THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
General Sessions Court
Letitia H. Verdin, Circuit Court Judge

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DEC 17 2018
SC Court of Appeals

Case No. 2015-GS-39-01893
Case No. 2015-GS-39-01895

Appellate Case No. 2017-002042

The State,

Respondent,

v.

Jaron Lamont Gibbs,

Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in allowing a witness who was not qualified as an expert to testify as to how certain firearms function?

2. Did the trial court err in allowing an improper demonstration and improper closing argument that was not based on evidence presented during the trial?

3. Was the cumulative effect of the trial court's errors, in combination, so prejudicial as to deny appellant a fair trial?

ARGUMENT IN REPLY

I. THE TRIAL COURT ERRED IN ALLOWING A WITNESS WHO WAS NOT QUALIFIED AS AN EXPERT TO TESTIFY AS TO HOW CERTAIN FIREARMS FUNCTION.

Appellant challenges the court's admission of the testimony of the lead investigator, Michael Arflin, on the functioning and mechanics of firing of certain types of revolvers, where he was not qualified as an expert as required by Rule 702 of the South Carolina Rules of Evidence and South Carolina case law. The state responds that his testimony was not offered as expert testimony but as lay testimony under Rule 701 of the evidence rules.

Contrary to the state's contention, the testimony the state sought to elicit from Arflin was not properly within the purview of Rule 701. That rule provides:

> 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.***

See Rule 701, SCRE (emphasis added). On the other hand, Rule 702 provides that matters of scientific, technical, or other specialized knowledge that will assist the trier of fact are a proper subject of ***expert*** testimony, where the witness is "qualified as an expert by knowledge, skill, experience, training, or education." *See* Rule 702, SCRE.

Although the state contends the testimony about the mechanics of the operation and functioning of certain types of revolvers was a proper subject of lay testimony under Rule 701, it also acknowledges that lay testimony "oversteps the bounds of Rule 701" when it becomes "technical" in nature. Clearly, a witness's testimony about the mechanics and functionality that causes a weapon to fire crosses that line, providing information of a technical and specialized nature, outside the ordinary knowledge of jurors. Instead, because of the technical, specialized nature of such testimony, it is a proper subject of expert testimony under Rule 702. Notwithstanding its argument premised on Rule 701, the state clearly contends Arflin's testimony was premised on his special knowledge and experience with firearms, even if that experience was personal and not the result of professional training. The state's argument concerning his knowledge and experience undermines its assertions that his testimony was offered and admitted as lay, not expert, testimony.

The state further contends the trial court did not abuse its discretion in admitting Arflin's testimony because, on the record created by the trial testimony, the basis or source of Arflin's purported experience with revolvers was ***unclear***. This contention tacitly admits the required foundation for Arflin's testimony – evidence of his qualification through knowledge, skill, experience, training, or education – was not established. Contrary to the state's contention, the absence of such evidence in the record

is the very reason the trial court abused its discretion in admitting the testimony. Because the state was the proponent of the evidence, the burden rested upon the state to establish its admissibility by laying the proper foundation as to the witness's technical and specialized knowledge of the subject matter – the mechanics of the operation and functionality of specific types of revolvers. Where the alleged basis of a witness's specialized knowledge is experience or training, the trial court is charged with the gatekeeping function of vetting that experience and training to determine the witness is sufficiently qualified to provide the jury with information about the technical functionality of the particular piece of equipment, in this case a firearm, and that the witness's testimony is reliable, both of which are foundational requirements for admission of the evidence. *See Graves v. CAS Medical Systems, Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012); *State v. Tapp*, 398 S.C. 376, 388, 728 S.E.2d 468, 474-75 (2012); *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009); *State v. Rose*, 423 S.C. 382, 392, 814 S.E.2d 529, 534 (Ct.App. 2018). Where, as here, the record is unclear and the basis for the witness's knowledge and experience is not explained in the evidence, the trial court abuses its discretion in admitting the evidence without this requisite foundation.

Even the case law on which the state relies with respect to a so-called "lay" witness's testimony about the functionality of a piece of equipment establishes that such testimony could only be admitted because of the foundation laid as to the "special knowledge and experience in the daily operation of the machine" by its operator, who testified about its malfunction and the cause of that malfunction. *See Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 468-69, 494 S.E.2d 835, 845 (Ct.App. 1997). Although

the Court in *Small* referred to the witness's testimony as "lay opinion testimony," this characterization was a misnomer, because the Court clearly set forth the limitation of Rule 701, and the cases decided under Rule 701, that lay opinion testimony is admissible ***only*** as to matters that do ***not*** require special knowledge. *See Small*, 329 S.C. at 468-69, 494 S.E.2d at 845, *citing* Rule 701, SCRE, and *State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (1996) (both noting requirement for admission under Rule 701 that special knowledge ***not*** be required). The Court's ultimate conclusion that the testimony was admissible was premised on the "special knowledge and experience" of the witness, in keeping with the requirements of Rule 702. *See Small*, 329 S.C. at 468, 494 S.E.2d at 845.

To the extent *Small* could be argued to allow testimony based on technical or specialized knowledge under Rule 701, *Small* was decided long before the seminal decisions in *White*, *Graves*, and the other precedents relied on by appellant and discussed in detail in his opening brief. For the reasons argued there, the testimony the state elicited from Arflin concerning the functioning of revolvers was within the purview of Rule 702, but the foundational requirements for admission of such testimony under that rule were not met. There was no vetting by the trial court of Arflin's qualifications, the reliability of his proposed testimony, or the testimony's ability to assist the trier of fact. The court abused its discretion by not performing its "gatekeeping role" before admitting this evidence. *See White*, 382 S.C. at 274, 676 S.E.2d at 689.

The state contends Arflin's testimony was not a technical explanation and did not lead to any inference concerning the gun that may have been involved in this shooting. It is simply disingenuous to argue that an explanation of what is necessary to fire a weapon

is not "technical" in nature. Arflin described the mechanics of cocking and pulling the trigger to fire one type of revolver and the kind of trigger action required to fire another type of revolver. Moreover, his testimony most definitely led to an inference. His assertion that pulling the trigger was necessary to discharge a revolver led to the inference that such a firearm could not fire as the result of being swatted by Raby as the gun was pushed back and forth between him and appellant, as multiple witnesses testified occurred in this case. Arflin's testimony was clearly within the purview of expert testimony under Rule 702, not lay testimony under Rule 701, and it was improperly admitted without the requisite foundation as to his technical and specialized knowledge about how such firearms operate.

The state also disingenuously argues that no prejudice could have resulted from this testimony. To the contrary, on the evidence presented by appellant and other witnesses, including those called by the state, the jury could have accepted appellant's account and found the shooting occurred either through recklessness or accident. Arflin's description of the functionality of the two types of revolvers suggested that an affirmative act of pulling the trigger was required for the weapon to fire. It clearly touched on the question of intent, which the state concedes was at issue. The testimony implied the gun could not have gone off as the result of being pushed and swatted by Raby. It likely contributed to the jury's guilty verdict on the charge of murder, rather than a guilty verdict on involuntary manslaughter or an acquittal on the basis of accident. The admission of this evidence was clearly prejudicial and requires reversal.

II. THE TRIAL COURT ERRED IN ALLOWING AN IMPROPER DEMONSTRATION AND IMPROPER CLOSING ARGUMENT THAT WAS NOT BASED ON EVIDENCE PRESENTED DURING THE TRIAL.

Appellant contends the trial court erred in allowing a demonstration by the solicitor and the accompanying argument that "guns do not accidentally go off," in contravention of the requirement that closing argument must be confined to the evidence presented at trial and the reasonable inferences that may be drawn therefrom. *See Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010); *Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004); *State v. Huggins*, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997); *State v. Copeland*, 321 S.C. 318, 326, 468 S.E.2d 620, 625 (1996); *State v. Cannon*, 229 S.C. 614, 618, 93 S.E.2d 889, 891 (1956); *see also Clark v. Cantrell*, 339 S.C. 369, 384, 529 S.E.2d 528, 536 (2000). In this case, the state's argument that guns do not accidentally go off and its related demonstration were not supported by the evidence.

The state contends the demonstration and argument pertained directly to the testimony of Arflin. The state does not address appellant's contention that, if Arflin's testimony was erroneously admitted, there is no evidentiary basis for either the demonstration or the argument that guns do not fire accidentally. If this Court reverses on Issue 1, above, it should also reverse on the basis of an improper demonstration and argument without any evidentiary support.

However, if the testimony of Arflin was properly admitted, that testimony does not support the inference that "guns do not accidentally go off." There was no testimony whatsoever about the possibility of malfunction or accidental discharge, especially with an old weapon that was testified to be a "piece of junk." In fact, Arflin's testimony implied some other manner of discharge might occur, since his testimony about how

revolvers are fired was "kind of the rule" and therefore not an absolute with no exceptions. Completely lacking in the trial record is any testimony as to the possibility or impossibility of malfunction or an accidental discharge, and therefore the solicitor's argument was improper.

Inexplicably, the state contends appellant opened the door to the testimony about how guns are fired and to the demonstration conducted by the solicitor. The questions and testimony on which the state relies – about a person shooting a gun with his dominant hand or non-dominant hand – had nothing to do with the mechanics of operating a revolver and what action is required to make it fire. That line of questioning could not possibly be construed to open the door to Arflin's testimony or the solicitor's demonstration, neither of which addressed what hand is used to shoot a firearm.

The state summarily asserts the demonstration and closing argument was "not prejudicially presented in closing argument," without squarely addressing appellant's prejudice argument. As set out in the opening brief, the unwarranted assertion that "guns do not accidentally go off" went to the very issue before the jury for decision – intent – and negated the theory of the case supported by the evidence presented by the defense – that the gun simply went off in the back-and-forth between appellant and Raby, either through being struck by Raby or through malfunction or accident. The solicitor's argument that was outside the evidence was clearly prejudicial and likely affected the jury's verdict.

III. THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRORS WAS SO PREJUDICIAL THAT APPELLANT WAS DENIED A FAIR TRIAL.

The state contends appellant's cumulative prejudice argument is not preserved. To the contrary, each claim of error was preserved by a contemporaneous objection, and

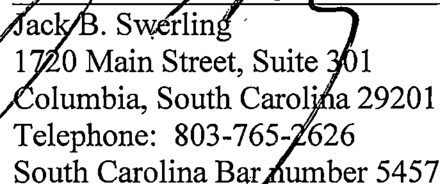
a facet of the analysis of each claim of error is whether there was resulting prejudice. If no single error resulted in sufficient prejudice to require a new trial, the appellate court may determine if multiple errors, in combination, so tainted the outcome as to undermine the appellant's right to a fair trial. *See* U.S. Const. amends. V, XIV; S.C. Const. art. I, § 3; *State v. Blurton*, 342 S.C. 500, 512-13, 537 S.E.2d 291, 297-98 (Ct.App. 2000) (finding cumulative effect of errors warranted reversal), *rev'd on other grounds*, 352 S.C. 203, 573 S.E.2d 802 (2002) (finding additional error requiring reversal); *State v. Freeman*, 319 S.C. 110, 123-24, 459 S.E.2d 867, 875 (Ct.App. 1995) (reversing on basis of combined effect of court's errors).

The South Carolina Supreme Court has never announced a rule requiring a defendant to raise a claim of cumulative error in the trial court in order to preserve for appeal a claim of cumulative prejudice resulting from multiple errors by the trial court. Here, because contemporaneous objections were made that properly preserved each claim of error for appellate review, the Court may review the cumulative effect of those errors and reverse on that basis.

CONCLUSION

For all the reasons set out above and the additional reasons set out in appellant's opening brief, this Court should reverse his convictions and remand for a new trial.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I have served the appellant's initial reply brief, by mailing a copy, postage prepaid, to counsel for respondent, Assistant Attorney General Caroline Scrantom, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29211, on December 17, 2018.

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December 17, 2018

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VIA HAND-DELIVERY
The Honorable Jenny A. Kitchings
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1220 Senate Street
Columbia, South Carolina 29201

RE: The State v. Jaron Lamont Gibbs
Appellate Case No.: 2017-002042

Dear Ms. Kitchings:

Enclosed for filing is the Initial Reply Brief of Appellant, along with the Proof of Service, in the above referenced matter.

By copy of this letter, I am serving Caroline Scrantom, Assistant Attorney General, with a copy of same.

If you have any questions, do not hesitate to contact me.

Very truly yours,

Jack B. Swerling

JBS/ksr
Enclosures

cc: Caroline Scrantom, Assistant Attorney General
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