

RECEIVED

JUL 27 2017

SC Court of Appeals

**STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

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

THE STATE,

Respondent,

v.

SANDY LYNN WESTMORELAND,

Appellant

Appellate Case No. 2014-002636.

RESPONDENT'S PETITION FOR REHEARING

Respondent seeks rehearing pursuant to Rule 221, SCACR, respectfully submitting that the Court misapprehended points of law and fact concerning the applicability of harmless error to Appellant's murder conviction. While Respondent agrees that the Coroner, who was not qualified as an expert witness, constituted the improper vehicle for the testimony offered in this case, Respondent contends that the Court misapprehended the applicability of the harmless error analysis.

I.

This Court found "Clevenger's lay testimony that Victim's death was a homicide, which he defined as an intentional act, was an opinion on Appellant's state of mind and, thus, his guilt under the circumstances of this case." (Op. at 8). This finding does not take into account the admissibility of the Coroner's testimony had he been qualified as an expert and, thus, the Court

improperly found the admission of non-expert testimony on the issue resulted in reversible error.

Under *State v. Commander*, a qualified expert's testimony "as to cause and manner of death is admissible under Rule 702, SCRE, so long as the expert does not opine on the criminal defendant's state of mind or guilt or testify on matters of law in such a way that the jury is not permitted to reach its own conclusion concerning the criminal defendant's guilt or innocence." 396 S.C. 254, 269, 721 S.E.2d 413, 421 (2011). *Commander* affirmed the application of harmless error to expert opinion testimony determined to violate the above-prescribed rule. *Commander* at 263, 721 S.E.2d at 418. While affirming on the basis of harmless error, *Commander* adopted a rule that the type of evidence offered is admissible specifically as to cause and manner of death if it does not delve into opinion on the defendant's intent.

This Court's finding that the testimony was improper under Rule 701(a), SCRE, when conjoined with the rule prescribed by *Commander*, infers testimony similar to this Coroner's testimony was admissible but-for his status as a lay witness. And, in fact, it was. The Coroner first testified that "homicide is the intentional act of you taking the life of another." (R. p. 144, lines 16-17). Next, he qualified that definition by stating that a homicide is "one human being tak[ing] the life of another human being." (R. p. 144, lines 19-20). He said he cannot determine whether a homicide is intentional "all the time." (R. p. 144, lines 21-23). And then he testified: "Well, I ruled this case a homicide." (R. p. 145, line 1). This testimony comports with the rule established in *Commander*. That is, the Coroner did not comment on the criminality of the Appellant. The Coroner did not identify Appellant, did not discuss the crime scene, did not give any reason for his finding, and did not speak to the causation of the victim's death. The Coroner's testimony did not, therefore, opine on Appellant's state of mind or guilt, or even on a matter of law. The Coroner did not speak to the crimes charges or defenses pled. He did not

address Appellant.

Because the testimony was admissible had it been offered under the right circumstances, it cannot be found to have irreparably invaded the province of the jury such that the harmless error standard cannot apply to the murder conviction obtained. It is still appropriate to weigh the Coroner's testimony in light of the remainder of the evidence presented. Additionally, had the testimony in this case been offered through a qualified expert, it would have been coupled with a special jury instruction, both at the time of the expert qualification and again during the final charge on the law, that a witness is generally not allowed to state an opinion absent expert qualification in a particular field. (*E.g.*, R. pp. 98, 348-49 (referring to witnesses who obtained expert qualification during Appellant's trial)). But because the Coroner was not qualified as an expert, no such instruction was given, and thus no special emphasis was made in conjunction with his testimony to the extent it may be construed it as an opinion.

Under *Commander*, harmless error can apply to a qualified expert's testimony which reaches to the state of mind or criminality of the defendant. Harmless error should similarly apply to the testimony in this case, which was improper lay testimony otherwise in accord with the type of expert testimony allowed by *Commander*.

II.

Respondent additionally submits that the Court overlooked the depth of evidence of intent concerning Appellant's murder conviction such that harmless error should apply. In support of its limited request for rehearing, Respondent respectfully points out the following from the record which it contends the Court overlooked in rejecting the applicability of the harmless error standard:

1. The Court misapprehended the record in this case insofar as it determined that a passerby discovered the victim's body "in the bushes in the hospital parking lot." (Op. at 2). The body was recovered from a large lawn adjacent to the emergency room parking lot. (R. p. 38, line 7 – p. 39, line 2). According to the witness who discovered the victim, the witness was "coming through the field" and saw the victim "off the road, "on the backside of the shrubs. . . ." (R. p. 38, line 22 – p. 39, line 1). Of particular import in examining the overtness of the steering act required to commit the injuries received, the body was discovered behind a hedge row which was offset from the street, and which was removed from the remainder of any area traversed by traffic. (State's Exhibit 55 (on file)).
2. The Opinion overlooked details of the M.A.I.T. investigator's testimony which corroborated the location of the victim's body and indicated the intent inherent in Appellant's act. In this case, the "vehicle had traveled through the shrubbery, about five to ten feet above where the patient was found, and exited through the shrubbery about 30 to 40 feet below the patient." (R. p. 63, lines 3-7; R. p. iv, State's Exhibit 55). The consensus was that Mr. Daniels sustained "a fender vault" where his body hit the vehicle at or near the right fender. (R. p. 126, lines 14-20; R. pp. 384 – 385). The M.A.I.T. investigator "could tell the vehicle continued on through the bushes on back out on the other side of the bushes and back out onto the road" without stopping "at all." (R. p. 123, lines 16-23; R. p. 126, lines 21-23; R. p. 131, lines 8-9; R. p. 384 – 385). In fact, acceleration marks were visibly present in the furrowing in the grass. (R. p. 124, lines 1-8). The angle at which the Ford Explorer turned off the road was calculated as between 22 to 28 degrees. (R. p. 127, lines 10-15). Of note, M.A.I.T.

concluded that the acceleration occurred after the impact. (R. p. 130, lines 6-25). And, there existed no physical evidence that Appellant turned around and pulled back onto the grass after impact as he testified to doing. (R. p. 130, lines 1-5; R. p. 132, lines 1-10; R. p. 237, lines 2-18).

3. The Opinion also overlooked evidence of Appellant's consciousness of guilt. After striking the victim but before arriving at his home, Appellant was pulled over for a missing headlight, telling the officer that he hit a deer so that he could go on his way without incident. (R. p. 58, lines 17-20; Tr. p. 140, lines 5-6; Tr. p. 330, lines 15-25). When questioned by law enforcement, Appellant twice repeated his story about hitting a deer and recorded it in writing. (Tr. p. 197, lines 4-17; R. p. 383). It was not until later that Appellant altered his story, first stating he hit the victim with his car, and later in an audio recorded statement saying he "accidentally" hit the victim and that he went back to check on him. (R. p. 111, lines 1-25; R. p. 114, line 21 – p. 115, line 24).
4. Also relevant to the determination of whether the error was harmless beyond a reasonable doubt is the inapplicability of the defense of accident to the evidence presented. Respondent submits that the Court overlooked the inapplicability of that defense in reversing the murder conviction. The legal defense of accident differs from the definition of "accident" utilized by the Coroner. (R. p. 144, lines 10-12). "For a homicide to be excusable on the ground of accident, it must be shown that the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon." *State v. Wharton*, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009). The jury was instructed regarding this legal definition and its potential

application to the crimes charged. (R. p. 356, lines 2-16). The evidence in this case did not comport with the legal defense of accident because the evidence demonstrated that the defendant was not acting with due care when he “jerked” his car off of the road. By Applicant’s own testimony, he struck the victim after law enforcement forced him to leave the hospital despite having taken Lortab and Valium and Diluadid, and despite having bad eyesight. (R. p. 234, line 15 – p. 236, line 25). Applicant’s own testimony undercuts the jury’s potential to find that the legal defense of accident applied.

For all of the foregoing reasons, Respondent respectfully submits that this Petition for Rehearing should be granted and the finding as to the inapplicability of harmless error to Appellant’s murder conviction be corrected to conclude that the Coroner’s opinion did not speak to Appellant’s criminality, and that harmless error applies to the murder conviction as a result.

Respectfully submitted,

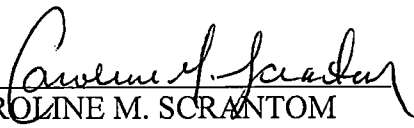
ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

CAROLINE M. SCRANTOM
Assistant Attorney General

BARRY J. BARNETTE
Solicitor, Seventh Judicial Circuit

By: 
CAROLINE M. SCRANTOM
SC Bar No. 101357

Office of Attorney General
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

July 27, 2017
Columbia, South Carolina

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

JUL 27 2017

SC Court of Appeals

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

THE STATE,

Respondent,

v.

SANDY LYNN WESTMORELAND,

Appellant

RECEIVED
JUL 27 2017
SC Court of Appeals

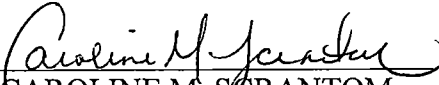
Appellate Case No. 2014-002636.

PROOF OF SERVICE

I, Caroline M. Scrantom, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appeal by depositing a copy of the same in the United States mail, addressed to his attorney of record at:

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

I further certify that all parties required by Rule to be served have been served. This 27th day of July, 2017.


CAROLINE M. SCRANTOM
Assistant Attorney General
SC Bar No. 101357



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

JUL 27 2017

SC Court of Appeals

July 27, 2017

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

Re: The State v. Sandy Lynn Westmoreland
Appellate Case No. 2014-002636

Dear Ms. Kitchings,

Enclosed please find the original and six (6) copies of the *Respondent's Petition for Rehearing*, dated July 27, 2017, along with proof of service, in the above-referenced case.

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

Sincerely,

Caroline M. Scraftom
Assistant Attorney General

CMS/csm
Enclosures

cc: Robert M. Dudek, Chief Appellant Deffender.
The Honorable Barry J. Barnette, Solicitor, 7th Circuit
Trisha Allen, Victim Advocacy