

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

DeAndrea G. Benjamin, Circuit Court Judge

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SC SUPREME COURT

Opinion No. 2015-UP-574 (S.C. Ct. App. Filed December 30, 2015)

2012-GS-10-40032;40033

THE STATE,

RESPONDENT,

V.

BRETT D. PARKER,

PETITIONER

APPELLATE CASE NO. 2016-000524

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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INDEX

INDEX.....1

CERTIFICATE OF COUNSEL.....2

QUESTIONS PRESENTED.....3

STATEMENT OF THE CASE.....4

 Procedural History.....4

 Relevant facts.....4

ARGUMENT

1.

The Court of Appeals erred in holding the trial judge’s refusal to charge the jury concerning circumstantial evidence pursuant to *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013) was harmless.8

How the Issue Arose at Trial.....8

Discussion.....11

2.

The Court of Appeals Erred in Affirming the Trial Court’s Failure to Restrict the State’s Main Expert from Offering an Opinion Outside of his Qualifications and Expertise.20

How the Issue Arose at Trial20

Discussion.....25

CONCLUSION29

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on February 19, 2016. App. 13.

QUESTIONS PRESENTED

1.

Did the Court of Appeals err in holding the trial judge's refusal to charge the jury concerning circumstantial evidence pursuant to State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013) was harmless?

2.

Did the Court of Appeals err in affirming the trial court's failure to restrict the state's main expert from offering an opinion outside of his qualifications and expertise?

STATEMENT OF THE CASE

Procedural History

A Richland County grand jury indicted petitioner for two counts of murder on August 15, 2012. R. 1-5. The state, represented by K. Luck Campbell, Nicole M. Simpson, and Meghan L. Walker, called the case for trial before the Honorable DeAndrea G. Benjamin and a jury on May 6, 2013. R. 8. David A. Fedor and J. Marcus Whitlark represented petitioner. R. 8. On May 28, 2013, the jury returned its verdicts, finding petitioner guilty as charged. R. 3178, ll. 2-13. Judge Benjamin sentenced petitioner to two life sentences to be served consecutively. R. 5-6; R. 3190, l. 25 – R. 3191, l. 9.

Petitioner filed a timely notice of appeal. His appeal was perfected by John S. Nichols, John D. Delgado, and Earnest L. Dessausure. On December 30, 2015, the Court of Appeals affirmed petitioner's convictions and sentences in an unpublished opinion. App. 1-3; State v. Parker, 2015-UP-574 (S.C. Ct. App. filed Dec. 30, 2015). On January 14, 2016, petitioner filed a petition for rehearing. App. 4-12. On February 19, 2016, the Court of Appeals denied the petition for rehearing. App. 13.

This petition for writ of certiorari follows.

Relevant facts

Petitioner testified in his own defense. Petitioner and his wife, Tammy Parker ("Tammy"), got married in 1996. R. 2747, ll. 17 – 19. They had two children. R. 2748, ll. 7 – 21. Petitioner worked selling medical equipment. R. 2745, ll. 4 – 16. He was also a bookie. R. 2745, ll. 17 – 19. Bryan Capnerhurst ("Capnerhurst") first met petitioner through petitioner's father, who was also a bookie. R. 2750, ll. 14 – 20. In 2006, Capnerhurst began working for petitioner in the gambling business. R. 2750, l. 21 – 2751, l. 1.

On the day of the shooting, petitioner was in the bathroom when he heard Capnerhurst come in his house. R. 2757, ll. 2 – 7. Capnerhurst “hollered” petitioner’s name. R. 2757, ll. 17 – 21. Petitioner responded that he was in the bathroom, but Tammy was upstairs and he could “go on up.” R. 2757, ll. 17 – 21.

Petitioner was still in the bathroom when he heard gunshots. R. 2757, l. 22 – 2758, l. 2. Petitioner ran up the steps. R. 2758, ll. 3 – 12. As he got to the landing, petitioner saw Capnerhurst pointing a gun at him. R. 2758, ll. 3 – 12. Capnerhurst told petitioner to “go to the fucking safe.” R. 2758, ll. 3 – 12. Petitioner asked Capnerhurst what he was doing. R. 2758, ll. 13 – 15. When he walked upstairs, he “could see Tammy’s feet sticking out of the bathroom; and then I knew something was wrong bad, that he had probably shot her.” R. 2758, ll. 16 – 19.

Capnerhurst forced petitioner into his storage room where he kept his safe. R. 2759, ll. 1 – 6. Capnerhurst did not know that on top of the safe, under a blanket, petitioner kept a gun. R. 2759, ll. 7 – 14. Capnerhurst held a pistol on petitioner. R. 2767, l. 25 – 2768, l. 3. Petitioner “grabbed” the gun hidden under the blanket “and immediately turned and just kept pulling the trigger.” R. 2768, ll. 11 – 13. After shooting Capnerhurst, petitioner “jumped over him and ran to check on Tammy.” R. 2769, ll. 7 – 10. Tammy was dead. R. 2769, ll. 11 – 24. Petitioner called 911. R. 2773, l. 15 – 2819, l. 6.

According to the state’s theory, petitioner killed Tammy for insurance proceeds and other assets. R. 3000, l. 17 – R. 3001, l. 1. He also attempted to frame Capnerhurst for her death. R. 3001, ll. 3-5; R. 3082, ll. 22-25. However, the state’s case against petitioner was entirely circumstantial – as evidenced by the solicitor’s closing argument requesting the jurors not ignore the evidence of petitioner’s “gambling, the debts, the adultery, the vengeance about Tammy having an affair.” R. 3081, ll. 14-16.

The police who arrived first on the scene found a gun in Capnerhurst's hand and an ammunition box in his bag. R. 309, ll. 4-5; R. 342, ll. 17-22; R. 592, ll. 12-24; R. 596, ll. 4-13; R. 947, ll. 16-18; R. 1143, ll. 2-7; R. 1152, ll. 9-10. Although the police found Capnerhurst's DNA on the gun and bag and gunshot residue on his hands, the state argued petitioner planted the gun and the ammunition box. R. 996, ll. 13-25; R. 1002, ll. 5-22; R. 1076, l. 22 - R. 1077, l. 3; R. 3082, ll. 17-18. To support these two points, the state's pathologist testified that Capnerhurst would have been unable to hold the gun in light of the injuries he sustained when petitioner shot him and a latent print examiner claimed petitioner's fingerprints were on the ammunition box. R. 687, l. 21 - 692, l. 25; R. 760, ll. 17-22; R. 1036, l. 3 - 1037, l. 2; R. 1538, l. 15 - 1551, l. 22; R. 3012, ll. 1-18; R. 3016, ll. 12-14; R. 3128, ll. 1-11.

Security video footage from petitioner's home showed the window blinds opening shortly before Capnerhurst's arrival. R. 1150, ll. 21-24; R. 1155, ll. 3-24; R. 1167, ll. 16-18; R. 1187, ll. 19-25; R. 3012, ll. 20-23; R. 3091, ll. 24-25. When the police watched the video, the police returned to petitioner's home on May 23, 20120, and took lifts from the blinds to test for the presence of gunshot residue. R. 709, l. 25 - 710, l. 3; R. 722, ll. 16-25; R. 1190, ll. 2-25; R. 3119, ll. 1-7. Of the six areas searched, three areas revealed the presence of one round lead particle. R. 1079, l. 1 - 1081, l. 19; R. 3119, ll. 11-12; R. 3092, ll. 8-11. As a result, the tests were "inconclusive" according to the state's expert because gunshot residue requires the presence of spherical, round particles that contain lead, barium and antimony. R. 1061, ll. 18-19; R. 1062, ll. 4-10; R. 1080, ll. 7-8; R. 1081, ll. 3-5; R. 1081, l. 10.

The state also presented multiple witnesses who testified regarding petitioner's debt. Petitioner had approximately \$176,000 in gambling debt associated with two accounts. R. 3013, ll. 8-13; R. 3082, l. 11; R. 3112, ll. 17-21; R. 3133, ll. 13-21. Additionally, a witness claimed

petitioner asked for a loan of \$5000 the day before the deaths. R. 3134, ll. 12-18. Both petitioner and Tammy were having affairs. To support the argument that petitioner was unhappy in his marriage, the state presented several women who testified regarding sexual relationships with petitioner while he was still married to Tammy, including one who testified to a sexual encounter in petitioner's son's bedroom shortly before Tammy's death. R. 948, ll. 2-16; R. 958, l. 2 – R. 959, l. 24; R. 1146, ll. 22-23; R. 1192, ll. 14-23; R. 3129, ll. 11-24. Tammy had an affair with one of her clients, Ben Staples. R. 2365, l. 22 – 2366, l. 4. Petitioner did not know Tammy had an affair until Sheriff Leon Lott told him about it. R. 2749, ll. 2-4. R. 2327, ll. 1-2.

Following Tammy's death, petitioner stood to receive almost \$1 million from the life insurance proceeds and the retirement account. R. 3113, ll. 7-10. Although petitioner disclaimed the funds and a trust was created on behalf of the children, the state claimed the disclaimer was at the suggestion of the certified public accountant, and not a selfless act by petitioner. R. 3134, ll. 19-23; R. 3135, ll. 4-9.

The state's case required the jurors to believe that petitioner killed his wife to end an unhappy marriage and inherit funds to allow him to pay off his debts. The state's case also required the jurors to believe petitioner attempted to frame his friend and colleague, Capnerhurst, for her murder. The state's case hinged upon the jurors believing the state's circumstantial evidence and the testimony of the pathologist regarding Capnerhurst's ability to hold a gun after death.

ARGUMENT

1.

The Court of Appeals erred in holding the trial judge's refusal to charge the jury concerning circumstantial evidence pursuant to *State v. Logan*, 405 S.C. 83, 747 S.E.2d 444 (2013) was harmless.

How the Issue Arose at Trial

Request to charge

During the course of the trial, petitioner submitted written requests to charge. R. 7. Recognizing that the evidence against petitioner would be entirely circumstantial and that the jury would require specific instructions regarding how to examine circumstantial evidence, petitioner prepared a proposed jury instruction concerning circumstantial evidence to guide the jury in its analysis. Petitioner requested the trial judge charge the jury as follows:

This criminal prosecution is based solely upon circumstantial evidence.

Therefore, the State must prove every circumstance beyond a reasonable doubt, that all circumstances must be consistent with each other, that the circumstances must point conclusively to the defendant's guilt to the exclusion of every other reasonable hypothesis, and that a strong probability of guilt is not sufficient if the circumstances may be accounted for upon any reasonable hypothesis that does not include the defendant's guilt.

R. 7. In support of this charge, petitioner cited *State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (1989), *Battle v. State*, 382 S.C. 197, 675 S.E.2d 736 (2009), and *State v. Hernandez*, 382 S.C. 620, 677 S.E.2d 603 (2009). R. 7.

During the charge conference, petitioner, referencing his written requests to charge, requested the judge charge the jury concerning circumstantial evidence pursuant to *Edwards*, supra.

R. 2964, ll. 5-6. The prosecutor countered, “Grippon,¹ I believe, is the controlling law.” R. 2964, ll. 10-11. Petitioner recognized Edwards “ha[d] been tinkered with,” but requested the judge charge the jury with the language of Edwards because it was a “fair,” “accurate,” and “correct statement of the law as it should be or [is] going to be.” R. 2987, ll. 13-20. The solicitor relied on State v. Cherry² to argue the Edwards language had been overruled. R. 2988, l. 6 – 2989, l. 2. Petitioner made clear he was “requesting that the law that has been the law of this state since 1850, . . . , to the exclusion of any other reasonable hypothesi[s].” R. 2989, ll. 6-14. Referring to the issue pending appeal in State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013), petitioner explained he did not “know what is going to happen,” but “had a gut feeling about this one” about “what is going to happen in the future” concerning the circumstantial evidence charge. R. 2990, ll. 9-11; R. 2990, ll. 13-14.³

In denying petitioner’s request, the judge stated Cherry, *supra*, was “the new law” and she had “to go with the changes.” R. 2988, ll. 1-3; R. 2989, ll. 17-18. Judge Benjamin explained her discretion in charging the jury was constrained in light of the directness of the opinion in Cherry, *supra*. R. 3034, ll. 21-22. She noted how the law rarely provided for something “directly on point,” but she found Cherry to be “on point” concerning this issue. R. 2989, l. 25 – 2990, l. 4; R. 2990, ll. 21-22.

¹ State v. Grippon, 327 S.C. 79, 489 S.E.2d 462 (1997).

² State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004).

³ After the judge instructed the jury, petitioner renewed his request to charge the jury concerning circumstantial evidence based on State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989). R. 3171, ll. 21-22. In his motion for new trial, petitioner again renewed his request for the circumstantial evidence charge pursuant to Edwards, *supra*. R. 3183, ll. 9-14. The judge denied the request for new trial, stating State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004) overturned Edwards, and “the language that was given in the jury charge [was] an accurate statement of the law today.” R. 3183, l. 19 – 3184, l. 5.

Closing arguments

Knowing petitioner had requested a specific and clarifying instruction concerning circumstantial evidence and the judge's refusal so instruct, the state argued to the jury concerning the two types of evidence. After reciting the definitions of direct evidence and circumstantial evidence, the solicitor told the jurors they heard "direct evidence" "from a number of witnesses." R. 3017, ll. 8-23. According to the solicitor, these were "lay witnesses" who testified about what they "saw, observed, or heard." R. 3017, ll. 22-25.

Turning to circumstantial evidence, the solicitor wanted "to make very clear" that "the law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence." R. 3018, ll. 16-21. The solicitor told the jurors that in her opinion, the state presented "a substantial amount" of circumstantial evidence to them. R. 3018, ll.1-2. She then explained that if she looked out her window before going to bed and there was no snow, but when she woke up there was snow, she could reasonably infer that it snowed during the night. R. 3063, ll. 2-11. She told the jurors, "Well, that is kind of how circumstantial evidence works in this case." R. 3018, ll. 12-13.

Petitioner attempted to respond to the solicitor's misleading and inaccurate statements regarding circumstantial evidence during his closing argument; however, the judge refused to permit petitioner to argue to the jury the correct analytical framework for circumstantial evidence. Specially, petitioner argued that the "[p]rosecutor tried to show you that circumstantial evidence is just as good as direct evidence." R. 3073, ll. 9-10. He then told the jury that with "circumstantial evidence you have got to connect all the dots. And there must not be another reasonable

hypothesis.” R. 3073, ll. 11-14. At this point, the state objected, and the judge sustained the objection. R. 3073, ll. 15-19.

Jury instructions

Denying petitioner’s request to charge the jury with specific instructions detailing how to analyze circumstantial evidence, the judge charged the jury as follows concerning direct and circumstantial evidence:

Ladies and gentlemen of the jury, there are two types of evidence which are generally presented during a trial: Direct and circumstantial evidence.

Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness. It is evidence which immediately establishes the main fact to be proved.

Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation.

The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence, nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all of evidence in the case.

After weighing all of the evidence, if you are not convinced of the guilt of the Defendant beyond a reasonable doubt, you must find the Defendant not guilty.

R. 3153, l. 10 – 3154, l. 9 (emphasis added).

Discussion

In November of 2012, Clarence Logan filed a brief in the South Carolina Court of Appeals challenging his convictions for robbery and attempted sexual misconduct. The issue on appeal concerned the propriety of the circumstantial evidence jury instruction. A month later, this Court certified Logan’s case for review pursuant to Rule 204(b), SCACR. On April 2, 2013, this Court

heard argument in the case, including Logan's request to argue against precedent concerning the circumstantial evidence charge. State v. Logan, 405 S.C. 83, 747 S.E.2d 444 (2013).

One month later, the state called petitioner to trial on May 6, 2013. R. 8. The evidence against petitioner was entirely circumstantial. His trial lasted over three weeks, concluding on May 28, 2013, when the jury found petitioner guilty of two counts of murder. R. 5-6; R. 3178, ll. 2-13. The judge sentenced petitioner to two life sentences to be served consecutively. R. 5-6; R. 3190, l. 25 – 3191, l. 9.

On August 14, 2013, while petitioner's case was pending on appeal, this Court issued its decision in Logan, supra. This Court explained that although a trial court may instruct a jury concerning circumstantial evidence as defined in Grippon, supra, and Cherry, supra, the trial court "should provide" an instruction guiding the jury on how to analyze circumstantial evidence, in addition to a proper reasonable doubt instruction, "when so requested by a defendant." State v. Logan, 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013). The approved charge provides jurors with much-needed guidance in analyzing circumstantial evidence:

There are two types of evidence which are generally presented during a trial – direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.

Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicious, the proof has failed.

The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rests with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

Id. at 99, 747 S.E.2d at 452.

According to this Court, “[t]rial courts should not be constrained from providing a jury charge encompassing the determinations critical for analyzing circumstantial evidence as it appears in some cases.” Id. “Additionally defendants should not be restricted from requesting a jury charge that reflects the requisite connection of collateral facts necessary for a conviction.” Id. Thus, “at times, a separate framework is necessary to the jury’s analysis of circumstantial evidence.” Id. at 100, 747 S.E.2d at 453. The judge’s denial of petitioner’s request rested *solely* on her reliance upon Cherry, supra, which is precisely what this Court warned against in State v. Logan, 405 S.C. 83, 99, 747 S.E.2d 444, 452 (2013)(explaining “[t]rial courts should not be constrained from providing a jury charge encompassing the determinations critical for analyzing circumstantial evidence as it appears in some cases” and “defendants should not be restricted from requesting a jury charge that reflects the requisite connection of collateral facts necessary for a conviction”). The judge made clear she believed her discretion concerning the charge was limited by this Court’s previous holdings. R. 3183, l. 19 – 3184, l. 5.

The Court of Appeals correctly determined that Logan applied retroactively to petitioner’s case. See App. 2; State v. Parker, 2015-UP-574 (S.C. Ct. App. filed Dec. 30, 2015). Petitioner benefits from the Logan ruling because his case was pending on direct review and the issue was preserved for review. See State v. Jenkins, 408 S.C. 560, 571, 759 S.E.2d 759, 765 (Ct. App. 2014)(holding that Logan applies to cases pending on appeal at the time the Logan opinion was published); see also State v. Belcher, 385 S.C. 597, 612-613, 685 S.E.2d 802, 810 (2009)(citing Griffith v. Kentucky, 479 U.S. 314, 328 (1987)(“hold[ing] that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final), Harris v. State, 543 S.E.2d 716, 717-718 (2001)(reversing a murder conviction and

overruling precedent that had approved inference of intent to kill from use of a deadly weapon and applying the new rule “to all cases in the ‘pipeline’ – i.e., cases which are pending in direct review or not yet final”)).

Nevertheless, the Court of Appeals erred in affirming the trial court’s denial of petitioner’s request to charge the jury with specific and clarifying instructions concerning circumstantial evidence. See App. 2. In affirming petitioner’s convictions, the Court of Appeals relied on two cases: State v. Jenkins, 408 S.C. 560, 759 S.E.2d 759 (Ct. App. 2014) and State v. Drayton, 411 S.C. 533, 769 S.E.2d 254 (Ct. App. 2015). According to the Court of Appeals, the trial court did not err in refusing to give the instruction because petitioner’s “requested jury charge included outdated ‘reasonable hypothesis’ language.” App. 2. Additionally, the Court of Appeals held any error in omitting other language from the Logan instruction was harmless beyond a reasonable doubt because the trial judge’s instructions to the jury, as a whole, properly conveyed the applicable law. App. 2.

Request for Exact Verbiage Unnecessary

In Logan, 405 S.C. at 89-90, 747 S.E.2d at 447, the defendant requested the judge not instruct the jury that the law made no distinction between the weight or value to be given to direct or circumstantial evidence. Thus, the issue on appeal concerned the aspect of the jury charge governing the weight or value to be given to direct and circumstantial evidence. Although this was the issue presented on appeal, as articulated by this Court, “the question [was] not whether circumstantial evidence carries the same probative weight as direct evidence”; “[i]nstead, the pertinent inquiry [was] the proper means for evaluating circumstantial evidence and how the trial court may best instruct a jury as to its analytical responsibility.” Id. at 97, 747 S.E.2d at 451. Thus, this Court used Logan’s appeal, as an “opportunity to revisit [] past discussions regarding the

circumstantial evidence charge, and articulate for the benefit of the bench and bar a circumstantial evidence charge reflecting the proper balance between the State's burden and the jury's responsibility." Id. at 94-95, 747 S.E.2d at 450.

This Court recognized that "[w]hile direct and circumstantial evidence carry the same value, a jury cannot accurately analyze these two types of evidence using identical approaches." Id. at 97, 747 S.E.2d at 451. "[E]valuation of circumstantial evidence requires jurors to find that the proponent of the evidence has connected collateral facts in order to prove the proposition propounded – a process not required when evaluating direct evidence." Id. "Analysis of circumstantial evidence is plainly a more intellectual process." Id. at 97-98, 747 S.E.2d at 451. When examining circumstantial evidence, jurors must first determine whether a particular fact is true, second, if true, does the fact permit an inference of guilt, and third, if the true fact permits an inference of guilt, the jurors must determine if any reasonable explanation other than guilt exists. Id. at 98, 747 S.E.2d at 451. The circumstantial evidence charge crafted by this Court in Logan, and made **mandatory** upon request, is "a construct requiring the State to prove its case beyond a reasonable doubt, while at the same time providing a framework for a 'rational' and 'cumulative' assessment for guiding the jury's consideration of circumstantial evidence." Id. at 98, 747 S.E.2d at 452.

Petitioner's inability to foresee the exact language this Court would use when crafting the Logan charge does not prohibit his ability to benefit from the charge. See State v. Tapp, 398 S.C. 376, 385-386, 728 S.E.2d 468, 473 (2012)(explaining that while issue preservation requires specific objections, the rules do not require that trial counsel be clairvoyant in anticipating the exact verbiage the appellate court utilize upon review). As indicated by the Court of Appeals, petitioner's request to charge included language about the circumstantial evidence pointing conclusively to guilt to the

exclusion of every other reasonable hypothesis, and this Court has not required that language in the Logan charge. However, petitioner's request to charge was based on the language of Edwards, supra, which formed the backdrop for this Court's opinion in Logan. The thrust of petitioner's request was for an instruction on how to analyze circumstantial evidence and to prevent the state from misleading the jury to believe that its analysis of direct and circumstantial evidence were the same.

While this Court cautioned that requiring a jury to inquire as to other reasonable hypotheses other than a defendant's guilt was "perilously close to shifting the burden of proof from the State to the defendant," this Court did not find the language did in fact shift the burden. In Grippon, 327 S.C. at 84, 489 S.E.2d at 464, then-Justice Toal wrote in her concurring opinion that "[t]he language concerning the necessity that the circumstantial evidence 'point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis' does not shift the burden of proof to the defendant." Additionally, a defendant who requested such a charge could not complain about the charge on appeal. See State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996)(explaining a party cannot complain of an error which his own conduct created).

Not Harmless Error

The Court of Appeals concluded that any error in the omission of language from the Logan charge was harmless beyond a reasonable doubt in apparent reliance upon the trial court's instructions as a whole. To the extent a review of the instructions as a whole aids the harmless error analysis, it must be noted the judge's instruction concerning direct and circumstantial evidence appeared very early in the judge's charge and was not surrounded by other instructions concerning the burden of proof or the presumption of innocence. In fact, one of the first instructions the judge delivered to the jurors concerned the lack of distinction between direct and circumstantial evidence.

R. 3153, l. 10 – 3154, l. 5. This instruction was followed by an explanation of the purpose of indictments. R. 3154, ll. 10-20. Only then did the trial judge instruct the jury concerning the presumption of innocence. R. 3154, l. 21 – 3156, l. 1. Thereafter, the judge told the jury about reasonable doubt. R. 3156, l. 2 – 3157, l. 5.

Although petitioner did not object to this portion of the jury instructions, the judge incorrectly charged the jury to examine the evidence to determine petitioner's guilt or innocence. Specifically, the judge instructed the jury that it was the duty of each juror "to consider and weigh all of the evidence in this case and from such evidence to determine, if you can, the question of the guilt or *innocence* of the Defendant." R. 3167, ll. 7-11 (emphasis added).

The judge's erroneous omission of the jury instruction to clarifying how to analyze circumstantial evidence cannot be deemed harmless in light of the judge's placement of the charge concerning direct and circumstantial evidence early in the instructions and not surrounded by charges on reasonable doubt and the presumption of innocence and the judge's later instruction to the jury to consider the question of petitioner's guilt or *innocence*. See State v. Aleksey, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251-252 (2000)(explaining jury instructions on reasonable doubt which charge the jury to "seek the truth" are disfavored because they run the risk of shifting the burden of proof to the defendant); State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867-868 (1998)(same).

When determining whether the erroneous omission of specific and clarifying instructions regarding how the jurors were to analyze circumstantial evidence, review of the instructions as a whole provides only limited utility. As this Court made clear in Logan, *supra*, the clarifying instruction concerning circumstantial evidence should be given *in addition* to the instructions required by the evidence. Thus, in order to find the error harmless, something *more* than otherwise technically correct jury instructions must exist in the case.

In Logan, this Court held any error in the jury instructions was harmless because the instructions as a whole were proper. Logan, 405 S.C. at 94 n.8, 747 S.E.2d at 449 n.8. Primarily, this Court examined the reasonable doubt instruction provided to the jury. Id. However, and perhaps more convincingly, the state presented direct evidence against Logan. Id. at 86-87, 747 S.E.2d at 445-446. In fact, the complaining witness testified that Logan was the man who attempted to sexually assault her in a restroom and stole her driver's license and twenty dollars. Id. Far from a circumstantial evidence case, the state relied principally upon direct evidence – the testimony of the complaining witness – to obtain a guilty verdict.

Similarly, the state relied on direct evidence in its prosecution of Clarence Jenkins. Jenkins, 408 S.C. at 564-566, 759 S.E.2d at 761-762. Jenkins' wife and co-conspirator, Carmen Jenkins, entered into a plea agreement with the State, which required her to testify against Jenkins. Id. at 565, 759 S.E.2d at 761. According to Jenkins' wife, Jenkins hatched a plan to intimidate a former housemate into returning to their home and continuing to live with them. Id. at 565, 759 S.E.2d at 762. The plan started with threatening letters. Id. at 566, 759 S.E.2d at 762. However, according to Jenkins' wife, Jenkins kidnapped a prostitute, forced her to read a threatening script to the former roommate's family members, and eventually killed her, using her body parts to send threatening messages to the former roommate. Id. at 566-567, 759 S.E.2d at 762-763. Jenkins' wife's testimony provided the jury with direct evidence of Jenkins' involvement in the murder. It is unsurprising then that the Court of Appeals would determine that the trial judge's failure to instruct the jury on circumstantial evidence pursuant to Logan was harmless.

Unlike Jenkins and Logan, the state presented no direct evidence against petitioner. Only circumstantial evidence was presented in this case. Further, the solicitor misled the jury in her closing argument concerning the type of evidence presented in the case. The solicitor told the jurors

they heard “direct evidence” from lay witnesses who testified about what they saw or heard. This was simply not the case. While direct evidence may include what witnesses saw or heard, the important distinction between direct and circumstantial evidence is how those pieces of evidence allow the jury to determine whether the state has proven beyond a reasonable doubt one of the elements of the charged offense. This error was compounded by the judge’s refusal to permit petitioner to respond in his closing. When petitioner informed the jurors that circumstantial evidence required connection of “all the dots” and that there must not be another reasonable hypothesis, the state objected, and the judge sustained the objection. Thus, the jury was left with the misrepresentation about direct evidence and circumstantial evidence from the solicitor, which was reinforced by the judge’s instruction, and no clarity from petitioner. Thus, the need for clear, cogent, and concise instructions directing the jury on how to analyze the circumstantial evidence before it was necessary in petitioner’s case.

Without question, a proper evaluation of circumstantial evidence requires connection of collateral facts to reach a conclusion, which is not required for evaluating direct evidence. What the jury required was the proper framework and foundation for analyzing the circumstantial evidence presented by the prosecution in order to render a true and just verdict. In light of the judge’s erroneous omission of the clarifying instruction and the clear harm resulting from the error as evidenced in the charge as a whole, the lack of direct evidence, the solicitor’s misleading argument, and the judge’s refusal to permit petitioner to respond to the solicitor’s argument, this Court should grant certiorari on this issue.

The Court of Appeals Erred in Affirming the Trial Court's Failure to Restrict the State's Main Expert from Offering an Opinion Outside of his Qualifications and Expertise.

How the Issue Arose at Trial

When the police found Capnerhurst's body, "there was a gun in his hand." R. 309, ll. 4 – 5. A police officer "grabbed [Capnerhurst's] left shoulder and yanked three times and cleared the gun." R. 309, ll. 15 – 21. "[M]ore than two" fingers were around the butt of the gun. R. 320, ll. 14 – 25.

The state's theory of the case hinged on convincing the jury that Parker planted the gun in Capnerhurst's hand. To prove this essential fact, the state used—not a neurologist; not an orthopedic surgeon; not a biomechanics expert—but a Caribbean-educated pathologist who could not even name the muscles of the forearm. R. 1573, ll. 3 – 17.

Prior to trial, the defense alerted the trial judge that Dr. Bradley Marcus ("Marcus") was not qualified to give an opinion on whether Capnerhurst could have held on to a gun after suffering a gunshot wound to his forearm. R. 125, l. 19 – 133, l. 3. Citing Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993), the defense argued that Dr. Marcus' opinion could not pass the threshold reliability test without first showing that it was based on science, "studies, and peer-reviewed articles." R. 126, ll. 11 – 19. Petitioner argued that Dr. Marcus was "not an orthopedic surgeon" and was not qualified to render this opinion. R. 122, ll. 10 – 25. The trial judge ruled that she would deal with Dr. Marcus' qualifications during the trial and that the state would not be allowed to attribute this opinion to him during its opening statement. R. 132, ll. 2 – 13.

When the state called Dr. Marcus during the trial, he described forensic pathology as determining the “cause of death” and the “manner of death.” R. 1459, ll. 3 – 21. Further defining “manner of death,” he said there were five categories: natural, suicide, accidental, homicide, and undetermined. R. 1459, l. 19 – 1460, l. 6. The state then offered Dr. Marcus as “an expert in forensic pathology or any of the other specialties for the purposes of this,” and tendered the witness for voir dire. R. 1462, ll. 15 – 22.

Petitioner established during voir dire that Dr. Marcus attended medical school at “the American University of the Caribbean” in Saint Martin. R. 1462, l. 22 – 1463, l. 3. Dr. Marcus chose this medical school because it “was very difficult to get in medical school at that time.” R. 1463, ll. 4 – 13. He spent another year in Ireland before returning to the United States. R. 1463, ll. 12 – 15. Finally, trial counsel asked Dr. Marcus if there was “another cause of death in this case other than gunshots.” R. 1463, ll. 24 – 25. Dr. Marcus answered in the negative and agreed that would be his expected testimony. R. 1464, ll. 1 – 3. Petitioner stated, “based on that, I have no problem with him being qualified.” R. 1464, ll. 4 – 5.

The trial judge clarified with the state that he was being offered as an expert in forensic pathology. R. 1464, ll. 6 – 9. The solicitor agreed, then added, “But for what we need today, forensic pathology is the cause and manner of death.” R. 1464, ll. 10 – 14. At no point during the voir dire or the qualification did the solicitor indicate that Dr. Marcus would give an opinion on whether Capnerhurst could have maintained his grip on the gun after being shot.

Dr. Marcus first testified about Tammy’s autopsy. R. 1469, ll. 11 – 14. The State attempted to introduce graphic autopsy photographs with trajectory rods. R. 1472, l. 1 – 1473, l. 3. The defense objected. R. 1473, ll. 8 – 9. The solicitor responded that “clearly the cause of death and the manner of death in this case is highly disputed by the Defense.” R. 1473, ll. 10 –

13. During argument on the objection, the solicitor continued to emphasize that the “manner of death” was disputed by the defense. R. 1474, l. 2 – 1522, l. 12. Defense counsel responded that Dr. Marcus could “certainly testify they died from gunshot wounds, and we are not contesting that.” R. 1475, ll. 22 – 25. After again emphasizing that there was no dispute that Tammy and Capnerhurst died from gunshot wounds, the solicitor argued that Dr. Marcus could testify “to the cause and manner of death and any reasonable inferences therefrom.” R. 1477, l. 8 – R. 1478, l. 4. The court ruled that the photographs would be marked for identification purposes and the jury returned to the courtroom. R. 1481, ll. 10 – 14.

Dr. Marcus then testified about the autopsy he performed on Capnerhurst. R. 1510, ll. 5 – 25. Capnerhurst’s wounds “looked like shotgun wounds.” R. 1519, ll. 13 – 18. Dr. Marcus explained that the type of ammunition used was like “a slender, long shotgun shell” that contained three copper-plated discs and metal shot. R. 1520, ll. 3 – 24. He found “a total of four gunshot wounds” to Capnerhurst’s body. R. 1523, ll. 18 – 24. One of the wounds was to Capnerhurst’s “posterior left arm area.” R. 1533, ll. 1 – 11. Capnerhurst’s arm “had a hole that looked like discs were coming through, and then the little holes where the BB-type shot went through.” R. 1533, ll. 1 – 5. Capnerhurst’s left ulna was broken. R. 1534, ll. 6 – 19.

After Dr. Marcus explained how he believed Capnerhurst’s body was positioned when he was shot, the solicitor asked, “Based on the multiple gunshots and the areas that were shot and everything, in your expert opinion, would Mr. Capnerhurst have been able to maintain a grip on anything –” and petitioner objected. R. 1538, l. 15 – 1551, l. 22. The trial judge excused the jury. R. 1551, l. 24 – 1552, l. 5.

Petitioner argued that Dr. Marcus was “not qualified to give this opinion” and that he was “not an orthopedic surgeon.” R. 1552, ll. 7 – 10. Dr. Marcus’ opinion was not based “upon any

study or science or anything that has been peer-reviewed.” R. 1552, ll. 11 – 14. Defense counsel cited Rules 702, 703, 704, and 705 of the South Carolina Rules of Evidence. R. 1552, ll. 15 – 19. The solicitor responded that petitioner’s argument was “ridiculous” because a forensic pathologist “is trained in order to determine the cause and manner of death and what did happen and what didn’t happen at crime scenes.” R. 1553, ll. 7 – 11.

The trial judge then required the State to proffer Dr. Marcus’s testimony because she was “not sure if we went that far when we did the voir dire initially qualifying him.” R. 1554, ll. 9 – 14. Judge Benjamin stated she was required “to look at the scientific reliability as to the testimony. Is this something he has done before.” R. 1554, ll. 15 – 20.

Without asking any specifics, the solicitor asked Dr. Marcus if based on his training as a medical doctor he could testify about “how certain wounds could affect a person’s ability to move, to handle things, or to do anything of that sort.” R. 1555, ll. 6 – 11. Dr. Marcus stated his opinion: “I believe that Mr. Capnerhurst, due to the injuries sustained to his left arm, that he was unable to have carried a weapon based on the injuries to his left arm, based on the circumstances of falling backward and downward. That is my opinion.” R. 1555, l. 23 – 1556, l. 3.

The court then allowed defense counsel to question Dr. Marcus. R. 1557, ll. 17 – 22. Dr. Marcus admitted he was not board certified in orthopedics. R. 1557, l. 24 – 1558, l. 4. He admitted that he was not basing his opinion on anything other than Capnerhurst’s broken ulna. R. 1558, ll. 5 – 8. Dr. Marcus had no study that supported his testimony. R. 1558, ll. 9 – 11. Dr. Marcus had never been involved in a case with similar facts. R. 1558, ll. 12 – 15. Defense counsel then argued Dr. Marcus was not basing his opinion on “any type of science.” R. 1558, ll. 16 – 20. Petitioner cited State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) and argued that

Dr. Marcus lacked proper qualifications and that his opinion had no reliable scientific basis. R. 1560, ll. 9 – 12. R. 1562, ll. 1 – 11. R. 1563, ll. 11 – 14.

Accepting the solicitor's argument that an opinion about whether Capnerhurst could hold a gun fit a pathologist's testimony about the "manner of death," the trial judge overruled the objection. R. 1560, l. 17 – 1561, l. 19. The court stated, "If she frames the question in that way regarding the manner of death then I think it's within his expertise to testify to it." R. 1561, ll. 17 – 19. Defense counsel stated that Dr. Marcus was "well qualified" to testify regarding the cause of death, but was not qualified to give further opinions on whether Capnerhurst could maintain his grip on the gun. R. 1561, l. 20 - 1563, l. 20. Judge Benjamin ultimately ruled that Dr. Marcus had already been qualified to testify "to the manner of death, the cause of death, and the circumstances surrounding the death," and that petitioner's objections involved the weight of the evidence, not its admissibility. R. 1562, ll. 13 – 19.

Dr. Marcus then gave his opinion to the jury that Capnerhurst could not have held on to the gun. R. 1565, ll. 5 -15. On cross-examination, Dr. Marcus admitted that his opinion about the gun appeared nowhere in his seven-page report. R. 1569, ll. 4 – 24. When asked what muscles controlled the fingers gripping the gun, Dr. Marcus replied, "I don't know the names of the muscles." R. 1573, ll. 3 – 9. He had never heard of "cataleptic rigidity." R. 1573, ll. 18 – 22. He could not define "dystonia." R. 1583, l. 23 – 1584, l. 21. He could not find anything in the scientific literature about holding a weapon. R. 1579, ll. 16 – 25. He never even spoke to the police officers who saw Capnerhurst holding the gun. R. 1589, ll. 4 – 8.

The Court of Appeals affirmed. App. 2-3. The court cited four cases in its string cite regarding the standard of review. App. 2-3.

Discussion

The Court of Appeals erred in affirming because Dr. Marcus was not qualified to give an opinion on whether Capnerhurst could have held the gun and his opinion was not reliable. “All expert testimony must satisfy the Rule 702 criteria, and that includes the trial court’s gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury’s ultimate consideration.” White at 270, 676 S.E.2d at 686. “Reliability is a central feature of Rule 702 admissibility, and our jurisprudence is in complete accord.” Id.

“[A]n expert’s testimony may not exceed the scope of his expertise.” State v. Commander, 396 S.C. 254, 264, 721 S.E.2d 413, 418 (2011) (holding that forensic pathologists may not testify regarding the state of mind or the guilt of the accused). Having been “improperly imbued with the imprimatur of an expert witness,” this testimony severely prejudiced petitioner on one of the main factual issues in this trial. See State v. Whitner, 399 S.C. 547, 732 S.E.2d 861, 867 (2012). In Commander, the Court noted that “manner of death” with respect to medical examiners is statutorily defined. Commander at 264-65, 721 S.E.2d at 418-19 *citing* S.C. Code Ann. § 17-5-5(9) (defining “manner of death” as “the means of fatal agency that caused a death.”). The definition of “manner of death” does not extend to crime scene reconstruction, but is limited to categorization in one of the five categories defined in the statute and repeated by Dr. Marcus. Id. (listing the five categories as natural, accidental, suicide, homicide, and undetermined).

In a case this Court cited with approval in Commander, the Supreme Judicial Court of Maine reversed a conviction because a medical examiner testified outside of her expertise. State v. Vining, 645 A.2d 20 (Me. 1994). In Vining, the issue at trial was whether the victim fell down a flight of stairs or was pushed by the defendant. Id., 645 A.2d at 20. The medical

examiner “testified that although there was no physical evidence from [the victim’s] body that would allow her to determine whether [the victim] fell or was pushed, she concluded based on her conversations with the police investigators that [the victim’s] death was a homicide.” Id. The court found that the medical examiner’s opinion “was not a product of her expertise.” Id. The court reasoned that the medical examiner’s qualifications allowed her to testify about the injuries to the victim’s skull, but without any physical evidence to support her testimony that the victim was pushed, her testimony did not qualify as “an expert medical opinion.” Id., 645 A.2d at 21. As in Vinings, Dr. Marcus testified outside the scope of his expertise in describing the wounds to Capnerhurst’s forearm and speculated about whether Capnerhurst could hold the gun.

In State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001), this Court reversed and ordered a new trial because a police officer testified outside of the scope of his qualifications. In Ellis, an officer was qualified as an expert in crime scene processing and fingerprint identification. Id. at 177-78, 547 S.E.2d at 491-92. The officer first testified about “measurements taken at the scene, to the recovery of shell casings, and to the identification of blood stains.” Id.

However, the officer “exceeded the scope of his expertise” when he testified as to his conclusions concerning the location of the victim and the position of the body at the time of a shooting. Id. This Court held that the officer was improperly allowed to give his opinion on the ultimate issue in the trial, which was self-defense. Id. Ellis noted that the state was free to argue inferences about the victim’s location, but the officer’s unqualified opinion prejudiced the defendant. Id. “An officer’s improper opinion which goes to the heart of the case is not harmless.” Id.

An expert may only offer an opinion on the ultimate issue at trial if the expert is properly qualified. See State v. Wilkins, 305 S.C. 272, 407 S.E.2d 670 (Ct. App. 1991) (holding that a

properly qualified psychiatrist could testify about state of mind in a battered woman's syndrome case); Ellis at 178, 547 S.E.2d at 491; SCRE 704. In In re Thomas S., 402 S.C. 373, 741 S.E.2d 27 (2013), this Court reversed because a social worker, who was not qualified to give an opinion on whether a sexually violent predator would reoffend, improperly gave such an opinion.

Dr. Marcus was not qualified to give this narrow, highly specialized opinion. Nor did the state provide any evidence that Dr. Marcus' opinion was reliable as required by White. The only qualification Dr. Marcus gave was a vague statement about his medical training. His opinion was "not capable of proof or disproof." State v. Jones, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979). The court erred in accepting Dr. Marcus' opinion based "on faith." Id. To determine scientific reliability, a court must assess four factors from Jones: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." State v. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999).

Dr. Marcus' testimony met none of the Jones factors. Dr. Marcus testified he found nothing in the scientific literature to support his opinion. R. 1579, ll. 16 – 25. He had no study that supported his testimony. R. 1558, ll. 9 – 11. He had never seen a situation with these facts. R. 1558, ll. 12 – 15. He was not board certified in orthopedics. R. 1557, l. 24 – 1558, l. 4. He did not even know the names of the muscles in the forearm that control a person's grip. R. 1573, ll. 3 – 9.

Against this complete lack of any reliability, the state urged the court to allow Dr. Marcus to give his opinion based on vague assertions about his medical training and that petitioner's objections based on the rules of evidence and White were "ridiculous." R. 1555, ll. 6 – 11. R.

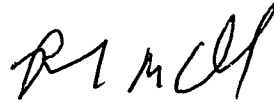
1553, ll. 7 – 11. This conclusory proffer during voir dire and blustering argument do not satisfy Rule 702 or White. The trial court accepted the state’s argument that this testimony fell within Dr. Marcus’ ability to testify about “the manner of death,” but this ignored Dr. Marcus’ own definition of “manner of death” as simply classifying a death as natural, a suicide, accident, homicide, or undetermined. R. 1459, l. 19 – 1460, l. 6. Dr. Marcus’ ability to describe “manner of death” at this broad, general level does not include the ability to give the narrow, extremely specific opinion on whether Capnerhurst could have held a gun after being shot.

The trial court erred in allowing this highly prejudicial, unreliable testimony. The prejudice to petitioner from Dr. Marcus’ speculative opinion cannot be understated. If the jury believed Dr. Marcus, then they could not believe petitioner’s testimony. Referencing Dr. Marcus’ testimony in her closing argument, the solicitor told the jury, “Regardless of what muscles are there. They were all blown away. His arm is broken. At that moment he wouldn’t have been able to grip anything. . . . But [the gun] could be placed there once he is down and once he knows he’s gone.” R. 3127, l. 20 – 3128, l. 11. In order to convict petitioner, it was essential that the jury believe petitioner planted the gun in Capnerhurst’s hand. But for Dr. Marcus’ unsupported, unreliable, unscientific, unqualified, and inadmissible opinion, the State could not have proved its case. This Court should grant certiorari and reverse.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order briefing on the issues presented.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 11th day of May, 2016

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 2015-UP-574 (S.C. Ct. App. Filed December 30, 2015)
2012-GS-10-40032;40033

THE STATE,

RESPONDENT,

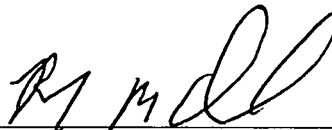
V.

BRETT D. PARKER,

PETITIONER

CERTIFICATE OF SERVICE

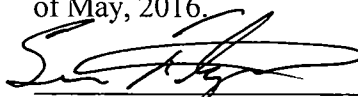
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William Edgar Salter, III, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, Brett D. Parker, #355546, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, and the S.C. Court of Appeals this 11th day of May, 2016.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 11th day
of May, 2016.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.