STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable Roger L. Couch, Circuit Court Judge

THE STATE,

Respondent,

v.

SANDY LYNN WESTMORELAND,

Appellant

Appellate Case No. 2014-002636.

INITIAL BRIEF OF RESPONDENT

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I. Whether the court erred by allowing the coroner, who admitted he had never testified about the manner of death in a prior case, to opine, where he was not qualified as an expert, that the cause of the decedent's death was a homicide since this was impermissible opinion by a lay witness that was extraordinarily prejudicial where appellant's defense was accident, and the jury was charged on the law of accident?

II. Whether the court erred by instructing the jury that voluntary intoxication was not a defense where the evidence in this case was undisputed that appellant was heavily medicated in the hospital emergency room for medical purposes, and was nonetheless allowed to leave to drive home, since this instruction on voluntary intoxication should not have been charged given the facts of this case, and it was consequently was very confusing and misleading?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

I. Whether the trial court erred when it allowed the county Coroner to testify as a lay witness that he ruled the victim's death a homicide. The Coroner is statutorily required to rule on the manner of death. His testimony does not comprise an expert opinion and constitutes merely one piece of evidence before the jury's consideration.

II. Whether the trial court erred by instructing the jury on voluntary intoxication. The evidence presented at trial created a question for the factfinder as to whether Appellant was or was not intoxicated at the time of the hit and run, and it was appropriate to thereafter instruct the jury on the implications of finding that Appellant was voluntarily intoxicated.

STATEMENT OF THE CASE

Appellant Sandy Lynn Westmoreland was indicted by the Spartanburg County Grand Jury for the charges of murder and hit and run with death. (R. pp. *Indictments). A third charge for second-degree assault and battery was severed prior to trial. (Tr. p. 77, lines 1-10).

Assistant Public Defender Matthew Shealy represented Westmoreland at a jury trial which began December 1, 2014, before the Honorable Roger L. Couch in Spartanburg County. (Tr. p. 1). Abel Gray and Megan Moricle of the Seventh Circuit Solicitors Office prosecuted the case which lasted four days. (Tr. p. 1).

The jury returned with a verdict of guilty on each charge. (Tr. p. 468, lines 16-24). Judge Couch sentenced Westmoreland to thirty years for murder and a concurrent twenty-five years for hit and run with death, and gave him credit for time served. (Tr. p. 474, lines 11-18). This appeal follows. (R. p. *Notice of Appeal).

STATEMENT OF FACTS

Appellant Sandy Lynn Westmoreland visited the emergency room at Mary Black Hospital in Spartanburg complaining of abdominal pain and blood in his stool. (Attachment 1, p. 242, lines 5-10). It was 5:56 pm when he arrived, and his initial treating doctor administered two doses of Dilaudid for pain, and Zofran to combat any nausea. He received his first dose at roughly 6:00 pm, and the second at 7:18 pm. (Tr. p. 243, lines 1-23). Eventually he was treated by Dr. Mark Rody, who administered no additional medication to Appellant. (Tr. p. 244, line 13 – p. 245, line 7).

Appellant awaited treatment in Room 4. (Tr. p. 1-04, lines 5-6). At some point in the four hours and 45 minutes between Appellant's last dose of pain medication and discharge, a hospital security guard witnessed a Mr. Michael Daniels stumble out of Room 4, crying, upset, and with a bloody nose. (Tr. p. 102, line 20 – p. 103, line 25; Tr. p. 245, lines 4-10). A deputy was called, but Mr. Daniels did not wish to press charges against Appellant. Instead, he wished to leave, and did so. (Tr. p. 104, line 19 – p. 105, line 18).

According to Appellant, he picked up Mr. Daniels, his best friend and lover of eighteen years, from work at a dialysis clinic that day in March of 2012. (Tr. p. 311, line 8 – p. 312, line 7; Tr. p. 314, lines 5-18). They went to the emergency room together for Appellant's abdominal pain. (Tr. p. 315, lines 20-25). At some point during the course of Appellant's treatment, he and Mr. Daniels began to bicker about money and Mr. Daniels' alleged purchase of a phony crack rock. (Tr. p. 320, lines 3-23). According to Appellant, he was twirling his cane around on the end of the bed. Mr. Daniels jumped up during their argument the cane struck Mr. Daniels in the nose. (Tr. p. 320, line 19 – p. 321, line

16).

A deputy responding to the altercation asked Mr. Daniels to wait outside for Appellant to be escorted out of the hospital "and then they would both be free to leave." (Tr. p. 114, lines 11-19). The deputy escorted Appellant to his vehicle after he was discharged, but Mr. Daniels was not there waiting. (Tr. p. 114, lines 21-24). The deputy refused Appellant's next request to charge Mr. Daniels with car breaking; Mr. Daniels had apparently removed the tape from a broken window in Appellant's car, taken some of his personal belongings from the car, re-taped the window, and went on his way. (Tr. p. 115, lines 1-14). Appellant, appearing agitated with that particular chain of events, also left. (Tr. p. 115, lines 9-14).

By the time Appellant departed the hospital, he did not act impaired by multiple accounts. The deputy who walked him to his car reported no stumbling or slurred speech. (Tr. p. 115, line 23 – p. 116, line 3). According to Dr. Rody, who discharged Appellant after the altercation, the painkillers he was administered during the first part of his hospital stay would not "have [had] any impact on the patient after four hours especially when [it is administered via] IV because its half life is . . . quick enough to where it's gonna be out of your system at that point." (Tr. p. 246, lines 3-9). Over the course of his four hour and 45 minute observation period, Dr. Rody "watched [Appellant] get up and walk to the bathroom . . . 30 yards away, and he walked over there just fine. He had no problem doing that. He was communicating with [Dr. Rody] and the nurses just fine. There was no alteration in his mental status." In Dr. Rody's opinion, Appellant did not suffer from any impairments at "any of the times [he] saw him and certainly not at discharge." (Tr. p. 249, lines 15-21).

Petitioner, however, also regularly took large amounts of additional prescribed medication for a host of chronic ailments.

> He was on Lantus for his diabetes. He was on Nexium probably for ulcers or gird. Singular is an asthma medication. Aspirin once a day. Spiriva is for asthma or COPD. Advair is an inhaled steroid for asthma or COPD. Symbicort is another inhaled steroid for asthma or COPD. Proventil is a rescue inhaler for COPD or asthma. Requip is a psych medication as is, as is Cymbalta, and he's on Lortab 10s three times a day.
>
> So, somebody takes Lortab 10[, the strongest dose of Lortab available,] three times a day is gonna have, you know, a greater tolerance for the medication and probably not respond to those lower doses of narcotics . . . versus somebody who is never on narcotics and gets a shot of Dilaudid. They would tend to be more zonked by it.

(Tr. p. 246, line 12 – p. 247, line 3).

> And then . . . as we continue the list, he was on Vitamin B daily, Magnesium daily, Glyburide Metformin, which is a diabetic oral . . . hypoglycemic agent for Type II diabetics, and he was on Diazepam, which is Valium, 10 milligrams twice a day, [and] Lisinopril for his blood pressure . . . .

(Tr. p. 250, likes 7-12; R. pp. *State's Exhibit 117).

Dr. Rody opined that an a individual who takes that amount of Lortab, a narcotic painkiller, "consistently, three times a day," would "build up a tolerance in terms of how that next dose of pain medication would" affect him." (Tr. p. 247, lines 15-21). The longer Appellant had been taking Lortab, the "more impressive" his tolerance to prescription painkillers would be. (Tr. p. 247, lines 23-25). Appellant was also on a "pretty big dose" of Diazepam, or Valium twice daily according to Dr. Rody. (Tr. p. 250, lines 16-19). A "five [milligram dose] would be kind of more your conventional dose of Valium to take at one time." (Tr. p. 250, lines 21-23). According to Appellant, his pills and the two intravenous doses of Dilaudid "still didn't ease the pain" that day in the

hospital. (Tr. p. 366, lines 13-20).

Regardless, Dr. Rody felt comfortable discharging Appellant given the applicable standard of evaluating a patient for impairments:

> [I]t depends on what they look like and . . . a big job of [his] in emergency medicine is evaluating how a patient looks or Gestalt to the patient, and getting an idea of how they interact with [the physician], and what their mental status is, how they walk.
>
> Since [Dr. Rody] talked to [Appellant] multiple times, watched him walk, interacted with him, and had him under [his] care for . . . three hours and 45 minutes . . . [,] with that length of time watching and observing him, [the doctor] can make a determination whether he's safe to go and drive and so forth[.]

(Tr. p. 259, lines 1-16).[1]

It was close to midnight when Appellant was discharged and escorted to his vehicle. (Tr. p. 245, line 7; Tr. p. 350, lines 6-12). According to Appellant, he "got in the car and left as [the deputy and doctor] wanted [him] to do." (Tr. p. 326, lines 4-5). He did not have his glasses because he had given them to Mr. Daniels for safekeeping while at the hospital. It was dark, and Appellant maintained that he had astigmatism or macular degeneration and could not see well without his glasses. (Tr. p. 326, lines 9-23). Appellant testified that he "turned to the right to leave to go back towards town" in his Ford, which had a manual transmission. (Tr. p. 327, lines 13-18). Appellant testified that he "jerked the car to pull over and pick [Mr. Daniels] up because he saw a glimpse of him walking away from the hospital. (Tr. p. 327, lines 18-25; *see* R. p.*State's Exhibit 55).

[1] Appellant testified at trial that the Dilaudid injections made him feel high for "[a] while" because he did not usually take that particular narcotic. Appellant also recalled that the Dilaudid injections were supposed to move in and out of his system fairly quickly. (Tr. p. 365, line 14 – p. 367, line 10). But, Appellant testified that he took no additional pain pills after the Dilaudid dosage. (Tr. p. 367, lines 24-25).

This is what Appellant stated happened next:

> When I jerked the car over and stuff, I felt a bump. I realized I was in the field. I jerked it back around. I was scared that I'd get stuck and gave it a little gas and got back on the road. I said oh, my God, you know, what happened. I turned around and came back. He was dead.

(Tr. p. 328, lines 2-6; *see* R. p.*State's Exhibit 55).

Appellant never called 911, never went back to the hospital to tell anyone what happened, never called for aid. (Tr. p. 344, line 4 – p. 345, line 25). Instead, he "flipped out" out and left. (Tr. p. 328, line 21 – p. 329, line 5). At some point, he ripped the bug guard off of the front of his vehicle and threw it in the back of the car. (Tr. p. 329, line 23 – p. 330, line 1). Then, he got pulled over at 12:37 am for a missing headlight—Appellant told the officer he hit a deer and that he was planning on replacing the light. (Tr. p. 139, lines 17-20; Tr. p. 330, lines 15-25). He was freed of the traffic stop, ticketless, by 12:49 am. (Tr. p. 140, lines 5-6).

That morning after daybreak, a pedestrian noticed a man lying "flat on his back" behind some shrubbery near the emergency room. (Tr. p. 100, lines 7-13; *see* R. p.*State's Exhibit 55). He reported it to a hospital worker. (Tr. p. 100, lines 14-19). A paramedic was dispatched to the scene and found "a male patient [lying] supine behind a row of shrubbery next to the roadway." (Tr. p. 143, lines 13-24).

> It appeared that a vehicle had traveled through the shrubbery, about five to ten feet above where the patient was found, and exited through the shrubbery about 30 to 40 feet below the patient. EMS requested the Coroner's Office, the Sheriff's Office, the Highway Patrol, and secured the scene till they got there . . . and cleared the call.

(Tr. p. 144, lines 4-10; R. p. *State's Exhibit 55). The body was "inside away from the roadway" near the hospital and there was "a number of bits and pieces of what looked to

be vehicular parts or component parts thereof." (Tr. p. 146, lines 5-24).

Mr. Daniels' head was dislocated from his neck as if he'd been hung. (Tr. p. 182, line 11 – p. 183, line 1). An autopsy conducted that afternoon showed contusions to the eye and nose, abrasions from brush beginning at the nipples and extending down to the crease of the left leg, and a stretch type abrasion resulting from his skin hyperextending almost to the point of tearing. (Tr. p. 182, lines 4-18). Mr. Daniels also suffered a fractured left leg and blood in the left plural cavity. (Tr. p. 183, lines 19-21). Moreover, he hemorrhaged from the neck all the way down to the first thoracic vertebra, and sustained a number of vertebra factures, and a large bruise and hemorrhage to the back of his head from impact with a solid object. (Tr. p. 184, lines 1-25). It was the fractured base of the skull and first cervical vertebra and related laceration, however, which caused his death. (Tr. p. 185, lines 13-19). The forensic pathologist opined that Mr. Daniels, while standing, suffered an impact to the back of his fractured leg causing him to bend backwards in relation to the bottom half of his body and creating the stretch type abrasion. In other words, he was hit from behind. (Tr. p. 185, lines 1-12).

Appellant became a suspect once law enforcement received information at the crime scene that Mr. Daniels had been with him in the emergency room the night before. (Tr. p. 168, lines 14-22). An investigator was able to match Appellant to a Ford Explorer registered to Appellant's residence. Law enforcement went to Appellant's house. At some point Appellant walked outside and cooperatively confirmed his identity, and law enforcement transported him to the Sheriff's Office for questioning. (Tr. p. 159, line 6 – p. 162, line 1). Appellant was Mirandized in the patrol car and immediately began to converse with law enforcement. (Tr. p. 174, lines 2-18).

First, Appellant told the officers that he and Mr. Daniels "got into a fuss at Mary Black [Hospital] and that Mike [Daniels] had walked off and left" and "that he had hit a deer later that evening." (Tr. p. 190, lines 10-14). At the station, this version of events was memorialized by Deputy Jason Bryant in writing and signed by Appellant. (Tr. p. 191, line 1 – p. 193, line 22; R. pp. *State's Exhibit 110). But later, Appellant changed his story.[2] (Tr. p. 192, lines 23-25). Appellant admitted in an audio recorded statement that he did not hit a deer, but rather "accidentally" hit Mr. Daniels with his Ford Explorer as he was pulling over to pick him up. He also said he "got out to see if Mike [Daniels] was okay, but he wasn't breathing" and he never called 911. (Tr. p. 194, line 1 – p. 195, line 20).

At the crime scene, Corporal Michael Duncan with the Highway Patrol's Multidisciplinary Accident Investigation Team (M.A.I.T.) observed no skid marks, but there were "definite tire tracks going off into the grass at a sharp angle." (Tr. p. 205, line 15 – p. 206, line 3; *see* R. p.*State's Exhibit 60). These marks extended up to the bushes and past Mr. Daniels' body. (Tr. p. 206, lines 4-9). Something "other than the car went through the type of bushes." Mr. Daniels probably traveled through the air once hit, then rolled or slid. (Tr. p. 208, lines 13-25; *see* R. p.*State's Exhibit 55). This was demonstrated by an additional marking in the grass, which led to where Mr. Daniels

[2] In total, Appellant provided what can be counted as four statements. First, during transport to the Sherriff's Office, Appellant told officers he hit a deer. This same story was recorded in writing and signed by Appellant. (Tr. p. 197, lines 4-17). The third statement was verbally made to Deputy Bryant and was not recorded. In that third statement, there is some question as to whether Appellant mentioned that his hitting Mr. Daniels with his car was an accident. (Tr. p. 194, lines 1-14; Tr. p. 197, line 21 – p. 198, line 24). In the fourth, audio-recorded statement which was not played at trial, Appellant did state that his hitting Mr. Daniels was an accident. (Tr. p. 194, lines 17-25).

"came to a rest." (Tr. p. 206, lines 10-15).

Corporal Duncan "could tell the vehicle continued on through the bushes on back out on the other side of the bushes and back out onto the road." (Tr. p. 206, lines 16-14). There was "no stopping to it at all." (Tr. p. 206, line 23; R. p. *State's Exhibit 111). In fact, acceleration marks were visibly present in the furrowing in the grass. (Tr. p. 207, lines 1-8; Tr. p. 213, lines 6-25). The vehicle's speed was calculated to be between 29 and 37 miles per hour. (Tr. p. 208, lines 11-12). There was also "severe steering input" on the part of the driver "into where the pedestrian was." (Tr. p. 210, lines, 1-7). It was apparent to the M.A.I.T. team that the vehicle turned off of the road at an acute angle ranging from 22 to 28 degrees. (Tr. p. 210, lines 10-15; *see* R. pp. *State's Exhibit 111).

The M.A.I.T. team's consensus was that Mr. Daniels sustained "a fender vault" where his body hit the vehicle at or near the right fender. (Tr. p. 209, lines 14-20). As for the driver, "there was no breaking prior to or afterwards. It was one continuous motion." (Tr. p. 209, lines 21-23; Tr. p. 214, lines 8-9). And, there existed no physical evidence that the driver turned around and pulled back onto the grass after impact. (Tr. p. 213, lines 1-5; Tr. p. 215, lines 1-10).

As for the Ford Explorer examined at Appellant's home, investigators documented berries under the headlight housing and in the front of the radiator, and a broken twig underneath the car. (Tr. p. 265, line 15 – p. 266, line 8). A multitude of pieces from the Ford Explorer were collected from the scene, including a headlight lens cover and assembly, painted pieces of the vehicle, and a piece of bug guard. Personal items of Mr. Daniels' were found scattered about the scene and additionally taken into evidence, including eyeglass frames and a lens, a busted cell phone, sneaker, and bag of

clothing.[3] (Tr. p. 284, line 18 – p. 290, line 9).

Also at the scene, the Spartanburg County Coroner and his investigators documented the tire tracks and Mr. Daniels' condition before transporting his body for autopsy. (Tr. p. 232, line 20 – p. 234, line 22). Based upon these observations, Coroner Rusty Clevenger ruled Mr. Daniels' death a homicide. (Tr. p. 228, line 1).

[3] Although Appellant testified that Mr. Daniels held Appellant's false teeth, wallet, and perhaps a fake crack rock at the time he walked away from the hospital, none of these items were recovered from the crime scene. (Tr. p. 317, line 13 – p. 318, line 8; Tr. p. 391, lines 1-10).

ARGUMENT

I. The trial court committed no error in allowing the county coroner to testify that he ruled the victim's death a homicide because his reporting the manner of death is statutorily required, does not constitute an expert opinion, and is merely one piece of evidence before the jury's consideration.

How the Issue Arose

In this case, the trial court correctly ruled that Coroner Clevenger would not be allowed to offer an opinion absent expert qualification, but that he could report his finding on the victim's manner of death. (Tr. p. 226, line 3 – p. 228, line 10). The ruling arose from Appellant's objection to the Coroner's qualification as an "expert in testifying as to the manner of death" on the basis that the Coroner "is an elected position." (Tr. p. 226, lines 3-7). At the time of Appellant's trial, the Coroner had never before testified regarding the manner of death.[4] (Tr. p. 225, lines 10-12). The State chose not to qualify the Coroner as an expert once the objection was raised. (Tr. p. 226, lines 16-23). In line with the trial court's ruling, the State articulated that it did not intend to elicit an opinion from the Coroner. The State would only ask the Coroner "[w]hat his findings were." (Tr. p. 226, lines 8-11). The Coroner then testified over Appellant's renewed objection that he "ruled this case a homicide," and that he cannot determine whether a homicide is intentional "all the time." (Tr. p. 227, lines 1-10; Tr. p. 227, line 21 – p. 228, line 3).

Standard of Review

"The admission or exclusion of evidence is a matter within the trial court's sound

[4] In laying its foundation for moving to so qualify the Coroner, the State elicited testimony that the Coroner was a former sheriff's deputy who left the violent crime detective division to begin a career as an investigator with the Solicitor's office in 1997. He remained an investigator until elected Coroner in 2009. (Tr. p. 224, lines 10-19). The Coroner also testified that he attended a number of continuing education courses in homicide investigations throughout his career. (Tr. p. 225, lines 5-9).

discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" *State v. Commander*, 396 S.C. 254, 262-63, 721 S.E.2d 413, 417 (2011) (quoting *State v. Douglas,* 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006)). "An abuse of discretion occurs when the trial court's ruling is based on an error law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings,* 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011).

A. A coroner is required by law to make a determination as to a victim's manner of death, and that testimony does not fall outside the purview of Rule 701, SCRE.

The trial court's ruling does not constitute an abuse of discretion. Rather, the court correctly categorized the challenged testimony as merely reporting a finding required by law. (Tr. p. 228, lines 5-10). Every person is generally competent to testify as a witness so long as their testimony is supported by personal knowledge. Rules 601 and 602, SCRE. In this case, the county coroner embodied the appropriate knowledge to testify that he reported the victim's death a homicide because he is statutorily responsible for reporting it. If a person dies as a result of, *inter alia*, violence or in any suspicious or unusual manner, the county coroner must be notified immediately, as he "shall make an immediate inquiry into the cause and manner of death and shall reduce the findings to writing on forms provided for this purpose." S.C. Code Ann. § 17-5-530.

A coroner's finding must represent "manner of death," which is defined as "the means or fatal agency that caused a death" and is categorized as either being natural, accidental, homicidal, suicidal, or undetermined. S.C. Code Ann. § 17-5-5(9); S.C. Code Ann. § 17-7-30. As stated by the Coroner in this case, his "responsibility is [to] make

sure that a cause [of death] is identified," (Tr. p. 225, lines 15-16), a determination which must be made regardless of any ability for the Coroner to determine whether the death was intentional. (Tr. p. 227, lines 21-23). Because the duty to determine a victim's manner of death rests with the Coroner, his testimony on that topic is appropriate. By virtue of his statutorily defined role, the Coroner exemplified the personal knowledge necessary to report that the manner of death was ruled homicide.

Given the Coroner's role at the scene of a deceased, the trial court's ruling was rationally based on the Coroner's performance of his statutory duties and did not require expert qualification.

> If the 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, SCRE.

Expert testimony is appropriate where the subject matter is beyond the ordinary knowledge of the jury. *Watson v. Ford Motor Co.,* 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). In the event that an area of testimony requires special knowledge in order for the jury to apply it to the case at bar, an expert is allowed to opine on that topic to assist the trier of fact. Rule 702, SCRE. But the Coroner's isolated testimony that he ruled the victim's manner of death a homicide fails to require the application of any specialized skill or expertise which would require expert qualification.[5] Furthermore, the Coroner did

[5] In contrast, the State qualified its forensic pathologist as an expert witness before providing an opinion on cause of death which was premised upon medical expertise. *State v. Commander, infra* at 258, n.4, 721 S.E.2d 413, 415, n.4 (parties stipulated to

not render opinion testimony, but rather simply reported an inference based upon his own perception of the crime scene. Therefore, Coroner Clevenger's testimony constitutes that of a lay witness.

The Coroner's testimony can be viewed in the same vein as the admissible lay testimony of an experienced forensic interviewer. *State v. Douglas,* 380 S.C. 499, 671 S.E.2d 606 (2009). In *Douglas,* our Supreme Court determined that a forensic interviewer could testify as a lay witness to her utilization of an established method to build rapport with the child victim, her interview with that victim, and "that based on the interview, it was her opinion the victim needed to [undergo] a medical exam." *Id.* at 502, 671 S.E.2d at 608. The Supreme Court found that the forensic interviewer's testimony "simply was not required to be presented by an expert witness" because the interviewer "testified only as to her personal observations and experiences, and her interview with the Victim in [that] case." *Id.* at 502-03, 671 S.E.2d at 608. The *Douglas* court concluded it was "unnecessary" for that witness to be qualified as an expert. *Id.*; *see State v. Kromah,* 401 S.C. 340, 357 n.5, 737 S.E.2d 490, 499 n.5 (2013) ("we can envision no circumstance where [a forensic interviewer's] qualification as an expert would be appropriate").

Our case law does dictate that lay witness testimony oversteps the bounds of Rule 701, SCRE, where the lay witness delves into the reason for its determination. Contrast the holding from *Douglas, supra,* with that regarding a fire chief's lay testimony in *Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 764 S.E.2d 249 (Ct. App. 2014)

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expert qualifications of forensic pathologist/chief medical examiner). But the pathologist's testimony did not extend to manner of death, instead opining only that the victim was hit from behind and that the cause of death was a ". . . laceration secondary to a cervical spine fracture at the base of the skull . . . ." (Tr. p. 185, lines 11-19).

reh'g dismissed (Oct. 24, 2014). In *Fowler*, the trial court permitted a fire chief to explain to the jury "his observations of the fire and his rationale for his entries on the [resulting] Report" *Id.* at 407, 764 S.E.2d at 251. But this Court found it erroneous to allow the fire chief to testify regarding his opinion *on the cause of the fire* without first being qualified as an expert. *Id.* at 410 & nn. 2-3, 764 S.E.2d at 252 & nn. 2-3. Statements that a "V pattern" indicated the fire's origin and that he did not "see or smell" anything that made him think the fire was intentional "were not mere perceptions observed by Chief Wright, but instead constituted opinions that 'require special knowledge, skill, experience or training' to properly be made." *Id.* (quoting Rule 701, SCRE).

Our case law does not demonstrate a limitation on a county coroner to testify as the Coroner did in this case. While a coroner should not testify to the *cause* of death absent expert qualification as a physician or forensic pathologist, *see State v. Griggs*, 184 S.C. 304, 313, 192 S.E.2d 360, 364 (1937), Coroner Clevenger's testifying solely as to the reported manner of death based on his crime scene observations and autopsy review does not demand expert qualification.

Mississippi agrees, rejecting the theory that a coroner must be qualified as an expert in order to testify that he or she ruled a victim's death a homicide. In *Tillis v. State,* 176 So.3d 37 (Miss. Ct. App. 2014), *cert. denied* (Oct. 15, 2015), the Mississippi Court of Appeals held that a coroner may testify at trial that she ruled victim's death a homicide "as part of her duties and in the normal course of her business." *Id.* at 47-48. That testimony "failed to constitute a matter requiring an expert opinion" and instead "simple reflected that [the victim] died due to another person's actions." *Id.* In the same vein, the Court of Criminal Appeals of Alabama has held that defense counsel did not perform

deficiently in failing to object to a coroner allegedly improperly opining that the manner of death was ruled a homicide and "not ruled an accident." *Miller v. State,* 1 So.3d 1073, 1077 (Ala. Crim. App. 2007), *cert. denied* (Apr. 14, 2006) (PCR case which was remanded on other grounds). The coroner in that case additionally testified that "[h]omicides for medical legal purposes is not the case as a court defining murder." *Id.* at 1078. That court found the challenged testimony "was not admitted in error." *Id.*

Coroner Clevenger merely synthesized the autopsy report and his crime scene observations to record the manner of death required by law. He testified within the bounds of his perceptions. Rule 701, SCRE. His testimony assisted the factfinder in winnowing out whether the victim died as a result of accident, recklessness, or by the intentional act of another. *Id.* Coroner Clevenger did not delve into any reasoning which led him to report the manner of death a homicide as was found erroneous in *Fowler, supra.* The Coroner also did not give any technical basis for his finding which would require an expert rendition to the jury. *See* Rule 702, SCRE; *Cf. Tillis v. State, supra.* His testimony was limited to the single word reported in accord with S.C. Code Ann. §§ 17-5-530, 17-7-30, and a brief explanation of how that ruling comports with his duties as coroner. (Tr. p. 225, lines 16-21). Here, the Coroner's review of the victim's autopsy and his investigative team's observations of the crime scene do not rise to the level of technicality requiring expert qualification.

B. A coroner's testimony that he ruled a victim's manner of death a homicide does not go to the ultimate issue at trial.

Coroner Clevenger's testifying that he ruled the death a homicide did not extend to either an expert opinion or an opinion on the ultimate issue as Appellant states. (Br. of

Appellant, p. 14). Opinion testimony in any event shall neither render an opinion outside of the witness' area of expertise, nor touch upon a defendant's guilt. *E.g. State v. Ellis,* 345 S.C. 175, 177-79, 547 S.E.2d 490, 491 (2001) (error for expert in crime scene processing and fingerprint identification, not accident reconstruction, to testify that his crime scene measurements and observations led him to a conclusion regarding the position of the victim's body at his time of death); *Fowler v. Nationwide Mut. Fire Ins. Co., supra.*

"Generally, '[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.'" *State v. Commander*, 396 S.C. at 264, 721 S.E.2d at 418 (2011) (quoting Rule 704, SCRE). Appellant cites to *Commander* for the proposition that the Coroner's lay testimony also constitutes a comment on Appellant's criminal culpability, thus invading the province of the jury and unduly confusing them or persuading them to convict on the basis of the Coroner's ruling. Appellant argues that the testimony at issue is prejudicial because a normal lay juror would view the Coroner's reporting the death a homicide "as ruling out that the decedent died as a result of an accident." (Br. of Appellant, p. 15).

In *State v. Commander*, a county medical examiner duly qualified as an expert witness was permitted to testify that he used "anecdotal history relayed by officers at the scene, together with the lack of normal indicators of physical violence" to opine as to a particular cause and manner of death. *Commander* at 258-60, 266-67, 721 S.E.2d at 415-16, 419-20. Within that case, our Supreme Court adopted

> a rule whereby an expert in forensic pathology's opinion testimony as to cause and manner of death is admissible under Rule 702, SCRE, so long as the expert does not opine on the criminal defendant's state of mind or guilt or testify on matters of law in such a way that the jury is not permitted to reach its own conclusion concerning the criminal defendant's guilt or innocence.

Commander at 269, 721 S.E.2d at 421.

In so adopting, the *Commander* court pointed out that "testimony that an individual died from 'homicide' means simply that he or she died 'by the act, procurement, or omission of another' without regard to the criminality of the killing or culpability of the killer." *Id.* at 265, 721 S.E.2d at 419 (quoting 23 S.C. Jur. Homicide § 2 (2011); Black's Law Dictionary 661 (5th ed. 1979)); *Cf. Miller v. State, supra.* Coroner Clevenger's testimony comports with the limitations contemplated by *Commander* because our court has determined that use of the word homicide does not comment on the ultimate issue before the trier of fact. *Id.* The use of the term "homicide" by any coroner is a term of art. That is, a witness testifying that he reported the victims' death was a homicide, without more, does not comment on a defendant's criminal culpability. Just because Coroner Clevenger was not an expert witness does not preclude him from testifying in the same benign term. *See id.* at 721, S.E.2d at 421 (citing *State v. Scott,* 206 W.Va. 158, 164, 522 S.E.2d 626, 632 (W.Va. 1999), for the proposition that homicide is a "neutral" term admissibly used by a medical examiner reporting the manner of death). In fact, Coroner Clevenger additionally testified that cannot always determine whether any death is intentional, and that he merely "ruled this case a homicide." (Tr. p. 227, line 21 – p. 228, line 3).

Utilization of the term "homicide" does not go to the ultimate issue to be determined by the trier of fact—Coroner Clevenger did not opine who contributed to the fate of the deceased. And, the Coroner did not in any way opine as to precisely what about the condition of the victim and crime scene led him to report homicide as the manner of death. When analogizing the Coroner's permissible lay witness testimony to the rule denoted in *Commander*, no error results in the trial court's allowing Coroner Clevenger to testify in this case. Coroner Clevenger's employing the word "homicide" merely meant that the victim's death occurred by the hand of another. His testimony plainly did not impinge upon the province of the jury or go to the ultimate issue before the trier of fact.

C. If found in error, the coroner's testifying that he ruled the victim's death a homicide caused no prejudice so as to warrant reversal.

"To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence." *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005) (internal citations omitted). The factors to be considered in a harmless error analysis include "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecution's case." *State v. Mizzell*, 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431 (1986)). The Court should uphold a

conviction if it determines, beyond a reasonable doubt, the error complained of did not contribute to the verdict obtained. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967).

Appellant argues that because he premised his defense upon that of an accident, the trial court's allowing the coroner's testimony manifestly prejudiced that defense. Appellant's argument presupposes that the Coroner's testimony confused the jury and caused it to rule out the legal defense of accident. But to establish prejudice, Appellant must demonstrate "'that there is a reasonable probability that the jury's verdict was influenced by the challenged evidence.'" *State v. Commander*, 384 S.C. 66, 74, 681 S.E.2d 31, 35 (Ct. App. 2009), *harmless error analysis upheld by State v. Commander, supra* (quoting *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)).

Consider the totality of the evidence. The State began its case with testimony showing that Appellant gave his partner a bloody nose during an altercation in the emergency room where Appellant was being treated. (Tr. p. 102, line 20 – p. 103, line 25; Tr. p. 245, lines 4-10). Appellant was discharged and asked to leave the hospital thereafter, which he did. (Tr. p. 245, line 7; Tr. p. 350, lines 6-12; Tr. p. 326, lines 4-5). Then, according to Appellant's own testimony, he "jerked the car to pull over and pick [Mr. Daniels] up because he saw a glimpse of him walking away from the hospital." (Tr. p. 327, lines 18-25). In doing so, Appellant struck the victim from behind with his vehicle, dragging him and causing mortal hemorrhaging to the victim's back and neck. (Tr. p. 182, line 11 – p. 185, line 12; Tr. p. 206, lines 10-15; Tr. p. 208, lines 13-25).

While Appellant maintained at trial that it was an "accident" and that he was

driving impaired at the time due to being on pain medication, being forced to leave by the police after his emergency room altercation, and due to the victim having Appellant's glasses for safekeeping at the time, (Tr. p. 325, line 15 – p. 327, line 25; Tr. p. 336, lines 3-7), ample evidence contradicted Appellant's accident defense. "For a homicide to be excusable on the ground of accident, it must be shown that the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon." *State v. Wharton*, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009).

As a whole, Appellant's actions, to which he testified directly, reveal the malice necessary to return a guilty verdict on the charge of murder. *See* S.C. Code Ann. § 16-3-10 (murder is the killing of another with malice aforethought). That is, Appellant acted with "wickedness and excluding a just cause or excuse. The term malice indicates a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it." *State v. Fennell,* 340 S.C. 266, 275 n.2, 531 S.E.2d 512, 517 n.2 (2000). Appellant never called for assistance in any way, never calling 911 or going back to the hospital to report that he struck someone. (Tr. p. 344, line 4 – p. 345, line 25). Instead, he "flipped out" and left. (Tr. p. 328, line 21 – p. 329, line 5). Adding insult to injury, Appellant himself testified that he removed the bug guard from his vehicle and threw it in the back of the car. (Tr. p. 329, line 23 – p. 330, line 1). Then, he got pulled over at 12:37 am for a missing headlight, but told the officer that he hit a deer so that he could go on his way without incident. (Tr. p. 139, lines 17-20; Tr. p. 140, lines 5-6; Tr. p. 330, lines 15-25). When questioned by law enforcement, Appellant twice repeated his story about hitting a deer and recorded it in writing. (Tr. p. 197, lines 4-17; R. p. *State's Exhibit 110). It was not until later that Appellant altered his story, first stating he hit the

victim with his car, and later in an audio recorded statement saying he "accidentally" hit the victim and that he went back to check on him. (Tr. p. 194, lines 1-25; Tr. p. 197, line 21 – p. 198, line 24).

As for the path of the vehicle itself, M.A.I.T. testimony showed that the impact sustained by the victim required an overtly intentional act. (Tr. p. 210, lines, 1-7). Coroner Clevenger's testimony merely corroborated the totality of the investigators' testimony put forward by the State on this point. In this case, the "vehicle had traveled through the shrubbery, about five to ten feet above where the patient was found, and exited through the shrubbery about 30 to 40 feet below the patient." (Tr. p. 144, lines 3-7; R. p. *State's Exhibit 55). The consensus was that Mr. Daniels sustained "a fender vault" where his body hit the vehicle at or near the right fender. (Tr. p. 209, lines 14-20; R. pp. *State's Exhibit 111). The M.A.I.T. investigator "could tell the vehicle continued on through the bushes on back out on the other side of the bushes and back out onto the road" without stopping "at all." (Tr. p. 206, lines 16-23; Tr. p. 209, lines 21-23; Tr. p. 214, lines 8-9; R. p. *State's Exhibit 111). In fact, acceleration marks were visibly present in the furrowing in the grass, the speed was calculated at a range between 29 and 37 miles per hour, and the angle at which the Ford Explorer turned off the road was calculated as between 22 to 28 degrees. (Tr. p. 207, lines 1-8; Tr. p. 208, lines 11-12; Tr. p. 210, lines 10-15; Tr. p. 213, lines 6-25). And, there existed no physical evidence that Appellant turned around and pulled back onto the grass after impact as he testified to doing. (Tr. p. 213, lines 1-5; Tr. p. 215, lines 1-10; Tr. p. 328, lines 2-18).

Even given this evidence, the jury was presented with a choice between murder, involuntary manslaughter, and the defenses of accident, permanent insanity by way of

voluntary intoxication, and involuntary intoxication. (Tr. p. 445, lines 8-13; Tr. p. 447, lines 2-25). Evidence existed to support these alternate verdicts wherein it became evident through the testimony of Appellant and his treating physician that Appellant took multiple pain medications on a daily basis, in large doses, and was perhaps under the influence of these narcotics so as to render his actions negligent or reckless. (Tr. p. 246, line 12 – p. 247, line 25; Tr. p. 250, lines 7-23). *See e.g. State v. Burriss,* 334 S.C. 256, 264-65, 513 S.E.2d 104, 109 (1999) (involuntary manslaughter is an unintentional killing without malice while either (1) engaged in an unlawful act not naturally tending to cause death or great bodily harm; or (2) engaged in lawful act with reckless disregard for the safety of others); *State v. Wharton, supra.* Appellant also received additional doses of painkillers at the emergency room, although competing testimony demonstrated that Appellant was not impaired by the time he was discharged. (Tr. p. 115, line 23 – p. 116, line 3; Tr. p. 249, lines 15-21). Testimony from Appellant himself showed that he embodied a tolerance to pain medication resulting from the amount taken daily. (Tr. p. 365, line 14 – p. 366, line 25). His treating doctor's testimony echoed the same. (Tr. p. 247, lines 8-25). Thus, a jury had reason to believe that Appellant acted intentionally and had control of his actions at the time of impact.

Given the totality of the evidence before it, the province of the jury was not invaded; it was free to accept or reject the State's case theory. The verdict demonstrates that the State's version of events indubitably convinced the jury of Appellant's guilt on the offense of murder. Beyond a reasonable doubt, the error complained of did not contribute to the verdict in this case.

II. The trial court committed no error in instructing the factfinder that there was a question before them as to whether Appellant was intoxicated at the time of the hit and run, and further instructing the jury of the effect of finding that Appellant was voluntarily intoxicated.

How the Issue Arose

During the charge conference, the parties and the court considered jury instructions on both voluntary and involuntary intoxication. (Tr. p. 394, lines 6-9). The trial court requested argument regarding Appellant's position on voluntary intoxication. Appellant's counsel opposed, positing that "to call this voluntary intoxication is a little disingenuous since [Appellant] was injected – I mean he was taking prescribed meds and he was also injected at the hospital." (Tr. p. 393, line 3 – Tr. p. 394, line 25). Before taking the requested instructions under advisement, the trial court reasoned:

> The taking of pain medications, you have the right to refuse them. In other words, you – a person is not required to take pain medications. . . . I'm trying to find anything that, that would indicate though that a – because it's a prescription that you're claiming to be an intoxicant, if that takes it out of the realm of voluntary intoxication. . . . [A]gain, the medications that he took he could [have] refused.
>
> . . .
>
> [M]ost pain medications are medications that people can either take or not take. It's not something you have to take to survive. You know, in the Civil War they amputated arms and legs and gave them a bullet to bite on. So, pain medication is something that people take.
>
> . . .
>
> I can see somebody, for example, take – having a prescription drug and then abusing it, taking twice the dosage, and that certainly would be a voluntary intoxication. . . . I'm just saying that the fact that it's a prescription drug, in and of itself, would not take it out of the voluntariness is what I'm trying to say.

(Tr. p. 395, line 21 – p. 399, line 25). Appellant's counsel next argued the rule of lenity as

its only authority against charging voluntary intoxication. (Tr. p. 400, lines 11-25).

The trial court held its ruling in abeyance until after closing argument, giving the parties additional time to research the propriety of the contested instruction. (Tr. p. 424, lines 10-22). The trial court ultimately instructed the jury as follows:

> *Now, the question of intoxication has come into this case, and I want to go over with you what, what that might mean in relationship to the defenses.*
>
> First of all, under the law, insanity caused by drugs or alcohol may be a defense if the insanity is permanent and destroys the defendant's ability to know right from wrong if the, if the intoxication was voluntary. However, when voluntary intoxication has not proved—produced permanent insanity, it is not a defense to a crime. A person who voluntarily becomes intoxicated is just as responsible for the acts committed while intoxicated as the person who is not intoxicated.
>
> Now, involuntary intoxication, however, is the opposite of that. If someone becomes involuntarily intoxicated, then it can be a defense to the charges in a crime of specific intent. And, so, if, for example, someone is intoxicated as a result of a trick, artifice, or force, or had no choice in the intoxication, then that, that could provide a defense to a crime requiring specific intent.
>
> Also, you could find, as a jury, that intoxication was not a factor in this case, that the defendant was not intoxicated at the time of the offense, and if it's not a factor in this case at all, then it would not be a factor for you to consider at all. *In other words, the question for you, the jury, to determine is whether or not the defendant was intoxicated at the time of the event, whether or not that intoxication was either voluntary or involuntary.*
>
> If the intoxication was voluntary, that means that the—it would not be a defense to the crime unless it produced permanent insanity. If the intoxication was involuntary—if the intoxication was involuntary, then it would be a defense to a crime requiring specific intent.

(Tr. p. 447, line 17 – p. 448, line 24 (emphasis added)).

Standard of Review

Turning to the merits of Appellant's second issue, "[a] jury charge is correct if, when read as a whole, the charge adequately covers the law. A jury charge that is

substantially correct and covers the law does not require reversal." *State v. Logan*, 405 S.C. 83, 90-91, 747 S.E.2d 444, 448 (2013). "[T]his Court considers the trial court's jury charge as a whole and in light of the evidence and issues presented at trial." *Id.*

A. Appellant conceded his objection upon the trial court's ruling on this issue so that the voluntary intoxication charge remains unpreserved for appellate review.

"[A]n objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge." *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001). "Furthermore, '[n]o issue is preserved for appellate review if the objecting party accepts the judge's ruling and does not contemporaneously make an additional objection.'" *State v. McCord*, 349 S.C. 477, 486, 562 S.E.2d 689, 694 (Ct. App. 2002) (quoting *State v. George*, 323 S.C. 496, 508, 476 S.E.2d 903, 910-11 (1996)). In such a circumstance, there can be no basis for appellate review, for "[a] party cannot complain of an error which his own conduct has induced." *State v. Carlson,* 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005). When "a party fails to properly object, the party is procedurally barred from raising the issue on appeal." *State v. Johnson,* 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996).

The following exchange between Appellant's counsel and the trial court encompasses the ruling on the contested voluntary intoxication instruction:

> THE COURT: Well, I mentioned to all of you the possibility of me charging the jury that they will have to make a finding of fact –
>
> COUNSEL: And that will be fine.
>
> THE COURT: – as to whether or not this was a voluntary or involuntary intoxication, if any at all. . . . If they find that it was voluntarily done, then it's not a defense. If they find that

it was involuntarily done, then it would serve as a mitigating factor or a defense to the – to the statute requiring [specific] intent.

COUNSEL: Yes, sir, and that would be – we would have no real objection to that. No real objection to that.

COURT: So, you would agree to me charging in that fashion?

COUNSEL: I would.

(Tr. p. 428, line 14 – p. 429, line 14).

Appellant's counsel consented to the trial court's crafted instruction. Counsel also presented no exception to the instruction following its issuance to the jury. (Tr. p. 450, lines 18-21). By accepting the trial court's ruling that intoxication was a question for the factfinder, Appellant's objection to the voluntary intoxication instruction was waived. Consequently, this issue remains unpreserved for appellate review. *State v. McCord, supra.*

B. Evidence at trial presented a question as to whether Appellant was intoxicated at the time of the crime, requiring the voluntary intoxication instruction.

"The law to be charged is determined from the evidence presented at trial." *State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 341 (1986). In crafting a jury instruction, "judges shall not charge juries in respect to matters of fact, but shall declare the law." S.C. Const. art. V, § 21. In doing so, "the trial judge must charge the correct and current law of the state." *State v. Shuler,* 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001). "If there is any evidence to support a charge, the trial judge should grant the request." *Id.*

In the case of a voluntary intoxication instruction, where there exists "some evidence showing the appellant had been drinking prior" to the crime, the trial court's

decision to charge the jury on the law of voluntary intoxication is not erroneous. *State v. Todd, supra.* "[V]oluntary intoxication is not an excuse for, or a defense to a crime. This rule also extends to the voluntary ingestion of drugs." *State v. Crocker,* 272 S.C. 344, 346, 251 S.E.2d 764, 766 (1979); *State v. Bellue,* 260 S.C. 39, 43, 194 S.E.2d 193, 195 (1973) ("Voluntary intoxication or drug use does not absolve a defendant of criminal responsibility."). "It has been recognized, however, that insanity caused by the use of drugs or intoxication may be a defense where the insanity is permanent and destroys the defendant's ability to know right from wrong." *State v. Hartfield,* 300 S.C. 469, 473, 388 S.E.2d 802, 804 (1990).

Appellant's taking a large number of prescription pain medications constitutes the voluntary ingestion of drugs. *State v. Crocker, supra; State v. Bellue, supra.* As such, a voluntary intoxication instruction was appropriate. Insofar as Appellant received intravenous pain medication at the hospital hours prior to the hit and run, that too constitutes evidence of voluntary intoxication. *See id.* Appellant had the ability to refuse additional pain treatment. He went to the hospital on his own volition and was not forced or tricked into having the medication administered. *See State v. Samuels*, 905 S.W.2d 536, 539 (Mo. Ct. App. 1995) (involuntary intoxication instruction not appropriate where, prior to the crime's commission, the defendant consented to a medical procedure requiring his being drugged). By all indications, Appellant requested the second dose of Dilaudid at the hospital. (Tr. p. 366, lines 10-20). Nothing in the record indicates Appellant's treating physician administered any drugs without permission, or to incapacitate Appellant for the purposes of major emergency treatment.

With evidence to support voluntary intoxication instruction, the decision to so

charge the jury does not prove erroneous.

C. The instruction did not serve to confuse the jury so as to constitute reversible error.

The crafted instruction also did not act to confuse the jury. "It is not error to read to the jury a statute defining a crime with which the defendant is not charged, if the purpose is to enlighten the jury regarding the issues before it; however, a non-charged offense should not be charged to the jury if it has the effect of confusing the issues the jury must determine." *State v. Peer*, 320 S.C. 546, 553-54, 466 S.E.2d 375, 380 (Ct. App. 1996). And while a confusing or misleading jury instruction may be a basis for error, "[t]he test is what a reasonable juror would understand the charge to mean." *State v. Rothell,* 301 S.C. 168, 170, 391 S.E.2d 228, 229 (1990).

The jury had to be instructed that if they found Appellant intoxicated, they would then be left to determine whether the intoxication was voluntary, and therefore not a defense absent evidence of permanent insanity. *See State v. Hartfield, supra.* If "the question of abuse of medications turn[s] on the resolution of disputed facts and inferences, the question [is] one within the province of the jury, not the trial court, to resolve." *State v. McKeon*, 201 Ariz. 571, 575, 38 P.3d 1236, 1240 (Ariz. Ct. App. 2002) (state law recognized temporary intoxication as an affirmative defense so long as it derived from the non-abusive use of prescription medication). Here, the evidence initiated a threshold determination by the jury as to whether or not Appellant *was* intoxicated at the time of the crimes.

The trial court pointed out that the evidence showed that Appellant took prescription pain medications daily, was given additional medications at the hospital, and

testified without explanation that he felt high. But, also noted by the trial court, Appellant's emergency room doctor testified that he did not appear to be under the influence of drugs when he left. (Tr. p. 395, lines 7-19). Thus, it was appropriate for the trial court to craft an instruction that touched upon all possibilities stemming from that potential finding.

Of course the jury was free, as instructed, to find that intoxication was not a component to this case and therefore not a factor for them to consider at all. (Tr. p. 448, lines 11-19). The trial court chose to treat the instruction in a manner which assisted the finder of fact in reaching the right conclusion in the eyes of the law. While there existed no evidence of permanent insanity at trial, the correct instruction could regard all potential outcomes of that finding for purposes of enlightening the jury on that topic.

D. Any error in the intoxication instruction proves harmless given the totality of the instruction, the evidence at trial, and the jury's verdict.

"Whether or not the [erroneous jury charge] was harmless is a fact-intensive inquiry" as to whether the charge contributed to the guilty verdict rendered. *State v. Middleton,* 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014). If there exists "no indication that the jury based their verdict on the erroneous part of the charge," then harmless error applies. *Id.*

Beyond a reasonable doubt, the error complained of did not contribute to the verdict in this case. As previously discussed in relation to the first issue on appeal, the State delivered a case succinctly probative of guilt. (Br. of Respondent, pp. 19-23). Ample evidence demonstrated that Appellant was not in fact operating in state of intoxication. According to his own trial testimony, Appellant embodied a tolerance to

pain medication. (Tr. p. 365, line 14 – p. 366, line 25). He did not undergo emergency treatment so as to render him incapacitated prior to the hit and run, or even so as to require an overnight observation. He admittedly took no additional medication between his second dose of Dilaudid and the murder. (Tr. p. 367, lines 24-25). Testimony also tended to show that Appellant was not under the pervasive influence of any prescription medication at the time of the murder: his treating physician cleared him for discharge and testified that Appellant's motor skills appeared normal even prior to that time. (Tr. p. 259, lines 1-16). Additionally, physical evidence indicated that Appellant undertook an overtly intentional act in veering off of the road towards the victim at such a sharp angle and with direct speed. (Tr. p. 210, lines 1-7). Appellant had to travel off-road a great distance to make contact with the victim, and maintained his speed before and after impact. (Tr. p. 206, lines 16-23; Tr. p. 209, lines 21-23; Tr. p. 214, lines 8-9; R. p. *State's Exhibit 111).

Considering the above, the instruction as a whole acted to enlighten the jury as to the consequences of intoxication should they choose to find Appellant was under any influence at the time of the crimes. However, given the options between accident, involuntary manslaughter, murder, permanent insanity by voluntary intoxication, or involuntary intoxication by force or trickery, the evidence clearly points towards murder. Therefore, even if the trial court erroneously charged voluntary intoxication, this Court should find that the error was harmless beyond a reasonable doubt.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should affirm the Appellant's convictions for murder and hit and run with death.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

January 15, 2016
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable Roger L. Couch, Circuit Court Judge

THE STATE,

Respondent,

v.

SANDY LYNN WESTMORELAND,

Appellant

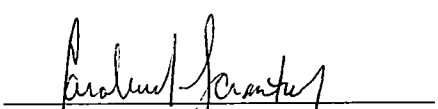
Appellate Case No. 2014-002636.

PROOF OF SERVICE

I, Caroline M. Scrantom, counsel for the Respondent, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appeal by depositing two (2) copies of the same in the United States mail, addressed to his attorney of record at:

Robert M. Dudek
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 15th day of January, 2016.



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ALAN WILSON
ATTORNEY GENERAL

January 15, 2016

Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: The State v. Sandy Lynn Westmoreland
Appeal from Spartanburg County
Appellate Case No. 2014-002636

Dear Ms. Kitchings:

Enclosed please find the original and one (1) copy of the ***Initial Brief of Respondent and Designation of Matter***, dated January 15, 2016, along with proof of service, in the above-referenced case.

By copy of this letter, I am serving opposing counsel with same. Thank you for your consideration in this matter.

Sincerely,

Caroline M. Scrantom
Assistant Attorney General

CMS/pcm
Enclosure

cc: Robert M. Dudek, Esquire, Chief Appellate Defender
The Honorable Barry J. Barnette, Solicitor, 7th Judicial Circuit
Trisha Allen, Victim Services