ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
Letitia H. Verdin, Circuit Court Judge

THE STATE,

Respondent,

v.

JARON LAMONT GIBBS,

Appellant

Appellate Case No. 2017-0002042.

FINAL BRIEF OF RESPONDENT

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SC Court of Appeals

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

CAROLINE SCRANTOM
Assistant Attorney General

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

ATTORNEYS FOR RESPONDENT

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APPELLANT'S STATEMENT OF THE ISSUES ON APPEAL

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

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

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

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES ON APPEAL

I. Did the trial court abuse its discretion when it allowed a detective with the Clemson City Police Department to testify, without being qualified as an expert, that he was personally familiar with revolvers and that a revolver would fire either with one trigger pull or by cocking the hammer and then pulling the trigger?

II. Did the trial court abuse its discretion when it allowed the State to argue at closing that guns do not accidentally discharge and to briefly demonstrate the types of trigger pulls that the detective with the Clemson City Police Department testified would discharge a revolver, where both statements were supported by properly admitted evidence?

III. Did Appellant argue or invoke the cumulative error doctrine argument at any time before the trial court, and does the doctrine apply where no errors exist for a combined review?

STATEMENT OF THE CASE

The Pickens County Grand Jury indicted Appellant Jaron Lamont Gibbs for the August 1, 2015 murder of Robby Porter and for possession of a weapon during the commission of a violent crime. (R. pp. 1-4). Druanne White, Esquire, and Ashlea White, Esquire, represented Appellant on the charges. Assistant Thirteenth Circuit Solicitors Brandi Hinton and Britni McCall prosecuted the case. (R. p. 7).

The Honorable Letitia H. Verdin presided over Appellant's trial which began with jury selection on September 18, 2017. (R. p. 8). Four days later, the jury convicted Appellant of murder and the weapons charge. Judge Verdin sentenced Appellant to 35 years for murder and a concurrent five years for the weapons charge, each with credit for 780 days' time served. (R. p. 510, lines 11-23). By and through trial counsel, Petitioner served a notice of appeal the day after sentencing. (R. p. iv).

STATEMENT OF FACTS

Hunter Raby, Robby Porter, and Kalyn Meaders were going to the lake on August 1, 2017, when they contacted Appellant Jaron Gibbs to buy some marijuana. (R. p. 28, line 9 – p. 29, line 6). Hunter drove Robby and Kalyn in his white Ford Explorer. (R. p. 28, lines 14-20). Kalyn sat in the back passenger seat behind Robby, her husband and high school sweetheart. (R. p. 26, line 20 – p. 28, line 21). The parties, all in their twenties, met near Abel Road in Clemson. (R. p. 29, lines 10-13). Appellant gave Robby some weed and Kalyn saw Appellant and Hunter trade "some kind of pills." (R. p. 29, line 24 – p. 30, line 6). Money exchanged hands as well. (R. p. 30, lines 7-8). After the transaction, the Explorer parted ways from Appellant and its occupants weighed the marijuana they had just purchased. (R. p. 30, lines 11-21). Believing they had been shorted, the friends in the Explorer returned to the place where they bought the marijuana to look for Appellant and saw him in a Chrysler. (R. p. 30, line 24 – p. 33, line 20; R. p. 85, line 22 – p. 87, line 5; R. p. 87, lines 8-25). The boys in the Explorer made contact with Appellant on the phone and began following him. (R. p. 33, line 23 – p. 34, line 22; R. p. 54, lines 14-15).

According to Hunter, they got Appellant on the phone and tried to reason with him but anger ensued as the phone calls wore on. (R. p. 89, lines 3-22). They got to a stop sign at a four-way stop at Issaqueena Trail and Cambridge Road in Clemson. (R. p. 141, lines 22-24). Appellant exited the front passenger seat of the Chrysler, walked behind the Chrysler, and walked right up to the driver's side window of the Ford Explorer. (R. p. 35, line 12 – p. 36, line 8). Appellant pulled a gun at the driver's side window where Hunter was seated. (R. p. 36, lines 9-12). Hunter had the Explorer in park. (R. p. 102, lines 13-22). Appellant put the gun inside Hunter's window, "yelling and telling" Hunter he had messed up and "was really close to losing

[his] life over it." (R. p. 91, lines 2-13). Hunter recalled Appellant held the gun, a silver revolver of average length, in his right hand along the left side of Hunter's face. (R. p. 91, lines 16-22; R. p. 113, line 18 – p. 114, line 14). Nobody else had a gun. (R. p. 36, lines 22-23). Hunter testified that, as Appellant threatened him, Hunter used both of his hands to push the gun up but did not put his fingers on the trigger. (R. p. 93, lines 3-16). "The gun goes off." (R. p. 95, line 7). Kalyn could not see the gun from her seat and only realized what it was after it fired. (R. p. 36, line 11 – p. 37, line 9). Kalyn testified that she assumed that Hunter swiped the gun away. (R. p. 52, lines 7-15).

The bullet first grazed the top of Hunter's head, leaving only a minor injury treated with gauze by EMS. (R. p. 194, lines 2-17). Robby, the front seat passenger, sustained a gunshot wound to the left side of his temple just above the ear. (R. p. 383, line 15 – p. 385, line 6; R. p. 388, lines 10-11). Appellant retreated to the Chrysler, which left the scene. (R. p. 40, lines 11-19). Robby was unconscious when EMS arrived and died at the hospital the following day. (R. p. 187, lines 7-19; R. p. 383, lines 15-18). Robby's toxicology report showed that he had benzodiazepines and marijuana in his system at the time of death. (R. p. 387, lines 9-18). A urine screen taken when he was admitted to the hospital also showed positive results for cocaine. (R. p. 390, line 22 – p. 391, line 19). The forensic pathologist listed the manner of death as homicide, further testifying that the results of the urine and blood screening did not contribute to Robby's death. (R. p. 388, lines 5-14).

The shooting occurred close to noon on a hot, sunny day. (R. p. 42, lines 5-9; R. p. 140, lines 8-13). Collectively, three other cars were at the four-way stop at the time of the shooting. (R. p. 143, lines 9-25). Occupants of these cars each offered corroborating testimony at trial. Each witness recalled being stopped at the four-way in broad daylight waiting for a silver sedan,

a Chrysler 300, to proceed through the intersection. They each witnessed a man exit the passenger side, walk up to the driver's side of the white SUV behind him, and address the driver of the SUV. (R. p. 132, line 21 – p. 178, line 24). These witnesses heard the gunshot. (R. p. 134, line 14; R. p. 146, lines 1-5; R. p. 161, line 3). One occupant noticed a dark satchel on the ground beside the passenger door of the silver sedan. (R. p. 133, lines 15-25). Another occupant remembered "seeing a hand go up and down." (R. p. 148, lines 24-25).

An EMT in the car with his wife and children were stopped at the four-way stop just to the left of the Chrysler. (R. p. 169, lines 6-22; R. p. 176, lines 19-20). He and his wife witnessed the encounter in its entirety and the EMT left his vehicle to render aid. (R. p. 161 lines 17-25; R. p. 163, lines 1-25; R. p. 178, lines 18-24). Her husband, the EMT, recalled waiting for the Chrysler to proceed through the intersection "when the passenger of the silver 300, he got out and he walked to the back of his vehicle." (R. p. 159, lines 16-25). Thinking there had been a fender bender, he "noticed he had a gun in his right hand" that looked like a silver revolver. (R. p. 160, lines 1-4 and 10-12). His wife witnessed yelling. Then she "saw the hand of the driver come out, and the gun went off." (R. p. 178, lines 3-22). "When the gun went off, the male who was in the Chrysler who had shot ran back to the Chrysler and they drove away." (R. p. 178, lines 22-24). Prior to the shot, the EMT characterized the interaction between the driver of the SUV and the passenger of the Chrysler 300 as "an argument" and "a heated discussion" lasting "between five and ten seconds." (R. p. 160, lines 23-25). He witnessed the man on foot "thrust his right arm inside the vehicle with the gun" and heard the gunshot. (R. p. 161, lines 1-3). Then the man on foot "quickly retreated back to his vehicle and they drove off." (R. p. 161, lines 4-5).

Law enforcement arrived and processed the scene led by Detective Arflin. (R. p. 201, lines 1-24). One officer collected Hunter's hat as evidence because it "had a hole somewhere in

the top of it from where he had been shot . . . ." (R. p. 205, lines 1-10). Law enforcement also collected the latex medical gloves given to Hunter by a first responder at the scene. (R. p. 207, line 22 – p. 208, line 10). They conducted gunshot residue (GSR) test kits on Hunter's hands and face. (R. p. 205, lines 20-15). The GSR tests tested negative as to Hunter's face, but his hands tested positive for three particles of GSR, one particle consistent with GSR, and two particles associated with GSR. (R. p. 265, lines 21-22; R. p. 269, lines 2-8). Hunter's hat and gloves were not tested for GSR as law enforcement found the results from his face and hands more probative than any item he may have worn. (R. p. 274, lines 12-25).

Law enforcement did not have to wait long to develop a suspect because the driver of the Chrysler 300, Autumn Gilstrap, went to the police station, gave an oral and written statement, and consented to a full search of the vehicle and within hours of the shooting. (R. p. 276, lines 2-9; R. p. 291, line 14 – p. 292, line 10). Her car contained no weapon or other evidence of the shooting other than potentially an empty cigar package located in the passenger door. (R. p. 213, line 24 – p. 214, line 8). A GSR test conducted with consent from Autumn tested positive for one particle of GSR. (R. p. 275, line 23 – p. 276, line 9). Autumn explained to law enforcement that Appellant contacted her that day and asked for a ride to Atlanta. (R. p. 293, lines 5-7). She agreed, picking up Appellant at Curtis Circle in Clemson (R. p. 292, lines 11-15). As soon as Appellant got in her car, she noticed a white Ford SUV trying to prevent them from leaving. She got around the SUV but observed that it kept following her. (R. p. 293, line 8 – p. 294, line 18). Appellant told her to keep driving as he answered a number of phone calls. (R. p. 294, line 19 – p. 295, line 6). They got to the four-way stop about five minutes later and Autumn remembered the SUV being right behind her. (R. p. 295, lines 14-25).

According to Autumn, Appellant got out of her car and walked to the SUV with his own

weapon. (R. p. 296, lines 4-23). She witnessed Appellant yelling in exchange with the people in the SUV, and eventually saw him holding the gun with the barrel pointed towards the SUV's window. (R. p. 297, lines 6-24). She noticed that Appellant's hand was inside the SUV, heard the gun go off, and watched Appellant walk back to her and get back into the Chrysler. (R. p. 298, lines 3-17). She did not see the gun when Appellant got back in her car, but she did see him with a brown satchel which he had when she picked him up. (R. p. 298, line 18 – p. 299, line 1). Nobody called 911; Appellant told her to drive off and explained to her that the gun went off and hit the top of the roof of the SUV. (R. p. 299, line 4 – p. 301, line 7). Autumn took Appellant to meet some other people at Greenville Hospital and declined to drive Appellant to Atlanta "because [she] was unsure of what really happened." (R. p. 302, lines 3-24). Autumn then drove directly to the Clemson Police Department. (R. p. 303, lines 15-19).

At trial, it was undisputed that the Explorer Hunter drove contained over 250 pills and other substances. (R. p. 64, lines 2-10; R. p. 96, lines 3-12; R. p. 363, line 25 – p. 364, line 2). Kalyn and Hunter also testified that they fabricated their initial version of events to law enforcement when they told the officers that Appellant had robbed them a few weeks prior to the shooting and owed them money. (R. p. 49, lines 1-7; R. p. 80, lines 4-10; R. p. 106, line 6 – p. 108, line 8). Hunter testified that they wanted law enforcement to "focus on finding" Appellant, so they did not initially tell the officers that they challenged the outcome of a drug deal with Appellant prior to the shooting. (R. p. 101, lines 3-21). Detective Arflin testified that neither Hunter nor Kalyn appeared under the influence during the processing of the crime scene and taking of statements. (R. p. 334, lines 8-22).

Appellant testified at trial that he asked Autumn to pick him up and take him to Atlanta so that he could spend time with a female friend who was also a dancer. (R. p. 403, line 3 – p.

404, line 8). He carried with him a brown satchel with clothes he packed for the weekend trip and a gun he had purchased for protection in the clubs where his female friend danced. (R. p. 406, lines 1-19). He purchased the gun with a box of ammo and kept both in his brown satchel. (R. p. 426, lines 20-24). Appellant testified that he owed Hunter and Robby money from a bet made during a social hangout with them a few weeks prior. (R. p. 401, lines 1-24). About the time that Autumn picked him up that day, Robby began calling him and asking him to settle up an unpaid bet. (R. p. 404, lines 12-19). Appellant testified that he explained to Robby and Hunter that he was on his way to Atlanta for the weekend and would pay him when he got back into town, but that Robby would not take no for an answer. (R. p. 408, line 2 – p. 409, line 22). He explained that Hunter and Robby were becoming upset as their phone calls went on and that they began following Appellant and Autumn "close behind" and "aggressively." (R. p. 408, lines 17-25).

Appellant stated he got out of the car when Autumn stopped at the four-way "to try to give them" the gun "for payment." (R. p. 410, lines 2-14). Appellant testified he believed the gun was unloaded and that they would take it and leave him alone. (R. p. 410, lines 17-22). Appellant testified that he held the gun in his left-hand, his non-dominant hand, by the grip without his finger on the trigger. (R. p. 410, line 24 – p. 411, line 25). According to Appellant, he pushed the gun inside the car in front of Hunter's face and Hunter pushed the gun back out. This process repeated itself and, on the second push inside the car, the gun went off. (R. p. 412, lines 9-25). Appellant testified he had no idea anyone had been hit with a bullet and he returned to Autumn's car and told her the bullet hit the roof and no one was hurt. (R. p. 413, lines 1-24). He put the gun back in the brown satchel before he got back into Autumn's car. (R. p. 417, lines 11-16).

Authorities picked up Appellant two days later in Atlanta. He waived extradition to South

Carolina. (R. p. 414, lines 3-11). No gun was recovered in connection to the incident. (R. p. 214, lines 6-18).

ARGUMENT

I. The trial court did not abuse its discretion in allowing Detective Arflin to provide limited testimony that he was personally familiar with revolvers and that a revolver would fire either with one trigger pull or by cocking the hammer and then pulling the trigger.

A. Standard of Review

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.'" *State v. Commander*, 396 S.C. 254, 262-63, 721 S.E.2d 413, 417 (2011) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 854, 847-48 (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. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." *Id.* at 212, 631 S.E.2d at 267.

B. Admissibility of Arflin's Limited Testimony Premised Upon Rule 701, SCRE

"Lay witnesses are permitted to offer testimony in the form of opinions or inferences if the opinions or inferences are rationally based on the witness' perception, and will aid the jury in understanding testimony, and do not require special knowledge" skill, experience or training. *State v. Douglas*, 380 S.C. 499, 502, 671 S.E.2d 606, 608 (2009); Rule 701, SCRE. Every person is generally competent to testify as a witness so long as their testimony is supported by personal knowledge. Rules 601 and 602, SCRE. In contrast, "expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge." *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010); Rule 702, SCRE.

"Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Rule 704, SCRE.

Lay testimony need not always been devoid of reference to prior skill or training in order to be admissible. A law enforcement agent is permitted to testify "about his knowledge as a law enforcement officer based on his previous observations." *S.C. Dept. of Rev. v. Meenaxi, Inc.*, 417 S.C. 639, 658, 790 S.E.2d 792, 801 (Ct. App. 2016) (permitting agent testimony about the commonality of video gaming players discarding coupons of no value of them, but finding the agent's specific interpretation of verbiage on a beverage license outside the bounds of permissible lay opinion testimony). A layperson can testify about his own "special knowledge and experience in the daily operation" of a technical item such as a machine absent any expert qualification. *Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 468-69, 494 S.E.2d 835, 845 (Ct. App. 1997) (finding a lay witness could offer his opinion as to what caused a machine to malfunction because his opinion was based "upon his observations and perceptions as the [daily] operator" of the machine). Our Supreme Court has also found it "unnecessary" for a forensic interviewer to be qualified as an expert witness, ruling admissible lay testimony concerning the established method utilized to build rapport with a child victim. *State v. Douglas*, 380 S.C. at 502-03, 671 S.E.2d at 608 (the interviewer "testified only as to her personal observations and experiences, and her interview with the Victim in [that] case").

Lay witness testimony oversteps the bounds of Rule 701, SCRE, where the lay witness delves into the reason for its determination or otherwise provides a technical basis for the testimony. *State v. Kelly*, 285 S.C. 373, 374-75, 329 S.E.2d 442, 443 (1985) (a police officer may not testify, as a lay witness, as to the cause of an accident). For example, a fire chief's lay testimony concerning the origin and intentionality of a fire has been found to impermissibly

reach beyond "his direct observations" and instead require expert qualification due to the opinion needing "'special knowledge, skill, experience or training' to be properly made." *Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 409, 764 S.E.2d 249, 252 (Ct. App. 2014) (quoting Rule 701, SCRE), *reh'g dismissed* (Oct. 24, 2014); *State v. Westmoreland*, 421 S.C. 410, 420, 807 S.E.2d 701, 706-07 (Ct. App. 2017) (coroner offered improper lay opinion under Rule 701(a), SCRE, where opinion rendered "was based upon review of the perceptions of others"), *reh'g denied* (Dec. 14, 2017).

Over Appellant's objection, Arflin testified that a single-action revolver has a hammer that must be cocked in order to pull the trigger and fire the gun. (R. p. 356, lines 5-19). He testified that a double-action revolver only requires "a long, heavy trigger pull" to fire the gun. (R. p. 356, line 20 – p. 357, line 1). The court allowed the testimony in limited fashion based upon Arflin's testimony that he understood revolvers. (R. p. 355, line 19 – p. 356, line 11). In this case, the trial court did not abuse its discretion when it allowed this limited lay testimony because, on this record, it was unclear whether Arflin's experience with revolvers was derived from anything other than his personal observation and experience. (R. p. 356, line 4 – p. 357, line 7). Arflin testified that he was familiar with firearms—and revolvers—both personally and professionally. (R. p. 338; lines 8-16; R. p. 355, lines 4-6). Arflin had earlier demonstrated familiarity with revolvers when he testified, without objection, that he would not expect to find shell casings when dealing with a revolver—he did not offer technical testimony as to why that was the case. (R. p. 338, lines 17-19). Arflin ultimately offered testimony that he was familiar with both single-action and double-action revolvers and that he fires weapons. (R. p. 355, lines 4-13; R. p. 357, lines 2-7).

As defense counsel pointed out in objecting to Arflin's testimony, counsel was not aware

and Arflin did not testify that he received training on revolvers as part of his employment as a law enforcement officer. (R. p. 356, lines 2-4 ("I'm not aware of any officers that are trained on revolvers. There are semi-automatic weapons and rifles.")). Though the State pointed out in its argument to the court that Arflin was familiar with revolvers as an officer, the State did not question Arflin in terms of training received, but rather in terms of general familiarity with that type of firearm. (R. p. 355, lines 4-22). Arflin never testified that he received any particular type of training, in firearms or otherwise, in order to be employed as a detective with the Clemson City Police Department. (R. p. 330, line 17 – p. 331, line 5). Further, Arflin's testimony did not reach to any technical bases, explanation, or, more importantly, any inference, opinion, or even an identification of the type of gun that may have been used in the shooting in this case. Thus, Arflin's limited testimony concerning how he fired single action and double action revolvers was permissible lay testimony relating to personal, not specialized, experience. *S.C. Dept. of Rev. v. Meenaxi, Inc.*, *supra*; *Small v. Pioneer Machinery, Inc.*, *supra*; *State v. Douglas*, *supra*.

C. Harmlessness of Detective Arflin's Limited Testimony

Even if wrongly admitted by the trial judge, lay testimony that overreaches the boundaries of Rule 701, SCRE, constitutes harmless error if it does not extend to "the heart of the case." *State v. Ellis*, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001); *State v. Westmoreland*, 421 S.C. at 421-22, 807 S.E.2d at 707-08. "A harmless error analysis is contextual and specific to the circumstances of the case: . . . the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial.'" *State v. Westmoreland*, 421 S.C. at 422, 807 S.E.2d at 707 (quoting *State v. Reeves*, 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990)). The factors to be

considered in a harmless error analysis include "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecution's case." *State v. Mizzell*, 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431 (1986)). The Court should uphold a conviction if it determines, beyond a reasonable doubt, the error complained of did not contribute to the verdict obtained. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967).

Even if this Court were to find Arflin's testimony required special knowledge, skill, experience or training falling outside the bounds of permissible lay testimony, Arflin offered no opinion or inference constituting reversible error. Rule 701, SCRE. At issue was the intent with which the gun fired. (R. p. 501, line 13 – p. 506, line 10 (jury instructions on murder, involuntary manslaughter, and defense of accident)). Arflin testified that there were two types of trigger pulls applicable to the discharge of a revolver. (R. p. 356, line 13 – p. 357, line 1). But in this case, Arflin's testimony lacked any prejudicial effect because it lacked relevance to the issue before the jury's ultimate determination. No one contested that the gun discharged. And the type of firearm was not at issue, including whether it was a double action or single action handgun. Law enforcement recovered no gun in connection to the incident. The State presented no ballistics evidence concerning the origin of the fired bullet. The general type of gun was essentially undisputed at trial: Appellant identified it merely as a "piece of junk" and other eyewitnesses identified it as a silver revolver. (R. p. 57, lines 17-25; R. p. 91, lines 21-22; R. p. 160, lines 10-12; R. p. 426, line 19). At most, Arflin offered background information relevant to the eyewitness' identification of a revolver.

Arflin's testimony further did not address any action testified to by any witness and accordingly did not offer an inference or opinion on the events resulting in the victim's death. (R. p. 356, lines 13 – p. 357, line 1). Appellant testified that he did not have his fingers on the trigger and that the gun fired as he and the driver of the Explorer engaged in a face-level shoving match with the gun. (R. p. 411, line 16 – p. 412, line 25). The driver of the Explorer likewise testified he engaged in a reflex-driven shoving match with Appellant over the threatening presence of the gun in his face. (R. p. 91, line 5 – p. 93, line 16). Even if erroneously offered through a lay witness, Detective Arflin's testimony did not prejudice Appellant because it did not speak to the intent of the actors at the scene of the shooting and therefore could not constitute direct evidence tending to show Appellant's guilt or innocence for murder. *See State v. Westmoreland*, *supra* at 424, 807 S.E.2d at 708-09.

II. The trial court did not abuse its discretion when it allowed the State to argue at closing that guns do not accidentally discharge and to briefly demonstrate the types of trigger pulls Detective Arflin testified would discharge a revolver, because both arguments were supported by properly admitted evidence.

A. Standard of Review

"A trial judge is vested with broad discretion in dealing with the range of propriety of closing argument, and ordinarily his rulings on such matters will not be disturbed." *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007). A prosecutor's statement during closing argument is impermissible if determined to have "by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871 (1974). "The appellant has the burden of showing that any alleged error in argument deprived him of a fair trial." *State v. Northcutt, supra.* "An appellant must prove both an abuse of discretion and resulting prejudice to warrant reversal." *State v. Navy*, 370 S.C. 398, 412, 635 S.E.2d 549, 556 (Ct. App. 2006), *aff'd in part, rev'd in part on other grounds*, 386 S.C. 294, 688 S.E.2d 838 (2010).

Moreover, any excerpt of the State's closing exists as "one moment in an extended trial." *Donnelly v. DeChristoforo*, 416 U.S. 637, 645, 94 S.Ct. 1868, 1872 (1974). Accordingly, a court must conduct an "examination of the entire proceedings" in context. *Id.* at 643, 94 S.Ct. at 1871; *State v. Northcutt, supra* ("We must review the [closing] argument in the context of the entire record.").

B. The State Confined its Closing Argument to Evidence in the Record and Permissible Inferences Therefrom

"Solicitors are bound to rules of fairness in their closing arguments." *State v. Northcutt, supra* at 222, 641 S.E.2d at 881. The closing's "content should stay with the record and reasonable inferences to it." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002).

The State's closing "must not appeal to the personal biases of the jurors," nor should it "be calculated to arouse the jurors' passions or prejudices." *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). Even if a prosecutor's closing argument appears "aggressive" on the face of the record before the appellate court, the closing should be upheld so long as its assertions lie in direct response to the defense presented at trial. *State v. Navy, supra* at 414, 635 S.E.2d at 557.

Over Appellant's objection, the State argued in a brief demonstration that the trigger on the gun would have had to have been pulled "for this gun to go off because guns do not accidentally go off. . . ." (R. p. 445, line 22 – p. 447, line 3). Appellant argued that the statement concerning accident was not supported by facts in evidence. (R. p. 446, lines 7-15). The trial court allowed the statement "in a limited fashion." (R. p. 446, lines 16-18). Appellant re-raised this objection in its post-trial motions, qualifying it by stating that "the demonstration in the closing argument [was not based upon] reliable facts in the evidence." (R. p. 512, lines 12-15). The trial court ruled that "the demonstration, which lasted all three, maybe, seconds, three to five seconds, did not go beyond the scope of what would just be argument by counsel." (R. p. 513, lines 2-7). The trial court also noted that it "had previously instructed the jurors that what the attorneys said was not evidence in the case." (R. p. 512, lines 22-24; *see* R. p. 17, lines 14-20).

The prosecutor's closing argument that "guns do not accidentally go off" derived directly from properly admitted evidence, as did the argument about the trigger pull. (R. p. 429, line 10 – p. 453, line 2). Appellant maintained that the gun involuntarily discharged as he offered it to the driver of the Ford Explorer as payment for a bet. (R. p. 411, line 16 – p. 412, line 25; R. p. 441, lines 14-25; R. p. 465, line 18 – p. 469, line 16). Moreover, the demonstration itself, however brief, pertained directly to the properly admitted testimony of Detective Arflin, who had earlier

testified that he was familiar with revolvers and that one of two types of trigger pulls applied to that type of gun.[1] (R. p. 356, line 13 – p. 357, line 1). To this end, the prosecution's closing contained no improper speculation nor extrapolation from facts in evidence. *See State v. Copeland*, 321 S.C. at 325, 468 S.E.2d at 625.

Nor did the argument render the trial fundamentally unfair.[2] *Donnelly v. DeChristoforo*, *supra.* "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." *Humphries v. State*, 351 S.C. at 373, 570 S.E.2d at 166 (2002). The evidence at trial indicated that the gun discharged during the exchanges testified to in conflicting manners by Hunter Raby and Appellant, and corroborated by eyewitnesses at the four-way stop. (R. p. 91, line 5 – p. 93, line 16; R. p. 161, lines 1-5; R. p. 178, lines 18-24; R. p. 297, line 3 – p. 298, line 13; R. p. 411, line 16 – p. 412, line 25). Given this testimony, the prosecution's closing argument cannot be found to have prejudiced Appellant when considered "in the context of the entire record." *State v. Northcutt, supra.* The State's closing argument focused on the premise that Appellant's exit from his vehicle and his repetitious pushing of the barrel of the gun into the driver's side window of the Explorer, along with his actions following the discharge of the gun, indicated an intent to kill, an absence of accident, and a series of unlawful acts. (R. p. 430, line 6 – p. 433, line 19; R. p. 436, line 13 – p. 452, line 18).[3] This was particularly clear from the

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[1] The State had earlier argued without objection that the gun was a revolver, and that Detective testified that a revolver either had to be cocked before firing or that it had a long handle trigger. (R. p. 442, lines 18-25).

[2] Appellant appears to acknowledge that his prejudice argument on this issue derives from the presupposition that the trial court erroneously admitted Detective Arflin's testimony concerning the pulling of the trigger. (Br. of App. at 18).

[3] ". . . Even if you believe his story that he was trying to give him payment for a gun, you do not pay somebody with a gun by pointing it in their face. So the law of accident does not apply." (R. p. 431, lines 17-21). ". . . Jaron Gibbs had no just cause to get out of that car and put a gun in

State's rebuttal closing. (R. p. 490, lines 11-24). It is reasonable to infer, and thus permissible to argue, that the discharge of the gun included the pulling of the trigger. *Humphries v. State*, *supra* (content of closing must be within record and reasonable inferences therefrom).

Furthermore, demonstrations during closing argument which are supported by the evidence at trial are not in and of themselves prejudicial during closing argument. *State v. Brisbon*, 323 S.C. 324, 332, 474 S.E.2d 433, 438 (1996) (solicitor conducted permissible demonstration with an axe during closing); *cf. State v. Northcutt*, *supra* at 222-23, 641 S.E.2d at 881-82 (Solicitor's demonstration with a crib held a "miscue" requiring reversal of death sentence); *contra State v. Cannon*, 229 S.C. 614, 618, 93 S.E.2d 889, 891 (1956) (prosecutor's version of the testimony argued in closing determined to be insufficiently supported by the evidence and prejudicially directed at the theory upon which the case was tried). Again, the gun indisputably discharged during the exchanges testified to in conflicting manners by Hunter Raby and Appellant at trial, making it reasonable to infer that the trigger had been pulled. (R. p. 91, line 5 – p. 93, line 16; R. p. 161, lines 1-5; R. p. 178, lines 18-24; R. p. 297, line 3 – p. 298, line 12; R. p. 411, line 16 – p. 412, line 25). The use of a revolver during the shooting was not in dispute at trial. Even though Appellant identified the gun merely as a "piece of junk," other witnesses presented unchallenged testimony the gun was a silver revolver. (R. p. 57, lines 17-25;

Hunter Raby's face. He certainly did it with the intent of inflicting injury." (R. p. 433, lines 3-6). ". . . The defendant didn't say I tried to put it in his hand. The defendant said I pushed it in his face. . . ." (R. p. 438, lines 5-7). ". . . They are yelling at each other. He says he's holding it by the grip. Again, he pushed it in Hunter's face. . . . twice . . . That is the intent to kill. That's not an accident. That's not a misunderstanding. This is the intent to kill. The gun goes off. There's been absolutely no testimony that there was a struggle [or] that anybody else's finger was on that trigger. . . ." (R. p. 441, line 14 – p. 442, line 17). ". . . And he drives off. And he goes to Atlanta to hang out with a stripper. Even after he received a phone call, he did not deny this, that, I think you shot someone." (R. p. 443, lines 13-16).

R. p. 91, lines 21-22; R. p. 160, lines 10-12; R. p. 426, line 19).

Particularly, "a defendant may open the door to what would be otherwise improper evidence through his own introduction of evidence or witness examination." *State v. Culbreath*, 377 S.C. 326, 333, 659 S.E.2d 268, 272 (Ct. App. 2008). "'Once the defendant opens the door, the solicitor's invited response is appropriate so long as it does not unfairly prejudice the defendant." *State v. Collier*, 421 S.C. 426, 436, 807 S.E.2d 206, 212 (Ct. App. 2017) (quoting *Ellenburg v. State*, 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006)); *Vaughn v. State*, 362 S.C. 163, 169-70, 607 S.E.2d 72, 75 (2004) ("Once a defendant opens the door, the relevant question in determining if a defendant's rights were violated is whether the solicitor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" (quoting *Donnelly v. DeChristoforo*, *supra*)). Thus, even if a solicitor's closing argument is determined inappropriate, it should not be found to deny the defendant due process so long as "it was responsive to statements or arguments made by the defense." *Tappeiner v. State*, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016).

Here, the record reflects that Appellant opened the door to the testimony regarding how the gun was fired. Appellant's counsel initially examined a State's witness, the EMT, concerning his experience with firearms, inviting the response that he was recreationally trained in firearms and could shoot from both his dominant and non-dominant hand. (R. p. 169, lines 3-15; *see also* R. p. 173, lines 17-23). Appellant testified he held the gun by the grip in his non-dominant hand. (R. p. 410, line 23 – p. 411, line 25). This testimony elicited by Appellant made ripe for the State's closing the manner in which the gun could have fired, permitting the demonstration at issue. *Vaughn v. State*, *supra* at 169, 607 S.E.2d at 75.

Not only was the demonstration an invited response to testimony put forward by

Appellant, but the State's closing argument made no appeal to any juror bias, nor did it include language which could be considered to arouse any passion or prejudice within the jury. *See State v. Copeland, supra.* The prosecution also imparted upon the jury that its argument was not evidence, and that the jury should only consider the testimony and evidence that came from the witness stand. (R. p. 437, lines 4-14). Thus, even the State qualified its argument as just that—argument—and its contents were wholly appropriate within the confines of the evidence presented and inferences allowable therefrom. The prosecutor's statement that "guns do not accidentally go off" and the following demonstration directly addressed the alternative theories presented at trial, was supported by or reasonably inferred from the evidence, and was therefore not prejudicially presented in closing argument. *Humphries v. State, supra.*

III. Cumulative Error Argument is Not Preserved and Need Not Apply

Appellant posits for the first time on appeal that the cumulative effect of the trial court's errors deprived him of a fair trial. (Br. of App. at 19-20). "The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial." *State v. Beekman*, 405 S.C. 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013). Specifically, Appellant contends that Detective Arflin's testimony about the types of trigger pulls applicable to a revolver was erroneously admitted as lay testimony, and the State's reliance on that testimony during its closing argument affected the outcome of the trial by prejudicially and erroneously providing the jury with a basis upon which to reject Appellant's accident defense. (Br. of App. at 20).

As an initial consideration, Appellant did not argue for the invocation of the cumulative error doctrine at any time before the trial court. "[A]n objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge." *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001). "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). Appellant's post-trial motions lacked the specificity required to preserve any objection regarding the cumulative error doctrine. (R. p. 511, line 21 – p. 512, line 18). The trial court addressed the errors cited by Appellant in its post-trial motion as individual bases raised in support of a motion for new trial, and did not address cumulative error. (R. pp. 512, line 19 – p. 513, line 9). Appellant did not request a finding as to any alleged accumulation of prejudice. (R. p. 513, line 10). Thus, this issue was not ruled upon by the trial court as required by our issue

preservation rules. *See State v. Beekman*, 405 S.C. at 236-37, 746 S.E.2d at 489 (citing *State v. Price,* 368 S.C. 494, 500, 629 S.E.2d 363, 366 (2006) (recognizing axiomatic rule that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review)).

Respondent further submits that Appellant has not demonstrated one or more errors to qualify this case for reversal on this ground. "An appellant must demonstrate more that error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground." *State v. Beekman*, *supra* at 237, 746 S.E.2d at 490; *State v. Daise*, 421 S.C. 442, 466–67, 807 S.E.2d 710, 722–23 (Ct. App. 2017) ("any errors by the circuit court were not prejudicial and did not combine to affect Daise's right to a fair trial"), *reh'g denied* (Dec. 14, 2017). When a court finds no error by counsel on any claim raised, there can be no sum of either error or prejudice upon which this Court may grant relief. *See United States v. Basham*, 561 F.3d 302, 330 (4th Cir. 2009) ("When 'none of [the] individual rulings work[ ] any cognizable harm, . . . [i]t necessarily follows that the cumulative error doctrine finds no foothold.'" (quoting *United States v. Sampson*, 486 F.3d 13, 51 (1st Cir. 2007))). Respondent submits that, for the reasons discussed herein, Appellant's convictions should not be reversed on any one issue and that the cumulative error doctrine need not apply.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should affirm the Appellant's conviction for murder and possession of a weapon during the commission of a violent crime.

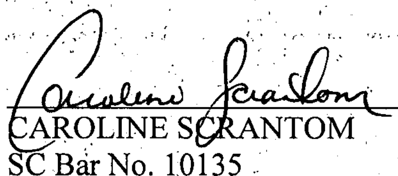
Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

CAROLINE SCRANTOM
Assistant Attorney General



CAROLINE SCRANTOM
SC Bar No. 10135

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

ATTORNEY FOR RESPONDENT

February 4, 2019
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Pickens County
Letitia H. Verdin, Circuit Court Judge

THE STATE,

Respondent,

v.

JARON LAMONT GIBBS,

Appellant

Appellate Case No. 2017-0002042.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully submitted,

CAROLINE SCRANTOM
Assistant Attorney General

P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

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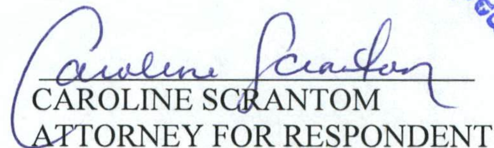

CAROLINE SCRANTOM
ATTORNEY FOR RESPONDENT

February 4, 2019
Columbia, South Carolina