STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County
Honorable W. Jeffrey Young, Circuit Court Judge
Appellate Case No. 2015-001679

The State, Respondent,

vs.

Jeffrey Dana Andrews, Appellant.

PETITION FOR REHEARING

On July 18, 2018, this Court reversed the conviction of Appellant by finding the trial judge abused his discretion in allowing the testimony of Kimberly Graham, an expert in emergency medical services, regarding the location of Shamar Howell's (Victim) body at the time of the shooting. This Court determined that error was not harmless. This Court misapprehended or overlooked relevant facts in the record and case law regarding the scope of expert witness testimony and what constitutes harmless error. Accordingly, pursuant to Rule 221(a), SCACR, this Court should grant the petition for rehearing and find Graham properly testified within the scope of her expertise, and even if her testimony exceeded the scope of her expertise, the error was entirely harmless under the facts of this case. This Court should affirm Appellant's convictions and sentences.

Expert Testimony

This Court found the trial judge abused his discretion by allowing Graham to testify regarding Victim's location at the time of the shooting. Specifically, although this Court

acknowledges Graham previously testified without objection that Victim would have dropped whenever he was shot, the Court found it was improper for Graham to testify that Victim was standing on the porch when he was shot. This testimony did not exceed Graham's scope of expertise. In fact, Graham's statement was a logical conclusion drawn from her previous testimony which was not objected to by Appellant.

Pursuant to the South Carolina Rules of Evidence, expert testimony is admissible under the following circumstances:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE. "Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge." Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010).

Here, Graham's testimony did not fall outside the realm of ordinary lay knowledge. Graham properly testified within the scope of her expertise about the injuries suffered by Victim and the effects a gunshot wound to the brain would have on a person's body. Graham properly testified that a gunshot which fracture's the skull would cause a person to fall immediately. (R. 254). This testimony was not objected to by Appellant (R. 254). Neither Appellant nor the State made a claim that Victim's body had ever been moved. Therefore, both sides agreed that Victim was outside the house when he was shot. The opinion of Graham that this Court takes issue with, that Victim was on the porch when he was shot, is a common sense conclusion that does not fall outside the realm of ordinary lay knowledge. A juror does not need the opinion of an expert to

understand that if an individual is shot in the head, that person would fall in the same place they were standing when they were shot. This is especially true when both sides agree the body was never moved. This is a common sense conclusion which does not fall outside the realm of ordinary lay knowledge.

Harmless Error

Additionally, this Court's precedent supports a determination that the admission of the allegedly improper evidence is harmless. Further, this Court overlooked vast portions of the record in which cumulative testimony was admitted without any objection by Appellant and in which the same evidence was even offered by Appellant. In addition to being concerned with Graham exceeding the scope of her expertise, this Court is also concerned that Graham's testimony somehow undermined Appellant's claim of self-defense. Specifically, this Court found that "by admitting into evidence Graham's challenged testimony that Victim was on the porch when he was shot, the circuit court allowed Graham to give her opinion on the ultimate issue: Whether [Appellant] acted in self-defense when he shot and killed Victim." (State v. Andrews, Opinion No. 5574 (S.C. Ct. App. filed July 18, 2018) (Shearhouse Adv. Sh. No. 29 at 36-37). It is difficult to substantiate how Graham's testimony was related to the ultimate issue in this case or detracted from Appellant's self-defense claim. Appellant himself never claimed that Victim was inside his house, but rather that Victim was on the threshold and fell backwards after being shot. (R. 479, 482-83). Appellant maintained a theme and a theory of the case from opening statement through closing argument that Victim was attempting to enter his house and was shot while doing so. Appellant never maintained Victim's body was moved from inside Appellant's house to the porch. Therefore, Graham's testimony is consistent with Appellant's theory of the case and any error in its admission is harmless.

An appellate court generally will decline to set aside a conviction due to insubstantial errors not affecting the result. State v. Black, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012). "The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence." State v. Kirton, 381 S.C. 7, 37, 671 S.E.2d 107, 122 (Ct. App. 2008). In ruling on the admissibility of evidence, the trial judge has considerable latitude and his ruling will not be disturbed absent a showing of probable prejudice. State v. Kelly, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995). An "error without prejudice does not warrant reversal." State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). "Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed." State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003). "Error is harmless when it could not reasonably have affected the result of the trial." Mitchell, 286 S.C. at 573, 336 S.E.2d at 151 (quoting State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971)).

Graham's testimony was cumulative to other testimony in the record overlooked by this Court, and the same testimony was not only elicited by Appellant but used by Appellant in both his opening statement and closing argument to prove his theory of the case. Appellant never maintained that Victim was shot inside the house or that Victim's body had ever been moved. Rather, Appellant argued from his opening statement through closing argument that Victim was in the process of entering Appellant's home and Victim was shot while doing so. In opening statement Appellant said:

> Ms. Cooke: As [Victim] ***was entering the house*** after the snatching the door and breaking the latch, [Appellant] grabbed, what he did see on the dresser was a gun.

> [sic] And [Appellant] grabbed the gun, and he aimed it. And he fired it. And he shot [Victim] in the head to protect his life and his dad's life. This is a self-defense case. (emphasis added)

(R. 221, lines 14-20). Appellant continued to emphasize his theme of self-defense and his theory of shooting Victim while Victim was entering his house throughout trial. During trial, seven different witnesses, including Appellant, testified either that Victim's body was laying outside or that Victim would have fallen wherever he was shot. Appellant either did not object to testimony regarding where Victim's body was located or Appellant himself testified about the positioning of the body. Because this Court is concerned that Graham's testimony somehow undermined Appellant's claim of self-defense, it is instructive to review each witness who testified regarding the positioning of Victim's body.

Appellant

Perhaps most significantly, Appellant himself testified that Victim was not inside his house when he was shot. The following exchange took place on Appellant's direct examination:

> Ms. Cooke: And one last question. Can you come down to the display and show the jury where [Victim] was when you shot him? And explain to them where he was standing when you shot him?
>
> Appellant: This is my front porch. This is the screen door. When you enter the house, the screen door opens this way. It is big door (sic) right here, a wooden door. It goes this way when you open it. You walk straight. The TV here (sic). My dad's room is here. I grabbed the gun, brandished the weapon; shot [Victim] right there.
>
> Ms. Cooke: You need to show where he was standing.
>
> Appellant: Right there coming into the house.
>
> Ms. Cooke: Is that inside or outside?
>
> Appellant: In the threshold.

(R. 482-83, lines 22-13). Appellant also claimed that after he shot Victim, one of Victim's feet was holding the door open. (R. 479). Thus, even Appellant never claimed Victim was inside the house when he was shot. Graham's opinion of Victim being on the porch and not in the house is entirely consistent with Appellant's self-defense claim.

Kimberly Graham

Kimberly Graham was called as a witness by both the State and Appellant. (R. 247, 431). When Graham testified for the State, she said she arrived at the scene and observed "a black male who was laying on his back on the porch." (R. 251, lines 17-18). Graham proceeded to give an opinion that "whenever [Victim] was shot, he dropped." (R. 254, line 23). This answer was not objected to by Appellant. (R. 254). Graham also opined, without objection by Appellant, that the back of Victim's head was "mushy" either because of Victim's head hitting the concrete on the porch or because of the bullet wound. (R. 255). When Appellant called Graham in his case in chief, Appellant questioned Graham about the position of Victim's body on the porch. The following exchange took place between Appellant and Graham:

> Ms. Cooke: And can you tell us which direction [Victim's] body and his feet where in?
>
> Graham: This was his head. ***His body and his feet were pointed towards the door.*** (emphasis added)

(R. 489, lines 14-17). Thus, ***Appellant*** called Graham as his own witness to establish the positioning of Victim's body ***on the porch***. Graham's testimony further enforced Appellant's theory that Victim was entering the house when he was shot and then he fell backwards and landed with his feet facing the door.

Dr. Ross

Like Graham, Dr. Ross testified Victim would have fallen wherever he was shot. (R. 318). Dr. Ross explained the bullet in Victim's brain would have caused him to lose consciousness immediately and lose control of his body. (R. 318). While Ross admitted she couldn't determine the exact locations of Appellant and Victim, she testified that Appellant's theory of the case was plausible:

> Ms. Cooke: And just one more question. As a hypothetical question since you've been qualified as an expert, if [Victim] was entering the house and saw [Appellant] with a gun, and began to back up because of seeing that gun, and simultaneously turn away from [Appellant] as [Appellant] shot [Victim], that would be consistent with [Victim] falling backwards ***on the porch*** from the initial inertia of his beginning to back up, correct? (emphasis added)
>
> Dr. Ross: If he had significant inertia, in other words, you were going in one direction, you might fall that way, yes.

(R. 324-25, lines 19-5). Four additional witnesses testified to their observation of Victim laying on the porch or their belief that the position of Victim's body was consistent with Appellant's theory of the case. Jerry Kelly of the Sumter County Sheriff's Office, the first law enforcement official to arrive at the scene, testified that Victim's body was laying on the porch when he arrived. (R. 226, 228). Appellant did not object to Kelly's testimony. (R. 226, 228). Erika Andrews, one of the few eyewitnesses to the shooting, testified that Victim was on the porch when he was shot, but she was inside the house when the actual shooting occured. (R. 283-85). Appellant did not object to Andrew's testimony. Appellant called his father, Robert Andrews, as a witness in his case in chief. Like Appellant, Robert Andrews testified that Victim was "standing in the front doorway" when he was shot. (R. 451, line 17). Appellant also called Investigator John Davis to testify regarding his attempts to measure how far Victim's head was from the door of Appellant's house. In conjunction with Graham's testimony, Davis testified

Victim's head was approximately six feet four inches from the Appellant's door. (R. 433-34). This roughly corresponded with Appellant's height. (R. 315).

Appellant summarized his theme of an attempted entering by Victim in his closing argument and used Graham's testimony to establish his theory of the case. Appellant made the following argument in closing:

> Ms. Cooke: The pathologist with 38 years of experience and 3,000 autopsies in a controlled environment with a specific reason of forensics, and law enforcement purposes, and with the intention of testifying, said that she with a medical degree and all that experience in doing this for 38 years for law enforcement and too (sic) testifying in the courtroom, couldn't say with any degree of scientific certainty exactly how and where [Victim] fell. But what she did agree to was when I posed the hypothetical to her of how [Appellant] said this happened, and she agreed and said yes, it could have happened that way. That's consistent.
>
> ....
>
> And just as I posed to the pathologist, when [Appellant] as [Appellant] sees the gun raised, if [Victim] in the very slightest leans backwards, [Victim] falls backwards when he is shot in the head; is what the pathologist said, because of the initial inertia of him leaning backwards, and he falls backwards. [Victim] didn't crumble into a ball and fall exactly where he was shot. He wasn't in a ball. He was laid out. You fall backwards. He was laid out. His feet were pointing towards the door. And his arms were back like this. There was testimony of it. [Victim] ***fell backwards when he was shot.***
>
> ....
>
> [Robert Andrews] said that [Victim] was shot in the doorway between the screen door and the wooden door. [Robert Andrews] said those words, in the doorway between the screen door and the wooden door. ***Not inside the doorway, in the threshold.***
>
> ....
>
> Erika said at point (sic) that [Victim] was leaving and [Appellant] walked out and shot him. Well then why isn't he shot in the back or on the steps or in the yard? That's just one of her inconsistent stories. Which one is it? Was [Victim] shot face to face on the porch? Was [Victim] shot as [Appellant] was following him out the door? None of that is consistent with [Appellant's] account. What is consistent with [Appellant's] account is the pathologist's hypothetical, ***EMS's***

> ***testimony about the position of the body***, the GSR expert, and John Davis' measurements. (emphasis added)

(R. 543, lines 3-15, R. 547, lines 2-14, R 548, lines 10-14, R. 552, lines 1-11). Appellant's closing argument and his own testimony clearly demonstrate his theory of the case: Victim was asked to leave, Victim walked outside and attempted to re-enter the house, and as Victim was entering the house Appellant shot him in self-defense and Victim fell backwards onto the porch. Graham's testimony in no way contradicts Appellant's clearly articulated theory of the case or his self-defense claim. In fact, as Appellant argued in closing, Graham's testimony was actually consistent with his theory of the case. Not only is Graham's testimony cumulative to other witnesses, but it did not prejudice Appellant in any way. In fact, Graham's testimony benefitted Appellant. Therefore, if Graham's testimony was admitted in error, its admission could only be harmless error.

CONCLUSION

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, find that Graham did not exceed the scope of her expertise when she testified about the location of Victim's body at the time of the shooting, or in the alternative find that Graham's testimony was cumulative to other testimony and any error was harmless. This Court should affirm Appellant's convictions and sentences.

Respectfully submitted,

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July 23, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Sumter County
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PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Petition for Rehearing by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
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I further certify that all parties required by Rule to be served have been served.
This 23rd day of July, 2018.

Sally Ellison

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ALAN WILSON
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July 23, 2018

VIA HAND DELIVERY
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: State v. Jeffrey Dana Andrews,
Appellate Case No. 2015-001679

Dear Ms. Kitchings:

Please find enclosed for filing the original and six (6) copies of the Petition for Rehearing, with proof of service, in the above-referenced case.

Sincerely,

Scott Matthews
Assistant Attorney General
S.C. Bar No. 101464

Enclosures
cc: Robert M. Dudek, Esquire (2 copies enclosed)
Victim's Services (enclosure)