STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

CALVERT MYERS,

PETITIONER

APPELLATE CASE NO. 2014-001803

Appeal from Richland County

Honorable Clifton Newman, Circuit Court Judge

Opinion No. 2017-UP-070

PETITION FOR REHEARING

Petitioner requests rehearing pursuant to Rule 221 (a), SCACR because this Court apparently overlooked the fact that the trial court abused its discretion by allowing Investigator Carwell to give testimony that was in fact *opinion testimony regarding his interpretation* of what was occurring on videotape of the incident at the tavern. If the jury could watch the videotape and make its own conclusions about what it saw -- and it could -- then Cardwell's *opinions about what was occurring were not necessary.* They were gratuitous opinions supporting the state's effort to convict petitioner of murder. Investigator Cardwell *opined* Sherry Myers and Cornelius

Green were "fine and calm," on the videotape. In context, this conveyed that they were only attempting to have a good time, and that petitioner was the aggressor.

This is the *problem when an agent of the state, Carwell*, describes his opinion about what the jury is watching. It was unnecessary and it was prejudicial. It was particularly prejudicial in this case where self-defense and voluntary manslaughter were jury issues.

Investigator Carwell was **not** an expert witness in this case. Respectfully, this Court erred in finding his identification was rationally related to his perception of the witnesses during his investigation, because "a lot of people were in and around Toney's Lounge, and it did not require **special knowledge**, skill, experience or training." That is respectfully incorrect. Investigator Carwell was telling the jury *who the people on the tape were, and he was interpreting their actions*.

A solicitor can play the surveillance tape in closing, and **argue** what he or she thinks it shows. That is permissible but having a law enforcement officer give his spin on what the jury was watching, as **evidence and testimony** should not have been allowed. It is inadmissible opinion testimony.

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 this 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. 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 remains on file with this Court for its viewing during this rehearing process.*

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 petitioner 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, 431, 102 S.E.2d 435, 445 (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." 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.

This Court should most respectfully reconsider that its implicit opinion that Investigator Carwell was not interpreting the events on the videotape, and that he did not claim **special knowledge** of what was happening on the tape. Petitioner 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).

The jury viewed the videotape live in court, and it had the opportunity to view the videotape again if it chose during deliberations. Again, the arguments of counsel are just that -- arguments – and the attorneys could have replayed the tape *and argued to the jury what was on the tape. However, to allow a law enforcement official to identify people he knew on the videotape, and opine to the jury what they were doing, what mood they were in, and what he thought they were doing at the time was improper opinion testimony.* This is a very real issue in

the Courts of General Sessions in this state, and petitioner respectfully urges this Court to reconsider its holding on this issue.

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.

Petitioner 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 petitioner 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 nearly beat petitioner to death could also have been found by the jury to have been so disconnected from petitioner 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).

II. This Court also may have overlooked the fact that the judge abused its discretion in denying a mistrial. The judge did indeed begin sustaining objections to Investigator Carwell's interpretation of events because he belatedly realized this opinion testimony was inadmissible. 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. The damage was done when the judge began sustaining the defense objections, and a mistrial should have been ordered out of fundamental fairness.

As seen, the judge overruled objections and allowed Investigator Carwell to testify that Sherry and the decedent were having "a fine time" before petitioner 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. **That is interpreting the videotape, and drawing conclusions – opining – about what occurred.** Petitioner 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 petitioner coming back towards the bar counter, and the owner then told someone to call 9-1-1. That defense objection *was indeed 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 petitioner 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 petitioner'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 petitioner. 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.

The trial court belatedly realized petitioner was correct in objecting to Investigator Carwell's interpretation of the videotape. That is why he began sustaining the objections. However, the damage had been done at that point, and a mistrial should have been granted.

Investigator Carwell in this case was in a no better position to evaluate petitioner'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 that was seeking a conviction for murder.* See, State v. Commander, 396 S.C. at 268, 721 S.E.2d at 420-421 (2011). Even expert law enforcement testimony in the manner in which Investigator Carwell testified about the videotape 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. This Court noted in its opinion that certain objections to this procedure were sustained – and they were. However, the overall prejudice in this case from the Investigators opinion show warranted a mistrial. The incompetent opinion evidence once the judge realized defense counsel was correct and started sustaining objections came too late. The prejudice was manifest by that time, and the judge should have granted the mistrial motion. 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 petitioner'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.*

A mistrial should have been granted under the highly unusual facts of this case where the jury had to decide whether petitioner was guilty of the lesser-included offence of voluntary manslaughter, or not guilty due to self-defense, or guilty of murder. The prejudice from the state eliciting inadmissible *opinion testimony had reached the point of no return.*

Rehearing should respectfully be granted in this case, and oral argument permitted on this important issue of a law enforcement official giving his or her opinion on what the jury is observing on a videotape. Such interpretations should be left to the **arguments and opinion of counsel in closing arguments. That should not be permitted "as objective evidence" by a law enforcement official the state does not even qualify as an expert.**

Respectfully Submitted,

ROBERT M. DUDEK
Chief Appellate Defender

This 23rd day of February, 2017.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Alphonso Simon, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Calvert Myers, #210042, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 23rd day of February, 2017.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 23rd day of February, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: November 3, 2026.