

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Sumter County
Honorable W. Jeffrey Young, Circuit Court Judge
Appellate Case No. 2015-001679

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S.C. SUPREME COURT

THE STATE,

Petitioner,

vs.

JEFFREY DANA ANDREWS,

Respondent.

Opinion No. 5574 (S.C. Ct. App. filed July 18, 2018)

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Counsel for Petitioner hereby certifies that a Petition for Rehearing was filed in the South Carolina Court of Appeals on July 23, 2018. The Petition for Rehearing was denied by Order filed September 20, 2018.

STATEMENT OF ISSUES ON CERTIORARI

I.

Whether the Court of Appeals erred in holding that EMT Kimberly Graham exceeded the scope of her expertise by testifying as to where Victim was standing when he was shot by Andrews when her testimony was not offered as expert testimony and instead was admissible as lay witness opinion testimony where it did not fall outside the realm of ordinary lay knowledge and where even if Graham's testimony did exceed the scope of her expertise, her testimony was cumulative to testimony that Andrew's presented in his own defense and to testimony offered by Dr. Janice Ross that Andrews did not object to thereby making any potential error harmless beyond a reasonable doubt?

STATEMENT OF THE CASE

Procedural History

In August 2014, the Sumter County Grand Jury indicted Respondent, Jeffrey Dana Andrews (Andrews) for one count of murder and one count of possession of a weapon during the commission of a violent crime. On July 20-24, 2015, a jury trial was held in the Sumter County Court of General Sessions with the Honorable W. Jeffrey Young, presiding. Andrews was represented by Elaine Cooke, Esq. Petitioner (the State) was represented by Assistant Solicitors John Meadors and Scott Matthews of the Third Circuit Solicitor's Office. Prior to trial, Andrews moved for immunity from prosecution under the Protection of Persons and Property Act. S.C. Code Ann. § 16-11-440. After a hearing on Andrew's motion, the trial judge denied Andrew's request for immunity under the act and a jury was selected. At the conclusion of trial, the jury acquitted Andrews of murder but convicted him of voluntary manslaughter and possession of a weapon during the commission of a violent crime. Following the verdict, the trial judge sentenced Andrews to thirty years' imprisonment for voluntary manslaughter and five years' imprisonment for possession of a weapon during the commission of a violent crime. Both sentences were to run concurrently with each other for an aggregate total of thirty years' imprisonment.

On appeal, Andrews alleged the trial judge committed three errors at trial. Andrews alleged: (1) the trial judge erred by not granting him immunity under the Protection of Persons and Property Act, (2) the trial judge erred by refusing to tender Investigator Terry Gainey as an expert in the field of Force Science; and (3) the trial judge erred in allowing EMT Kimberly Graham to testify regarding where Shamar Howell (Victim) was standing when Andrews shot him. (App. 642-43). The Court of Appeals issued a published opinion affirming the first two

issues raised by Andrews. However, the Court of Appeals reversed Andrews' convictions on the third issue regarding Graham's testimony. State v. Andrews, Op. No. 5574 (S.C. Ct. App. filed July 18, 2018) (App. 695). Thereafter, the State filed a petition for rehearing with the Court of Appeals regarding the third issue on July 23, 2018. (App. 708). Andrews filed a petition for rehearing regarding the trial judge's ruling on the immunity issue on August 2, 2018. (App. 718). The Court of Appeals requested that Andrews and the State each file a return to opposing counsel's petition for rehearing on August 7, 2018. The State and Andrews both filed their respective returns. (App. 724, 730). Both petitions for rehearing were denied on September 20, 2018. (App. 733). This Petition for a Writ of Certiorari in regard to issue number three now follows on behalf of the State.

Factual Background

On March 25, 2014, Corporal Jerry Kelly of the Sumter County Sheriff's Office responded to a shooting at a residence in Sumter County (App. 234-35). Upon arrival, Kelly witnessed Victim lying on Andrews' front porch with a gunshot wound to the front of his head. (App. 234-35, 237). Erika Andrews (Erika), Victim's girlfriend, was sitting next to Victim and began yelling "Jeffrey shot my boyfriend." (App. 235, line 12). Kelly then entered the house and made contact with Andrews, who stated "I'm the guy you're looking for." (App. 236, lines 15-16). Kelly placed Andrews under arrest and read him his Miranda rights. After being read his rights, Andrews told Kelly that Victim took a bottle of liquor from his back porch. (App. 242). When asked if he shot Victim over a bottle of liquor, Andrews explained that he asked Victim to leave and Victim did not comply with his request. (App. 243).

Prior to trial, Andrews sought immunity from prosecution under the Protection of Persons and Property Act. S.C. Code Ann. § 16-11-440 Andrews called eight witnesses on his behalf

during the immunity hearing, including Kimberly Graham. At the conclusion of the hearing, the trial judge ruled Andrews had not met his burden of proof to receive immunity under the Act. (App. 213). At trial, Andrews presented a self-defense theory to the jury. (App. 231). Andrews admitted that he shot Victim, but claimed he had done so to protect himself when Victim forcibly entered his home. (App. 485). Erika contradicted Andrews' version of events and claimed that Victim was in the process of leaving Andrews' home when Andrews shot Victim. (App. 290-94). Erika testified that prior to Victim leaving Andrews' residence, Andrews had angrily confronted her and Victim on two different occasions that day about stealing his bottle of liquor from the back porch. (App. 279, 289). Erika also stated that Andrews invited Victim to his home that day. (App. 285).

Dr. Janice Ross was called as a witness by Andrews during the immunity hearing and by the State at trial. (App. 40, 319). Ross was tendered as an expert in forensic pathology. (App. 321). At the immunity hearing, Ross, while responding to a hypothetical question posed by Andrews, testified that it was possible Victim could have fallen backwards after he was shot, if Victim had started to turn away from Andrews' house after seeing Andrews' pointing a gun at him. (App. 44). On direct examination at trial, Ross testified about Victim's cause of death and the immediate effect getting shot in the head would have had on Victim's body. (App. 326-27). Specifically, Ross said Victim would have collapsed immediately after being shot. (App. 327). On cross examination, Andrews asked Ross the same hypothetical question that he asked in the immunity hearing about the position of Victim's body on the porch and whether Victim would have fallen backwards after being shot. (App. 333-34). Ross gave a similar response. (App. 334).

Kimberly Graham was called as a witness by both Andrews and the State. Graham was called by Andrews at the immunity hearing and during Andrews' defense at trial. (App. 145,

440). The State also called Graham in its case in chief at trial. (App. 256). At the immunity hearing, Graham identified where Victim's body was lying when she arrived on the scene using a demonstrative exhibit of the porch. (App. 146). Graham testified to the same information at trial when she testified as a witness for Andrews. (App. 441). In the State's case in chief, Graham was tendered as an expert in emergency medical services. Andrews did not object to Graham's expertise. (App. 258). Graham testified, in a similar manner to Dr. Ross, that the bullet wound to Victim's head would cause him to drop wherever he was shot. (R. 263). Andrews did not object to Graham's testimony on this subject. Indeed, Andrews did not object during Graham's direct examination until Graham opined that Victim was standing on the porch when he was shot. (R. 264). The following exchange is the relevant portion of Graham's testimony at trial:

Mr. Meadors: And excuse me if I'm being ridiculous, but I mean could [Victim] have talked?

Graham: No, sir. When he was shot, the amount of force that it takes to go through and fracture the skull and the go through the brain, my opinion is whenever he was shot, he dropped.

Mr. Meadors: And that's based on you looking at this head and the injuries to his brain. And do you describe those injuries in your report?

Graham: Yes, sir. He was noted to have a gunshot wound above his right eye, with skull and brain matter noted. Crepitus was noted around the wound. The back of the patient's head is noted to be mushy and pupils are nonreactive.

Mr. Meadors: And would the back of the head being mushy, be consistent with hitting the concrete? Or how would you get that, or is that from the bullet?

Graham: It could be from the concrete. It could also be from the bullet going through.

Mr. Meadors: So based on your observation of the body, and your observation of the injury, where was he when he got shot?

Graham: He was standing on the porch.

Mr. Meadors: Outside?

Ms. Cooke: Your Honor, I am going to object to that. Even as an expert, as an EMT, I don't think she's qualified with crime scene reconstruction work.

The Court: I think based upon her testimony that was not objected [sic], that he dropped right there. I think she can say where he dropped. Overruled.

(App. 263-64, lines 18-25). At the conclusion of trial Andrews was acquitted of murder, but convicted of voluntary manslaughter and possession of a weapon during the commission of a violent crime.

ARGUMENT

I.

The Court of Appeals erred in holding that EMT Kimberly Graham exceeded the scope of her expertise when she testified regarding Victim's location at the time he was shot by Andrews, because her testimony in this regard was not offered as expert testimony and instead was admissible as lay witness opinion testimony where it did not fall outside the realm of ordinary lay knowledge. Even if Graham did exceed the scope of her expertise, her testimony was cumulative to testimony that Andrews presented in his own defense and testimony offered by Dr. Janice Ross that was un-objected to by Andrews. Therefore, any error in admitting Graham's testimony regarding the location of Victim's body was harmless beyond a reasonable doubt.

The Court of Appeals reversed Andrews' convictions after concluding the trial judge abused his discretion by allowing Graham to testify as to Victim's location at the time he was shot by Andrews. The Court of Appeals concluded that Graham's statement regarding where Victim was standing on the porch when he was shot exceeded her scope of expertise in emergency medical services. Furthermore, the Court of Appeals found that Graham's testimony undermined Andrews' self-defense claim and therefore the error was not harmless. The State respectfully disagrees with the conclusion of the Court of Appeals and asks this Court to grant the State's Petition for a Writ of Certiorari for two reasons: (1) Graham's testimony regarding Victim's location at the time of the shooting was not offered as expert testimony, but rather was admissible as lay witness opinion testimony because it did not fall outside the realm of ordinary

lay knowledge, and (2) even if the trial judge abused his discretion by allowing Graham to testify regarding where Victim was standing at the time of the shooting, any error was entirely harmless under the circumstances of this case.

Expert Testimony

The Court of Appeals found the trial judge abused his discretion by allowing Graham to testify regarding Victim's location at the time of the shooting. Specifically, the Court of Appeals concluded that Graham's opinion about Victim's location was an opinion on the ultimate issue in the case. The Court of Appeals decision is incorrect. The disputed testimony did not exceed Graham's scope of expertise. In fact, Graham's statement was a logical conclusion deduced from her previous testimony which was not objected to by Andrews.

Trial courts have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial court's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002). Likewise, a decision as to whether to admit or exclude expert testimony rests within the trial court's sound discretion and will not be reversed on appeal absent a prejudicial abuse of that discretion. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

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). By comparison, the South Carolina Rules of Evidence allow lay witnesses to give their opinion under the following circumstances:

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Rule 701, SCRE.

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 also properly testified that a gunshot which fractures a person’s skull would cause that person to fall immediately. (App. 263). This testimony was not objected to by Andrews and is consistent with the testimony from Dr. Ross. (App. 263). Neither Andrews nor the State made a claim that Victim’s body was ever moved after he was shot. Therefore, both sides agreed that Victim was outside the house when he fell to the ground. Graham’s opinion that Victim was on the porch when he was shot, is therefore 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 an individual who is shot in the head and who would fall in the same place they were standing when they were shot, was shot in the same place where their body was found. This is especially true

when both sides agree the body was never moved and unchallenged evidence was admitted establishing the predicate opinion. Indeed, it is difficult to imagine what other conclusion the jury could have drawn from Graham's previous unchallenged testimony. This subsequent opinion is a common sense conclusion which does not fall outside the realm of ordinary lay knowledge. Because Graham's expert testimony did not exceed the scope of her expertise, and her opinion about Victim's location was not an opinion outside the scope of ordinary lay knowledge, this Court should grant the State's Petition for a Writ of Certiorari to review the decision of the Court of Appeals.

Harmless Error

The Court of Appeals also held that Graham's testimony was not harmless because it undermined Andrews' claim of self-defense. However, it is difficult to substantiate how Graham's testimony was related to the ultimate issue in this case or detracted from Andrews' self-defense claim. Andrews himself never claimed that Victim was inside his house, but rather that Victim was in the threshold of his doorway and fell backwards after being shot. (App. 488, 491-92). Andrews 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. Andrews never maintained Victim's body was moved from inside his house to the porch. Therefore, Graham's lay witness opinion testimony regarding Victim's location is consistent with Andrews' 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, and the same testimony was not only elicited by Andrews but was used by Andrews in both his opening statement and closing argument to prove his theory of the case. Andrews never maintained that Victim was shot inside the house or that Victim’s body had ever been moved. Rather, Andrews argued from his opening statement through closing argument that Victim was in the process of entering Andrews’ home and Victim was shot while doing so. In opening statement Andrews’ said:

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

(App. 230, lines 14-20). Andrews 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 Andrews, testified either that Victim's body was lying outside or that Victim would have fallen wherever he was shot. With the exception of Graham, Andrews did not object to testimony regarding where Victim's body was located and Andrews himself testified about the positioning of the body. Because the Court of Appeals was concerned that Graham's testimony somehow undermined Andrews' claim of self-defense, it is instructive to review each witness who testified regarding the positioning of Victim's body.

Andrews

Perhaps most significantly, Andrews himself testified that Victim was not inside his house when he was shot. The following exchange took place on Andrews' 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?

Andrews: 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.

Andrews: Right there coming into the house.

Ms. Cooke: Is that inside or outside?

Andrews: In the threshold.

(App. 491-92, lines 22-13). Andrews also claimed that after he shot Victim, Victim fell backwards and one of Victim's feet was holding the door open. (App. 488). Thus, even Andrews 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 Andrews' testimony and his self-defense claim.

Kimberly Graham

Kimberly Graham was called as a witness by both the State and Appellant. (App. 256, 440). 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.” (App. 260, lines 17-18). Graham proceeded to give an opinion that “whenever [Victim] was shot, he dropped.” (App. 254, line 23). Andrews did not object to this answer. (App. 263). Graham also opined, without objection by Andrews, 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. (App. 264). When Andrews called Graham in his case in chief, Andrews questioned Graham about the position of Victim’s body on the porch. The following exchange took place:

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).

(App. 498, lines 14-17). Thus, *Andrews* called Graham as his own witness to establish the positioning of Victim’s body *on the porch*. Graham’s testimony further enforced Andrew’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. Therefore, Andrews suffered no prejudice from Graham’s lay witness opinion testimony.

Dr. Ross

Like Graham, Dr. Ross testified Victim would have fallen wherever he was shot. (App. 327). Dr. Ross explained that the bullet in Victim’s brain would have caused him to lose consciousness immediately and lose control of his body. (App. 327). While Ross admitted she

couldn't determine the exact locations of Andrews and Victim, she testified that Andrews' 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 [Andrews] with a gun, and began to back up because of seeing that gun, and simultaneously turn away from [Andrews] as [Andrews] 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.

(App. 333-34, 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 Andrews' theory of the case. Jerry Kelly testified that Victim's body was lying on the porch when he arrived. (App. 235, 237). Andrews did not object to Kelly's testimony. (App. 235, 237). Erika, the only eyewitness to the shooting other than Andrews, testified that Victim was on the porch when he was shot, but admitted that she was inside the house when the actual shooting occurred; she emerged from the house to see Victim lying on the porch while Andrews had his gun raised. (App. 292-94). Andrews did not object to Erika's testimony. Andrews called his father, Robert Andrews (Robert), as a witness in his case in chief. Like Andrews, Robert testified that Victim was "standing in the front doorway" when he was shot. (App. 460, line 17). Andrews also called Investigator John Davis to testify regarding his attempts to measure how far Victim's head was from the door of Andrews' house. In conjunction with Graham's testimony, Davis testified Victim's head was approximately six feet four inches from Andrews' front door. (App. 442-43). This roughly corresponded with Victim's height. (App. 324).

Andrews 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. Andrews 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 [Andrews] 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 [Andrews] as [Andrews] 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] said that [Victim] was shot in the doorway between the screen door and the wooden door. [Robert] 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 [Andrews] 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 [Andrews] was following him out the door? None of that is consistent with [Appellant's] account. What is consistent with [Andrews'] account is the pathologist's hypothetical, ***EMS's testimony about the position of the body***, the GSR expert, and John Davis' measurements. (emphasis added).

(App. 560, lines 3-15, App. 564, lines 2-14, App. 565, lines 10-14, App. 569, lines 1-11).

Andrews' 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 Andrews shot him in self-defense and Victim fell backwards onto the porch. Graham's testimony in no way contradicts Andrews' clearly articulated theory of the case or his self-defense claim. In fact, as Andrews 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 Andrews in any way. In fact, Graham's testimony seems to have benefitted Andrews. Therefore, if Graham's testimony was admitted in error, its admission could only be harmless error.

The Court of Appeals cited this Court's holding in State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001) as justification for its decision to reverse Andrew's convictions. Ellis is distinguishable from the facts of this case. Ellis was charged with murder after he shot the victim while the victim was riding his bike. Ellis claimed self-defense at trial and maintained that he only shot the victim after he got off his bike and approached Ellis with a knife. Ellis 345 S.C. at 177, 547 S.E.2d at 491. The State maintained that Ellis shot the victim while he was on his bike. A police officer was tendered as an expert in crime scene processing and fingerprint identification. Id. The officer was allowed to give an opinion over Ellis' objection about the location of the victim in relation to the bicycle. Ellis 346 S.C. at 177-178, 547 S.E.2d at 491. This Court held the police officer exceeded the scope of his expert testimony and essentially gave an opinion on the ultimate issue in the case, namely whether Ellis had acted in self-defense. Id. This Court found the trial judge's error was compounded by the solicitor's repeated references to the "scientific testimony" of the police officer. Id.

The facts of the current case are easily distinguishable from Ellis. Here, each side utilized Graham's testimony to argue their theory of the case. Neither side disputed where the body was located. The only decision for the jury to make was whether Victim was moving towards the house to attack Andrews or moving away while attempting to leave. In Ellis, there was a dispute about the location of the victim's body. The State maintained it was on or near his bicycle while the defense claimed otherwise. In Ellis, the State repeatedly emphasized how the "scientific" evidence proved that the victim was on his bicycle when he was shot. Here, each side argued that Graham's testimony proved their theory of the case. (App. 569, 581). Far from emphasizing Graham's opinion in their closing argument, the State only made a single reference to her testimony, and in doing so merely reiterated the same testimony about the position of Victim's body elicited by Andrews when he called Graham in his defense. (App. 441, 581).

Because Graham's testimony was cumulative to testimony that was presented by Andrews and not objected to when offered by other witnesses, and because her testimony did not prejudice Andrews, any error in its admission is harmless. This Court should grant the State's Petition for a Writ of Certiorari to review the decision of the Court of Appeals.

CONCLUSION

For all the foregoing reasons, the State respectfully requests this Court to grant this
Petition for a Writ of Certiorari.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

September 27, 2018

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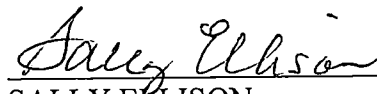
Respondent.

PROOF OF SERVICE

I, Sally Ellison, certify that I have served the within Petition for Writ of Certiorari and Appendix on Respondent by sending two copies of the same to:

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 27th day of September, 2018.



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