RECEIVED

MAY 23 2018

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

The Honorable Clifton Newman, Circuit Court Judge

Case No. 2018-00753

The State of South Carolina. . . . . Petitioner,

v.

Robert Jared Prather . . . . . Respondent.

RETURN TO PETITION

Elizabeth Franklin-Best
Blume Franklin-Best & Young, LLC
900 Elmwood Avenue, Suite 200
Columbia, SC 29201
(803)76+5-1044
betsy@blumelaw.com

Attorney for Respondent

Other Counsel:
Susannah R. Cole
SC Attorney General's Office
PO Box 11549
Columbia, SC 29211
(803)734-0265

Respondent's Question Presented

Should this Court deny the State's Petition for Writ of Certiorari?

Argument

This Court should deny the State's Petition for Writ of Certiorari because the Court of Appeals' published opinion, *State v. Robert Jared Prather*, 422 S.C. 96, 810 S.E.2d 419 (2017), correctly applies the applicable state law to this highly unusual set of facts. The State incorrectly argues in its Petition for Writ of Certiorari that the Court of Appeals applied the wrong standard of review, and ignored the "concession" that the reply testimony conflicts with Respondent's trial testimony. Additional review of this case is neither necessary nor warranted.

Petitioner argues in its petition that the "Court of Appeals did not review the record for abuse of discretion as precedent requires. Rather the Court of Appeals' majority concluded it was "not convinced by the dissent's citation to Respondent Prather's testimony that one person committed the crime, "regardless of what the jury may have inferred from it." Petitioner's Brief, p. 3. Respectfully, this claim is inaccurate. The Court of Appeals' opinion specifically articulates the correct, applicable law:

> The admission of reply testimony is within the sound discretion of the trial court. *State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986). "Reply testimony should be limited to rebuttal of matters raised by the defense, rather than to complete the plaintiff's case-in-chief." *State v. Huckabee*, 388 S.C. 232, 242, 694 S.E.2d 781, 786 (Ct. App. 2010). Testimony that is "arguably contradictory and in reply to" that offered by the defense is admissible. *Todd*, 290 S.C. at 214, 349 S.E.2d at 340. However, reply testimony should be limited to that which refutes or rebuts testimony presented by the defendant. *See State v. Durden*, 264 S.C. 86, 90, 212 S.E.2d 587, 589 (1975) (finding reply testimony proper noting "[t]he reply testimony did not go beyond a refutation of that which the [defendant]'s witness had asserted"); *State v. Garris*, 394 S.C. 336, 351, 714 S.E.2d 888, 896 (Ct. App. 2011) (affirming admissibility of reply testimony that rebutted the defendant's claim

> he did not own a pistol or fire one on the day in question); *Palmetto All., Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 438, 319 S.E.2d 695, 700 (1984) (finding admission of rebuttal testimony appropriate when "[t]he Commission properly limited the rebuttal evidence strictly to a reply to [the appellant's] evidence, and the Commission's Order demonstrates clearly that [the respondents'] rebuttal evidence was related only to the specific issues raised by [the appellant's witness].

Id. at 104-05.

The Court of Appeals then found the reply testimony offered in this case was not proper because "the rebuttal should have been limited to refuting Prather's testimony, rather than to complete the State's case-in-chief." Id. at 106. As the court noted, "Prather did not testify to the number of perpetrators or to anyone's motives for carving rapist, for the placement of the dildo, or for covering Victim with a blanket at the scene." He did not testify to any of the conduct surrounding these events. He did not testify they happened in a specific manner or for a specific reason, but simply denied doing them or being present when they occurred. Id. at 107. Respondent denied carving rapist in the decedent's back and covering the decedent with a blanket. He claimed that he merely saw a dildo on the bed by his co-defendant's feet. In response to this, LaRosa interjected a whole new forensic field of behavioral science, and testified to the existence of "two distinct offenders" and purported to divine "two specific personalities" in the crime scene as the result of his reviewing an incomplete file of the case. As the opinion notes, "LaRosa testified in detail about staging and undoing, why someone would carve rapist in a victim's back, and about the level of anger associated with superficial cutting. LaRosa opined the offenders used the dildo "for shock value to show what type of rapist [Victim] is" and the blancket to "sympbolically eras[e] what had occurred at the scene." *Id.* All of this was wildly beyond proper reply to Respondent's denial that he was guilty of the crime.

The Court of Appeals' opinion is a straight forward application of well-established South Carolina law on the issue of admissibility of reply evidence. Petitioner's claim that the court of appeals has placed "new and unfair restrictions on reply testimony" is without factual basis.

Further, Petitioner appears to argue that, since Respondent offered a defense in his case, that the State should then have right, carte blanche, to offer anything in reply that it wants to. *See* Petitioner's Brief, p. 12, "Prather conceded in his brief before the Court of Appeals that LaRosa's reply testimony contradicted Prather's trial testimony . . . This concession should have ended the inquiry whether the testimony was proper reply." This is not an accurate interpretation of the applicable law. According to our well established law in South Carolina, reply testimony is limited. The State is not empowered to complete its case-in-chief in reply just because a defendant exercises his constitutional right to testify on his own behalf.

Both Petitioner and Judge Williams, in his dissent, appear to fail to acknowledge the extraordinary quality of Paul LaRosa's testimony that further removes it from the ambit of proper reply testimony. LaRosa was no mere fact-witness offering say, some testimony that might undercut an alibi defense. Instead, his testimony imported an entirely new forensic discipline into this case, and on reply.[1] But regardless of his status as an expert or percipient witness, his

---

[1] The Court of Appeals has found Paul LaRosa's testimony to be improper in another case, *State v. Huckabee*, 419 S.C. 414, 798 S.E.2d 584 (2017). There, the court found his criminal profiling testimony to have been improperly admitted during the state's case-in-chief under a Rule 403, SCRE analysis. As in this case, LaRosa's testimony was not "expressly offered to identify Appellant as the perpetrator" . . . his testimony "could lead a reasonable juror to no other inference than" that the Appellant in *Huckabee* committee the crime. *Id.* at 427. At the very least, Huckabee illustrates that this is not garden-variety witness testimony as this Court noted in *State v. Tapp*, 398 S.C. 376, 728 S.E.2d 468 (2012). In *Tapp*, this Court reiterated that expert witness evidence of this nature must be vetted for its reliability prior to its admission at trial. *See State v. White,* 382 S.C. 265, 676 S.E.2d 684 (2009). In Respondent's case, trial counsel had absolutely no forewarning that the State intended to introduce evidence of this nature until they called LaRosa to testify on reply.

testimony clearly exceeded the bounds of proper reply testimony when he interjected his opinions regarding "staging, directed anger and recovery," R.p. 754, during the State's reply case, and when those were matters not introduced by Respondent when he testified.

Judge Williams's dissent also found the reply testimony proper because, he states, Respondent "inferred that only one person participated in these acts." *Id.* at 111. With all due respect, a fair reading of Respondent's testimony is that he denied being guilty of the crime. All he knew is that his co-defendant was still in the house. Again, under our well-established state law, reply evidence is to be limited to address those issues raised by the defense. The mere assertion of one's innocence does not swing open the door to any and all possible evidence that the State wishes to introduce. Additionally, LaRosa's testimony was highly prejudicial to Respondent. LaRosa's testimony was that "two distinct personalities" were involved in this criminal act. Clearly the implication was that it was Respondent and his co-defendant.

Also, Judge Williams's statement that, even if improper, the reply testimony was harmless is belied by fact that Respondent's first trial resulted in a hung jury. As Respondent argued to the Court of Appeals, the State introduced two new elements into its second trial against Respondent: 1) LaRosa's testimony, and 2) the introduction of Respondent's co-defendant's statement in which he misspelled "rapist" to "prove" that Respondent must have been the "carver" since the carving on the decedent was correctly spelled. Other than those two facts, the trials were alike in all material respects. The introduction of LaRosa's testimony was not harmless.

The Court of Appeals opinion is a correct application of well-established applicable state law, and respectfully this Court should deny Petitioner's petition for writ of certiorari.

SCACR, Rule 220(c) Sustaining Grounds

Respectfully, Respondent asks this Court to affirm the decision on the basis of these additional sustaining grounds:

1) The trial court abused its discretion, and violated Respondent's rights to due process, by allowing the State to present a "crime scene analyst" when his testimony was not scientifically valid, and invaded the province of the jury;

2) The trial court abused its discretion by allowing Paul LaRosa's testimony when it was not produced in discovery pursuant to the South Carolina Rules of Criminal Procedure, Rule 5, or *Brady v. Maryland*, 373 U.S. 83 (1963).

3) The State committed prosecutorial misconduct and violated Respondent's right to due process when it "sandbagged" the defense with LaRosa's rebuttal testimony.

4) The trial court abused its discretion by allowing the State to introduce Respondent's co-defendant's inadmissible hearsay because a) it was inadmissible under the South Carolina Rules of Evidence, b) it was unreliable, c) it was irrelevant, and d) its admission violated Respondent's right to confront the witnesses against him in violation of the Eighth Amendment to the Federal Constitution and South Carolina law.

5) The trial court erred, and Respondent was denied his right to due process, when it denied Respondent's motion for a directed verdict because the evidence did not rise above a "mere suspicion" that Respondent caused the decedent's death.

6) The State's actions in pursuing factually inconsistent theories in Respondent's and his co-defendant's cases denied Respondent his right to due process.

7) The trial court abused its discretion, and Respondent was denied due process of law when it did not allow Respondent to introduce a statement made by Ralph Jody Webb Becknell, an unavailable witness, when the statement was admissible as a present sense impression or an excited utterance, and the statement would have corroborated Respondent's defense that he was not responsible for the decedent's death.

8) The trial court erred and violated Respondent's Fourth Amendment rights and South Carolina law when it did not suppress the Coca-Cola glasses and knife pursuant to a fatally defective warrant.

Conclusion

The Court of Appeals decision correctly states the well-established law in South Carolina regarding the admissibility of reply evidence. It correctly applies that law to the highly unique facts of this case. The Court of Appeals opinion does not break any new ground, and this area of law is not in need of any clarification. Respectfully, this Court should deny Petitioner's petition for writ of certiorari.

Respectfully submitted,

Elizabeth Franklin-Best
Blume Franklin-Best & Young, LLC
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
(803) 765-1044
betsy@blumelaw.com

May 21, 2018

RECEIVED
MAY 23 2018
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

The Honorable Clifton Newman, Circuit Court Judge

Case No. 2018-00753

The State of South Carolina. . . . . Petitioner,

v.

Robert Jared Prather . . . . . Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Respondent's Return to Petition was served by first class United States mail, postage prepaid, this 21st day of May, 2018, upon the following:

Susannah R. Cole
SC Attorney General's Office
PO Box 11549
Columbia, SC 29211

Jill B. Abernethy