

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Williamsburg County

R. Ferrell Cothran, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LOU ANN ROBINSON,

APPELLANT

APPELLATE CASE NO. 2013-000293

INITIAL BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS1

TABLE OF AUTHORITIES.....2

STATEMENT OF ISSUE ON APPEAL.....3

STATEMENT OF THE CASE4

ARGUMENT5

CONCLUSION.....22

TABLE OF AUTHORITIES

Cases

State v. Grooms, 343 S.C. 248, 540 S.E.2d 99 (2000)..... 18

State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493 (Ct. App. 2003)..... 17

State v. Hawes, 399 S.C. 211, 730 S.E.2d 904 (Ct. App. 2012)..... 20

State v. Robinson, No. 2012-UP-574 (Ct. App. Oct. 24, 2012) 4

Statutes

S.C. Code Ann. § 16-25-20(A) 18

S.C. Code Ann. § 16-25-90 18, 20, 21

STATEMENT OF ISSUE ON APPEAL

Whether, pursuant to section 16-25-90 of the South Carolina Code, appellant presented a sufficient history that she was a victim of domestic violence when she testified to multiple instances of physical and mental abuse, her friend testified regarding two instances of physical violence and other mental abuse, and an expert witness testified that appellant was a battered woman?

STATEMENT OF THE CASE

On July 6, 2009, appellant was indicted by a Williamsburg County grand jury for murder, voluntary manslaughter, and a related weapons charge. R. ____. On December 14, 2009, appellant was tried before the Honorable R. Ferrell Cothran and a jury. R. 1. Kimberly V. Barr and Ronnie A. Sabb represented the State. R. 1. William E. Jenkinson, III, and Samuel L. Floyd represented appellant. R. 1. The jury acquitted appellant of murder. Tr. V. 2 469, ll. 2 – 4. The jury convicted appellant of voluntary manslaughter and the weapons charge. Tr. V. 2 469, ll. 5 – 9. Judge Cothran sentenced appellant to concurrent terms of twelve years' imprisonment for voluntary manslaughter and five years' imprisonment on the weapons charge. Tr. V. 2 478, ll. 4 – 8.

On October 24, 2012, this Court affirmed appellant's convictions, but remanded the case "for a determination of whether [appellant] presented a preponderance of evidence showing she suffered criminal domestic violence inflicted by the victim." R. ____; State v. Robinson, No. 2012-UP-574 (Ct. App. Oct. 24, 2012). On December 20, 2012, Judge Cothran held a hearing pursuant to this Court's remand. Hearing transcript 1. On January 25, 2013, Judge Cothran issued an order finding that appellant was not entitled to early parole eligibility because she had not proved that she was a victim of a history of criminal domestic violence. R. ____ (January 25, 2013, Order). This appeal follows.

ARGUMENT

Appellant is eligible for early parole pursuant to section 16-25-90 of the South Carolina Code because she presented a sufficient history that she was a victim of domestic violence when she testified to multiple instances of physical and mental abuse, her friend testified regarding two instances of physical violence and other mental abuse, and an expert witness testified that appellant was a battered woman.

Relevant Facts

Robinson and Dunmore's Relationship

Defendant Lou Ann Robinson ("Robinson") testified in her own defense. Robinson grew up in Philadelphia and after a year of college, worked primarily in the medical technology field. Tr. V.2 175, ll. 3 – 17. She was fifty-six years old at the time of trial. Tr. V.2 173, ll. 15 – 16. She moved to South Carolina in 2004 to take care of her elderly mother. Tr. V.2 178, ll. 2 – 15. Robinson's mother was eighty-three years old, in poor health, and her mind was failing. Tr. V.2 173, l. 23 – 174, l. 10.

Between her arrest and the trial, Robinson suffered a stroke. Tr. V.2 176, ll. 5 – 7. The stroke affected her writing, speech, and memory. Tr. V.2 176, ll. 8 – 14. It caused her problems communicating her thoughts and trouble remembering dates. Tr. V.2 176, ll. 8 – 14. Tr. V.2 179, ll. 4 – 7. She also had problems hearing. Tr. V.2 176, ll. 1 – 4. One of Robinson's two children was murdered in Philadelphia in the early 1990s, causing her to seek treatment for mental health issues. Tr. V.2 176, l. 18 – 177, l. 12. Robinson did not have a driver's license and had no transportation. Tr. V.2 174, ll. 14 – 21.

Robinson began dating the decedent, Willie Dunmore ("Dunmore"), after she moved to South Carolina. Tr. V.2 178, ll. 16 – 20. Dunmore moved in with Robinson and

her mother. Tr. V.2 178, l. 21 – 179, l. 3. Six months after Dunmore moved in, their relationship soured. Tr. V.2 179, ll. 20 – 22. They had “a lot of arguments.” Tr. V.2 180, ll. 6 – 7. He paid no household bills. Tr. V.2 245, ll. 18 – 22. Dunmore was jealous and controlling. Tr. V.2 180, ll. 8 – 11. He listened in on Robinson’s telephone calls and recorded some of them. Tr. V.2 181, ll. 8 – 12. He would take the telephone away from her when she would make calls. Tr. V.2 182, l. 24 – 183, l. 2. Dunmore was fired from his job in November 2006 and began drinking more heavily.¹ Tr. V.2 194, l. 13 – 195, l. 3.

Dunmore was significantly larger than Robinson. Dunmore was 6’2” tall and weighed 203 pounds. Tr. 236, ll. 17 – 20. Robinson was only 5’4” and weighed 135 pounds. Tr. 236, l. 25, - 237, l. 3. Robinson was eleven years older than Dunmore. She was 54 years old and he was 42. Tr. 236, l. 23 – 237, l. 3.

Dunmore physically abused Robinson during his drinking binges. Tr. V.2 179, l. 23 – 180, l. 3. He slapped Robinson in her face, sometimes “for no reason at all.” Tr. V.2 195, ll. 6 – 10. Tr. V.2 180, ll. 2 – 5. She called the police once, but Dunmore left. Tr. V.2 195, ll. 13 – 14. Robinson recalled a particular incident when Dunmore became violently jealous at a bar. Tr. V.2 183, l. 8 – 185, l. 12. Dunmore grew angry when a man approached her and began “throwing his hands up and pushing chairs.” Tr. V.2 183, l. 8 – 185, l. 12. They left and on the way home, Dunmore was “fussing” and “driving very wild,” frightening

¹ The State objected when defense counsel asked Robinson why Dunmore was fired. Tr. V.2 189, ll. 11 – 14. Judge Cothran excused the jury. Tr. V.2, l. 14. Robinson proffered that Dunmore was fired because of his drinking. Tr. V.2 189, ll. 21 – 22. After a colloquy about whether Robinson could testify as to the cause of Dunmore’s dismissal, the trial judge stated, “**I’m not real sure any of this matters. You all—in my opinion, this drinking has nothing to do with the case.** I don’t think the jury will think so either, but that is just my opinion. She has testified about a drinking problem he had and all of this, but you all are trying the case. **I think you all are beating this to death.**” Tr. V.2 193, ll. 15 – 23 (emphasis added).

Robinson. Tr. V.2 183, l. 8 – 185, l. 12. When they got home, Robinson tried to take his keys and Dunmore gave her a black eye. Tr. V.2 183, l. 8 – 185, l. 12. She “put up with” the abuse because she was “always scared.” Tr. V.2 180, ll. 17 – 19. Despite this, she claimed at trial that she was still in love with Dunmore. Tr. V.2 180, ll. 20 – 23.

Dunmore would threaten Robinson with a shotgun he kept beside his bed. Tr. V.2 185, l. 25 – 186, l. 9. He kept shells in the bedroom. Tr. V.2 185, l. 25 – 186, l. 9. After the incident at the bar, he threatened to get the shotgun. Tr. V.2 185, ll. 15 – 24. Despite threats with the gun, he did not point it at Robinson until the fight that led to his death. Tr. V.2 187, ll. 9 – 17.

Robinson's Friend Witnesses Dunmore's Abuse

Josephine Mouzon (“Mouzon”) was Robinson’s only friend in South Carolina. Tr. V.2 145, ll. 24 – 25. Tr. V.2 152, ll. 12 – 14. Mouzon and Robinson became friends after Robinson moved to South Carolina to take care of her sick mother. Tr. V.2 146, l. 1 – 148, l. 12. She often saw Robinson and Dunmore socially since she was dating Dunmore’s first cousin. Tr. V.2 146, l. 20 – 148, l. 17. She had known Dunmore for a long time. Tr. V.2 146, ll. 15 – 21. Mouzon had to see less of Robinson because it caused a problem with Dunmore. Tr. V.2 150, l. 4 – 151, l. 15. Dunmore did not “want nobody to be around them.” Tr. V.2 150, ll. 4 – 13. Dunmore’s desire to keep people away even applied to “a friend like” Mouzon. Tr. V.2 152, ll. 1 – 3.

Mouzon was not allowed to go to Robinson’s house to socialize because “it was always causing problems.” Tr. V.2 151, ll. 11 – 15. She described Dunmore and Robinson as “always . . . arguing or something.” Tr. V.2 151, ll. 11 – 15. She witnessed the arguments and did not understand what was happening to her friends. Tr. V.2 151, ll. 16 –

24. She had to stop calling Robinson because it would anger Dunmore. Tr. V.2 152, ll. 4 – 9. Dunmore became more controlling of Robinson. Tr. V.2 153, ll. 10 – 17. Robinson was afraid of Dunmore. Tr. V.2 166, ll. 3 – 10.

Robinson had no way to leave her house. Tr. V.2 154, ll. 10 – 11. She had no transportation. Tr. V.2 154, ll. 12 – 13. If Robinson wanted to go somewhere, she had to call Mouzon. Tr. V.2 152, ll. 17 – 20. Mouzon worked collecting change from pool tables and sometimes Robinson would accompany her. Tr. V.2 153, ll. 1 – 5. Tr. V.2 170, ll. 13 – 20. Mouzon would take her grocery shopping and for rides. Tr. V.2 152, ll. 21 – 25.

Robinson's trips with Mouzon angered Dunmore to the point where he became violent. Tr. V.2 153, ll. 6 – 9. Mouzon recalled Dunmore's violence on a day when she picked up Robinson from her house and Dunmore blocked them in the driveway. Tr. V.2 154, ll. 6 – 25. He tried to make Robinson get out of Mouzon's car. Tr. V.2 153, ll. 18 – 22. Robinson did not want to get out and Mouzon drove around Dunmore. Tr. V.2 154, l. 15 – 155, l. 3. Mouzon described what happened next:

Then [Dunmore] came over to my house and Lester [Dunmore's cousin] was there, and he was outside talking to Lester, and before Lester came up and [Robinson] was getting out of the car he hit her up side the house—up side the head and I told her to go on in the house.

Q. Did he hit her hard?

A. Yeah, he hit her hard.

Q. Okay, Which part of her body did he hit?

A. Up side the head.

Tr. V.2 155, ll. 4 – 12. Mouzon intervened and told Dunmore "he had no right to hit her" and there would be no fights at her house. Tr. V.2 155, ll. 14 – 16. Robinson then went

back outside and, after talking to Dunmore, asked Mouzon to take her home. Tr. V.2 155, ll. 14 – 22. Robinson was afraid. Tr. V.2 157, ll. 1 – 16.

Mouzon witnessed Dunmore physically abuse Robinson on another occasion. Tr. V.2 158, l. 17, - 160, l. 1. Robinson and her mother came to Mouzon's house. Tr. V.2 158, l. 17, - 160, l. 1. Dunmore knocked on the door and came in the room. Tr. V.2 158, l. 17, - 160, l. 1. He told Robinson "let's go" and when she got up to leave, Dunmore pushed her so hard that she stumbled. Tr. V.2 159, ll. 2 – 11. Robinson told Dunmore not to "touch me again." Tr. V.2 159, ll. 2 – 11.

On the night of the incident, Robinson called Mouzon and asked if she could have a ride to the store. Tr. V.2 160, ll. 2 – 23. She called between 6:30 – 7:00 PM. Tr. V.2 160, ll. 2 – 5. Mouzon gave Robinson a ride to the store and then took her home. Tr. V.2 160, l. 19 – 161, l. 4. Later that night, Dunmore dropped Mouzon's boyfriend (Lester) off at her house. Tr. V.2 161, l. 5 – 162, l. 20. Mouzon's boyfriend had been drinking. Tr. V.2 162, ll. 11 – 15.

The Fight

That fight that led to Dunmore's death began after Dunmore returned home from a day of drinking at a barbeque. Tr. V.2 197, ll. 11 – 12. Tr. V.2 199, ll. 2 – 4. Tr. V.2 17, ll. 11 – 13. Dunmore's blood alcohol level at the time of his autopsy was 0.156. Tr. V.2 68, ll. 21 – 25. Dunmore began drinking gin early that morning, even before leaving for the barbeque. Tr. V. 2 197, l. 6 – 198, l. 19. Robinson was in her bedroom cooking because it was too cold in her kitchen. Tr. V.2 199, ll. 13 – 24. She briefly left that house that evening to go to the store. Tr. V.2 201, ll. 1 – 18. When Dunmore arrived, he strode into the bedroom, told Robinson that she did not answer the phone when he called, then "slapped

[her] to the floor.” Tr. V.2 204, ll. 4 – 8. Robinson described Dunmore as “mad” and “crazed-like.” Tr. V.2 205, ll. 1 – 4.

Robinson tried to get up from the floor. Tr. V.2 207 ll. 16 – 24. Dunmore had a pocket knife that she had never seen before. Tr. V.2 207 ll. 16 – 24. Tr. V.2 208, ll. 2 – 5. He told Robinson, “I’m going to cut you up.” Tr. V.2 207 ll. 16 – 24. He waved the knife. Tr. V.2 208, ll. 8 – 10. He cut Robinson across the chest. Tr. V.2 208, ll. 11 – 13. Tr. V.2 259, l. 24 – 260, l. 11. Tr. 245, ll. 1 – 25. She grabbed a small knife and Dunmore shoved her to the ground again. Tr. V.2 208, ll. 14 – 24.

Dunmore got his shotgun. Tr. V.2 209, ll. 4 – 9. He pointed it at Robinson’s stomach and hit her on her leg and arm. Tr. V.2 209, ll. 10 – 19. His finger was on the trigger. Tr. V.2 209, ll. 20 – 22. He pointed the gun at her legs and arms. Tr. V.2 210, ll. 4 – 13. Robinson was still on the floor with Dunmore on top of her. Tr. V.2 210, ll. 9 – 18. She “was trying to get him to move but he wouldn’t.” Tr. V.2 210, l. 23 – 211, l. 2. She was “juggling” the knife at Dunmore and did not know she stabbed him. Tr. V.2 211, ll. 1 – 16. Dunmore stopped, put the gun down, and walked out the door. Tr. V.2 212, ll. 9 – 21. She locked the door behind Dunmore as he got in his car and drove away. Tr. V.2 212, l. 22 – 213, l. 13.

Dunmore then called the house. Tr. V.2 214, ll. 12 – 22. He threatened Robinson, saying, “I’m going to get you.” Tr. V.2 214, ll. 21 – 22. She took the gun and knife and threw them in the woods. Tr. V.2 214, l. 23 – 215, l. 3. She was afraid of Dunmore returning to attack her again. Tr. V.2 216, ll. 14 – 19. She did not call the police, but voluntarily went with them when they came to her house. Tr. V.2 216, l. 20 – 219, l. 13. Robinson gave the police a statement recounting the events of the fight before she knew

Dunmore was dead. Tr. V.2 217, l. 19 – 224, l. 5. She admitted she told the police that Dunmore threw the shotgun in the yard. Tr. V.2 221, ll. 12 – 19. However, there was never any evidence that the shotgun was used or fired by any person that evening.

The Police Investigation

Scott King was a sheriff's deputy and emergency medical technician. Tr. 62, l. 17 – 63, l. 23. He responded to a call for a motor vehicle accident. Tr. 65, ll. 11 – 15. Dunmore was laying in the grass near his truck. Tr. 66, ll. 19 – 20. The accident site was approximately one mile from Robinson's house. Tr. V.2 42, ll. 8 – 13. King found a stab wound in Dunmore's chest. Tr. 69, ll. 10 – 19. King asked Dunmore what happened and he replied, "My girlfriend." Tr. 82, ll. 2 – 4. Dunmore did not elaborate on how he received the wound. Tr. 89, l. 4 – 90, l. 22. Dunmore did not accuse Robinson of a crime. Tr. 89, l. 4 – 90, l. 22. Dunmore died from a single stab wound, which pierced his heart. Tr. V.2 65, ll. 4 – 16. The State's pathologist testified that most murder cases involve multiple stab wounds. Tr. V.2 84, ll. 3 – 25.

The night of Dunmore's death, the crime scene investigator found an unloaded shotgun in a field beside Robinson's yard. Tr. 140, l. 5 – 142, l. 1. It looked like it had blood on it. Tr. 142, ll. 2 – 12. The police never tested the blood found on the shotgun. Tr. 233, l. 20 – 234, l. 6. Subsequently, a steak knife was found in the same field near where the shotgun had been found. Tr. 143, l. 5 – 144, l. 8. A large butcher knife was found in Robinson's bedroom. Tr. 144, ll. 12 – 24. Among the items inventoried by the hospital after Dunmore's death was a pocket knife. Tr. 123, ll. 5 – 7. This pocket knife was collected by Dunmore's brother. Tr. 123, ll. 5 – 7. Even though this knife was an important piece of evidence, it was not processed by the police. Tr. 167, ll. 3 – 25.

Also found in the bedroom were a female's bloodstained shirt and shotgun shells. Tr. 146, l. 3 – 147, l. 25. Tr. 173, l. 15 – 174, l. 10. The shotgun shells were on Dunmore's side of the bed. Tr. 174, ll. 1 – 10. The police found Coors Light cans and a pint of alcohol in the bedroom. Tr. 212, ll. 3 – 7.

A small blood trail led from the bedroom to the carport. Tr. 150, ll. 12 – 17. No wounds were seen by the crime scene investigator on Dunmore's hands. Tr. 163, ll. 9 – 15. The police failed to test the steak knife and the butcher knife for blood. Tr. 241, ll. 2 – 15. Neither the police nor the pathologist knew which of the three knives inflicted the fatal wound to Dunmore. Tr. V.2 53, ll. 15 – 20. Tr. V.2 104, ll. 3 – 20.

Willie Brown ("Brown") was an investigator assigned to the case. Tr. 197, ll. 17 – 19. He made contact with Robinson shortly before 12:30 AM. Tr. 200, ll. 18 – 22. Robinson initially did not answer the door and denied she lived there when Brown called from his cell phone. Tr. 201, l. 7 – 204, l. 15. However, it was very late at night and no lights were on in the house. Tr. 263, ll. 13 – 14. Brown recalled Robinson having a bruise and a fresh, deep scratch across her chest that could have been made with a knife. Tr. 245, ll. 1 – 25.

Brown testified regarding his experience in domestic abuse cases. He had received training regarding domestic violence. Tr. 247, ll. 11 – 18. He testified that abusive husbands are typically "control freaks" who prevent women from leaving the house or having friends. Tr. 251, ll. 10 – 25. Another investigator testified that African-American women are the most frequent victims of domestic violence. Tr. V.2 48, l. 23 – 49, l. 2.

Brown testified that his department had not received any domestic violence calls from Robinson about Dunmore. Tr. 254, ll. 9 – 16. Neither Dunmore nor Robinson called 911 on the night of the incident. Tr. 254, ll. 17 – 23.

The Expert Testimony of Dr. Lois Veronen

Dr. Lois Veronen (“Veronen”) is a clinical psychologist and part-time professor at Winthrop University. Tr. V. 2 270, ll. 4 – 5. The trial court qualified Veronen as an expert in the field of battered woman syndrome. Tr. V. 2 275, ll. 14 – 19. Veronen saw Robinson three times. Tr. V. 2 275, ll. 24 – 25. Veronen administered psychological and language tests to Robinson. Tr. V. 2 277, ll. 3 – 15. She spent a total of 18.5 hours with Robinson. Tr. V. 2 276, ll. 17 – 19.

Veronen's testing revealed that Robinson was “a very impaired individual.” Tr. V. 2 296, ll. 7 – 8. Even though Robinson finished high school and one year of college, at the time of Veronen's assessment of her intellectual functioning “she was considered to be borderline intelligence.” Tr. V. 2 295, lines 6 – 11. She found severe deficits in functioning regarding Robinson's memory and attention. Tr. V. 2 295, lines 12 – 24. Veronen attributed these deficits in part to Robinson's stroke. Tr. V. 2 294, line 23 – 297, l. 10. Veronen's testing did not show that Robinson was malingering or faking her responses. Tr. V. 2 314, ll. 2 – 21.

Veronen testified that one type of abuse was controlling a woman's activities. Tr. V. 2 282, ll. 19 – 25. Abusive men often restrict a victim's access to friends, family, or other persons. Tr. V. 2 282, ll. 20 – 22.

Veronen examined Robinson's mental health records from Philadelphia. Tr. V. 2 283, ll. 10 – 13. Robinson had “a history of trauma and mental health problems.” Tr. V. 2

283, ll. 14 – 20. The murder of her son and a prior violent relationship caused Robinson to suffer from post-traumatic stress disorder and depression. Tr. V. 2 286, l. 6 – 288, l. 19. Veronen testified that Robinson was suffering from these conditions at the time of the incident. Tr. V. 2 288, ll. 11 – 19. Veronen opined that Robinson was desensitized to her violent situation. Tr. V. 2 288, l. 20 – 289, l. 11. Robinson suffered from depersonalization. Tr. V. 2 290, l. 13 – 291, l. 6.

Importantly, Veronen examined Robinson's medical records. Tr. V. 2 283, l. 23 – 284, l. 4. These records confirmed that Robinson had been evaluated in July 2008 and found that she suffered a stroke. Tr. V. 2 283, l. 23 – 284, l. 4. Veronen testified that Robinson "had a scan which confirmed that she had the stroke, an infarct in the left hemisphere." Tr. V. 2 284, ll. 2 – 4. This portion of the brain is very important to language and damage in that area affects language, memory, and attention. Tr. V. 2 285, ll. 10 – 24.

Veronen testified that in her opinion, Robinson "was definitely a battered woman in December of 2006." Tr. V. 2 292, lines 7 – 12. Veronen specifically testified about the effect of abuse on a battered woman's memory:

Q. Did [Robinson] have difficulty in explaining to you how the stabbing occurred?

A. There was difficulty with her trying to explain what happened, yes. Great difficulty.

Q. Would a battered woman have difficulty in explaining these sorts of things?

A. Battered women often have difficulty because at the same time they may be so emotionally aroused or just fearful or anxious that the memory does not work as well to take the steps to take them into stored memory. They can't put them into memory.

Sometimes they have to – sometimes parts of it is recovered and established but sometimes they can't do that.

About 1982 there was research about interviewing victims by the Criminal Justice System, and in that particular setting I said that, you know, you cannot use immediate statements as indications of what has happened.

The research has found out later that sometimes some of the memory gets recovered later on, but sometimes it doesn't, and there are spaces in the memory, a partial amnesia, and reactions are extremely difficult.

Q. Can you tell us whether or not you saw that in her statements to you about what happened?

A. Yes, I did.

Tr. V. 2 292, l. 23 – 293, l. 21.

Testimony of the Other Defense Witnesses

Mary Ross was a former nurse and went to see Robinson at the jail on December 28, 2006. Tr. V. 2 329, lines 12 – 16. She saw bruises and cuts on Robinson. Tr. V. 2 329, ll. 17 – 19. She saw a bruise on Robinson's right forearm, a healing laceration on her upper left chest, a swollen area on her foot, and a bruise on her left wrist. Tr. V. 2 330, l. 6 – 331, l. 3.

Officer Danny McRae worked for the Kingstree Police Department and testified for the defense. Tr. V. 2 336, ll. 12 – 22. Officer McRae was with Dunmore when he died. Tr. V. 2 344, ll. 11 – 16. Even though Dunmore was lucid, Dunmore refused to tell Officer McRae what happened to him and how he had been injured. Tr. V. 2 343, l. 6 – 344, l. 10. Officer McRae said, “there was nothing to keep [Dunmore] from telling me, but he just chose not to tell me.” Tr. V. 2 344, ll. 9 – 10.

The Close of the Trial

At the charge conference, the defendant asked the trial court not to charge the lesser included offense of voluntary manslaughter. Tr. V. 2 460, ll. 9 – 25. The State asked the trial judge to charge voluntary manslaughter. Tr. V. 2 460, ll. 22 – 25. During deliberations, the jury asked for a definition of voluntary manslaughter. Tr. V. 2 463, ll. 13 – 18. The jury reached a verdict an hour after recharge. Tr. V. 2 468, ll. 5 – 6.

At sentencing, Robinson asked for a finding pursuant to section 16 – 5 – 90 of the South Carolina code that she had suffered a history of domestic violence and was entitled to early parole eligibility. Tr. V. 2 474, ll. 5 – 14. The trial judge said, “In this case, outside of one witness and the testimony of your client, the Defendant, there is no history of domestic violence.” Tr. V. 2 475, ll. 11 – 13. The judge then found that the decision regarding parole eligibility was for the parole board, an error which resulted in the remand from this Court. Tr. V. 2 476, l. 24 – 477, l. 18.

Discussion

The trial court found that the evidence of abuse presented by Robinson was not credible and not sufficient. Admittedly, on appeal, a trial judge’s findings regarding credibility are entitled to great deference. It should be so and appellant will not argue otherwise. However, the trial judge’s findings regarding the credibility of the evidence is inconsistent and contains a glaring omission in its reasoning. The trial judge used Robinson’s memory deficits to find her not a credible witness, but failed to recognize the impact of Robinson’s stroke. The trial court specifically found Dr. Veronen a credible witness and Dr. Veronen testified regarding the impact of Robinson’s stroke on her intelligence and memory. The trial court’s failure to recognize the cause of Robinson’s

memory problems led it to make an erroneous finding against Robinson and requires reversal.

The Trial Court's Order

The trial court wrote, "The Court finds that Dr. Veronen presented credible evidence that Ms. Robinson has suffered from a history of domestic violence." R. ___ (Order, p. 5). Despite this finding, the trial court disregarded Dr. Veronen's testimony because of a cherry-picked answer to the solicitor's cross-examination that some of her test results could relate to Robinson's prior abusive relationship. R. ___ (Order, p.5) Without discussing Dr. Veronen's opinions regarding Robinson's stroke, the trial court found Dr. Veronen's testimony "problematic" because she relied, in part, on her interviews with Robinson who had "memory problems."² R. ___ (Order, p.5).

As for Robinson's testimony, the trial court found her evidence to lack credibility. R. ___ (Order, p.3). The trial court did not base its credibility finding on observations of her demeanor, prejudice, or bias, but instead on Dr. Veronen's opinion that she had memory deficits. R. ___ (Order, p.4). While the trial court found minor inconsistencies in Robinson's testimony, the thrust of the trial court's finding as to her lack of credibility is based on Dr. Veronen's findings regarding Robinson's memory. R. ___ (Order, p.4-5).

Finally, the trial court found that Mouzon "presented evidence of domestic violence but the testimony is found to lack credibility." R. ___ (Order, p.3). The trial court did not base this finding upon observations of the witness or her demeanor. R. ___ (Order, p.3). Instead, it found what it termed an inconsistency in her testimony because Mouzon testified

² The failure to allow Dr. Veronen to testify as an expert in a domestic violence case was grounds for reversal in State v. Grubbs, 353 S.C. 374, 381, 577 S.E.2d 493, 496-97 (Ct. App. 2003).

she had to curtail her interaction with Robinson because of Dunmore, yet spoke to Robinson at Thanksgiving and again saw her the day of the incident. R. ___ (Order, p.3). Interestingly, the trial court appeared to believe that Mouzon told the truth about the slapping and shoving incidents because it found that these incidents were not sufficiently severe “to warrant a finding of a history of domestic violence.” R. ___ (Order, p.3).

The Combined Testimony of Mouzon, Robinson, and Dr. Veronen Establish a History of Domestic Violence

Robinson presented sufficient evidence to qualify for early parole. A defendant who presents “credible evidence of a history of criminal domestic violence . . . suffered at the hands of a household member” is entitled to be considered for parole after serving one-fourth of her sentence. S.C. Code Ann. § 16-25-90. This code section references the definition of criminal domestic violence which provides that it “is unlawful to: (1) cause physical harm or injury to a person’s own household member; or (2) offer or attempt to cause physical harm or injury to a person’s own household member with apparent present ability under circumstances reasonably creating fear of imminent peril.” S.C. Code Ann. § 16-25-20(A). It was undisputed that Dunmore was Robinson’s household member.

In State v. Grooms, 343 S.C. 248, 540 S.E.2d 99 (2000), the Supreme Court first interpreted the burden of proof under section 16-25-90. In Grooms, the defendant argued that she only had a burden of production, not a burden of proof. Id. at 251-52, 540 S.E.2d at 101. The Court quickly rejected that argument and found that defendants bear the burden of proof by a preponderance of the evidence. Id. at 253-55, 540 S.E.2d at 101-02. Grooms implied this burden from the Legislature’s use of the word “credible” in the statute. Id. The

Court found that “credible” has its normal meaning of “trustworthy” and did not mean, as the defendant suggested, “simply plausible.” Id.

Grooms is of immense importance to Robinson’s case because of its discussion of credibility. Grooms quoted extensively from the trial judge’s findings on the record. Id. at 250-51, 540 S.E.2d at 100-01. The trial judge stated he “watched the witnesses, how they acted on the stand, their demeanor, and I’ve taken into account all the bias and prejudice which a trier of fact has to take into account” Id. at 251, 540 S.E.2d at 251. Unlike the trial judge in Grooms, Judge Cothran’s credibility findings in this case do not relate to observations, demeanor, bias or prejudice. Judge Cothran’s adverse credibility findings regarding Robinson flow wholly from Dr. Veronen’s findings regarding Robinson’s memory loss.

At no point did the trial court specifically find that Robinson lied about being slapped by Dunmore for no reason, lied about being controlled by Dunmore, lied about being given a black eye after leaving a bar, lied about Dunmore threatening to shoot her with a shotgun, lied about being slapped “upside” the head and shoved in front of Mouzon. Instead, the trial court simply disregarded her testimony regarding these specific instances of abuse because of her “memory problems.”

Dr. Veronen, whose testimony was specifically found to be credible, testified extensively about the effect of abuse and, more importantly, the effect of Robinson’s stroke. Dr. Veronen explained that Robinson’s stroke was the primary reason why a woman who graduated from high school, attended a year of college, and had a career in a technical field now scores in the bottom range on memory and intelligence tests. Tr. V. 2 294, l. 23 – 297, l. 10. The fact that Robinson suffered a stroke and Dr. Veronen credibly

testified that it explained Robinson's memory deficits cannot form the basis of an adverse credibility finding that specific incidents of abuse did not occur. Dr. Veronen never testified that Robinson's stroke or abuse would lead her to lie or fabricate abuse. In fact, the amnesia described by Dr. Veronen makes it more likely that Robinson cannot recall other chapters in Dunmore's history of abuse, not imagine the incidents she described.

The misuse of Dr. Veronen's testimony against Robinson is a logical error that masquerades as a credibility finding. Unlike Grooms, no traditional credibility findings exist in this case. Finding error in this case would not run afoul of the proper deference given true credibility findings by a trial judge, but would correct a mistaken conclusion used to disregard a witness's entire testimony.

The trial court also erred when it found that the physical violence witnessed by Mouzon was not sufficient. In State v. Hawes, 399 S.C. 211, 216-17, 730 S.E.2d 904, 906-07 (Ct. App. 2012), this Court declined to define "a history" of criminal domestic violence in section 16-25-90. Hawes credited the circuit court with examining the legislative history of section 16-25-90 and crafting its own definition of "a history." Id. The Hawes Court also appeared to agree with the circuit court's reasoning that section 16-25-90 is meant for a middle ground where a defendant could not maintain a homicide defense based on battered spouse syndrome, but still had worthy mitigating evidence. Id. Robinson's case falls squarely on this "middle ground."

The trial court recognized that Hawes left "a history" undefined. R. ____ (Order, p. 1). However, in its next sentence, it appeared to adopt a portion of the circuit court's definition of "a history" from Hawes. R. ____ (Order, p.2). When discussing Mouzon's testimony, the court stated it was "[a]pplying the definition of history." R. ____ (Order, p.3).

It then found that “a history” did not include the violence witnessed by Mouzon because of “the short length of time” between the incidents and Dunmore’s death, R. ___ (Order, p.3).

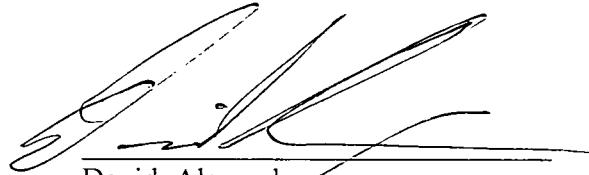
Whatever the definition of “a history,” it certainly does not mean that recent events should disqualify a defendant from qualifying under section 16-25-90. This reasoning would mean that as domestic violence escalates toward the precipitating crime, that escalation should be discounted. A close proximity of domestic violence to the crime should weigh in favor of early parole eligibility, not against it. Appellant also submits that slapping someone “upside” the head and shoving a person to the floor are severe instances of physical abuse. The trial court’s finding that these incidents were not sufficiently severe was erroneous.

When the trial court’s error regarding Robinson’s “memory problems” is undone, what is left is a clear picture of a woman who suffered a history of abuse at Dunmore’s hands. Dunmore repeatedly physically attacked Robinson and controlled her access to friends and the outside world. The jury also must have believed some of Robinson’s testimony. The jury’s decision to acquit Robinson of murder means they necessarily credited Robinson’s description of Dunmore and his attack the night of his death because they were required to find that Robinson acted with legal provocation to convict her of manslaughter. This Court should reverse and find that Robinson is entitled to be considered for early parole pursuant to section 16-25-90.

CONCLUSION

For the foregoing reasons, this Court should reverse and find that Robinson is eligible for early parole pursuant to section 16-25-90 of the South Carolina Code.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of February, 2014.