawfully armed in self-defense and the victim's death occurred as the result of an accidental discharge of the gun when victim reached for or allegedly grabbed the barrel. Being mindful of prior decisions in which the Supreme Court of South Carolina and this Court noted that evidence of a struggle over a weapon between a defendant and the victim supports an involuntary manslaughter charge, *See, e.g.*, State v. Light, 378 S.C. 641, 649, 664 S.E.2d 465, 469 (2008) ("[T]he fact petitioner and [the victim] were struggling over the weapon is sufficient evidence for submission of an involuntary manslaughter instruction to the jury."); State v. Patrick, 289 S.C. 301, 305-06, 345 S.E.2d 481, 483-84 (1986) (stating the appellant's testimony that "the victim, apparently thinking that the appellant was going to shoot him, grabbed the end of the barrel causing the gun to fire ... constituted a sufficient ground for submitting the possible verdict of involuntary manslaughter to the jury"); State v. Battle, 408 S.C. 109, 757 S.E.2d 737 (Ct. App. 2014)(appellant's testimony that he struggled with the victim over control of the murder weapon was sufficient to support charge of involuntary manslaughter)(citing Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991)(evidence of a struggle between defendant and third party and gun discharged killing victim was sufficient to support involuntary manslaughter instruction); Tisdale

v. State, 378 S.C. 122, 125, 661 S.E.2d 410, 412 (2008)("Evidence of a struggle between the defendant and the victim over a weapon supports submission of an involuntary manslaughter charge."), this Court should affirm Yarborough's conviction pursuant to State v. Cabrera-Pena, 361 S.C. 372, 381, 605 S.E.2d 522, 526–27 (2004), however the evidence in each case must be considered.

Under the State's theory of the case, Yarborough picked up a loaded SKS Assault Rifle, pointed it at his father, and intentionally shot his father when the father entered the garage to check on both Yarborough (who had just before threatened self-harm with another weapon) and Emerson and asked "what's going on" or "stop this shit." Under the defense theory, Yarborough armed himself in self-defense, and the gun discharged accidentally when Victim grabbed the gun or reached for the gun. To fit under the first definition of involuntary manslaughter, one must be engaged in *some unlawful act* **not amounting to a felony and not tending to cause death or great bodily harm**. As Judge Brown held in this case in denying an instruction on involuntary manslaughter, pointing and presenting a firearm is a felony and one naturally tending to cause death or great bodily harm. Judge Brown is correct as that is the law. S.C. Code Ann. § 16–23–410 (1976) (pointing or presenting a firearm); State v. Cabrera-Pena, 361 S.C. 372, 381, 605 S.E.2d 522, 526–27 (2004)("Cabrera–Pena's conduct does not fit within the first definition of involuntary manslaughter because he was engaged in unlawful, felonious and harmful conduct" of pointing a loaded firearm at the victim and her friends). In State v. Rivera, 389 S.C. 399, 699 S.E.2d 157 (2010), the Supreme Court agreed with the State that "[Rivera's brandishing a weapon was unlawful conduct naturally tending to cause death or great bodily harm[;] thus [,] he was not entitled to a charge on involuntary manslaughter." Id. at 403 699 S.E.2d at 159. Under the State's theory and evidence, Yarborough was committing a felony dangerous to human life, pointing a

firearm, when he shot Victim intentionally. Under Yarborough's evidence and theory, he was committing no crime at all. He was lawfully armed in self-defense. The gun discharged accidentally. As a result, Judge Brown was correct that Yarborough did not fit under the first definition of involuntary manslaughter.

Further, Yarborough does not fit under the second definition of involuntary manslaughter. Tucker. To fit under the second definition of involuntary manslaughter there must be evidence the killing of another was without malice, unintentionally, but while one is *acting lawfully* **with reckless disregard of the safety of others.** Id. 334 S.C. at 264–265, 513 S.E.2d at 109.

First of all, Respondent submits Yarborough was not actually acting lawfully under South Carolina law. He was not lawfully armed in self-defense. In State v. Smith, 391 S.C. 408, 414, 706 S.E.2d 12, 15–16 (2011), the Court held:

> There is no actual evidence Smith was entitled to arm himself in self-defense. Specifically, there is no evidence to suggest that Smith was without fault in bringing on the difficulty, that he believed or actually was in imminent danger of losing his life or sustaining serious bodily injury, or that he "had no other probable means of avoiding the danger" other than drawing the loaded weapon. Accordingly, the trial court properly refused the involuntary manslaughter instruction.

Smith, 391 S.C. 408, 414, 706 S.E.2d 12, 15–16. While the law recognizes that the defendant does not have to be acting in self-defense to arm himself in self-defense, Brayboy, *supra*, here, it is undisputed Victim walked out to the garage to check on Emerson because Yarborough had attacked his girlfriend and put a gun in his mouth and threatened to kill himself. Steele had called Victim and asked him to check on Emerson because Yarborough was acting crazy and had a gun. This is based on the testimony of Steele and Emerson's recorded statement. This is also based on Yarborough's own statement to police about what occurred before the shooting, including assaulting his girlfriend and threatening to kill himself. Victim came to the garage and asked: "What's going on" or "Stop this Shit." It is undisputed Yarborough brought on the difficulty.

Further, Respondent submits, there is no evidence, Yarborough reasonably believed, or a reasonable person would have believed he was *in danger of death or great bodily injury* in these circumstances. State v. Santiago, 370 S.C. 153, 161, 634 S.E.2d 23, 27 (Ct. App. 2006). It is undisputed the father came out to the garage to check on his children, one of whom had assaulted his girlfriend and threatened to kill himself. Victim was not armed, and Yarborough did not testify Victim was armed. Victim stated "what's going on" or "stop this shit". He did not verbally threaten Yarborough. If Victim reached for the assault rifle it was to prevent harm to or protect Yarborough or Emerson. Finally, *under these circumstances*, it was unnecessary for Yarborough to act as he did, arm himself with an assault rifle and shoot his father intentionally, or unintentionally. Smith.[5]

Further, there is no evidence Yarborough recklessly handled the weapon in self-defense, a requirement of the second definition of involuntary manslaughter. Tucker. The following is considering the evidence in the light most favorable to Yarborough. Yarborough told police in his statement that he had been in the Army, was trained in weapon safety, and knew how to safely operate a firearm. (State's Ex. 75). In the 911 call, Yarborough stated Victim's blood pressure medicine had made him very angry. (State's Ex. 7, 911 call). Yarborough's mother testified Victim had abused Yarborough in the past, and Victim was in a foul mood when she woke him shortly before the shooting. Yarborough's mother also testified Yarborough exclaimed to her over the phone immediately after the shooting that Victim grabbed the gun, and it went off accidentally.

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[5] The South Carolina Supreme Court has previously noted, that "[a] claim of imperfect self-defense ... has no application to involuntary manslaughter." Douglas v. State, 332 S.C. 67, 75 n. 4, 504 S.E.2d 307, 311 n. 4 (1998). Even if the Court were to adopt imperfect self-defense, which it has not, it would only entitle Yarborough to a charge on voluntary manslaughter not involuntary manslaughter. State v. Sams, 410 S.C. 303, 315, 764 S.E.2d 511, 517 (2014)

Yarborough told his mother in other calls that the shooting was an accident. Yarborough told police in his statement that he armed himself because Victim abused him in the past and Yarborough was afraid of Victim and afraid of him all the time. (State's Ex. 75). While Yarborough stated to police that he had drank some alcohol, Yarborough stated he was not drunk at the time of the shooting.[6] Emerson told police in his statement that Victim had abused Yarborough while growing up on a prior occasion which may have led to the shooting. (State's Ex. 89). In his statement to police, Yarborough stated he was pointing the gun at his father because he was afraid of him, and to protect Emerson from similar abuse that he endured, he took the safety off, and moved his finger to the trigger, his father reached for the gun, and it accidentally discharged when he, Yarborough, backed up or breathed but he did not pull the trigger. (State's Ex. 75). Finally, in the 911 call, Yarborough exclaimed Victim attacked him, Victim grabbed the weapon, and it discharged accidently when Victim grabbed the gun. (State's Ex. 7). Yarborough called a pathologist who said the injuries to Victim's hand were consistent with Victim's fingers touching the barrel or grasping the end of the barrel. (Tr. 394-432). Yarborough does not fit under the second definition of involuntary manslaughter. State v. Burriss, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999)(the negligent handling of a loaded gun will support a finding of involuntary manslaughter)(*citing as e.g.* State v. White, 253 S.C. 475, 171 S.E.2d 712 (1969); *See* State v. Mekler, 379 S.C. 12, 16–17, 664 S.E.2d 477, 479 (2008)(defendant was entitled to involuntary manslaughter charge where there was evidence she acted with reckless disregard for the safety of others when she negligently handled a loaded shotgun). To constitute involuntary manslaughter, there must be a finding of criminal negligence, statutorily defined as a reckless disregard of the

[6] Emerson also told police that Yarborough had drank some liquor, but Emerson stated he did not know when that was, and Emerson stated he and Yarborough were out in the garage for several hours. (State's Ex. 89).

safety of others. State v. Crosby, 355 S.C. 47, 52, 584 S.E.2d 110, 112 (2003): Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991); S.C. Code Ann. § 16–3–60 (1985). According to Yarborough, he was acting lawful in arming himself in self-defense, or the shooting was an accident.[7] There is no evidence Yarborough handled the gun recklessly or with criminal negligence. Judge Brown was correct to deny the request to charge involuntary manslaughter.

ARGUMENT IV.

Judge Brown did not err in qualifying witness Scott Ballard only as an expert in firearms as he was not qualified by education, training, or experience to testify about the injuries to the decedent's hand or to the psychological trauma of a shooting to an defendant or eyewitness under Rule 702, SCRE.

What Occurred Below

The defense called Scott Ballard, who was qualified as an expert in firearms, as a witness. However, defense counsel sought to have Ballard qualified in other fields and testify to things that he was not qualified to testify to such as the injury to the victim's hand and how it was caused and the trauma a defendant or witness experiences during a shooting and that they should not be interviewed for several days until they have had time to calm down and reflect. By his own admission, Ballard is the owner of a private security company who rose up through its ranks. (Tr. 434). The State objected and Judge Brown appropriately sustained the objection and would not allow Ballard to testify outside his field of expertise. Yarborough now appeals alleging Judge Brown abused his discretion. Yarborough is wrong.

Standard of Review

The decision whether to admit or exclude the testimony from an expert witness is within the sound discretion of the trial judge. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365

[7] This is consistent with his theory of accident, there was not request for self-defense, and the charge was not given.

(2006); State v. Hill, 287 S.C. 398, 339 S.E.2d 121 (1986); State v. Caldwell, 283 S.C. 350, 322 S.E.2d 662 (1984). The trial 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). 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). A trial court's ruling on the admissibility of an expert's testimony constitutes and 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). To show prejudice, the appellant must prove there is a reasonable probability the jury's verdict was influenced by the challenged evidence or lack thereof. Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

Law/Analysis

The burden of qualifying a witness as an expert falls on the party offering the witness, to show that the witness possesses the necessary learning, skill, or practical experience to give opinion testimony. State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993). Yarborough has not met that burden on the additional issues he wanted the witness qualified as an expert on.

Scott Ballard testified that he went to college at UCLA. (Tr. 434). Ballard then did six years active service in the military, four years in the reserves, and the four in inactive reserves. (Tr. 434-35). Ballard then worked for a firearms manufacture, for eight years as a senior instruction, master armor. (Tr. 435-36). Ballard then worked in Peru and Columbia where he worked creating standards for the use of force in those countries. (Tr. 436-43). Ballard testified he had formal

education in *criminal psychology* and claimed he had real life experiences as to how people act under stressful situations involving firearms and shootings. (Tr. 437-40). At the time of his testimony, Ballard was the owner of a private security company. (Tr. 435). He testified that he worked his way up through the company and was now the owner. (Tr. 435). While working for the private security company he had been involved in conducting over 1000 *after action reports* where deadly force was used.

Ballard testified he was a member of the International Association of Law Enforcement Firearm Instructors, which 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. 440-443). Ballard noted that he had trained both military police officers and private citizens, he had worked in this area for twenty-four years and claimed he reviewed over a thousand individual cases. (Tr. 442-443).

Yarborough moved to qualify Ballard as an expert in ballistics, firearms, and shooting incidents. The jury was excused. (Tr. 444). The State then argued Yarborough wanted Ballard to opine the shooting in this case was accidental. The State argued Ballard was not qualified to give that opinion. (Tr. 444-45). Yarborough argued that Ballard was qualified in the fields proposed based on experience and training. (Tr. 445-46). Judge Brown stated he wanted Ballard's testimony proffered before he ruled.

Ballard then testified that he had reviewed all the discovery, photographs, police and autopsy reports, as well as the firearm, a SKS assault rifle, in this case. (Tr. 449-451). 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. 450-451). Ballard also asserted 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). Ballard asserted he had witnessed six incidents, as in on the shooting range, where gas injuries were sustained, and he had consulted on another twelve incidents or cases. (Tr. 453-457). Ballard explained that he concluded that the injuries to Victim's thumb showed his thumb was underneath and around the muzzle in a grabbing motion when the gun discharged. Ballard did not attend the autopsy. Ballard explained the gases from the gun were impeded by Victim's hand based on the pictures he saw and the scorch on Victim's thumb. (Tr. 456-57).

Ballard also testified that taking statements from an individual who shot and killed someone immediately after a shooting is not good professional practice. He claimed sleep deprivation affects memory. Further, the memory was not reliable after the brain trauma due to the unnatural act of killing someone. Ballard claimed police should wait 48 hours before taking a statement from such a person, so the brain could rest from the trauma. (Tr. 457-61).

After Ballard's proffer was finished, the State declined cross-examination. The State argued Ballard had never conducted an autopsy and he had no forensic or medical background. The State also argued that as to Ballard's testimony as to the reaction of a person following a traumatic event of a shooting, Ballard was not qualified to give an opinion on the matter. Further, the trial court had already ruled that Yarborough's statement was freely and voluntarily entered. (Tr. 461-64).

Yarborough argued that the defense was not arguing Yarborough's statement, but that Emerson only had two hours of sleep, and his statement was given the next day. Yarborough argued Ballard had worked in law enforcement, he had worked in the military, had PhD in [criminal] psychology, and he was a master armor, and that he had the qualifications to give expert testimony in this case. (Tr. 462-63). The State argued Ballard was not qualified to give these

opinions, the testimony was highly prejudicial, and not probative, and would only confuse the issues. (Tr. 463).

Judge Brown ruled that he would qualify Ballard as an expert in firearms and Ballard could testify about the effect of grabbing or pulling the barrel of a gun when a person's finger was on the trigger, i.e. it would cause the gun to discharge. (Tr. 471-73). However, Judge Brown would not qualify Ballard as an expert in ballistics or shooting incidents. (Tr. 471-73). Judge Brown ruled that Ballard did not have the necessary training, experience, or expertise to opine on the cause of the injury to Victim's hand and what kind of injury it was **and** where two different experts, one pathologist for the State and one pathologist for the defense, had already testified about the same. (Tr. 471-73). Judge Brown further ruled that Ballard did not have the necessary training, experience, or expertise, even though he had a Ph.D. in criminal psychology, to opine on the validity of post-incident interviews. (Tr. 472-74).

Before the jury, Ballard testified that if a person were holding the gun in this case, and the victim grabbed the end of the gun and the gun was pulled, it could discharge. (Tr. 479). Ballard explained that if Yarborough's finger were anywhere near or on that trigger, and the end of the gun is pulled forward, and Yarborough pulled backward, you would have opposing forces that's going to cause the gun to fire. (Tr. 479).

Additionally, because he was qualified as an expert in firearms, Ballard also explained to the jury what "chamber pressure" is. It is the pressure inside the rifle when the rifle is fired caused by the explosion of gases from the bullet when fired. Ballard explained the chamber pressure from the gun in this case was 45,000 PSI (pounds per square inch). Ballard explained the cuts in the end of the barrel of the gun in this case are gas ports from which gas escapes from the end of the

barrel of the gun when fired. Ballard testified that when this gun is fired approximately 30,000 PSI of gas would **go out the end of the rifle, the barrel and the gas ports.** (Tr. 479-484).

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 was not qualified to testify to the cause of the injuries to Victim's hand. Ballard had no medical training. He was not a qualified medical professional. He was not a forensic pathologist, had not gone to medical school, was not an emergency trauma physician or even a nurse or an EMT. He was not even qualified as an expert in ballistics, simply in firearms because he had worked at a firearms factory as an armor and had trained people in how to use firearms. Further, Ballard was the owner of a private security company where he had previously conducted after action reports where deadly force was used. This did not qualify him to testify whether an injury was a thermal injury or not. Simply because he had witnessed what he thought were gas injuries or consulted on the same, did not qualify him to give an opinion whether the Victim grabbed the end of the barrel and pulled the gun when it was fired. Judge Brown did not abuse his discretion in limiting Ballard's testimony in this area in which he was not an expert. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006)(the decision whether to admit or exclude the testimony from an expert witness is within the sound discretion of the trial judge); State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006)(a trial court's decision on expert testimony will not be reversed on appeal absent "a manifest abuse of discretion accompanied by probable prejudice.").

Further, Judge Brown did not err in not qualifying Ballard in shooting incidents and allowing him to testify that it is not wise to interview a witness to a shooting for 48 hours. This

was clearly outside Brown's expertise in firearms. Rule 702, SCRE. Brown only had a Ph.D. from UCLA in **"criminal psychology."** (Tr. 434). He had no formal education in witness psychology. Nor did he testify he had been involved in any scientific studies on this subject *with real defendants or real witnesses*. Further, his opinion that a person committing a shooting should not be interviewed for at least 48 hours until the person has had time to rest and reflect is not scientifically sound or valid and is self-evidently farcical. State v. Phillips, 430 S.C. 319, 844 S.E.2d 651 (2020)(court must vet expert testimony for its scientific validity); State v. White, 372 S.C. 318, 642 S.E.2d 590 (2007); State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979). Defendants are interviewed all the time because the event is fresh in their mind. Not only would Ballard's theory be unworkable, but also would allow the defendant time to fabricate and others to gain access to the defendant and get them to change their statement from what they actually did at the time of the crime. Respondent would note here that Ballard testified that **the person who committed the shooting** should not be interviewed for 48 hours until they have had time to process the event and overcome the trauma of what they have done, but Yarborough claims below, and in his brief, he wanted this expert testimony for the sake of Emerson's testimony, an eyewitness. Yarborough's assertion in his brief does not even match Ballard's testimony before Judge Brown.

This testimony was also inadmissible because it was nothing more than an attempt to bolster the trial testimony of Emerson. Yarborough admits in his brief he wanted this testimony to support Emerson's trial testimony. (BOA). However, what occurred with Emerson is counter intuitive to Ballard's theory as applied to this witness. Emerson remembered almost everything when he gave his statement the day of the murder. (State's Ex. #89). He had not trouble recalling events (State's Ex. 89). It was at trial, years later, that he could not remember what happened or what he said. Additionally, Emerson claimed portions of his initial video-recorded statement **were**

false because he intentionally lied to the interviewer because he was angry with his brother. Further, even if Ballard's theory was applied to an eyewitness to a traumatic event, and not just a perpetrator, his opinion that a person witnessing a shooting should not be interviewed for at least 48 hours until the person has had time to rest and reflect is again not scientifically valid or sound and is self-evidently farcical. Phillips, 430 S.C. 319, 844 S.E.2d 651 (2020); White 372 S.C. 318, 642 S.E.2d 590; Jones, 273 S.C. 723, 259 S.E.2d 120.[8] Witnesses are interviewed all the time because the event is fresh in their mind. Not only would Ballard's theory be unworkable, but also would allow the witness time to fabricate and for others to gain access to the witness and get them to not cooperate or change their statement from what they actually witnessed at the time of the crime. This testimony of Ballard was inadmissible under Rule 403, SCRE, because its probative value was outweighed by its prejudicial effect, confusion of the issues, and misleading the jury.

Harmless Error

Regardless of the above, any error by Judge Brown in this regard was harmless. Judge Brown qualified Ballard as an expert in firearms and allowed Ballard to testify as an expert in firearms to the fact that if the rifle was grasped by its end and pulled and Yarborough had his finger on the trigger, the gun would fire. Additionally, Ballard testified to the chamber pressure, 30,000 PSI, that would have been expelled from end of the gun's barrel and gas ports when the gun was fired. (Tr. 479-84). Furthermore, the defense called its own forensic pathologist, Dr. Thomas Owens, who was qualified by Judge Brown as an expert in forensic pathology, who testified without objection that the Victim's fingers were in contact with the end of the barrel or around the end of the barrel and the injury to the hand was caused by the bullet coming out of the end of the

[8] Under Ballard's theory, applied to witnesses and not a shooter, absent surveillance video of a violent crime, police could not investigate or work on the violent crime because police could not interview any eye-witnesses for at least 48 hours, the most crucial time in any investigation.

rifle or the gas escaping from the gas ports. (Tr. 409-14, 420, ln. 21- 421, ln. 21). *See* State v. Broaddus, 331 S.C. 534, 605 S.E.2d 549 (Ct. App. 2004)(any error in admission of evidence is harmless where it is cumulative to other testimony properly admitted).

CONCLUSION

For the above stated reasons, Yarborough's conviction and sentence for murder should be affirmed.

Respectfully Submitted,

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December 16, 2024.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
The Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

MASON YARBOROUGH,

APPELLANT.

Appellate Case No. 2023-000694

DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

In addition to Appellant's Designation of Matter, Respondent requests the following material be included in the record on appeal:

Tr. 1-12;
Tr. 112-31;
Tr. 136-180;
Tr. 182-204;
Tr. 209-315;
Tr. 317-81;
Tr. 393-447;
Tr. 449-474;
Tr. 476-536;
Tr. 539-553;
Tr. 593-96;
Tr. 597-606;
Tr. 614-616;
State's Ex. 74;
State's Ex. 75;
State's Ex. 86;
State's Ex. 89;
Def. Ex. 28;

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PROOF OF SERVICE

I, **Donna D'Alessio**, an employee of the Respondent and legal assistant to J. Anthony Mabry, of counsel for the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Initial Brief of Respondent has been forwarded to Appellant's counsel, Robert M. Dudek, Esq., via email today, December 16, 2024 to RDudek@sccid.sc.gov, and to his assistant at kwarren@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 16th day of December, 2024.

s/ Donna D'Alessio
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