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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of General Sessions

The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2024-000049

State of South Carolina……Respondent,

v.

Dallan Timothy Thorstenson……Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the circuit court erred in denying immunity under the Protection of Persons and Property Act where it analyzed the claim under the law of ordinary self-defense rather than defense of habitation, and where it denied the benefit of the statutory presumption in section 16-11-440(A) by requiring proof that Thorstenson knew a forcible entry had occurred rather than applying the statute's disjunctive "knows or has reason to believe" standard.

II. Whether the trial court abused its discretion in excluding evidence of the victim's prior specific acts of violence known to Thorstenson—including that the victim had forced his way into another person's home and beaten the occupants with a bat—where that evidence was central to the reasonableness of Thorstenson's apprehension and to his claim of self-defense and defense of habitation.

III. Whether the trial court abused its discretion under Rule 403, SCRE, in admitting the "murk" text message where the court itself found no reliable method existed to determine the meaning of the term, leaving the message's principal probative value—as proof of intent to kill—resting on an interpretation the court had ruled too unreliable to admit.

IV. Whether, in the alternative, Thorstenson is entitled to a new trial because the missing portion of the trial transcript could not be reconstructed in a manner permitting meaningful appellate review, where the reconstruction was undertaken nearly two years after trial, from memory, and where the wording of the recharge on the dispositive defense remained disputed.

STATEMENT OF THE CASE

Dallan Timothy Thorstenson was charged in Aiken County with murder and possession of a weapon during the commission of a violent crime arising out of the August 27, 2021, shooting death of Gary Pixley inside Thorstenson's residence at 1179 Thurmond Street in North Augusta. *Trial Tr. 1.*

Before trial, Thorstenson moved to dismiss the prosecution and for immunity under the Protection of Persons and Property Act. The Honorable R. Scott Sprouse conducted a pretrial immunity hearing on June 9, 2022 (Aiken County Case No. 2022-GS-02-00215), heard testimony and documentary evidence, and denied immunity on the record. *Immunity Hr'g Tr. 90–95.* The court declined to issue a separate written order, stating that its detailed oral findings on the record were sufficient. *Immunity Hr'g Tr. 95.*

The case proceeded to a jury trial before the Honorable Michael G. Nettles from November 27 through November 30, 2023 (Aiken County Case Nos. 2023-GS-02-01034 and 2023-GS-02-01036). *Trial Tr. 1.* The jury found Thorstenson guilty as indicted, and the court sentenced him to forty-three years' imprisonment for murder and a concurrent term of five years' imprisonment for possession of a weapon during the commission of a violent crime.

A portion of the trial proceedings—beginning at the close of the jury charge and continuing through deliberations, the verdict, and sentencing—was not captured by the courthouse digital recording system. Compounding the problem, Thorstenson's predecessor appellate counsel died during the pendency of the appeal. On the appellant's motion, the Court of Appeals held the appeal in abeyance and remanded for a reconstruction proceeding, which the circuit court conducted on September 30, 2025. By order dated November 21, 2025, the circuit court found the record sufficiently reconstructed and denied a motion for a new trial. The present consolidated appeal

challenges both the pretrial denial of immunity and evidentiary rulings made during trial and, in the alternative, the adequacy of the reconstructed record.

This appeal is properly before the Court. Thorstenson filed a timely notice of appeal from the judgment of conviction and a timely notice of appeal from the November 21, 2025, order denying a new trial; the appeals have been consolidated.

STATEMENT OF FACTS

Thorstenson owned and lived at 1179 Thurmond Street, which served as both his residence and a recording studio. The home also housed several roommates, including Devon Taylor, Rebecca Senecal, Michael Guare, and William Chris Goddard. *Trial Tr. 479.* Pixley did not live there. Thorstenson had known Pixley for roughly a year through music-production work. *Immunity Hr'g Tr. 57–64.* Thorstenson served in the military and testified that he has been diagnosed with PTSD. *Immunity Hr'g Tr. 12.*

At the immunity hearing, Thorstenson testified that Pixley had a reputation for violence and had described prior violent conduct to him, including breaking into a home and beating the occupants with a bat and shooting his cousin. *Immunity Hr'g Tr. 8–10.* He testified that Pixley had recently contacted him for help and had become increasingly aggressive over the preceding year. *Immunity Hr'g Tr. 8–10.*

On the evening before the shooting, after studio equipment malfunctioned, Pixley accused Thorstenson of speaking with Pixley's girlfriend, became confrontational, and identified himself as affiliated with a gang. *Immunity Hr'g Tr. 15.* Thorstenson testified that although the situation "deescalated," he "knew at that time that I needed to get him out of the house" and that "downtown was his location." *Immunity Hr'g Tr. 15.* Before the group left, Thorstenson told

Pixley, "You can't stay here." *Trial Tr. 461.* Thorstenson, Taylor, and Pixley took an Uber across the river to Augusta, Georgia. Thorstenson and Taylor later returned home without Pixley. Thorstenson testified that Pixley "had threatened my life the night prior." *Immunity Hr'g Tr. 18.* After returning, Thorstenson locked the house, placed Pixley's belongings outside in the mailbox at the end of the driveway, and texted Pixley that he was no longer welcome and should not return. *Immunity Hr'g Tr. 60–62.*

During the early-morning hours, Pixley returned to the house. Goddard's recorded statement, admitted at the immunity hearing, described Goddard opening the door and telling Pixley that Thorstenson was asleep; Pixley, Goddard said, "shoved me out of the way and then opened up the dang door." *Immunity Hr'g Tr. 22–23.* At trial, Officer Jason Fox agreed that Goddard reported that Pixley "pushed past him, bum rushed in." *Trial Tr. 325; see also Immunity Hr'g Tr. 68* (agreeing that Goddard told the interviewing officer that "this intruder bum-rushed him"). There was no evidence that Goddard communicated to Thorstenson, before the shooting, how Pixley had entered. *Immunity Hr'g Tr. 93.*

Thorstenson testified that he awoke around 4:45 a.m. to Pixley banging on his bedroom door and saying, "Open the door, I'm going to fuck you up." *Immunity Hr'g Tr. 19.* He remained in his room for hours, monitored Pixley through the ADT camera application on his phone, and tried to summon help from his roommates by text message. The phone extraction reflected messages from Thorstenson that morning, including "this mother f----- broke in last night," "He got to go," and "This man is illegally here." *Immunity Hr'g Tr. 60–61, 67–68.*

At 10:23 a.m., Thorstenson texted Taylor: "I'm going to murk this nigga, man, you better do something." *Immunity Hr'g Tr. 61.* Two minutes later, at 10:25 a.m., he texted Pixley directly—

"WTF you doing in my house?"—a message that was never read on Pixley's device. *Immunity Hr'g Tr. 58, 69.* Thorstenson then exited his upstairs bedroom onto the loft and ordered Pixley to leave. Taylor's prior statement, admitted at the immunity hearing, corroborated that Thorstenson told Pixley to leave and that Pixley refused. *Immunity Hr'g Tr. 28–29.* Pixley said, "Make me." *Immunity Hr'g Tr. 93.* Thorstenson testified that Pixley "threw his hands" and said, "I'm going to fuck you up. You're going to have to shoot me," and then "started proceeding toward the stairs" and "coming towards" him. *Immunity Hr'g Tr. 26.*

Thorstenson fired from the second floor. The fatal shot struck Pixley in the back of the head on the left side while Pixley was on the first floor. Pixley was unarmed and was holding a sandwich. *Immunity Hr'g Tr. 81–82, 93–94.* The immunity court found that Pixley "was moving in the direction toward the front door," while acknowledging that "there's a dispute of fact about this." *Immunity Hr'g Tr. 94.*

At trial, the State portrayed Pixley not as a trespasser but as an invited guest who lingered in a home where he believed he was welcome, emphasizing that no one summoned police for hours and arguing that Thorstenson became enraged by Pixley's continued presence. *Trial Tr. 155–159, 520–21, 528–32.* The jury heard the ADT audio of the confrontation, in which Thorstenson repeatedly ordered Pixley to leave—"I told you not to come in my house, bro. You've got to leave. Get out ASAP right now"—and Pixley responded, "Make me get out then" and "You've got to kick me out." *Trial Tr. 335–36.* Thorstenson testified that Pixley "yelled" at him, "You're going to have to shoot me," and then stepped toward him. *Trial Tr. 482.* The forensic pathologist testified that the fatal bullet entered at "the base of his head on the neck" and traveled "back to front," "left to right and downward." *Trial Tr. 263.* Officers found Pixley "at the base of the stairs

beside an exit door"; the stairs and the front door are "side by side." *Trial Tr. 210, 337.* The State relied heavily on the 10:23 a.m. text message, arguing in closing that "murk means murder" and that the text proved a formed intent to kill. *Trial Tr. 514, 520–21, 536.*

The jury deliberated for approximately two hours. Its sole question during deliberations was a written request, signed by the foreman, to be re-instructed on the law of defense of habitation; the court re-read the habitation charge, and the jury then returned guilty verdicts, which were affirmed on individual polling. *Order Finding Record Reconstructed and Denying New Trial Motion (Nov. 21, 2025); Recon. Tr. 8–9, 11–14.*

STANDARD OF REVIEW

A claim of immunity under the Protection of Persons and Property Act "requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review." *State v. Curry,* 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013); *see also State v. Duncan,* 392 S.C. 404, 709 S.E.2d 662 (2011) (setting forth the pretrial procedure, burden of proof, and standard of review under the Act). A circuit court abuses its discretion when its ruling "is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Douglas,* 411 S.C. 307, 316, 768 S.E.2d 232, 237 (Ct. App. 2014). The proper construction of a statute and the legal standard a court applies are questions of law that receive no deference within that framework.

Evidentiary rulings are likewise reviewed for abuse of discretion. *State v. Lyles,* 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008). A court necessarily abuses its discretion when it applies the wrong legal standard or excludes evidence under a rule applied in a manner that deprives the

defendant of a meaningful opportunity to present a complete defense. *Id.; Holmes v. South Carolina,* 547 U.S. 319, 324 (2006).

As to Issue IV, an appellant is entitled to a record permitting "meaningful appellate review," and the circuit court's determination that a reconstructed record is adequate is reviewed deferentially. *State v. Ladson,* 373 S.C. 320, 644 S.E.2d 271 (Ct. App. 2007).

ARGUMENT

I. The circuit court erred in denying immunity because it analyzed the claim under ordinary self-defense and denied the section 16-11-440(A) presumption by requiring actual knowledge of a forcible entry rather than "reason to believe."

The Protection of Persons and Property Act shields from prosecution a person who is justified in using deadly force under the Act. *S.C. Code Ann. § 16-11-450.* To determine entitlement to that immunity, "a trial court should first consider whether the defendant has proved the elements of self-defense by a preponderance of the evidence," and "[i]f the defendant has failed to meet the elements of reasonable fear or the duty to retreat, the court should then determine whether section 16-11-440(A) or (C) is applicable." *State v. Glenn,* 429 S.C. 108, 118, 838 S.E.2d 491, 496 (2019). The Act "may, under appropriate facts, replace the reasonable fear element of self-defense by providing a presumption that the person's fear was reasonable." *Id.* Two independent legal errors infected the immunity ruling here.

Preservation. This issue is preserved. Thorstenson moved before trial for immunity under the Act; the circuit court held a hearing and denied the motion on the record. *Immunity Hr'g Tr. 90–95.*

A. The court applied the law of ordinary self-defense rather than defense of habitation.

The court expressly found that the shooting occurred in Thorstenson's home and that the property qualified as a dwelling. *Immunity Hr'g Tr. 94.* It further found, on Goddard's statement,

that Pixley "pushed his way past him entering the premises," and that when Pixley was instructed to leave, he said, "Make me." *Immunity Hr'g Tr. 93.* Those findings establish the two classic predicates of defense of habitation in South Carolina: a trespass into the dwelling and a refusal to leave after permission was revoked.

Defense of habitation is not coextensive with self-defense. As the South Carolina Supreme Court held in *State v. Rye,* "[f]or the defense of habitation to apply, a defendant need only establish that a trespass has occurred and that his chosen means of ejectment were reasonable under the circumstances." 375 S.C. 119, 124, 651 S.E.2d 321, 323 (2007). "[U]nlike the defense of self-defense, the defense of habitation does not require that a defendant reasonably believe that he (or his property) was in imminent danger [of] sustaining serious injury or damage." *Id.* Rather, "where one attempts to force himself into another's dwelling, the law permits an owner to use reasonable force to expel the trespasser." *Id.* at 124, 651 S.E.2d at 323. A person defending his home "has no duty to retreat." *Id.* at 122, 651 S.E.2d at 322.

Having found both that Thorstenson was in his own dwelling and that Pixley had pushed his way in and refused a command to leave, the court was required to evaluate whether the force used to expel the trespasser was reasonable under the law of habitation. Instead, the court denied immunity on grounds drawn from ordinary self-defense: that Pixley was unarmed and holding a sandwich, that the fatal shot entered the back of his head, that Pixley was moving toward the front door in a manner the court believed "could be interpreted" as compliance, and that there was no corroboration of certain prior threats. *Immunity Hr'g Tr. 94–95.* Those considerations sound in the imminent-danger and reasonable-fear elements of self-defense—elements that *Rye* holds are not

the measure of the habitation defense. By analyzing the claim exclusively through the lens of self-defense, the court applied the wrong legal framework.

To be candid with the Court, the reasonableness of the force Thorstenson used presents a serious question: a fatal shot to the back of the head of an unarmed man moving toward the exit is not obviously a "reasonable" means of ejectment. But that is precisely the question the circuit court never reached. Whether the means of ejectment were reasonable is the habitation inquiry *Rye* requires, and it is a factual determination the court must make as fact-finder under the correct legal standard. *See State v. Cervantes-Pavon,* 426 S.C. 442, 451, 827 S.E.2d 564 (2019) (the court "must sit as the fact-finder" at the immunity hearing). That an unarmed victim was holding a sandwich does not, by itself, defeat immunity: "while the fact a victim is unarmed is a relevant consideration under the Act, it does not automatically prohibit immunity." *Id.* at 451, 827 S.E.2d at 569. The remedy for applying the wrong framework is to remand for the correct one—not for this Court to resolve in the first instance a reasonableness question the circuit court declined to decide.

B. The court denied the section 16-11-440(A) presumption by demanding actual knowledge of a forcible entry rather than applying the statutory "knows or has reason to believe" standard.

Section 16-11-440(A) creates a presumption of reasonable fear when the person against whom force is used "is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling," and the person using force "knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred." S.C. Code Ann. § 16-11-440(A)(1)–(2); *Glenn,* 429 S.C. at 118, 838 S.E.2d at 496 (quoting the statute). The standard is disjunctive: actual knowledge *or* reason to believe will do.

The court denied the presumption on the ground that "there is no evidence that the Defendant knew that forcible entry had been made." *Immunity Hr'g Tr. 95* (emphasis added). That formulation collapses the statute's two alternatives into a single, more demanding one—actual knowledge—and reads the "reason to believe" prong out of the Act. The distinction is not academic. The undisputed hearing evidence showed that Thorstenson had locked the house, placed Pixley's belongings outside, and texted Pixley not to return; that he awoke to Pixley pounding on an interior bedroom door; and that he sent messages that morning stating that Pixley had "broke[n] in last night" and was "illegally here." *Immunity Hr'g Tr. 60–61, 67–68.* Whatever that evidence proved about Thorstenson's actual, certain knowledge of how Pixley crossed the threshold, it plainly supplied a reason to believe that an unlawful and forcible entry had occurred—which is all the statute requires.

The circuit court's own findings underscore the error. The court recited that Thorstenson's messages reflected him "wanting to know who let this man into the residence." *Immunity Hr'g Tr. 95.* The State will likely argue that this uncertainty negates "reason to believe." But a person who awakens to find a barred and unwelcome individual inside his locked home—pounding on his bedroom door after being told in writing not to return—has, at a minimum, reason to believe the entry was unlawful and forcible, even if he does not yet know the mechanics of how it occurred. The statute does not condition the presumption on the homeowner's ability to reconstruct the intruder's point and method of entry; it asks only whether he had reason to believe an unlawful, forcible entry had occurred. The court's contrary construction was an error of law.

The State may also invoke section 16-11-440(B), under which the subsection (A) presumption does not apply if the person against whom force is used "has the right to be in . . . the

dwelling." *See State v. Curry,* 406 S.C. 364, 752 S.E.2d 263 (2013) (presumption inapplicable where the decedent was a social guest "rightfully in the apartment"). That argument does not rescue the ruling. The undisputed evidence—revocation of any prior license in writing, removal of Pixley's belongings, a locked home, a forced entry, and a refusal to leave on command—supports the conclusion that Pixley had no right to be in the dwelling when force was used. At a minimum, his status was a disputed factual question the court was obligated to resolve as fact-finder under the correct standard. And even if subsection (A) were unavailable, the Act's protections still reach "attackers . . . who are initially invited into the home and later place the homeowner in reasonable fear," *State v. Douglas,* 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014), so the court's threshold legal errors require a new determination regardless of which subsection ultimately governs.

C. The proper remedy is reversal of the immunity ruling and remand for a new determination under the correct standards, with specific findings.

Where, as here, an immunity ruling rests on an error of law, the appropriate remedy is to vacate the ruling and remand for a new immunity determination under the proper framework. *See Glenn,* 429 S.C. at 123, 838 S.E.2d at 499 (remanding for a new immunity hearing where the circuit court failed to make specific findings). On remand, the circuit court should "at least make specific findings on the elements on the record," because "specific findings of fact and conclusions of law are critical to reviewing courts, particularly given the gravity of the circumstances these cases necessarily involve." *Id.* (quoting *State v. Cervantes-Pavon,* 426 S.C. 442, 452 n.4, 827 S.E.2d 564, 569 n.4 (2019)). Because immunity operates as a bar to prosecution itself, the error was not cured by the subsequent trial; Thorstenson was entitled to a correct pretrial determination of whether he could be tried at all. *See Duncan,* 392 S.C. at 410–11, 709 S.E.2d at 665 (immunity is "a bar to prosecution"). Nor can the error be dismissed as immaterial: the reconstructed record establishes

that, in a deliberation lasting only about two hours, the jury's single question was a request to be re-instructed on the law of defense of habitation—confirming that the very framework the immunity court declined to apply was the pivot on which the case turned.

II. The trial court abused its discretion in excluding evidence of the victim's prior specific acts of violence known to Thorstenson, depriving him of evidence central to his defense.

Preservation. This issue is preserved. At an in-camera hearing at the outset of trial, the defense proffered the evidence and argued for its admission; the trial court excluded it. *Trial Tr. 40–56, 65–69.*

Thorstenson's defense was that Pixley was not a benign social guest but a recently aggressive, violent man who had forced his way into Thorstenson's locked home after being barred from it, pounded on his bedroom door, and refused to leave. Central to that defense was what Thorstenson knew about Pixley's capacity for violence. At the in-camera hearing conducted at the outset of trial, the defense sought to introduce two specific acts of violence Pixley had described to Thorstenson: that Pixley had forced his way into another person's home and beaten the occupants with a bat, and that Pixley had shot at his cousin some months before. *Trial Tr. 40–56, 65–69.* The court excluded both as not sufficiently connected in time to the homicide. *Trial Tr. 48, 56.*

South Carolina law has long permitted a defendant claiming self-defense to prove the victim's prior specific acts of violence that were known to the defendant, because such acts bear directly on the reasonableness of the defendant's apprehension. In *State v. Day,* the Supreme Court held that "[i]n 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" is admissible where 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." 341 S.C. 410, 419, 535 S.E.2d 431, 435 (2000). Applying that rule, *Day* held that a prior violent act the deceased committed against a third party four months before the homicide "was admissible to prove [the defendant] had a reasonable apprehension of violence from [the victim], an essential element of his self-defense claim." *Id.* at 420, 535 S.E.2d at 436.

The excluded evidence here was at least as probative as the evidence held admissible in *Day*. The cousin-shooting incident occurred only months before the homicide—well within the temporal range *Day* found sufficient. And the bat-beating incident was uniquely probative because it was, in substance, the very scenario Thorstenson faced: Pixley forcing his way into a home where he was unwelcome and visiting violence on its occupants. That a person known to have invaded another's home and beaten its occupants with a bat had now pushed his way into Thorstenson's own locked home and refused to leave goes to the heart of whether Thorstenson's fear, and his resort to force to expel Pixley, were reasonable. Excluding it left the jury to assess Thorstenson's state of mind in a vacuum, while permitting the State to recast Pixley as a harmless guest who merely overstayed his welcome. *Trial Tr. 155–159, 520–21.*

The exclusion implicated more than the rules of evidence. A criminal defendant has "a meaningful opportunity to present a complete defense," *Holmes v. South Carolina,* 547 U.S. 319, 324 (2006), including "the right to present the defendant's version of the facts" to the jury, *State v. Lyles,* 379 S.C. 328, 665 S.E.2d 201 (Ct. App. 2008); *see Chambers v. Mississippi,* 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his

own defense."). Where the central issue is the reasonableness of a defendant's fear, evidence of what he knew about the victim's violent history is not a peripheral matter—it is the defense.

The State emphasized below that the prior acts were known only through Thorstenson's account of what Pixley had told him, that no independent evidence corroborated them, and that Thorstenson had continued a relationship with Pixley afterward. Those points bear on weight and on whether the bat incident—described as occurring roughly two years earlier—was too remote. But *Day* sets no bright-line cutoff, and at least the more recent incident fell squarely within its range. The court's categorical exclusion, resting on temporal remoteness alone and without weighing the distinctive probative force of a home-invasion assault in a case about a home-invasion shooting, was an abuse of discretion that prejudiced the defense on the issue of Thorstenson's reasonable apprehension of Pixley. The prejudice is confirmed by the jury's deliberations: in a brief deliberation, its only question was a request to be re-instructed on defense of habitation—the very defense to which the excluded evidence of Pixley's prior violence was directly addressed. The jury was thus required to weigh the reasonableness of Thorstenson's fear while deprived of the evidence most probative of it.

III. The trial court abused its discretion under Rule 403 in admitting the "murk" text message after finding no reliable method existed to determine the term's meaning.

Preservation. This issue is preserved. The defense objected to the State's proffered interpretation of the "murk" message and to its admission; the court ruled on the objection. *Trial Tr. 377- 382, 392.*

The State made the 10:23 a.m. text message—"I'm going to murk this nigga, man, you better do something"—a centerpiece of its malice case, arguing in closing that "murk means murder." *Trial Tr. 514, 520–21, 536.* To establish that meaning, the State sought to qualify

Lieutenant Chris Lind as an expert in interpreting cell-phone "jargon." *Trial Tr. 379–87.* The foundation was thin: Lind conceded he was aware of no "exact publications" or accepted documentation establishing the meaning of the term, that he had never been qualified as an expert in the field, and that he knew the word only from prior cases, suspects, and confidential informants. *Trial Tr. 384–86.*

The trial court got the threshold ruling right. "[A]ll expert testimony under Rule 702, SCRE, imposes on the trial courts an affirmative and meaningful gatekeeping duty," which applies to "nonscientific (or experience[-]based)" testimony no less than to scientific testimony, and requires that the proffered testimony "meet[] a reliability threshold." *State v. White,* 382 S.C. 265, 270, 676 S.E.2d 684, 686–87 (2009). South Carolina courts have recognized that interpreting coded or slang language based on "general . . . experience alone"—rather than on personal involvement in the particular investigation—"is textbook expert testimony" that may not be admitted absent qualification under Rule 702. *State v. Ostrowski,* 435 S.C. 364, 385, 867 S.E.2d 269, 279 (Ct. App. 2021). Finding no reliable basis for Lind's proposed interpretation, the court declined to qualify him and excluded his opinion that "murk" meant murder. *Trial Tr. 386–87.*

Having so ruled, however, the court admitted the text message and announced that the parties would have "free rein to tell the jury what [they] think it means." *Trial Tr. 387.* That ruling is in tension with the court's own reliability finding and warrants exclusion under Rule 403. The message's principal probative value, as the State deployed it, lay entirely in the contested premise that "murk" meant "murder"—the very interpretation the court had just found too unreliable for a witness with decades of experience to offer. Where a court has determined that no reliable

method exists to establish what a term means, permitting the State to supply that meaning through argument invites the jury to convict on speculation dressed as fact. *Trial Tr. 520–21, 536.*

To be sure, a defendant's own statement, sent two minutes before he shot the victim, is ordinarily admissible and probative of his state of mind regardless of the precise meaning of any single word, and Rule 403 rulings are reviewed with "broad deference" and reversed only in "exceptional circumstances." *Lyles,* 379 S.C. at 338, 665 S.E.2d at 206. But this is the exceptional case in which the State extracted the message's decisive meaning from an interpretation the court had expressly found unreliable, then pressed that meaning relentlessly in closing. The danger of unfair prejudice was acute precisely because the jury was invited to treat "murk" as a confession of intent to murder on no reliable foundation at all. To the extent the court's pretrial Rule 404(b) ruling, *Trial Tr. 10–12,* had excluded the gang- and narcotics-tinged implications of Lind's "jargon" theory, the State's "murk means murder" theme reintroduced a similar inference by other means. The court's admission of this unreliable but unduly prejudicial evidence denied Thorstenson a fair trial, and this Court should reverse his convictions.

IV. In the alternative, the inability to reconstruct the missing portion of the transcript in a manner permitting meaningful appellate review entitles Thorstenson to a new trial.

Preservation. This issue is preserved. Thorstenson moved for a new trial on the ground that the reconstructed record was inadequate; the circuit court denied the motion. *Order (Nov. 21, 2025).*

A criminal appellant is entitled to a record on appeal adequate to permit "meaningful appellate review," and "a new trial is . . . appropriate if the appellant establishes that the incomplete nature of the transcript prevents the appellate court from conducting a meaningful appellate review." *State v. Ladson,* 373 S.C. 320, 324–25, 644 S.E.2d 271, 273 (Ct. App. 2007).

Although the inability to prepare a complete verbatim transcript is not, standing alone, a ground for reversal, *id.* at 324, 644 S.E.2d at 273, a reconstruction undertaken long after trial and dependent on the fragile recollection of participants can fail to supply the assurance that meaningful review requires.

Here, the courthouse recording system failed at the close of the jury charge and captured nothing thereafter, thereby omitting the jury's only deliberation question, the recharge on the dispositive defense, the verdict, and sentencing. The reconstruction did not occur until September 30, 2025, nearly two years after the November 2023 trial, and was further delayed by the death of Thorstenson's predecessor appellate counsel. The fragility of a memory-based reconstruction of the decisive moment is illustrated by the proceeding itself: the trial court initially could not say which of two written versions of the habitation charge had been given, the parties reconciled the competing versions only by comparing them line-by-line against the surviving transcript, and Thorstenson maintained that the recharge actually delivered to the jury differed from the version memorialized. *Recon. Tr. 33-35.* Because the one substantive event lost from the record—the recharge on defense of habitation—concerned the precise defense the jury was actively deliberating, the dispute over its wording is not immaterial.

Unlike *Ladson,* where the entire three-day trial was lost and reconstructed only in "bare bones" summary fashion, *id.* at 327, 644 S.E.2d at 274, the substantive evidence here was transcribed, and the circuit court found the limited missing portion adequately reconstructed—a determination entitled to deference. *Ladson* also requires the appellant to "identify a specific appellate claim that th[e] court would be unable to review effectively using the reconstructed record." *Id.* at 325, 644 S.E.2d at 273. To the extent this Court concludes that the surviving and

reconstructed record permits full review of Issues I through III, the predicate for a new trial under *Ladson* is not met, and the Court should reach those issues on their merits. Thorstenson preserves the reconstruction issue, however, because the convergence of a recording failure at the decisive moment, a multi-year delay, the death of prior counsel, and a disputed memory-based recharge presents the rare circumstance in which a defendant may be unable to obtain the meaningful review to which he is constitutionally entitled.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the denial of immunity and remand for a new immunity determination under the correct legal framework, with specific findings on the record. In the alternative, Appellant requests that this Court reverse his convictions and remand for a new trial because the exclusion of evidence central to his defense deprived him of a meaningful opportunity to present that defense, and because the "murk" message was admitted in violation of Rule 403. Should the Court conclude that the reconstructed record does not permit meaningful review of these issues, Appellant requests in the further alternative that the Court reverse and remand for a new trial under *State v. Ladson.*

Respectfully submitted,

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