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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Walton J. McLeod, IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DWIGHT ANTHONY POWELL, JR.

APPELLANT

APPELLATE CASE NO. 2024-000490

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

Whether the court erred by permitting the codefendant's attorney to testify that he, the attorney, knew there was no deal with the solicitor's office in exchange for the codefendant's testimony, where the assessment of witness credibility is within the exclusive province of the jury, since the testimony impermissibly bolstered the codefendant's credibility?

II.

Whether the court erred in Appellant's trial for second-degree burglary by refusing to charge the jury on the lesser offense of third-degree burglary, where there was evidence in the record from which the jury could infer Appellant was guilty of the lesser-included offense?

III.

Whether the court erred in permitting Officer Hugue to testify it is more common for burglaries to happen at night, where a lay witness's opinion must be based on his own personal knowledge, since this was inadmissible speculation?

STATEMENT OF THE CASE

On or about September 7, 2021, a Lexington County Grand Jury indicted Appellant, Dwight Powell, Jr., for second-degree burglary. On February 5, 2024, a Lexington County Grand Jury indicted Appellant for attempted grand larceny. R. *(indictments). Appellant was tried before the Honorable Walton J. McLeod and a jury, from March 18 – 20, 2024. Stephen Story, Jr., and Jean Popowski represented Appellant. Angela Martin and Kyle Smith prosecuted the case. Tr. 1. Appellant was convicted as indicted, and he was sentenced to serve concurrent terms of imprisonment of eight years for each offense. Tr. 269, ll. 19-25; Tr. 283, ll. 9-12.

This appeal follows.

STANDARD OF REVIEW

The standard of review for all three issues is abuse of discretion. In criminal cases, this Court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001). Thus, on review, the appellate court is limited to determining whether the trial court abused its discretion. *Id.* at 6, 545 S.E.2d at 829. A trial court abuses its discretion when its ruling is unsupported by the evidence or controlled by an error of law. *State v. Garrett*, 350 S.C. 613, 619, 567 S.E.2d 523, 526 (Ct. App. 2002).

"In general, rulings on the admissibility of evidence are within the trial court's sound discretion and will not be disturbed on appeal absent an abuse of that discretion resulting in prejudice to the complaining party." *State v. Halcomb*, 382 S.C. 432, 443, 676 S.E.2d 149, 154 (Ct. App. 2009).

"An appellate court will not reverse the trial judge's decision regarding jury charges absent an abuse of discretion." *State v. Santiago*, 370 S.C. 153, 159, 634 S.E.2d 23, 26 (Ct. App. 2006). Generally, the trial court is required to charge only the current and correct law of South Carolina. *Sheppard v. State*, 357 S.C. 646, 665, 594 S.E.2d 462, 472 (2004). A charge to the jury is correct if it contains the correct definition of the law when read as a whole. *Id.* at 665, 594 S.E.2d at 472-73.

STATEMENT OF FACTS

The State alleged that on or about November 7, 2020, Appellant and his codefendant, Randall Corey Sternenberg (Sternenberg), entered a garage behind the office of Tommy Thomas (Complainant), an attorney in Irmo, and tried to steal a car therein. Complainant kept a red Maserati convertible and antique furniture in the garage. R. *(indictments); Tr. 46, l. 7 – 61, l. 18; Tr. 67, ll. 21-24. Complainant stated he left his office the day before and the garage had not been broken into at that point. Complainant did not say what time he left the office. Tr. 58, ll. 18-21. The next morning, an electrician arrived to do some work and noticed that furniture had been removed from the garage and was sitting outside getting wet. Tr. 41, l. 10 – 43, l. 25. The police were notified and responded.

No one testified what time in the morning Complainant, the electrician, or the responding officer arrived at the scene, and no one testified what time Complainant left the scene the day before. Whether the crime occurred at night was an element of second-degree burglary. S.C. Code Ann. § 16-11-312(B)(3). The State alleged the burglary was second-degree based on the element of nighttime. Tr. 240, l. 8 – 241, l. 13. Responding Officer De'Andre Hugue testified that he was dispatched to the scene. He said he saw the lock on the garage had been cut and he spotted fingerprints on the car. The solicitor then elicited, over objection, the officer's lay opinion that burglaries are more common at night. Tr. 65, l. 25 – 69, l. 19.

> Q. Okay. Based on your experience in law enforcement, is it more common for burglaries to occur in the nighttime or the daytime?
>
> A. The nighttime.
>
> MR. STORY: Objection. That's speculation.
>
> THE COURT: Overruled.

Tr. 69, ll. 14-19.

Law enforcement collected fingerprints from the car's window. Tr. 68, l. 16 – 69, l. 5; Tr. 137, l. 8 – 139, l. 9. An expert in fingerprint identification testified the prints matched Appellant and Sternenberg. Tr. 167, l. 17 – 168, l. 6; Tr. 180, l. 7 – 192, l. 5. Sternenberg, a "convicted felon" with a bevy of prior convictions, including multiple burglaries and possession of methamphetamine, testified during the State's case-in-chief. Tr. 86, l. 4 – 87, l. 16.

Sternenberg had been arrested and charged with the offenses in this case, but he had already been to court for them. Sternenberg stated that in April of 2021 he was being prosecuted by this solicitor, he was represented by attorney Brad Kirkland, and he pleaded guilty to a different burglary. That other burglary was reduced from a second-degree offense to a third-degree offense. Concurrently, Sternenberg's three counts of breaking into a motor vehicle were reduced to two counts. The second-degree burglary and attempted grand larceny associated with this case were dismissed. Sternenberg stated that at the time of his plea, he did not have a deal that required him to testify against Appellant. Tr. 87, l. 24 – 88, l. 19; Tr. 114, l. 11 – 116, l. 21.

At the time of his testimony in this case, Sternenberg had new pending charges being prosecuted by the Eleventh Circuit Solicitor's Office. Those offenses were possession of a stolen vehicle and possession of methamphetamine. Sternenberg stated he had no deals with regard to the pending charges either. Tr. 88, l. 21 – 89, l. 8; Tr. 117, ll. 2-21.

Sternenberg had contacted authorities from jail while detained on other charges and informed on Appellant. At trial, Sternenberg incredibly claimed that Appellant forced him to participate in the burglary and attempted grand larceny in this case at gunpoint. Among other details, Sternenberg claimed the burglary occurred at night. Tr. 89, l. 21 – 106, l. 4. Sternenberg admitted he "hate[s]" Appellant. Tr. 119, ll. 1-3.

The State wished to offer the testimony of Sternenberg's attorney, Bradley Kirkland, to show that Sternenberg was telling the truth about not having a deal. The judge ruled the testimony should be proffered and a proffer was made. Tr. 121, l. 23 – 124, l. 5. Kirkland testified he represented Sternenberg at his plea in 2021 and he was currently representing him on his pending charges. Kirkland affirmed Sternenberg did not have a deal regarding testifying against Appellant in 2021 and he did not have a deal now. Tr. 122, l. 12 – 123, l. 25. Defense counsel argued the testimony was inadmissible bolstering. "[M]y position is this is bolstering his testimony, so I object." Tr. 124, ll. 11-12.

The court ruled the testimony was admissible.

> I looked into this as well, and Mr.—Mr. Kirkland's not gonna offer any testimony about Mr. Sternenberg's veracity or truthfulness or anything they discussed regarding what happened or what didn't happen. **I think this really more confirms both direct and cross-examination for Mr. Sternenberg and as long as there's nothing – nothing appears to be going – nothing will be said that improperly bolsters the previous witness, and whether it's ultimately corroborated is a question for the jury anyway**. If we keep it that simple I think we can be quick in and out, so obviously without—I mean, Mr. Story, you're free to do your own cross, but if your cross is in the same line as what you did with Mr. Sternenberg, although Ms. Martin may beat you to some of it anyway on her direct, but you may or may not have any questions or obviously please don't elicit any – or attempt to elicit any improper bolstering by accident. I'm just saying – I don't expect you to ask about his opinion on the truthfulness of Mr. Sternenberg, of course, so.

Tr. 124, l. 13 – 125, l. 8 (emphasis added).

Mr. Kirkland's testimony on direct before the jury was as follows.

Q. Okay. Can you tell us what your occupation is?

A. I am an attorney. Specifically I specialize in the area of criminal defense.

Q. Okay. And did you know the fella that just testified, Corey Randall Sternenberg?

A. Yes.

Q. Did you represent him at his guilty plea in April of 2021?

A. I did.

Q. **And in 2021, did you and I ever discuss him being a State's witness in the trial of Dwight Powell?**

A. **No.**

Q. **And did Mr. Sternenberg get a probation offer because he had committed to being a State's witness in Dwight Powell's trial?**

A. **No.**

Q. Mr. Sternenberg actually did plead guilty to a burg second; did he not?

A. He did.

Q. To the storage units – Lake Murray Storage Units?

A. Yes.

Q. In addition to other indictments?

A. Yes.

Q. **All right. Was his burglary charge to Tommy Thomas's garage dismissed because he had committed to being a State's witness in any trial involving Dwight Powell?**

A. **No.**

Q. Mr. Sternenberg has new charges; is that right?

A. He does.

Q. Do you represent him?

A. I do.

Q. **And today does Mr. Sternenberg through you and my office have any deal in place with anyone in our office, in the Solicitor's office, any deal in place that will benefit him because he just testified?**

A. **No**, he – but it's a – it's a non-deal deal. The deal is that your office, and this is the same deal that has been offered to me for twenty-five years that I've been practicing law, **the deal is the same as it always is in every single negotiation, the deal is that your office promises**, which I don't personally believe is a promise at all, but nonetheless a promise **to take into consideration the fact that he cooperated** if and/or when – it's if or when a plea offer is made, and additionally that your office, if he does plead guilty, will inform the judge that he did cooperate at a trial –

Q. Okay.

A. – and that's it. And I advise my clients that that is no deal at all. That there is no promise because your definition of taking into consideration may not be at all what the Solicitor's office's definition of taking into – the charges into consideration is.

Q. **And is that what was discussed this year when you and Corey met with the trial team?**

A. **That was discussed this year. That was never discussed back in 2021.**

Tr. 126, l. 19 – 128, l. 24 (emphasis added).

In closing argument, the solicitor stated the following about Kirkland's testimony.

> Ladies and gentlemen, Sternenberg's burglary, it's over. He's pled to some cases, he had other cases that were dismissed, and he's already been to prison for those. **He and his attorney, you-all remember Brad Kirkland, they told you that there was no requirement for Sternenberg to come to into court and testify in this trial some three years after Sternenberg has pled guilty. They told you that him being a State's witness was first discussed with the trial team early this year. Is that lawyer not to be believed?**
>
> Now Sternenberg does have two small charges pending now, but it's not his court time. It's not his day in court. And, of course, of course, Sternenberg hopes and **his lawyer hopes that maybe him testifying will put in a good word with the judge** at a later time, but, again, it's not his court date. That's not for your consideration. It has nothing to do with the guilt or innocence of Dwight Powell. **You're not here** to judge the way the criminal justice system works or **to pass any kind of judgment on plea bargains when I'm sure you don't have all of the relevant information.**

Tr. 230, ll. 4-24 (emphasis added).

> Defense is—seems like they're insinuating that something fishy was going on with how Sternenberg's cases were handled. That's not true, ladies and gentlemen. **His own lawyer told you** he pled to several cases, including burglary, and that **there was no requirement that he come into court and testify**.

Tr. 235, ll. 10-15.

During the charge conference, defense counsel moved that the jury be charged on the lesser-included offense of burglary in the third degree. Defense counsel argued if the jury found Appellant committed every element of burglary except that it occurred at nighttime, it could find him guilty of third-degree burglary. The solicitor cited to Sternenberg's testimony the offense occurred at nighttime. The solicitor then incorrectly argued that the complainant, Mr. Thomas, stated it "would have happened the night before." However, Complainant did not testify to that. Defense counsel responded that Complainant's testimony left open the possibility the crime occurred during the daytime. Defense counsel argued the jury might reasonably discount Sternenberg's testimony due to his "tremendous credibility issues." The judge stated the jury could find second-degree burglary based on Sternenberg's claim Appellant had a gun rather than his claim it occurred at nighttime. The court ruled it would not charge third-degree burglary. Tr. 214, l. 15 – 216, l. 16; Tr. 219, l. 4 – 223, l. 13.

ARGUMENT

I.

The court erred by permitting the codefendant's attorney to testify that he, the attorney, knew there was no deal with the solicitor's office in exchange for the codefendant's testimony, where the assessment of witness credibility is within the exclusive province of the jury, since the testimony impermissibly bolstered the codefendant's credibility.

A witness is not permitted to bolster the credibility of or vouch for the veracity of another witness.[1] "The assessment of witness credibility is within the exclusive province of the jury." *State v. Makins*, 433 S.C. 494, 501, 860 S.E.2d 666, 670 (2021) (quoting *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012)). "[A] witness cannot bolster the credibility of another witness because doing so invades the province of the jury." *Makins*, 433 S.C. at 502, 860 S.E.2d at 670-71 (citing *Briggs v. State*, 421 S.C. 316, 328, 806 S.E.2d 713, 719 (2017)). A witness may not "directly or indirectly" convey his opinion about another witness's credibility. *Briggs v. State*, 421 S.C. at 324, 806 S.E.2d at 717-18. A witness's testimony "is improper bolstering if (1) the witness directly states an opinion about the victim's credibility, (2) the sole purpose of the testimony is to convey the witness's opinion about the victim's credibility, or (3) there is no way to interpret the testimony other than to mean the witness believes the victim is telling the truth." *Chappell v. State*, 429 S.C. at 77, 837 S.E.2d at 501 (citing *State v. Jennings*,

[1] The terms bolstering and vouching are used interchangeably in case law on this topic. *E.g.*, *State v. Reyes*, 432 S.C. 394, 404, 853 S.E.2d 334, 339 (2020) ("solicitor's general line of questioning as to whether Minor knew the difference between the truth and a lie and as to whether she intended to tell the truth did not impermissibly vouch for or bolster Minor's credibility"); *Chappell v. State*, 429 S.C. 68, 75, 837 S.E.2d 496, 499 (Ct. App. 2019) ("Chappell argues Galloway-Williams improperly vouched for and bolstered the victim's credibility by testifying, 'Children don't often lie about sexual abuse incidents.' We agree with Chappell.").

394 S.C. 473, 480, 716 S.E.2d 91, 94 (2011); *Briggs v. State*, 421 S.C. at 325, 806 S.E.2d at 718; *State v. McKerley*, 397 S.C. at 465, 725 S.E.2d at 142).

"A prosecutor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness." *State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001). "Improper vouching occurs when the prosecution places the government's prestige behind a witness by making explicit personal assurances of a witness' veracity, or where a prosecutor implicitly vouches for a witness' veracity by indicating information not presented to the jury supports the testimony." *Id.* "It is inappropriate for the State to assure the jury of a witness' credibility, because the jury is charged with assessing the credibility of witnesses based on evidence in the record." *Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). "Thus, solicitors may not vouch for a witness's credibility, as doing so improperly invades the province of the jury and places the government's prestige behind the witness." *Tappeiner v. State*, 416 S.C. 239, 250, 785 S.E.2d 471, 476-77 (2016). *See also State v. Kelly*, 343 S.C. 350, 367–68, 540 S.E.2d 851, 860 (2001), *reversed on other grounds by Kelly v. South Carolina*, 534 U.S. 246 (2002) (solicitor's questions of witness: "What did I tell you that I absolutely required regarding your testimony to this jury today?" and "Did I tell you to tell the truth to this jury?" improperly gave the witness's testimony the imprimatur of the government and may have induced the jury to trust the State's judgement about the witness).

In closing argument, the solicitor posited Kirkland guaranteed Sternenberg's credibility: "Is that lawyer not to be believed?" Tr. 230, ll. 12-13. There was no way to interpret Kirkland's testimony other than to mean he believed Sternenberg was telling the truth. The sole purpose of the testimony was to convey Kirkland thought Sternenberg was credible. Thus, the testimony

was forbidden. *State v. Jennings*, 394 S.C. at 480, 716 S.E.2d at 94; *Briggs v. State*, 421 S.C. at 325, 806 S.E.2d at 718; *State v. McKerley*, 397 S.C. at 465, 725 S.E.2d at 142.

Not only did Kirkland's testimony bolster Sternenberg's credibility, the questions posed by the solicitor about Kirkland's dealings with the solicitor's office and the way the solicitor characterized Kirkland's testimony in closing argument also bolstered Sternenberg's credibility by placing the imprimatur of the State on his testimony. The solicitor essentially leveraged Kirkland in such as way as to use not only Kirkland but herself to bolster Sternenberg's credibility. For instance, she asked Kirkland: "And in 2021, did you and I ever discuss him being a State's witness in the trial of Dwight Powell?" Tr. 127, ll. 3-5. In another instance, in closing argument, the solicitor stated to the jury: "You're not here to pass any kind of judgment on plea bargains when I'm sure you don't have all of the relevant information." Tr. 230, ll. 21-24. The testimony impermissibly vouched for Sternenberg's credibility. *State v. Kelly*, 343 S.C. at 367–68, 540 S.E.2d at 860; *State v. Shuler*, 344 S.C. at 630, 545 S.E.2d at 818.

As the trial judge recognized, calling an attorney as a witness was highly unusual.[2] It was wholly improper in these circumstances. Calling a witness's lawyer to bolster the witness is not a practice that has been approved by our appellate courts, and this Court should not approve it now.

"Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Error is harmless beyond a reasonable doubt where it did not contribute to

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[2] The court stated this was "a little outside the ordinary." Tr. 124, ll. 9-10. This was indeed unusual because lawyers are generally precluded from combining the roles of advocate and witness. Yet in this trial, Sternenberg's lawyer was both a witness and, although he was not trying the case, he was in a sense Sternenberg's advocate. *See* Rule 3.7(a), RPC, Rule 407, SCACR ("A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.").

the verdict obtained. Thus, an insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) (cleaned up). "A harmless error analysis is contextual and specific to the circumstances of the case: No definite rule of law governs a finding of harmless error; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial." *State v. Byers*, 392 S.C. 438, 447–48, 710 S.E.2d 55, 60 (2011) (cleaned up). This error was not harmless. Sternenberg's credibility was the key issue for the jury to determine. His was the only testimony which placed Appellant inside the garage trying to steal things and placed him inside it at nighttime.

II.

The court erred in Appellant's trial for second-degree burglary by refusing to charge the jury on the lesser offense of third-degree burglary, where there was evidence in the record from which the jury could infer Appellant was guilty of the lesser-included offense.

A person is guilty of burglary in the third degree if the person enters a building without consent and with intent to commit a crime therein." S.C. Code Ann. § 16-11-313(A). In contrast,

> **A person is guilty of burglary in the second degree if the person enters a building without consent and with intent to commit a crime therein, and** either: (1) When, in effecting entry or while in the building or in immediate flight therefrom, he or another participant in the crime: (a) Is armed with a deadly weapon or explosive; or (b) Causes physical injury to any person who is not a participant in the crime; or (c) Uses or threatens the use of a dangerous instrument; or (d) Displays what is or appears to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm; or (2) The burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both; or (3) **The entering or remaining occurs in the nighttime.**

S.C. Code Ann. § 16-11-312(B). "The test for determining when a crime is a lesser included offense of the crime charged is whether the greater of the two offenses includes all the elements of the lesser offense. If the lesser offense includes an element not included in the greater offense, then the lesser offense is not included in the greater." *State v. Bland*, 318 S.C. 315, 317, 457 S.E.2d 611, 612 (1995) (citations omitted). Second-degree burglary contains all the elements of third-degree burglary. Therefore, third-degree burglary is a lesser-included offense of second degree burglary. *See also Wertz v. State*, 349 S.C. 291, 294, 562 S.E.2d 654, 656 (2002) (Trial court charged jury that third-degree burglary is a lesser-included offense of second degree burglary.).

The court must charge the jury on the applicable law. S.C. CONST. art. V, § 21. "The law to be charged to the jury is determined by the evidence presented at trial." *State v. Hill*, 315 S.C. 260, 262, 433 S.E.2d 848, 849 (1993). "If there is any evidence to support a jury charge, the trial judge should grant the request." *State v. Brown*, 362 S.C 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004).

"If there is evidence in the record from which the jury could infer the defendant is guilty of the lesser-included offense, rather than the crime charged, the trial judge must instruct the jury on the lesser-included offense." *State v. Gilmore*, 396 S.C. 72, 76, 719 S.E.2d 688, 690 (Ct. App. 2011). "The trial judge is to charge the jury on a lesser included offense if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed." *State v. Gourdine*, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). "[O]ur cases consistently hold that a request to charge a lesser included offense is properly refused only when there is no evidence the defendant committed the lesser rather than the greater offense." *Casey v. State*, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991). *See also State v. Goldenbaum*, 294 S.C. 455, 457, 365 S.E.2d 731, 732 (1988) (trial court properly refused to charge the jury on second and third-degree burglary where there was no evidence "from which the jury could infer that appellant committed second or third rather than first degree burglary").

"In determining whether the evidence requires a charge on a lesser-included offense, the Supreme Court must view the facts in the light most favorable to the defendant." *State v. Sams*, 410 S.C. 303, 308, 764 S.E.2d 511, 513 (2014). "In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003). "A jury charge is

correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." *Id.*, 353 S.C. at 318, 577 S.E.2d at 464.

"[T]o warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant." *State v. Burkhart*, 350 S.C. 252, 263, 565 S.E.2d 298, 304 (2002). "Failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining the issues." *Id.* at 263, 565 S.E.2d at 304.

The court erred in refusing to charge the jury on third-degree burglary. The only evidence that the burglary was a second-degree burglary rather than a third-degree burglary came from Sternenberg. The jury could have reasonably found Sternenberg was not credible and disregarded his testimony. Sternenberg, who had a lengthy prior record, incredibly claimed Appellant forced him to participate in this crime at gunpoint. There was no other evidence Appellant had a gun. There was no other evidence this crime occurred at night. (Officer Hugue's improper speculation that burglaries generally occur at night will be discussed in Issue III, below, but it was just that—speculation.) Complainant merely testified that the burglary occurred sometime after he left his office the prior day but before the electrician arrived the next morning. Complainant did not state it was already nighttime when he left his office. The jury could have inferred from Complainant's testimony that the offense either occurred during daylight hours or during nighttime.

In the light most favorable to Appellant, the court erred when it failed to instruct the jury on third-degree burglary. *E.g.*, *State v. Gourdine*, 322 S.C. at 398, 472 S.E.2d at 241 (jury must be charge on a lesser offense if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed); *State v. Sams*, 410 S.C. at 308, 764 S.E.2d at

513 (appellate courts must view the facts in the light most favorable to the defendant when determining whether the evidence required a charge on a lesser-included offense).

Because the judge did not instruct the jury on the lesser offense, the jury could have concluded that Appellant committed burglary due to his fingerprint being on the car window, and convicted him of second-degree burglary based on the fact it was offered no other option which supported guilt. Appellant was prejudiced because the jury instructions did not afford the proper test for determining the issues. *E.g.*, *State v. Burkhart*, 350 S.C. at 263, 565 S.E.2d at 304 (defendant is prejudiced where the instructions given do not afford the proper test for determining the issues).

III.

The court erred in permitting Officer Hugue to testify it is more common for burglaries to happen at night, where a lay witness's opinion must be based on his own personal knowledge, since this was inadmissible speculation.

"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony." Rule 602, SCRE. *See also State v. Douglas*, 380 S.C. 499, 502–03, 671 S.E.2d 606, 608 (2009) (witness "testified only as to her personal observations and experiences"); *State v. Frazier*, 357 S.C. 161, 167, 592 S.E.2d 621, 624 (2004) (Rule 602, SCRE precluded admission of testimony that was "too speculative").

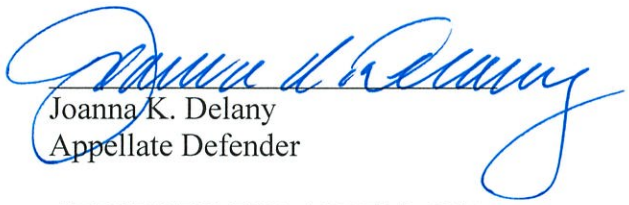
Rule 701, SCRE governs the admissibility of opinion testimony by lay witnesses. It provides that where a "witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training." "Rule 701 requires testimony that is based on the witness's 'perception,' i.e., things the witness observed firsthand in the factual underpinnings of the case—not the general or background experience of the witness." *State v. Gibbs*, 438 S.C. 542, 548–49, 885 S.E.2d 378, 381 (2023). "Lay opinion evidence that strays too far from the anchor of observed, concrete facts is nothing more than speculation." D. Garrison Hill, *Lay Witness Opinions*, S.C. Law., September 2007, at 34, 38.

Officer Hugue was not qualified as an expert witness. His opinion, that burglaries are more commonly committed at night, was not based on his perception or personal knowledge—things he observed firsthand in the factual underpinnings of this case. It was instead speculation based on his general experience. The testimony was improper lay opinion and it was inadmissible. Rule 602, SCRE; Rule 701, SCRE; *State v. Frazier*, 357 S.C. at 167, 592 S.E.2d at 624.

"Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. Thus, an insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) (cleaned up). "A harmless error analysis is contextual and specific to the circumstances of the case: No definite rule of law governs a finding of harmless error; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial." *State v. Byers*, 392 S.C. 438, 447–48, 710 S.E.2d 55, 60 (2011) (cleaned up). This was a thin case against Appellant, being as it was largely dependent on the word of an incredible witness. The jury could have relied on Officer Hugue's speculation in convicting Appellant. The testimony helped the State prove the element of nighttime for second-degree burglary. The error was not harmless beyond a reasonable doubt.

CONCLUSION

Based on the foregoing argument, as to Issue I, Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial. As to Issues II and III, Appellant respectfully requests this Court reverse his burglary conviction and sentence and remand for a new trial.



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 9th day of April, 2025.