STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Honorable Clifton Newman, Circuit Court Judge

Opinion No. 2017-UP-070 (S.C. Ct. App. Filed February 8, 2017)

2013-GS-40-01493

THE STATE,

RESPONDENT,

V.

CALVERT MYERS,

PETITIONER

APPELLATE CASE NO. 2017-001032

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 27, 2017.

QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred by holding Investigator Carwell's opinion testimony regarding his interpretation of what was occurring on the videotape was admissible lay witness testimony, since his opinions about everything "being fine," and the decedent and his girlfriend only attempting to enjoy their evening was calculated to clearly convey his opinion that petitioner was the aggressor on the videotape while the decedent acted innocently, since this was highly prejudicial particularly where self-defense and voluntary manslaughter were jury issues?

2.

Whether the Court of Appeals erred by holding it was not an abuse of discretion for the trial court to deny petitioner's mistrial motion especially when the trial court 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

Petitioner 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 petitioner. Megan Walker and John Steadman were the assistant solicitors. R. 1.

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

Petitioner conviction was affirmed by the Court of Appeals in State v. Calvert Myers, 2017-UP-070 (February 8, 2017). App. 1-3. Petitioner sought rehearing. App. 4-12. Rehearing was denied. App. 13-14.

This petition for a writ of certiorari follows.

ARGUMENT

1.

The Court of Appeals erred by holding Investigator Carwell's opinion testimony regarding his interpretation of what was occurring on the videotape was admissible lay witness testimony, since his opinions about everything "being fine," and the decedent and his girlfriend only attempting to enjoy their evening was calculated to clearly convey his opinion that petitioner was the aggressor on the videotape while the decedent acted innocently, since this was highly prejudicial particularly where self-defense and voluntary manslaughter were jury issues

Relevant trial 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 was conscious and one was unconscious." R. 11, ll. 8-17.

As will be seen *infra*, there was evidence that the 6'3 decedent at one point was on top of 5'9 petitioner in the parking lot beating him. One witness estimated petitioner *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 petitioner beating him. It was undisputed that petitioner was badly beaten, and that he remained in the hospital "hooked up to machines."

Deputy Ellis remembered that petitioner 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 arrived at Toney's tavern that night also. He "immediately started to work the crowd back from the two individuals, [petitioner] 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." Someoone 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 petitioner for thirty or forty years. They had "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 petitioner was in the bar that evening arguing with his great niece, Sherry. Toney did not know petitioner's relationship to Sherry at that time. However, he did recall that petitioner 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 petitioner 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 petitioner 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.

Petitioner told Toney that he was "going to let all this go." Toney allowed petitioner 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 petitioner re-entered the bar. Toney got petitioner a drink, and petitioner 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 petitioner "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 petitioner took his jacket off inside the bar, and that the decedent was going outside the bar at that time. Words were exchanged between petitioner 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 petitioner 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 petitioner 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 [petitioner] *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 petitioner 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 petitioner hitting him in the face while this occurred. R. 72, l. 11 – 156, l.24.

Sherry Myers testified that petitioner 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 petitioner. Petitioner was already at the bar when she arrived with the decedent. R. 76, l. 19 – 79, l. 8. While the videotape was played, Sherry testified that the tape showed petitioner 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 petitioner to leave her alone and then Toney, the owner, began talking to petitioner. Sherry claimed she told petitioner 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 petitioner that evening. Sherry told the jurors that they were eventually outside in the parking lot, and she was face to face with petitioner. "I swung and I hit him." Sherry confirmed that the decedent also hit petitioner. 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 claimed that she saw petitioner 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 petitioner 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 admitted that the decedent was about **6'3" and petitioner was only 5'9"**. (emphasis added). She remembered the decedent hit petitioner, and knocked him to the ground. R. 93, ll. 5-21.

As Sherry watched the videotape on cross-examination, she admitted that she pushed petitioner. Sherry claimed she got physical with petitioner because he was calling her names. She admitted that Toney held petitioner 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 petitioner had a history of "sneaking around" and "hitting people from behind." **Sherry again confirmed that the decedent hit petitioner, and knocked him to the ground**. However, Sherry maintained that petitioner 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 petitioner so badly that petitioner was in 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 petitioner in the hospital to interview him. She remembered petitioner was "hooked up to multiple machines" and "he was unable to speak." R. 173, ll. 17-24.

James Myers was petitioner's nephew. He was thirty-years-old and he worked daily with petitioner 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 petitioner "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, petitioner, was at the bar. James knew that petitioner and Sherry did not "get along." James testified at some point petitioner was cursing at Sherry. James helped Toney, the owner take petitioner outside. R. 190, l. 12 – 192, l. 6.

James was ready to go home at this point, but petitioner wanted to stay. He remembered that Toney allowed petitioner to go back inside after talking to him. R. 192, l. 8 – 193, l. 4. James stayed outside, and he eventually saw petitioner 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, petitioner shot at the decedent, and "shot him in the back or something." R. 194, l. 11 – 195, l. 25.

James confirmed that both petitioner 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 petitioner **for about five minutes**. R. 205, ll. 3-5; R. 209, l. 2 – 210, l. 8.

Investigator Carwell – The issue in this case

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 petitioner and the decedent had already been transported to the hospital. Carwell acknowledged that petitioner was seriously hurt, and that petitioner 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."** Carwell opined "everything was calm at this 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."** Defense counsel correctly argued: "[T]this is in evidence. They can look at it. **There's no need narrating an opinion as to what's going on."** 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. Thus, we have the solicitor's admission that she wanted have an agent of the prosecution, Investigator Carwell, to narrate what was occurring on the tape to tell the jury that the decedent and Sherry were only having a good time,

that everything was calm and fine until petitioner "injects himself into their evening," and in the view of the state started the trouble.

After the judge overruled the objection, Carwell then testified that petitioner was watching Sherry. He told the jury that the videotape showed petitioner approaching Sherry and "obviously saying something." Carwell said petitioner re-entered the bar with Toney, the owner, and petitioner was "approaching Sherry. He's obviously saying something." The solicitor asked Carwell when watching the video if that was significant to him in deciding who to charge "with a crime." Carwell told the jury that this was significant because "*I want to find the aggressor.*" R. 255, l. 7 – 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. It was clear that Carwell was narrating the tape to give his opinion that petitioner was the troublemaker. The damage had been done with the trial judge's approval.

When Carwell also testified that the videotape showed Toney instructing someone to call 9-1-1, the judge now 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. Petitioner, 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 also sustained. R. 259, ll. 2-10. When the solicitor continued the line of questioning about the video allegedly showing the decedent hiding and petitioner 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 agreed 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.

Petitioner's statement

Petitioner 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. Then he went to Toney's with his nephew, James Myers. Petitioner told law enforcement at this point his mind "goes blank." Again, it was undisputed that petitioner was badly beaten that night at Toney's bar by the much larger decedent, and he was hospitalized for his serious injuries.

The police also questioned petitioner about having a nine-millimeter gun. Petitioner responded that his wife "bought me a house gun." However, he did not recall how he "got the gun on me." Petitioner 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. Petitioner also did not recall having a gun. Petitioner was asked if it was possible that he shot the decedent. Petitioner 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 clarified: "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 petitioner 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.

Petitioner 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. Petitioner said he did not recall critical times of that evening.[1] R. 412, ll. 1-8.

Court of Appeals

The Court of Appeals (Lockemy, C.J. and Konduros and McDonald, JJ.) found Carwell's testimony was not improper opinion testimony. The Court found Carwell's narration of events with his commentary was "proper lay testimony." App. 2. The Court also found the testimony helpful to "a clear understanding of the witness'[s] testimony or the determination of a fact in issue. . ." The Court additionally found the narration and commentary was "cumulative." App. 2.

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1 Most respectfully to the trial judge, petitioner would be remiss not to convey the strange animus he showed towards this particular petitioner 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.

Rehearing

Petitioner strongly argued on rehearing that the Court of Appeals should reconsider its summary disposition of these issues. Carwell's improper opinions during his "narration" of the videotape were very damaging to petitioner's self-defense case or his chance for a voluntary manslaughter verdict were it was undisputed he was badly beaten in this case. As defense counsel argued, the videotape spoke for itself, and Carwell was invading the province of the jury on critical fact finding matters. Petitioner also sought rehearing on issue two, the mistrial issue. App. 4-11. Rehearing was denied.

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), this 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, this 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.

This 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, and the solicitor even admitted on the record that she thought it "was appropriate" for the Investigator to state to the jury that Petitioner caused the problem that evening

by injecting himself "into their evening." Petitioner began staring at his niece, and he was the instigator of the trouble in 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 as trial counsel argued. 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 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.

Further, Sherry Myers was obviously a biased witness in favor of her dead boyfriend, and she did not like petitioner. To the extent the Investigator's opinion testimony was "cumulative" to her testimony it was improper corroboration by a lay law enforcement officer. As argued more fully infra, law enforcement officials should state facts, not give opinions about why the state chose to pursue certain criminal charges based on that officials view of the evidence. Petitioner respectfully submits this is a significant issue of broad importance in the trial of criminal cases in this state -- despite its summary treatment by the Court of Appeals – and that this Court should grant certiorari. See Rule 242 (b)(1), SCACR.

In Green v. Sparks, 232 S.C. 414, 431, 102 S.E.2d 435, 445 (1958), this 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.

Here, the investigator was not an expert witness. While not necessary to the resolution of this case, 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).

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. As seen, the jury returned to Court at 4:47 asking to hear "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. "A portion of the pathologist's expert testimony was then replayed for the jury. R. 397, l. 23 – 399, l. 11.

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 petitioner to a pulp after being fatally shot.

Petitioner's nephew testified the decedent beat petitioner 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).

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 much larger – 6'3 compared to 5'9 -- decedent almost beat the 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).

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 was improper. The Court of Appeals erred by affirming on this issue, and this Court should most respectfully grant certiorari.

2.

The Court of Appeals erred by holding it was not an abuse of discretion for the trial court to deny petitioner's mistrial motion especially when the trial court later correctly admitted 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.

Relevant facts

As seen above, 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. 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 damage was respectfully done before the trial judge realized that Petitioner's counsel was correctly objecting to the Investigator's improper opinion testimony. It also became belatedly apparent to the trial judge that what was happening on the tape was not at all as clear as were the Investigator's self-serving dogmatic opinions.

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 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.

Discussion

Petitioner understands that mistrial are reserved for highly unusual situations. This case was one of those highly unusual situations given the unfairness of the solicitor's use of Investigator Carwell to narrate the videotape, and give his improper opinions. The investigator 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 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). Nonetheless, he was not an expert and he should have stayed with presenting facts as a law enforcement official, and not giving opinions on charging decisions, who was at fault, and who was "behaving appropriately."

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 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. The Investigator had impermissibly conveyed his opinion that the videotape, as he narrated it, allegedly showed the decedent and Sherry were acting innocently, and

that petitioner was the aggressor that night even where petitioner was gratuitously nearly beaten to death.

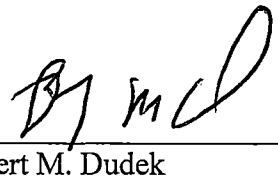
Defense counsel did not make a knee jerk reaction in requesting a mistrial. He only made the mistrial motion when the state continued to insist on eliciting inadmissible opinion testimony from the investigator where the videotape itself – as the judge agreed -- did not support those opinions.

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 petitioner 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). The Court of Appeals erred by affirming on this issue also, and petitioner respectfully submits that certiorari should be granted.

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should be granted to allow full briefing on these issues.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

May 16, 2017

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Honorable Clifton Newman, Circuit Court Judge

Opinion No. 2017-UP-070 (S.C. Ct. App. filed February 8, 2017)
2013-GS-40-01493

THE STATE,

RESPONDENT,

V.

CALVERT MYERS,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Alphonso Simon, 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 16th day of May, 2017.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 16th day of May, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.