ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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JAN 29 2016
SC Court of Appeals

Appeal from Richland County

Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CALVERT MYERS,

APPELLANT

APPELLATE CASE NO. 2014-001803

FINAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief 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

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1.

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2.

Whether the court abused its discretion in denying a mistrial, especially when it found the investigator's highly prejudicial opinions about what was allegedly occurring on the videotape at critical times were not at all apparent, and the state made maximum use of the inadmissible unsupported opinions?

STATEMENT OF THE CASE

Appellant was indicted by the Richland County Grand Jury for the offense of murder. R. 417. His case was called to trial on August 12, 2014, before the Honorable Clifton B. Newman, and a jury. Robert Mills represented appellant. Megan Walker and John Steadman were the assistant solicitors. R. 1.

On August 14, 2014, the jury found appellant guilty of murder. R. 406, ll. 19-24. Judge Newman sentenced appellant to thirty-seven years' imprisonment. R. 415, ll. 13-16. This appeal follows.

ARGUMENT

1.

The court abused its discretion by allowing Investigator Carwell to give opinion testimony regarding his interpretation of what was occurring on videotape of the incident at the bar, since his opinions that the decedent and his girlfriend were only attempting to enjoy their evening, that appellant became the aggressor, while the decedent acted innocently were highly prejudicial particularly where self-defense and voluntary manslaughter were jury issues.

Relevant facts

On December 29, 2012, Deputy Tristen Ellis was patrolling in Richland County in the Eastover-Gaston area. R. 10, l. 3 – 11, l. 4. At about 1:30 in the morning, he was dispatched to a "civil disturbance between two black males out of Toney's Lounge on Congaree Road." When he arrived, "I observed two black males laying on the ground, one of conscious and one was unconscious." R. 11, ll. 8-17.

As will be seen infra, there was evidence that the decedent at one point was on top of appellant in the parking lot beating him. One witness estimated appellant was beaten for five minutes. The state attempted to persuade the jury that the decedent -- however miraculously –had **already** been fatally shot in the chest at the time he was on top of appellant beating. It was undisputed that appellant was badly beaten, and that he remained in the hospital "hooked up to machines."

Deputy Ellis remembered that appellant was very bloody when he saw him on the ground in the parking lot. "His face was completely bloody." The decedent was unconscious and breathing "very shallow." He later died in the hospital. R. 15, ll. 3-23.

Deputy Robert Furgal remembered arriving at Toney's tavern that night also. He "immediately started to work the crowd back from the two individuals, the defendant and the victim, who was noticeably in the same vicinity on the ground, tried to get them back to make the scene safe so that EMS would come on the scene." Furgal said some in the crowd pointed to a handgun in the nearby area. Furgal secured the gun, and put in his trunk. R. 24, ll. 3-9.

Deputy Jeffrey Hazelbrook was asked to go back to the club on January 10, 2013, about thirteen days after the fatal shooting because some shell casings had been located in the parking lot. R. 36, l. 5 – 37, l. 7. Hazelbrook said he found three brass nine-millimeter shell casings. R.37, l. 4 – l. 39, l. 4.

Toney Lowman was disabled by the time of the trial. He had been the owner of Toney's Bar and Restaurant for over twenty-five years. He had known appellant for thirty or forty years. They "kind of grown up together." He had known the decedent, Cornelius Green, for about twenty years. R. 42, l. 1 – 43, l. 16.

Toney remembered that appellant was in the bar that evening arguing with his great niece, Sherry. Toney said he did not know appellant's relationship to Sherry at that time. However, he did recall that appellant was cursing at her inside his bar. Toney did not know what started the argument. R. 43, l. 12 – 46, l. 6.

Toney testified that Sherry tried to hit appellant over him as he got between them inside the bar. The decedent was Sherry's boyfriend, and Toney was trying to "calm everybody down." R. 46, ll. 10-23.

Toney took appellant outside after this encounter, and he talked to him about "how easy trouble is to get into, how our family and stuff grew up together." R. 46, l. 25 – 47, l. 3. Appellant

told Toney that he was "going to let all this go." Toney allowed appellant to go back into the bar where Sherry seemingly still was drinking. R. 47, l. 8 – 48, l. 16.

Toney confirmed "Sherry was still at the bar" when appellant re-entered the bar. Toney got appellant a drink, and appellant walked toward the back end of the bar. The decedent was sitting at the bar at the same time. Toney vaguely relayed to the jury that "Calvin started back again. Toney said he now told appellant "me and you got trouble. That's where I told my sister 'go and call the police for Calvin.'" R. 50, ll. 3-22.

Toney recalled appellant took his jacket off inside the bar, and that the decedent was going outside the bar at that time. Toney remembered that words were exchanged between appellant the decedent. Toney said the decedent told him: "Toney, you know I ain't never started no trouble at your place. I said, you sure ain't, but I got somebody on the way to take care of Calvin." R. 52, ll. 7-16.

Toney confirmed to the solicitor his understanding of the sequence of the blows: "Sherry hit Calvin. Calvin turned around and hit Sherry in the back. That's when Neil [the decedent] hit Calvin . . . when Neil hit Calvin, Sherry and Neil walked off." R. 52, ll. 7-16. Toney maintained appellant was not bleeding as a result of being hit the first time by the decedent.. R. 52, l. 17 – 53, l. 21.

Toney also remembered that the decedent hit appellant while both men were outside in the parking lot. "There was three licks passed . . . *when Neil hit Calvin, Calvin hit the ground . . . I didn't see how hard he [the decedent] hit him [appellant] but Calvin went down to the ground.* But, when Calvin - - when Neil hit Calvin, him and Sherry walked off." R. 66, l. 10 – 67, l. 18. (emphasis added).

Toney confirmed that appellant was able to get up off the ground after the decedent knocked him down. Toney said the next thing he knew "everybody was running and scattering." The decedent was shot during this melee. R. 66, l. 10 – 73, l. 23. Toney repeatedly confirmed that the decedent was on top of appellant hitting him in the face while this occurred. R. 72, l. 11 – 156, l.24.

Sherry Myers testified that appellant was her great uncle. R. 75, ll. 10-25. She had been dating the decedent for about two and one-half years before the incident at Toney's Lounge. Sherry recalled: "We slept all that day and we woke up that afternoon and decided we wanted to go out and have a drink." R. 76, ll. 4-25.

Sherry confirmed that she did not have a good relationship with appellant. Appellant was already at the bar when she arrived there with the decedent. R. 76, l. 19 – 79, l. 8. While the videotape was played, Sherry testified that the tape showed appellant walking up and calling her "a no-good bitch." There was no audio on the videotape. The videotape is on file with this Court. R. 79, ll. 19-21.

Sherry said she told appellant to leave her alone and then Toney, the owner, began talking to appellant. Sherry claimed she told appellant she was going "to put a restraining order against him." Sherry maintained her decedent boyfriend was trying to calm everyone down. R. 80, l. 13 – 82, l. 8.

Sherry claimed the decedent never said anything to appellant that evening. Sherry told the jurors that they were eventually outside in the parking lot, and she was face to face with appellant. "I swung and I hit him." Sherry confirmed that the decedent also hit appellant. R. 83, ll. 14-24.

At this point, the decedent apparently realized Sherry had his car keys. Sherry speculated: "That's when somebody must have yelled out about the gun and he [the decedent] ran behind that truck right there." She stated that she saw appellant running also and saw a "flash." She did not remember how many shots she heard, but she remembered the decedent saying: "Baby, that mother

fucker done shot me." Sherry claimed the decedent fell on top of appellant at that time. R. 84, l. 5 – 85, l. 25. Sherry admitted there was a lot of chaos at the club at that time with about forty-five or fifty people together. R. 89, l. 4 – 175, l. 20.

Sherry said that the decedent was about 6'3" and appellant was only 5'9". She remembered the decedent hit appellant, and knocked him to the ground. R. 93, ll. 5-21.

As Sherry watched the videotape on cross-examination, she admitted that she pushed appellant. Sherry claimed he got physical with appellant because he was calling her names. She admitted that Toney held appellant back. Sherry denied that she was angry at the time. She said she was "upset and talking." R. 96, l. 8 – 104, l. 22.

Sherry claimed appellant had a history of "sneaking around" and "hitting people from behind." Sherry again confirmed that the decedent hit appellant, and knocked him to the ground. However, Sherry maintained that appellant had hit her first. R. 96, l. 8 – 104, l. 22. Sherry acknowledged that the videotape showed the decedent "beating Mr. Myers, the defendant." R. 105, ll. 7-10.

Interestingly, Sherry maintained "all of this [was] after he [the decedent] got shot." The state would try to make the most of this claim that the decedent was already fatally shot when he was plummeting appellant so badly that appellant was the hospital on life supporting machines for several days afterwards. R. 104, l. 3 – 105, l. 4.

Sherry did acknowledge she told the police that she heard three shots, and she "heard Neil say 'he shot me,' and Neil hit Calvin in the face, but he did not have any strength and fell to the ground and laid on his back." R. 104, l. 15 – 106, l. 2.

The pathologist

The pathologist, Dr. Amy Durso, testified that the decedent had six gunshot wounds (both entrance and exit wounds included). He was shot in the left lung from more than two feet away. R. 110, l. 13 – 127, l. 23. Dr. Durso admitted that the shot to the left lung was enough to kill the decedent by itself. R. 126, ll. 1-16.

The defense cross-examined Dr. Durso at length. R. 129, l. 1 – 139, l. 1. The state's witness, Durso, on cross-examination:

> Q. The wound that you testified to that was the one who—*the one which probably caused the death of Mr. Green, in a normal situation of a gunshot wound of that nature, how long would it take for death to occur*?
>
> A. Lot of people **kind of get a shot of adrenaline and [are] known to run a mile or two,** so the rate he was bleeding, **it could have been five minutes**, just a rough estimate, because your blood pressure is going to go down as you're bleeding.
>
> Q. Okay. How long would you remain conscious in all likelihood?
>
> A. I say up to five minutes.

R. 138, l. 17 – 139, l. 3. (emphasis added).

Richland County investigator Yvonne Woods visited appellant in the hospital to interview him. She remembered appellant was "hooked up to multiple machines" and "he was unable to speak." R. 173, ll. 17-24.

James Myers was appellant's nephew. He was thirty-years-old and he worked daily with appellant on their food truck that they operated in various parts of Richland County. "Construction sites," and similar areas were targeted for their food sales. R. 185, l. 16 - 187, l. 16.

James remembered that they worked out of the food truck all day on December 29, 2012. Then they went to a Citco station and had a "couple of beers," and possibly some gin. They made their way to Toney's bar at about 10:00 or 11:00 that evening. This was not routine, and James

remembered appellant "said that he was going to stop through and take a drink before we go to the house." R. 187, l. 12 – 189, l. 4.

James sat at the bar and ordered a beer. We were "just chilling out," "hanging out and not talking to anybody" in particular. R. 188, l. 2 – 189, l. 24.

James remembered that Sherry and the decedent came into the bar. Sherry hesitated once inside when she saw her great uncle, appellant, was at the bar. James knew that appellant and Sherry did not "get along." James testified at some point appellant was cursing at Sherry. James helped Toney, the owner take appellant outside. R. 190, l. 12 – 192, l. 6.

James was ready to go home at this point, but appellant wanted to stay. He remembered that Toney allowed appellant to go back inside after talking to him. R. 192, l. 8 – 193, l. 4. James stayed outside, and he eventually saw appellant and another man on the ground fighting. R. 192, l. 25 – 193, l. 7. James remembered: "I saw Calvin trying to get up and he was pulling a gun out." James said the decedent ran, appellant shot at the decedent, and "shot him in the back or something." R. 194, l. 11 – 195, l. 25.

James confirmed that both appellant and the decedent were bleeding. Sherry and others called 9-1-1. R. 196, ll. 1-15; R. 202, ll. 13-14. James estimated that the decedent actually beat appellant **for about five minutes**. R. 205, ll. 3-5; R. 209, l. 2 – 210, l. 8.

Investigator Carwell

The state called Richland County Sherriff's Investigator John Carwell as a witness. There was no attempt to qualify Carwell as an expert in anything. R. 244, l. 22 – 253, l. 9.

Carwell remembered that when he arrived at Toney's bar that evening that appellant and the decedent had already been transported to the hospital. Carwell acknowledged that appellant was

seriously hurt, and that appellant was not able to talk to the police in the hospital. R. 246, l. 16 – 247, l. 5; R. 251, l. 19 – 252, l. 4.

The solicitor then played the videotape from the bar on that fatal evening. Carwell claimed he could corroborate statements made to him by watching the videotape "understanding **it is a very chaotic situation**, *but both provided statements where I could go back in the video and match up everything*. There may be little inconsistencies, but the majority of both statements [Sherry and the bar owner, Toney] matched up to what the video shows." R. 248, l. 25 – 249, l. 15.

Carwell confirmed to the solicitor that the videotape was *very significant* to him. R. 252, l. 19 – 253, l. 2. Carwell immediately testified that the videotape showed Sherry Myers and the decedent "having a fine time." Defense counsel Mills immediately objected to Carwell's opinion "about what's going on. **It can speak for itself. He's giving opinion testimony.**" The solicitor defended Carwell arguing Carwell was only testifying that the decedent was having a good time with Sherry "before Calvin Myers injects himself into their evening." R. 253, l. 3 – 254, l. 16. The judge overruled the defense objection. R. 253, ll. 12-16.

After the judge overruled the objection, Carwell then testified that appellant was watching Sherry. He told the jury that the videotape showed appellant approaching Sherry and "obviously saying something." Carwell said appellant re-entered the bar with Toney, the owner, and appellant was "approaching Sherry. He's obviously saying something." Carwell told the jury that this was significant because "*I want to find the aggressor.*" R. 256, l. 2 – 257, l. 4. (emphasis added).

Carwell said Toney tried to step in, and separate the two. Carwell maintained to the solicitor that he was able to "determine how many people tried to deescalate the situation, and how many times Mr. Myers was taken out" of the bar. Carwell maintained the videotape showed "Calvert Myers again sneaking in." R. 255, l. 1 – 257, l. 1.

When Carwell also testified that the videotape showed Toney instructing someone to call 9-1-1, the judge sustained the defense objection. R. 257, ll. 2-11. Carwell admitted there were "blind spots at this location where the cameras don't pick up what's going on." Carwell confirmed to the solicitor that he was "making a determination about the appropriate charges" when he watched the videotape." R. 257, l. 13 – 259, l. 6. Appellant, of course, was charged with murder.

Carwell also said the videotape showed the decedent hiding behind a vehicle in the parking lot. Another defense objection was sustained. R. 259, ll. 2-10. When the solicitor continued the line of questioning about the video allegedly showing the decedent hiding and appellant going for his gun, the court again sustained another defense objection. R. 259, l. 16 – 260, l. 21. The judge sent the jury out of the courtroom at that point.

Mistrial motion

Defense counsel then argued to the judge that the solicitor was leading investigator Carwell through the videotape while Carwell commented on what he allegedly saw that was not backed up by testimony, and it was also based on hearsay. The judge stated that he had sustained some of the defense objections. Defense moved for a mistrial noting it was the jury's province to determine what happened, and he argued what the solicitor and her witness, Carwell, claimed the videotape showed was not at all apparent. The solicitor claimed that assertion "went to the weight of the evidence." R. 261, ll. 6-17.

The solicitor argued: "I think it's appropriate" for the investigator to comment on what parts of the video he found significant. "I can't help it if that prejudicial to his client. But, I think if I ask him a question about what was significant in terms of the lead investigator's charge in this case, it is appropriate." R. 357, l. 19 – 358, l. 1.

The judge agreed with defense counsel that it was not clear at all what was happening on the videotape at critical times, and he told the solicitor: "And as it relates to the witness's ability to say what occurred, it has to be clearly demonstrated on the video." Defense counsel told the judge he totally agree and that was why the solicitor's demonstration was so improper, and the prejudice from it was so apparent. The judge nonetheless refused to declare a mistrial. R. 261, l. 2 – 265, l. 17.

Appellant's statement

Appellant told police, after being released from the hospital that he got up at about 5:30 in the morning of December 29, 2012 and prepared to work on his food truck by grilling food. He told police about stopping at the Citgo station after work for a drink and then went to Toney's with his nephew, James Myers. Appellant told law enforcement at this point his mind "goes blank." Again, it was undisputed that appellant was badly beaten that night at Toney's bar.

The police also questioned appellant about having a nine-millimeter gun. Appellant responded that his wife "bought me a house gun." However, he did not recall how he "got the gun on me." Appellant said he did not remember shooting that evening in the parking lot, nor did he remember being assaulted or hit that evening even though he obviously was beaten. R. 277, l. 7 – 282, l. 16. Appellant also did not recall having a gun. Appellant was asked if it was possible that he shot the decedent. Appellant responded: "What reason would I have to shoot him? I have known this kid all my life. I don't just…I just don't know." R. 282, ll. 9-25.

Charge on the law

The judge charged the jury on the law of murder, voluntary manslaughter, and self-defense. R. 382, l. 19 – 387, l. 15.

Jury questions

The jury returned wanting to hear the part of the pathologist's testimony about an "adrenaline rush." Defense counsel Mills correctly remembered: "I believe that was on cross-examination." The jury also asked about seeing the videotape. The judge would instruct the jury that they would have a computer in the jury room if it chose to view the videotape again. R. 395, l. 9 – 399, l. 22. 6

The jury sent another note stating: "We would like the testimony beginning with how Neil would have the energy to beat Calvert after he was shot. We want to be 100% that the fight that made Calvert severely beaten occurred after he was shot." The solicitor noted that the jury was again referencing "that adrenaline rush, she [the pathologist] used that word." That's the part that we found. That portion of Dr. Durso's testimony was then played for the jury. R. 397, l. 23 – 399, l. 21.

The jury finally asked for an instruction on the difference between premeditated murder and murder. The solicitor asked the judge to charge the jury that murder did not have to be premeditated. The judge instead recharged the jury on the elements of murder, and the definition of malice. R. 400, l. 1 – 405, l. 20. The jury found appellant guilty of murder at 7:10 that evening. R. 405, l. 17 – 406, l. 24.

The defense moved for a new trial, arguing the evidence did not support the verdict. The judge denied that motion. R. 409, l. 15 – 411, l. 8.

Appellant told the judge at sentencing that he was "beaten beyond capacity and just nothing I intended to do. Me and him was very good friends and [he] respected me very well as everybody

does." R. 411, ll. 12-21. Appellant said he did not recall critical times of that evening.[1] R. 412, ll. 1-8.

Discussion

Investigator Carwell was **not** an expert witness in this case. In State v. Commander, 396 S.C. 254, 721 S.E.2d 413 (2011), the Supreme Court considered the **expert** opinion of the pathologist that the autopsy and the background information provided to him led him to conclude the victim's death was "a homicide." While ruling this was not error, our Supreme Court noted the very real possibility that a forensic pathologist could render opinion testimony outside of his medical expertise. That opinion would invade the province of the jury because the evidence the expert was relying on was available to the jury so it could draw its own conclusions from that evidence.

Our Supreme Court stated that expert testimony that addressed the guilt or innocence or state of mind of the accused was inadmissible. See State v. Commander, 396 S.C. at 268, 721 S.E.2d at 420-421 (2011).

Here, the investigator was not qualified as an expert. It is clear beyond cavil that the solicitor had the investigator opine that the decedent and his girlfriend were just having "a good time" inside the bar. Appellant began staring at his niece, and he was the instigator of the trouble in

[1] Most respectfully to the trial judge, appellant would be remiss not to convey the strange animus he showed towards this particular appellant when he told him at sentencing: "You should have just shot yourself in the head and killed yourself and let everybody move on." "I think Mr. Green was thirty-seven when you killed him . . . I think that's the sentence I'm going to give you, Mr. Myers, the sentence of the court is that you be committed to the state department of corrections for a period of thirty-seven years." R. 541, l. 1 - 542. l. 16.

the opinion of the investigator. While admitting the "blind spots on the videotape," the investigator said this videotape was important in his "charging" decision regarding who was the aggressor at whatever apparent point he thought was important.

The videotape in this case was played for the jury, and the jury was quite capable of drawing its own conclusions. Further, undersigned counsel has closely watched the videotape on more than one occasion, and he is in agreement with the trial judge that what was transpiring on the videotape, at what points, and who was who on the videotape, was difficult to follow. That videotape is on file with this Court for its viewing.

It is clear the state wanted to present a law enforcement witness on the side of the prosecution to interpret the videotape in such a manner as to clearly signal to the jury that appellant was guilty of murder, and that this case was not voluntary manslaughter or self-defense. That invaded the province of the jury because the jury was quite able to draw its own conclusions as defense counsel argued.

In Green v. Sparks, 232 S.C. 414, 102 S.E.2d 435 (1958), our Supreme Court held "the opinion of a witness is not admissible where all the facts are capable of being clearly detailed so the jury may form the correct conclusion therefrom." See Green v. Sparks, 232 S.C. at 431, 102 S.E.2d at 445.

Further, in Smith v. Hooligan's Pub and Oyster Bar, LTD., 753 So.2d 596 (3d. District Fla. 2000), the court held that an expert opinion must on a subject is that is beyond the common understanding of the average layman, and as such it would probably aid the triers of fact in their search for the truth. The court in Smith held that the matter of who was an aggressor in a fight is one within the ordinary understanding of the jury. The court, therefore, found it was error to allow Hooligan's expert to testify and identify the alleged aggressor in a fight for the jury.

Here, the investigator was not an expert witness. While not necessary to the resolution of this case, appellant submits that even if this investigator was an expert, his opinion would have "crossed the line" into invading the province of the jury.

In State v. Jamerson, 153 N.J. 318, 708 A.2d 1183 (1998), the New Jersey Supreme Court held that a medical examiner was **not qualified** to testify that the decedent died as a result of a reckless homicide rather than an accidental killing. The Court noted where the circumstances involved in the case were within the understanding of the average juror, permitting an *expert opinion tends to mislead the jury into thinking the expert knows something that they do not know.* State v. Jamerson, 708 A.2d at 1195 citing Biro v. Prudential Insurance Co., 110 N.J. Super. 391, 404, 265 A.2d 830 (Matthews, J. dissenting, rev'd on the dissent, 57 N.J. 204, 271 A.2d 1 (1970).

Investigator Carwell's opinions were very prejudicial, and they invaded the province of the jury. The jury viewed the videotape live in court, and it had the opportunity to view the videotape again if it chose during deliberations.

The opinions and interpretations of the investigator in this case where voluntary manslaughter and self-defense were also jury options were extraordinarily prejudicial. The state pushed the envelope too far by eliciting these improper opinions from the investigator. The state peddled to the jury that the decedent beat appellant to a pulp after being fatally shot.

Appellant's nephew testified the decedent beat appellant for five minutes. The pathologist testified that: "Lot of people **kind of get a shot of adrenaline and [are] known to run a mile or two,** so the rate he was bleeding, **it could have been five minutes**, just a rough estimate, because your blood pressure is going to go down as you're bleeding." R. 138, l. 17 – 139, l. 3. (emphasis added).

Appellant was so badly beaten in the parking lot that he was "hooked up to machines, bloodied all over, and remained in the hospital for several days." The jury easily could have determined that this was a classic case of voluntary manslaughter where appellant was badly beaten, and responded in a heat of passion based upon the sufficient legal provocation of being badly beaten by shooting the decedent. See State v. Knoten, 347 S.C. 296, 303, 555 S.E.2d 391, 395 (2001).

Self-defense was also a jury option. The fact that the decedent almost beat the appellant to death could also have been found by the jury to have been so disconnected from appellant allegedly cursing at the decedent's girlfriend earlier inside the bar as to be irrelevant to the first "without difficulty in bringing on the difficulty" element of self-defense. See State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008).

The state respectfully is the author of its own dilemma in this case, and the trial judge's admission of this highly prejudicial inadmissible opinion testimony by the law enforcement investigator entitles appellant to a new and fair trial.

2.

The court also abused its discretion in denying a mistrial. This was especially true when it found the investigator's highly prejudicial opinions about what was allegedly occurring on the videotape were not at all apparent from the videotape, and the state made maximum use of these inadmissible unsupported opinions.

Relevant facts

As seen, the judge overruled objections and allowed Investigator Carwell to testify that Sherry and the decedent were having "a fine time" before appellant began watching Sherry and the owner of the bar, Toney, came into the bar and intervened. Investigator Carwell opined that Sherry did not move from her seat which "was consistent" with the testimony of another state's witness, James Myers. Appellant approached Sherry and Investigator Carwell said this was significant since he wanted to find the aggressor, and properly charge him – here with murder. R. 252, l. 12 – 255, l. 14. The investigator said it was "very significant," that in his opinion, the decedent "never engaged at that point." R. 255, l. 1 – 257, l. 4.

The solicitor continues to push the envelope

Armed with the judge's overruling the defense objection, the solicitor continued to push and lead the investigator while he testified. The investigator told the jury that the tape showed appellant coming back towards the bar counter, and the owner then told someone to call 9-1-1. That defense objection is sustained. R. 257, ll. 5-11.

The solicitor continued to ask the investigator to interpret what he alleged he saw on the videotape. The investigator stated that the tape showed the decedent was hiding behind a car as appellant was apparently trying to shoot him. That objection was also sustained. The investigator

agreed there were "blind spots at this location where the cameras don't pick up what's going on." R. 258, l. 5 – 259, l. 12.

Defense counsel objected about opinions that went to appellant's mental state. R. 259, ll. 13-14. The solicitor continued and the solicitor asked the investigator if: "The defendant crouching behind the vehicle and doing this motion, was that significant to you?" The defense objection to that was sustained. Defense counsel correctly moved for a mistrial noting the solicitor continuing to lead the investigator into giving these highly prejudicial impermissible opinions was very prejudicial to appellant. The solicitor argued that the defense arguments that the videotape did not show what Carwell claimed it showed went to the "weight of the evidence." The solicitor maintained that the videotape was "significant" to the investigators "charging decision," and therefore his testimony was "appropriate." R. 259, l. 16 – 265, l. 16. As seen, the judge agreed that the videotape did not support Carwell's opinions of what it showed at apparently critical times, but the judge nonetheless denied the mistrial motion. R. 265, ll. 16-17.

Discussion

Investigator Carwell in this case was in a no better position to evaluate appellant's state of mind or his actions on the videotape than the jurors were. The same was true of the actions of the decedent, and his girlfriend, Sherry. Green v. Sparks, 232 S.C. 414, 102 S.E.2d 435 (1958). In fact, the jurors were in a better position to evaluate the evidence since they sat through the entire trial, and they were not working with the solicitor's office which was seeking a conviction for murder. See State v. Commander, 396 S.C. at 268, 721 S.E.2d at 420-421 (2011) Again, even **expert testimony** in the manner in which Investigator Carwell testified in this case would have been improper. See, State v. Jamerson, 153 N.J. 318, 708 A.2d 1183 (1998); State v. Mishne, 427 A.2d 450, 459 (Me. 1981); State v. Slick, 425 A.2d 167, 171 (Me. 1981).

The judge initially overruled the defense objections, and the solicitor obviously felt emboldened to keep pushing further with this inadmissible testimony. The solicitor refused to give in, and continued to push the envelope with this inadmissible testimony even once the defense objections were sustained. The prejudice could not be cured at that point, and a mistrial was required. Whether the prejudice is sufficient from the admission of incompetent evidence to the point that it justifies a mistrial this Court has held generally turns on the facts of each case. State v. White, 371 S.C. 439, 447, 478 639 S.E.2d 160, 163-164 (Ct.App. 2006).

The judge noted that he had sustained appellant's latter objections to this highly improper prejudicial testimony, and he reasoned that was sufficient. The trial judge respectfully was in error in that ruling. The damage had been done by the solicitor's continued pounding with this investigator, and the videotape, and merely sustaining the latter objections regarding it was insufficient to cure the prejudice.

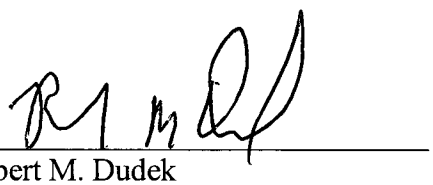
Defense counsel did not make a knee jerk reaction in requesting a mistrial. He only made the mistrial motion when the state continued to insist on eliciting inadmissible opinion testimony from the investigator where the videotape itself – as the judge agreed -- did not support those opinions.

A mistrial should have been granted under the highly unusual facts of this case. Given the extremely prejudicial character of the inadmissible evidence where the jury had to decide whether appellant was guilty of the lesser-included offence of voluntary manslaughter, or not guilty by reason of self-defense, or guilty of murder, the prejudice from the state eliciting inadmissible opinion testimony had reached the point of no return. The undue prejudice was manifest at that point. See State v. Douglas, 367 S.C. 498, 626 S.E.2d 72 (Ct.App. 2006). Appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant's conviction should be reversed, and this case remanded to the Richland County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

January 29, 2016

Robert M. Dudek
Chief Appellate Defender

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

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Richland County
Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CALVERT MYERS,

APPELLANT

APPELLATE CASE NO. 2014-001803

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Alphonso Simon Jr., Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 29th day of January, 2016.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 29th day of January, 2016.

(L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2025.