ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Robert E. Hood, Circuit Court Judge

THE STATE,

Respondent,

v.

MIMI JOE MARSHALL,

Appellant

Appellate Case No. 2017-002329.

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF THE ISSUES ON APPEAL

I. Whether the trial court erred in refusing to charge the jury on the law of involuntary manslaughter where there was evidence tending to mitigate the offense of murder?

II. Whether the trial court erred in admitting the testimony of Timothy Lee, a crime scene investigator, on crucial blood evidence where he was not qualified as an expert in blood spatter evidence or crime scene reconstruction, and where the evidence failed to satisfy three of the four factors proffered in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), and was thus not reliable?

III. Whether the trial court erred in admitting the testimony of Stan Richards, an expert in blood spatter, on crucial blood evidence where the evidence did not satisfy three of the four factors proffered in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), and where the evidence was unreliable.

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES ON APPEAL

I. Did the trial court properly reject Appellant's request for a jury instruction on involuntary manslaughter where no evidence was presented at trial from which the jury could infer Appellant was engaged in a lawful act not amounting of a felony or was otherwise lawfully armed?

II. Is Appellant's objection to the expert qualification of Investigator Timothy Lee and Investigator Stan Richards properly preserved, and did the trial court adequately rule upon the expert qualifications of these Investigators in admitting them as experts in their respective fields based upon the test from *State v. Council*, *infra*, and that more modernly reiterated in *State v. White*, *infra*?

III. Was any error in the scope of the testimony of the expert in crime scene processing harmless where it was cumulative to earlier, un-objected to testimony by the same witness, and cumulative to the properly admitted expert testimony of a blood stain pattern analyst, and where self-defense was not at issue?

STATEMENT OF THE CASE

The Richland County Grand Jury indicted Appellant Mimi Joe Marshall for the August 2015 murder of his wife Doris Marshall and for possession of a firearm by a person convicted of a violent felony. (R. pp. 753-754; Indictment No. 2015-GS-40-06134). Attorneys Alicia Goode, Stephen Krzyston, and Lucas Hawks of the Fifth Circuit Public Defender's Office represented Appellant on the charges. (R. p. 1). Assistant Fifth Circuit Solicitors April Sampson, Sandra Moser, and Samuel McGlothin prosecuted the case. (R. p. 1).

The Honorable Robert E. Hood presided over Appellant's trial, first accepting Appellant's guilty plea to the firearms charge on October 30, 2017. (R. pp. 34-37). Beginning that same day, Appellant stood trial on the murder charge. After a four day trial, the jury convicted Appellant of murder. Appellant received a life sentence on the murder charge and was at that time sentenced to a concurrent five years on the weapons charge. (R. p. 740).

By and through trial counsel, Petitioner served notice of appeal on November 9, 2017. (Notice of Appeal). Trial counsel continues to represent Appellant on appeal in conjunction with the South Carolina Commission on Indigent Defense, Office of Appellate Defense. (Br. of App.).

STATEMENT OF FACTS

Doris Marshall clocked out of her dining facility attendant shift at Fort Jackson at 10:15 PM on August 14, 2015. (R. p. 159, lines 9-13; R. p. 163, lines 10-33). Early that next morning, her nephew was awoken by Appellant Mimi Marshall knocking at his and his father's door. (R. p. 41, lines 22-25). Appellant had come over to tell them he had "messed up" while he was arguing with Auntie Doris and she tried to grab the gun and it went off. (R. p. 142, lines 5-8). He had already left his brother a voicemail indicating the same. (R. p. 368, lines 1-9; R. p. 374, lines 4-22). He had driven a gray van to their home. (R. p. 142, line 22). He showed his nephew the double barrel shotgun. (R. p. 143, line 23 – p. 144, line 7). Then he left, and the family members called 911 and their extended family to fill them in. (R. p. 144, lines 14-24).

As the family heard what happened, Appellant's daughter-in-law Amanda went to Appellant and Doris' home. (R. p. 411, line 18 – p. 412, line 14). Amanda checked the front door but it was locked, and the other door was too. She pushed in an A/C unit in the window until she caught sight of the victim in the living room. (R. p. 412, line 19 – p. 414, line 2). Amanda saw Doris sitting "like in the middle of the couch" and leaning to one side. (R. p. 414, lines 4-9). Amanda ran to the neighbor to ask for help breaking open the front door. (R. p. 414, lines 12-21). When they gained access, it was obvious that the victim was deceased. (R. p. 415, lines 22-23).

The victim "had been sitting on a sofa with her lunch bag beside her foot and had been shot in the face at close range with a shotgun. That's where she was killed instantly." (R. p. 557, lines 7-10). The Richland County Sheriff's Department and EMS arrived on scene and EMS noted the following about its arrival:

> EMS was able to visualize the patient from the front door of the home without entering. Noted brain matter on the floor. The patient was sitting on a couch to the right of the front door, leaning to her right with her head down. Noted injury to

> the head inconsistent with life, skull fragment on the back of the couch, noted brain matter. Blood splatter around the patient. The patient had no respiratory effort, no signs of life, noted coagulation of blood on and around the patient, lividity and notified dispatch of D.O.A.

(R. p. 150, lines 6-23).

Law enforcement issued a BOLO for Appellant and a gray Chrysler Pacifica minivan. (R. p. 174, lines 4-6). The night before, neighbors witnessed Appellant banging on the window of a running vehicle as if he were trying to break in. (R. p. 128, lines 10-20; R. p. 345, line 17 – p. 346, line 9). That same night one neighbor helped Appellant, who had locked himself out of his and the victim's home, by crawling in one of Appellant's back windows and opening the side door so Appellant could get back in. That neighbor said that it "reeked" when he got inside the house, but that he did not see the victim. (R. p. 329, line 23 – p. 341, line 25). That neighbor also recalled seeing a flash coming from the direction of Appellant's home that night. (R. p. 338, line 17 – p. 339, line 18).

A short time after the BOLO was issued, Appellant surrendered to law enforcement at Tony's Lounge, a spot near Eastover about ten miles away from his home. (R. p. 174, line 8 – p. 175, line 7). Somebody at the Lounge who had heard Appellant was suspected of murder noticed him there and called 911. (R. p. 333, line 3 – p. 334, line 19). At the time of arrest, Appellant had noticeable reddish brown spatters on his pants, socks and shoes. (R. p. 358, lines 15-17). The Chrysler Pacifica was parked at the Lounge and law enforcement located a double barrel shotgun inside the van. (R. p. 177, lines 10-21). The van's back window was broken. (R. p. 406, lines 5-8).

At the Sheriff's Department, Appellant gave a signed question-and-answer type statement to Sergeant Joe Clark about what happened to his wife:

> When she came home from work last night, I had my gun in the front room. I did this because the trailer park is an unstable place. She came at me. She grabbed the gun. It went up and it went off. I grabbed her. I had her head in my hands and I let her down on the chair. I knew she was dead then. I should have handled it a different way, the way I did not handle it, I should have killed myself.

(R. p. 566, lines 11-21).

The Sergeant asked where the gun was. (Tr. p. 566, line 25 – p. 567, line 1). Appellant told him it was in a closet, but the Sergeant knew there was no closet in the living room. (R. p. 567, lines 1-4). Then Appellant said he shot her at the front door. (R. p. 567, line 5). Moments later in the interview Appellant expounded:

> I told her when she came in the house that I had just called her job. She was a little late and I was worried about her. I had just had the car's front end alignment fixed with a new tire for her safety. She comes in with an attitude. I told her I was worried about her. She says, quote, you've got no reason to worry about me, unquote. She said it with an attitude. We were just talking at each other.
>
> . . .
>
> My gun was laying against the wall the whole time. When I decided to check out around my trailer with my shotgun, Doris was coming in the front door. We are right there at the same time. She comes in the door, that is when I told her I was worried about her. That is when the gun went off. She had touched the gun when it when off. She took the gun and threw it up.
>
> . . .
>
> She was standing on the side of the couch when the gun went off. I held her by the face and laid her on the couch.

(R. p. 567, line 21 – p. 570, line 3).

Appellant defined "threw [the gun] up" by swiping his hand in front of his face. (R. p. 569, lines 4-7). The Sergeant asked, "So the barrel was obviously in her face?" (R. p. 569, lines 7-8). Appellant answered "he pushed the gun away. And that's when he said it went off." (R. p. 569, lines 9-10).

Appellant's statement, however, was unsupported by the forensic evidence presented by the State at trial. (R. p. 567, lines 5-10).

Timothy Lee: Crime Scene Processer

Investigator Lee, a ten-year veteran of the Richland County crime scene unit, photographed the scene at the Marshall's home. (R. p. 188, lines 14-19; R. p. 208, lines 1-10). Lee documented small birdshot pellets and "gelatized blood" pooled on the center of the living room sofa where the victim was located. (R. p. 212, lines 9-20; R. p. 213, lines 20-23; *see* State's Exhibit 25). He documented the ceiling of the living room which was stained with blood as well. (R. p. 216, lines 10-17; *see* State's Exhibit 22). "There was a broken pair of glasses that were on the floor near the rug." (R. p. 219, lines 17-18). The investigator also denoted a piece of shotgun wadding found on the sofa. (R. p. 218, line 10). He testified that the location of the wadding indicated "that the shot occurred within the parameter" of where they found the victim. (R. p. 218, lines 13-21). Lee testified about photographs depicting differing concentrations of blood at the scene in relation to the victim's location. (R. p. 231, lines 5-24; R. p. 233, lines 2-11; R. p. 255, lines 17-19). Lee photographed biological matter near the sofa, including the documentation of a portion of brain near the victim's foot and "a chunk of skull and scalp that was up on top of the couch." (R. p. 270, line 7 – p. 271, line 13).

David Collins: Firearms Examiner

Collins, the firearm and tool mark examiner from SLED, testified about the 12-gauge double barrel shotgun located in Appellant's Chrysler Pacifica. (R. p. 286, line 24 – p. 287, line 4). The butt stock on the shotgun had been repaired with electrical tape, but the gun fired and the safety worked. (R. p. 289, lines 1-25). The gun was manufactured before 1968. (R. p. 293, lines 17-22). On the muzzle of the gun, Collins noted not blood, but other biological material. (R. p.

295, lines 9-24). Collins did not test the trigger press weight but did not notice anything mechanically unsound about the trigger pull. (R. p. 303, lines 17-23). "It did not appear to be excessively light nor excessively heavy compared to other shotguns of the same make and model[.]" (R. p. 324, lines 1-4).

Collins also received for examination three unfired shotgun shells, the wadding located on the victim's sofa, and three sets of birdshot pellets. (R. p. 290, line 22 – p. 291, line 2; R. p. 292, line 1; R. p. 298, line 25 – p. 299, line 5). Like the shotgun muzzle, the wadding contained a coating of biological material which Collins cleaned off as part of his examination. (R. p. 297, lines 13-17). "The fired wadding was consistent with the wadding found in one of the fired shotgun shells" in brand, type, and gauge. (R. p. 298, lines 19-24). All three unfired shotgun shells "were capable of being fired in that gun." (R. p. 299, lines 13-18). Also consistent with the unfired shells received for comparison were the birdshot pellets received for examination, including those extracted from the victim. (R. p. 300, line 3 – p. 301, line 23).

"Based on the nature of the injury to the victim in this case and the severity of it, [Collins] did not feel that there was sufficient information present" for him to test the distance from which the victim was shot with any degree of scientific reliability. (R. p. 304, line 21 – p. 305, line 6). In addition to a precise diameter of the wound, which was unavailable, Collins needed more of the same ammunition to reliably test-fire and determine that distance. (R. p. 305, lines 8-14).

Jennifer Martin: DNA Analyst

Richlands County Sheriff's Department's DNA analyst Jennifer Martin received a number of items for DNA testing. (R. p. 387, lines 3-13). Two swabs from the double barrel

shotgun positively matched the victim's DNA, but the matter tested was some other biological matter other than blood. (R. p. 389, line 4 – p. 390, line 24).

Amanda Durso: Forensic Pathologist

Doctor Durso performed the autopsy on the 58-year-old victim. (R. p. 451, lines 3-6). She recorded a shotgun would to the head as the cause of death. (R. p. 453, lines 11-12). The large wound "entered the right front of her face, kind of centered around the area of the right eye" and exited through the top of the skull. (R. p. 453, lines 6-10). "Some of it did exit the kind of back right top of the skull and very slightly left [to] right." (R. p. 454, lines 17-18). Manipulating the edges of the wound, Durso pieced together a 2.8-inch by 3-inch entry wound. (R. p. 454, lines 1-9). Durso retrieved birdshot pellets from the victim. (R. p. 454, lines 11-13). She identified stippling on the left side of the victim's face which she described as an indicator that the shotgun was within approximately 30 inches of the victim at the time the shot was fired. (R. p. 456, line 1 – p. 457, line 8). Durso testified that soot would be present if the shotgun was 12 inches or closer to the victim at the time of the shot. (R. p. 458, lines 9-18).

No soot was present, allowing Durso to estimate that the shot occurred between 12 and 30 inches from the victim. (R. p. 457, line 13; R. p. 458, lines 14-15; R. p. 461, lines 13-23). The victim's right eye was obliterated as was a portion of the brain such that "half of her brain actually fell out through this defect and was received separately in the body bag due to the force of the blast." (R. p. 459, lines 14-20). The victim sustained no other remarkable injuries to the remainder of her body. (R. p. 462, lines 2-9).

Jennifer Nates: GSR Analyst

Jennifer Nates from SLED testified that two gunshot residue (GSR) kits were collected and submitted for testing in conjunction with this case. (R. p. 472, lines 8-16). The kit collected

from the victim tested positive for a single particle of GSR, which is not inconsistent with a shooting victim who has faced the muzzle of a loaded gun. (R. p. 477, lines 16-25). The result gave no information as to the distance from which the victim sustained the gunshot. (R. p. 478, lines 4-7). The second kit, collected from Appellant, was inconclusive as Appellant was swabbed for GSR beyond the 6-hour timeframe during which any probative test for GSR can be collected from a living person. (R. p. 478, lines 14-23). Although testing on the kit was halted halfway through the analysis, it did return one particle of GSR. (R. p. 479, lines 12-15).

Stan Richards: Blood Stain Pattern Analyst

Stan Richards, a lieutenant in the forensics division of the Richland County Sheriff's Department, testified about the bloodletting evidence at the scene photographed by Investigator Lee. (R. p. 484, lines 21-24; R. p. 486, lines 13-18). Richards attended the scene, identified the victim "slumped over on the sofa nearest the door" into the front of the mobile home and observed the blood on the sofa cushions, extending up the sofa back, on the window shades, on the ceiling, and wrapping around the end of the sofa to the windows and blinds on the short side of the room. (R. p. 487, lines 13-25). He witnessed brain matter "at the doorway on the floor" unaccompanied by "major blood." (R. p. 488, lines 1-4). Richards could tell from the nature of the wound on the victim's face that blood had gone from the point of impact outward as a result of "a very significant impact and a dynamic impact" of the shotgun blast. (R. p. 488, lines 10-15).

He identified the several stains, small and large, as "individual stains of an overall pattern called impact spatter" which occurs as a result of a high velocity impact. (R. p. 488, lines 18-24). Impact spatter created stains which radiate outward from the point of impact, up to the ceiling, and out towards the end of the room. (R. p. 490, lines 11-18; *see* State's Exhibits 22, 84, and 85).

Richards "saw no indication of any major bloodletting going through the door in that area." (R. p. 495, lines 5-6; *see* State's Exhibit 95). Blood was significantly present on the pillows, sofa, and blinds away from the front door. (R. p. 498, lines 10-25). Richards described the spatter stains as creating a V-shaped cone beginning at the window and radiating out to the sofa and ceiling and stopping at or near the other furniture in the room. (R. p. 499, line 17 – p. 502, lines 10; *see* State's Exhibits 22, 25, 85, 85 and 95).

Richards also attached significance to the lack of bloodletting in the area the victim would have been sitting when the impact occurred. (R. p. 506, line 22 – p. 507, line 15). Because blood on the victim's leg was soaked into the area rather than dripping downward, it indicated that the victim was sitting during the duration of the bloodletting event. (R. p. 514, lines 12-21). He called the area without blood the void in which the victim sat during the impact. (R. p. 514, line 22 – p. 515, line 1).

Richards also classified the stains and biological matter appearing nearest the front door outliers because the bloodletting was otherwise contained to the center and side of the sofa farthest from the door, and because the area from the front door straight back contained no major bloodletting. (R. p. 515, lines 2-9). Richards also described that in order for the portion of the victim's scalp to land on the back of the sofa where it was found, the victim had to be on the sofa in the sitting position. (R. p. 515, lines 11-17).

Appellant countered the State's case with his own blood spatter analyst.

Christopher Robinson: Private Forensic Analyst

Appellant put forward Robinson, who testified as an expert in crime scene reconstruction, blood spatter analysis and firearms analysis. (R. p. 617, lines 5-9). Robinson addressed the double barrel shotgun and assessed its trigger pull as averaging 6 ¾ pounds of pressure. (R. p.

618, lines 9-17). He opined that the safety on the gun was not acting as intended and that the gun was unsafe. (R. p. 620, lines 1-7). He measured the overall length of the weapon as 44.5 inches. (R. p. 618, lines 19-20).

As for the victim's injury, Robinson opined "the shot occurred from a distance of approximately three to four inches or less" from the victim's face, with gas pressure from the chamber causing the expansive injury to the skull. (R. p. 620, lines 16-25; R. p. 622, lines 21-25; R. p. 624, line 22 – p. 625, line 5). Based on the pattern of blood dispersion, he described the shot as an "upward shot through the head". (R. p. 621, lines 20-25). He testified, "reportedly, she's standing at the end of the couch when the shot occurs, driving her over onto the couch" and Appellant was "going out the door." (R. p. 625, lines 8-11). He clarified for the record that he assessed the positioning of the parties at the time of the shot based upon Appellant's statement to law enforcement. (R. p. 640, line 14 – p. 641, line 6).

ARGUMENT

I. Appellant's own statements failed to provide evidence warranting a jury charge on involuntary manslaughter because no evidence was presented at trial from which the jury could infer Appellant was engaged in a lawful act not amounting of a felony or was otherwise lawfully armed.

A. Standard of review

"The law to be charged must be determined from the evidence presented at trial." *State v. Brayboy*, 387 S.C. 174, 179, 691 S.E.2d 482, 485 (Ct. App. 2010). When the jury could infer from the evidence presented at trial that the defendant committed a lesser offense, the trial court must charge the lesser included offense to the jury. *State v. Rivera*, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010). "A trial court commits reversible error when it fails to give a requested charge on an issue raised by the evidence presented." *State v. Smith*, 391 S.C. 408, 412, 706 S.E.2d 12, 14 (2011).

"In determining whether the evidence requires a charge on a lesser included offense, the court views the facts in a light most favorable to the defendant." *State v. Brayboy*, 387 S.C. at 180, 691 S.E.2d at 485. A charge is properly refused only when "there is no evidence that the defendant committed the lesser offense rather than the greater offense." *Id.*

B. Introduction

Because he told law enforcement in a signed statement "that he picked up the shotgun to go outside and check what was going on with the shed outside his trailer," Appellant posits he should have received a jury instruction on involuntary manslaughter. (R. p. 654, line 24 – p. 655, line 5). Counsel argued that Appellant "armed himself to go check around the trailer or around the outside the trailer, and that's what he was on the way to do and the accident [with the victim] interrupted that." (R. p. 660, lines 7-11). The State published this statement through the

testimony of Sergeant Joe Clark. (R. p. 566, line 11 – p. 572, line 5; R. pp. 742-45).

Finding *State v. Reese*, 370 S.C. 31, 633 S.E.2d 898 (2006), persuasive, the trial court denied Appellant's request for an involuntary manslaughter instruction because Appellant's statement indicated that he pointed the firearm at the victim, constituting the felony of pointing and presenting. (R. p. 650, lines 24-25; R. p. 651, line 23 – p. 653, line 16). The trial court noted that although Appellant acted "unlawfully the moment he pick[ed] up a gun" because of a prior conviction, that alone was not sufficient to bar the instruction. (R. p. 656, line 6 – p. 657, line 20). Additionally, the trial court found no evidence supporting Appellant's argument that he lawfully armed himself in self-defense. (R. p. 654, lines 21-23; R. p. 655, line 22 – p. 657, line 3). The trial court otherwise instructed the jury on the law of accident and that it was unlawful to point or present a firearm. (R. p. 655, lines 11-13; R. p. 657, lien 21 – p. 658, line 10).

In determining the propriety of the involuntary manslaughter instruction, "the pivotal issue is whether Appellant was engaged in a lawful activity at the time of the killing." *State v. Burriss*, 334 S.C. 256, 265, 513 S.E.2d 104, 109 (1999); *id.* at 265 n.11; 513 S.E.2d at 109 n.11. "Involuntary manslaughter is the killing of another without malice and unintentionally while engaged in either: (1) an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm; or (2) a lawful act with reckless disregard for the safety of others." *State v. Reese*, 370 S.C. 31, 36, 633 S.E.2d 898, 900 (2006), *overruled on other grounds by State v. Belcher*, 385 S.C. 597, 685 S.E.2d 802 (2009); S.C. Code Ann. § 16-3-60. "To constitute involuntary manslaughter, there must be a finding of criminal negligence, statutorily defined as a reckless disregard of the safety of others." *State v. Crosby*, 355 S.C. 47, 52, 584 S.E.2d 110, 112 (2003).

C. Under any interpretation of the evidence, Appellant was pointing or presenting a firearm at the time of the shooting such that he was engaged in an unlawful act amounting to a felony and was therefore precluded from receiving a jury instruction on involuntary manslaughter.

A defendant's engagement in a felony at the time the gun went off precludes a charge on involuntary manslaughter. *State v. Burriss, supra* at 264-65, 513 S.E.2d at 109. "It is unlawful for a person to present or point at another person a loaded or unloaded firearm. A person who violates the provisions of the section is guilty of a felony[.]" S.C. Code Ann. § 16-23-410 ("Pointing firearm at another person"). Where the evidence at trial leads to the inference that the defendant was pointing or presenting a firearm at the time of the shooting, involuntary manslaughter cannot be charged. *State v. Reese, supra* at 36, 633 S.E.2d at 901; *State v. Cabrera-Pena*, 361 S.C. 372, 381, 605 S.E.2d 522, 526-27 (2004) (concluding the defendant was not entitled to a jury charge under either definition of involuntary manslaughter because the defendant's use of a firearm to intimidate the victim constituted the felony of pointing or presenting a firearm and because he was not lawfully entitled to arm himself in self-defense at the time).

Here, even when viewed in the light most favorable to Appellant, the evidence presented within Appellant's statement precluded the involuntary manslaughter instruction under prong (1)[1] because it demonstrated that he was pointing or presenting a firearm at the time of the shooting. *See id.* According to his own statement, Appellant was standing at the front door holding the shotgun when the victim came in the front door. (R. pp. 742-45). He indicates that their meeting at the door was unintentional and that they immediately began "talking at each

[1] "Involuntary manslaughter is the killing of another without malice and unintentionally while engaged in either: (1) an unlawful act not amounting to a felony and not naturally tending to cause death or great bodily harm . . . ." *State v. Reese*, 370 S.C. at 36, 633 S.E.2d at 900.

other," culminating in the discharge of the shotgun. (R. p. 566, line 11 – p. 568, line 14). According to Appellant, he was standing and pointing the shotgun at her when she came in the front door and up until the time the gun discharged:

- "When I decided to check out around my trailer with my shotgun, Doris was coming in the front door. We are right there at the same time. She comes in the door, that is when I told her I was worried about her. That is when the gun went off. She had touched the gun when it went off. She took the gun and threw it up." (R. p. 568, line 23 – p. 569, line 3).
- "When she came home from work last night, I had my gun in the front room. I did this because the trailer park is an unstable place. She came at me. She grabbed the gun. It went up and it went off. I grabbed her." (R. p. 566, lines 14-18).
- "I shot her at the front door." (R. p. 567, line 5).
- "I told her when she came in the house that I had just called her job. She was a little late and I was worried about her. . . . She says, quote, you've got no reason to worry about me, unquote. She said it with an attitude. We were just talking at each other." (R. p. 567, line 21 – p. 568, line 3).
- "[I was] holding the gun." (R. p. 571, lines 4-6).
- "He pushed the gun away. And that's when he said it went off." (R. p. 569, lines 9-10).
- "She grabbed the gun. . . . She threw it up." (R. p. 569, lines 13-15).
- "She was standing by the side of the couch when the gun went off." (R. p. 570, lines 1-2; *compare* State's Exhibits 22 and 95).

Appellant's description of events leaves no room for an interpretation other than one in which Appellant pointed a loaded firearm at the victim when she entered their residence. Code Section § 16-23-410 designates this act as a felony. No evidence of a struggle over the gun exists in the record which may support an inference that Appellant was not in fact pointing or presenting the firearm as indicated by the statement. *See Wigington v. State*, 413 S.C. 578, 588, 776 S.E.2d 407, 412 (Ct. App. 2015) ("evidence of a struggle over a gun supports an instruction on involuntary manslaughter when the evidence shows the defendant was lawfully armed in self-

defense at the time of the shooting and the defendant recklessly handled the loaded gun"); *contra State v. Crosby*, *supra* at 53, 584 S.E.2d at 112 (defendant entitled to involuntary manslaughter where his statement indicated he was in fear for his life, closed his eyes, and unknowingly pulled the trigger). The trial court accordingly properly refused to instruct the jury on involuntary manslaughter. *State v. Reese*, *supra*; *State v. Cabrera-Pena*, *supra*.

D. Under any interpretation of the evidence, Appellant's prior conviction barred him from owning or carrying a firearm, and he was not engaged in a factual scenario warranting the application of self-defense, and was therefore precluded from receiving a jury instruction on involuntary manslaughter.

Appellant was also not otherwise lawfully armed, thus precluding an involuntary manslaughter under prong (2).[2] *State v. Burris*, *supra* at 265, 334 S.E.2d at 109. Appellant had a prior felony conviction which made it unlawful for him to have the firearm. S.C. Code Ann. § 16-23-500(B). Before trial began on the murder charge, Appellant pled guilty to unlawful possession of a firearm by a person convicted of a violent felony. (R. pp. 34-37). However, the prior felony conviction did not exclusively act to preclude the involuntary manslaughter instruction. *State v. Goodson*, 312 S.C. 278, 280 n.1, 440 S.E.2d 370, 372 n.1 (1994) (unlawful possession of a weapon does not in and of itself preclude an accident defense); *State v. Burriss*, *supra* (applying *Goodson*, *supra*, in the context of involuntary manslaughter)

A defendant who may not lawfully possess a gun may otherwise lawfully arm himself in self-defense if the elements of self-defense are met at the time the gun discharged. *State v. Burriss* at 262, 513 S.E.2d at 108 (1999) ("a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of

[2] "Involuntary manslaughter is the killing of another without malice and unintentionally while engaged in . . . (2) a lawful act with reckless disregard for the safety of others." *State v. Reese*, 370 S.C. at 36, 633 S.E.2d at 900.

the shooting"); *State v. Smith*, 391 S.C. 408, 414, 706 S.E.2d 12, 15 (2011). For self-defense, the defendant must establish each of the following: (1) he was without fault in bringing on the difficulty; (2) he actually believed he was in, or was actually in, imminent danger of losing his life or sustaining serious bodily injury; (3) if his defense is based upon his belief of imminent danger, that a reasonably prudent man of ordinary firmness and courage would have believed the same; but if he actually was in imminent danger that the circumstances were such as would warrant a man of ordinary prudence, firmness, and courage to strike the fatal blow to save himself from serious bodily harm or losing his own life, and, finally; (4) he had no other probable means of avoiding the danger than to act as he did in this particular instance. *State v. Goodson*, *supra* at 280, 440 S.E.2d at 372.

Here, no evidence supports a finding that Appellant was lawfully armed in self-defense at the time of the shooting. Appellant's statement yields no information supportive of any element of self-defense. Appellant's statement gave no indication there existed any imminent threat or that he feared for his own safety in any way. (R. pp. 742-45). Appellant gave no indication in that some occurring altercation caused him to pick up the shotgun and "go check" on things. It states that Appellant picked up the shotgun to "check" around the trailer park, which he merely characterized as "unstable." (R. p. 566, line 11 – p. 572, line 9). Appellant did not characterize his interaction with the victim as anything more than a verbal argument; he explained to the officer that they "were talking at each other." (R. p. 568, lines 1-14). He did not state that she tried to turn the gun, a full-barreled shotgun, on him. (*See* R. p. 618, lines 19-20). Nor did Appellant give any details supporting a conclusion that he or the reasonable man would have acted to save himself from serious bodily injury or loss of life. Also, Appellant, who said he armed himself "to check out around my trailer" had probable means of avoiding the purported

danger inside and outside of trailer: he could have set the gun down when he began talking with his wife. (R. p. 566, line 11 – p. 572, line 9).

Appellant's case is not one where "a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting." *State v. Crosby*, *supra* at 52, 584 S.E.2d at 112 (citing *State v. Burriss*, *supra* at 262, 513 S.E.2d at 108). In short, Appellant identified no imminent threat either in the trailer park or in his own living room that he could lawfully meet with deadly force or from which he could not retreat. *State v. Smith*, *supra* at 414, 706 S.E.2d at 15. Only that his wife "came at [him]" when she arrived inside the home and "took the gun and threw it up." (R. p. 566, line 16 – p. 569, line 17). Because the facts do not support a finding that Appellant lawfully armed himself in self-defense, the trial court properly refused to instruct the jury on the lesser included offense of involuntary manslaughter. *State v. Smith*, *supra*. *State v. Cabrera-Pena*, *supra*.

II. Not only did Appellant inadequately preserve his objection to the qualification of either witness, but the trial court did adequately rule on the qualifications of Investigator Timothy Lee, offered as an expert in crime scene processing, and Investigator Stan Richards, offered as an expert in blood stain pattern analysis. Each was duly qualified to testify by the applicable test.

A. Standard of Review

"A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." *State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011). Our courts have found no abuse of discretion where the witness qualified as an expert "has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge." *State v. Henry*, 329 S.C. 266, 273, 495 S.E.2d 463, 466 (Ct. App. 1997).

However, when defense counsel withdraws or otherwise consents to the qualification of an expert witness, any issue regarding their qualification is not ripe for appellate consideration. "A party cannot complain of an error which his own conduct induced." *State v. Carlson,* 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005).

B. Standard of Admissibility of Expert Testimony

"[A] witness qualified as an expert by knowledge, skill, experience, training, or education, may testify . . . in the form of an opinion" so long as that witness' "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Rule 702, SCRE. The procedure for admitting scientific evidence

under Rule 702, SCRE, requires a series of findings. *State v. Council*, 335 S.C. 1, 20–21, 515 S.E.2d 508, 518 (1999). The court "must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." *Id.*; *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009).

Rule 702, SCRE, "'applies its reliability standard to all 'scientific,' 'technical,' or 'other specialized' matters within its scope.'" *State v. White*, 382 S.C. at 270, 676 S.E.2d at 686 (quoting *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147, 119 S.Ct. 1167, 1174 (1999)). For reliability of scientific evidence, *Council* applied a set of factors from *State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979), requiring trial courts to examine "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures" before ruling upon its admissibility. *State v. Council*, 335 S.C. at 19, 515 S.E.2d at 517 (citing *State v. Ford*, 301 S.C. 485, 392 S.E.2d 781 (1990)). However, so long as the expert testimony sought to be admitted is nonscientific, "the *Council* factors serve no useful analytical purpose" in evaluating whether the expert's qualifications meet Rule 702's threshold reliability requirement. *State v. White*, 382 S.C. at 274, 676 S.E.2d at 688.

If the trial court determines that the content of the evidence, the qualifications of the witness, and the reliability of the evidence sought for admission warrant admission under Rule 702, SCRE, the trial judge should then determine if its probative value is outweighed by its prejudicial effect pursuant to Rule 403, SCRE. *State v. Council*, 335 S.C. at 20, 515 S.E.2d at 518. If admissible, the jury is then free to weigh the evidence as it sees fit. *State v. Council* at 21, 515 S.E.2d at 518.

C. The court's qualification of Lee as an expert in crime scene processing did not require express consideration of the reliability factors for scientific evidence enunciated in *State v. Council*, *infra*, because Appellant agreed he was qualified in that field, because his qualification concerned a technical skillset rather than science, and because the trial court made the appropriate threshold finding after consideration of Lee's experience and training in the underlying field of expertise

Appellant does not equivocate over Investigator Timothy Lee's qualification as a crime scene processor, but rather that his methodology was unreliable and/or that the court made no specific finding as to reliability.[3] (R. p. 199, lines 11-14; Br. of App. at 19). Appellant initially requested an *in camera* hearing "to determine the reliability of any expert opinion" Lee may offer in accord with Appellant's reading of Rule 702, SCRE, *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979), and *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009). (R. p. 185, lines 7-17). Recognizing that Lee has undertaken "over 500 hours of classes on exactly how to" process a crime scene, the trial court ruled that Lee's technical knowledge reached beyond the average citizen insofar as what should be collected from and photographed at a crime scene and found him qualified as an expert in crime scene processing. (R. p. 197, line 21 – p. 198, line 18).

Appellant agreed to the expert qualification so long as Lee's testimony did not reach beyond that scope. (R. p. 198, lines 11-14; Tr. p. 204, lines 1-8). To this end, this issue is not preserved for appellate review. *State v. Carlson, supra* at 595, 611 S.E.2d at 287; *see also State v. McCrary*, 242 S.C. 506, 131 S.E.2d 687 (1963) (appellate court without authority to consider question on appeal where defendant consent to being tried on two indictments at same time and

[3] To the extent Appellant argues Lee's testimony should have been excluded as unduly prejudicial under Rule 403, SCRE, (Br. of App. at 22), that issue is unpreserved as no prejudice argument appears in the record laid on Lee's expert qualification. *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) ("an 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. Johnson*, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996) (contemporaneous objection rule). A party cannot argue one ground below and another on appeal. *State v. Benton*, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000).

raised no objection to such mode of trial at appropriate time in court).

At a later juncture, Appellant renewed an objection only to the "methodology" employed by Lee, arguing that the methodology did not meet the reliability requirement inherent in Rule 702, SCRE; *State v. White*, *supra*; *State v. Council*, *supra*; and *State v. Jones*, *supra*. (R. p. 229, lines 10-25). Reiterating that he earlier admitted Lee as an expert under authority cited by Appellant, the court ruled that Lee's methodology was a matter of weight. (R. p. 230, line 1).

"To be clear, the reliability of a witness' testimony is not a pre-requisite to determining whether or not the witness is an expert." *State v. Tapp*, 398 S.C. 376, 388, 728 S.E.2d 468, 474-75 (2012). "The expertise, reliability, and the ability of the testimony to assist the trier of fact are all threshold determinations to be made prior to the admission of expert testimony, and generally, a witness' expert status will be determined *prior* to determining the reliability of the testimony." *Id.* To that end, "the opponent may still challenge the amount or quality of the qualifications. It is in this latter context that the trial court properly concludes that 'defects in the amount and quality of education or experience go to the weight to be accorded the expert's testimony and not its admissibility.'" *State v. White*, 382 S.C. at 273-74, 676 S.E.2d at 688 (quoting *State v. Myers*, 301 S.C. 251, 256, 391 S.E.2d 551, 554 (1990)).

The trial court's qualification of Lee as an expert in crime scene processing, which the trial court identified as "technical knowledge" and "scientific technical evidence," was adequate under the strictures of Rule 702, SCRE, as interpreted in *State v. White*, *supra*, and its progeny. (R. p. 229, lines 10-25). Any opinion offered by Lee as a crime scene processor did not pertain to a matter of science but rather a technical skillset not requiring express consideration of the *Jones* factors articulated in *Council*. 335 S.C. at 19, 515 S.E.2d at 517 (citing *State v. Ford*, 301 S.C. 485, 392 S.E.2d 781 (1990)). Our Supreme Court has held that "the foundational reliability

requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the *Council* factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony." *State v. White*, 382 S.C. at 274, 676 S.E.2d at 688 (offering "no formulaic approach that will apply in the generality of cases" seeking admission of nonscientific expert testimony); *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 75, 735 S.E.2d 650, 656 (2012) (noting nonscientific expert evidence "must be evaluated on an ad hoc basis"); *State v. Whaley*, 305 S.C. 138, 142, 406 S.E.2d 369, 372 (1991) (finding *Jones* test not applicable to expert opinion on eyewitness identification, characterizing it as nonscientific).

In camera, Lee provided the following list of qualifications: 22 years' experience with the Sheriff's Department; 10 years' experience in the crime scene unit; attendance at over 500 hours of courses ranging from basic photography, fingerprinting, crime scene processing, blood pattern analysis, reconstruction, and DNA analysis; a two-year, ten-phase in-house training course on crime scene processing; advanced courses put on by private individuals on specific skills such as photography; annual in-house recertification in blood pattern analysis and fingerprinting; and certification as a crime scene investigator through the International Association of Identification requiring, *inter alia*, about 85 hours in course study. (R. p. 188, line 16 – p. 193, line 18). Lee testified he was qualified to opine on what he does as a crime scene investigator to collect and preserve evidence, such as "what needed to be done at the scene, what [he] did, what [he] looked at based on the blood at the scene;" but also that he "did not do a blood pattern analysis of the scene" in this case. (R. p. 193, line 21 – p. 196, line 3).

Lee's skillset is one of evidence collection and preservation. (R. p. 193, line 21 – p. 196, line 3). His hundreds of hours of training in evidence collection and preservation, including that in certain sub-sets of on-scene evidence such as fingerprints and skills such as photography,

indicates that he embodied a technical skill not based in scientific study. *Compare State v. Whaley*, 305 S.C. at 142, 406 S.E.2d at 371 (designating "DNA test results, blood spatter interpretation, and bite mark comparisons" as samples of "scientific evidence"); *see also* "Evidence," BLACK'S LAW DICTIONARY (10th ed. 2014) (scientific evidence defined as "fact or opinion evidence that purports to draw on specialized knowledge of a science or to rely on scientific principles for its evidentiary value"). Furthermore, not only did Appellant agree Lee was a qualified crime scene processor, (R. p. 198, lines 11-14), but a trial court is permitted to utilize a witness' training and experience as a basis for their admission of a witness as an expert. *State v. Rose*, 423 S.C. 382, 393, 814 S.E.2d 529, 534 (Ct. App. 2018) (affirming admission of expert in arson origin and causes where qualification was based on breadth of "experience and training possessed at the time of trial"); *see also State v. Mealor*, Op. No. 5590, Shearouse Adv. St. at 28 (Ct. App. filed Aug. 15, 2018) (no abuse of discretion in qualifying expert on the theoretical yield of methamphetamine based on his training and experience and where expert utilized widely accepted calculation), *pet. for reh'g filed* (Ct. App. Aug. 29, 2018); *contra State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001) (pre-*White* case finding witness should not have been admitted as expert on barefoot sole impressions and deeming that field unreliable where there were no known standards appropriate for comparison).

The trial court complied with the mandates of Rule 702, SCRE, when it admitted Lee as an expert in crime scene processing. (R. p. 197, line 21 – p. 198, line 18). When ruling upon the methodology objection, the trial court expressly stated that he considered the language of Rule 702, SCRE, in addition to *State v. White*, *supra*; *State v. Council*, *supra*; and *State v. Jones*, *supra*. (R. p. 229, lines 10-25). The trial court left the weight of the reliability of Lee's methodology for the jury to decide. (R. p. 230, line 1). The ruling indicates the trial court

completed its gatekeeping role after expressly considering the amount of skilled training Lee had undertaken in the underlying field of expertise, which is a permissible basis for this expert's qualification. *State v. White*, *supra* at 274, 676 S.E.2d at 688 ("foundational reliability requirement does not lend itself to a one-size-fits-all approach"); *State v. Rose*, *supra*; *State v. Mealor*, *supra*. Any challenge to the amount or quality of Lee's specific coursework and methodology were then available for Appellant's cross-examination, which Appellant in fact amply critiqued. (R. p. 243, line 15 – p. 267, line 25).

D. Not only did Appellant withdraw his objection at the time Investigator Stan Richards was admitted as an expert in front of the jury, but the court complied with the mandates of *Council*, *infra*, in qualifying Investigator Stan Richards for admission as an expert in blood stain pattern analysis.

As with Investigator Timothy Lee, Appellant complains of a defect in the expert qualification ruling made by the trial court with regard to Investigator Stan Richards. Also as with Investigator Timothy Lee, Appellant stated on the record at the time of Richards' admission as an expert in front of the jury: "Judge, we don't' have any objection to qualification . . . ." (R. p. 484, lines 14-20). Thus, as with Lee, Appellant conceded Richards was qualified to testify as an expert in blood stain analysis. An objection contemporaneous to the challenged witness' expert admission is required to preserve an issue for direct appellate review. "[M]aking a motion *in limine* to exclude evidence . . . does not preserve an issue for review because a motion *in limine* is not a final determination. The moving party, therefore, must make a contemporaneous objection when the evidence is introduced." *State v. Forrester*, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001); *see also State v. McCrary*, *supra* (appellate court without authority to consider question on appeal where defendant consented to being tried on two indictments at same time and raised no objection to such mode of trial at appropriate time in

court).

The Court's ruling otherwise comported with Rule 702, SCRE, and the additional factors our jurisprudence requires for consideration in admitting an expert to testify about scientific evidence. *In limine*, Appellant posited that because Richards did not utilize the protocol of "roadmapping" at the scene, that the methodology employed in this case (as opposed to the general field of blood spatter analysis) held defects rendering the entirety of Richards' proffered expert testimony inadmissible.[4] (R. p. 440, line 17 – p. 442, line 25; R. pp. 441, line 25 – p. 442, line 1 ("I didn't say [the metholodogy] was improper. It just wasn't complied with.")). Respondent submits that such an argument stretches to the soul of the definition of the oft-utilized phrase "it goes to weight, not admissibility." *State v. Myers*, 301 S.C. 251, 256, 391 S.E.2d 551, 554 (1990) (finding witness should have been qualified as expert in blood spatter pattern analysis). "With respect to qualifications, a witness may satisfy the Rule 702 threshold yet the opponent may still challenge the amount or quality of the qualifications. . . ." *State v. White*, 382 S.C. at 273–74, 676 S.E.2d at 688.

Our courts have designated blood spatter analysis as a sample of scientific evidence. *State v. Whaley*, 305 S.C. at 142, 406 S.E.2d at 371. In admitting scientific evidence, South Carolina applies, with additional guiding factors, a more liberal standard than that widely established in *Frye v. United States*, 293 F.1013 (D.C. Cir. 1923). *State v. Council*, 335 S.C. at 19, 515 S.E.2d

[4] To the extent Appellant argues Richards' testimony should have been excluded as unduly prejudicial under Rule 403, SCRE, (Br. of App. at 30-31), that issue is unpreserved as no prejudice argument appears in the record laid on Richards' expert qualification. *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001) ("an 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. Johnson*, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996) (contemporaneous objection rule). A party cannot argue one ground below and another on appeal. *State v. Benton*, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000).

at 517. "[T]he standard for admitting scientific evidence in South Carolina [is] 'the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom.'" *Id.* (quoting *State v. Jones*, 273 S.C. at 731, 259 S.E.2d at 124). It is with this standard in mind that the specific *Jones* factors must be considered, along with the remaining requirements of Rule 702, SCRE, in determining the admissibility of scientific evidence. *State v. Council* at 20, 515 S.E.2d at 518.

In this case, the court ruled Richards "more than qualified as an expert in blood stain pattern analysis":

> He has been to class upon class upon class on this issue. He is certified. There are no issues with his qualifications. There are no issues with the science in this case. Whether or not they did roadmapping or not is an issue that goes to weight and not admissibility. This evidence is clearly admissible. He is clearly qualified. He will clearly assist a trier of fact. He clearly employed the methodology that he's been trained in for the majority of his adult life. And just because they decided not to do roadmapping doesn't mean the entire thing is flawed from an admissibility standpoint, period. I mean, it's just not an issue. All that testimony is completely and totally admissible.

(R. p. 443, lines 1-15).

The court aptly admitted Richards as an expert in blood stain pattern analysis. *See State v. Myers*, *supra* at 256, 391 S.E.2d at 554 (holding the trial court "applied the rules concerning the qualifying of an expert" in blood spatter "too stringently"). The State proffered testimony relevant to the exhaustive list of factors *Council* requires the court to consider before admitting expert testimony: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." 335 S.C. at 19, 515 S.E.2d at 517. The State also proffered testimony relevant to the

broader series of findings the court must make under Rule 702, SCRE: (1) "the evidence will assist the trier of fact," (2) "the expert witness is qualified," and (3) "the underlying science is reliable." *State v. Council*, 335 S.C. at 20–21, 515 S.E.2d at 518.

Richards' proffered testimony demonstrated that he had been working with the Richland County Sheriffs' Department Crime Scene Unit since late 2000 and began training in blood patterns in 2001. (R. p. 428, line 7 – p. 429, line 3). Richards testified he was a certified crime scene investigator and certified blood stain pattern examiner with the International Association for Identification. (R. p. 429, lines 10-13). He explained the training and testing it took to achieve blood stain pattern certification as well as the recertification process which is required on a five-year rotation. (R. p. 429, line 16 – p. 430, line 4).

Richards then explained what constitutes the science of blood stain patterns: "how it is put into flight, how it lands, the patterns that generate behind it" in conjunction with the size of the stain and discrete patterns among stains. (R. p. 430, lines 5-15). He described the taxonomy and physics involved in blood stain pattern analysis. (R. p 430, line 15 – p. 431, line 2). He testified that there are "about seven steps in the methodology" but that the main step is to decipher what taxonomy applies to the stain "because it gives you an objective look at the patterns that's already been described for you so you know what you're looking at." (R. p. 431, lines 2-7). He testified the science has been peer reviewed. (R. p. 431, lines 10-12). He testified the techniques and methodology he uses in his analysis comply with national standards even though the precise names for the taxonomies of stains may differ across regions. (R. p. 431, lines 13-19).

Richards then testified about his work at the scene in this case, further demonstrating where his training informs the steps he takes in the field. (R. p. 431, line 24 – p. 438, line 8). On

in camera cross-examination, Richards testified that he is the author of the current blood spatter protocol for the Richland County crime lab. (R. p. 439, lines 7-15). He testified that he did not undertake the process called roadmapping at this crime scene because he determined it was "not necessary" due to their only being one identifiable pattern at the scene. (R. p. 439, line 16 – p. 440, line 12).

Richards' testimony covered all areas required for the court's determination regarding the admissibility of an expert witness. *State v. Council*, 335 S.C. at 19-21, 515 S.E.2d at 517-18; Rule 702, SCRE. Prior to admitting him as an expert, the State laid the foundation for Richards' personal training and experience in the field, as well as factors informing a decision on the reliability of the science of blood stain pattern analysis, including that it was peer reviewed, that there were standard protocols in place for conducting the scientific analysis, and that the manner in which the analysis was conducted was standard across the country. (R. p. 428, line 7 – p. 440, line 12). The proffer also demonstrated that the evidence would assist the trier of fact, as the location, size, and type of the blood stain in this case were relevant to the jury's determination of facts of consequence: there was a large amount of blood at the scene. *See* Rules 401 and 702, SCRE. Further, our Supreme Court has recognized in at least one other case that the presentation of blood stain pattern analysis requires the admission of expert testimony and is a science recognized in other jurisdictions. *State v. Myers*, *supra* at 258 n.1, 391 S.E.2d at 555 n.1 ("Depriving the jury of expert testimony regarding the bloodspatters clearly hampered its ability to evaluate the facts before it in this case."); *compare*, 9 A.L.R.5th 369 ("Admissibility, in criminal prosecution, of expert opinion evidence as to 'blood splatter' interpretation") (Originally published in 1993); *contra State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001) (pre-*White* case finding witness should not have been admitted as expert on barefoot sole impressions

and deeming that field unreliable where there were no known standards appropriate for comparison).

Appellant was provided an opportunity to cross-examine Richards regarding reported weaknesses in the protocols followed and the analysis conducted in this case. (R. p. 517, line 10 – p. 530, line 24; R. p. 533, lines 5-8). The jury was instructed to give any expert testimony only the weight it saw fit. (*E.g.* R. p. 484, line 21 – p. 485, line 3). Otherwise, Richards' proffer provided ample indicia that the practice of blood stain pattern analysis is a reliable and technical area of study upon which he was personally qualified to opine at trial, and the court did not abuse its discretion in allowing Richards to present his educated opinion before the jury.

III. Because Investigator Stan Richards was duly qualified to testify as an expert in blood stain pattern analysis, and because self-defense was not at issue, harmless error controls any error in the admission of the scope of Investigator Timothy Lee's Testimony.

Relying upon *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 480 (2001), Appellant argues that Lee impermissibly exceeded the bounds of his area of expertise when he testified that there was blood associated with the location of the victim's body on the sofa. *See also State v. Andrews*, 424 S.C. 304, 318, 818 S.E.2d 227, 235 (2018). An expert in crime scene processing may testify about items and substances observed, recorded, and recovered from the scene. *State v. Ellis*, *supra* at 177, 547 S.E.2d at 491. Appellant categorizes Lee's expert testimony as impermissibly reaching to that of either crime scene reconstruction or blood spatter interpretation. (Br. of App. at 16).

A. In the regards to the scope of Investigator Timothy Lee's testimony, he was permitted to testify about his own crime scene observations regardless of any expert qualification, and was permitted to offer his opinion insofar as it informed his documentation of the evidence at the scene.

Before the jury, Lee described the steps he took upon responding to the scene and beginning to photograph it, as well as what protocols dictated his efforts. (R. p. 205, line 12 – p. 209, line 25). It was clear from the outset of his testimony that he arrived at the scene and began to process it *while the victim was still on the scene*: "I observed on the couch to my right a female victim that was on the couch. She had sustained a large trauma to the side of her head. I began photographing inside of the property." (R. p. 208, lines 1-10). Lee continued photographing after the body had been removed. (R. p. 213, lines 7-18).

Lee testified that he photographed blood stains at the incident location to record "that something had happened [t]here." (R. p. 210, lines 1-18). He testified that his role was to

document the bloodletting—which was essential, highly visible evidence at this particular crime scene. (R. p. 210, line 15 – p. 217, line 21; State's Exhibits 15 through 39). He "wanted to show that the scene had a lot of stains . . . ." (R. p. 215, lines 8-16) He also photographed the location of the victim and shotgun pellets and wadding in her vicinity. (R. p. 213, lines 4-23; R. p. 218, lines 3-12).

Lee was addressing the importance of a photo he took of the victim on the couch, explaining that the photographed showed limited blood staining on one side of the sofa versus the other, and that it gave law enforcement "an indication that a bloodletting occurred within –" when Appellant objected. (R. p. 220, lines 6-16). Appellant argued this testimony fell outside Lee's scope of expertise as a crime scene processor because it opined "where a bloodletting event occurred." (R. p. 220, line 24 – p. 221, line 4). Appellant expounded that there had been no *in camera* examination about Lee's methodology to determine the reliability of his collection practices. (R. p. 221, lines 12-15).

Next, *in camera*, and in response to the trial court, Lee explained:

> What was showing with this photograph was the dynamic explosion of the blood from the body to the left and how the edge of the couch doesn't have that much on it. There might be a little bit. So that gives us, as a crime scene investigator, that this is where the majority of the – how do I want to put it, the blast occurred, and that gives me an idea to look for evidence within this area. So we know that there's shot pellets. I've already seen a few pellets there on the couch, I can look for a few more things like that. When you have projectiles – with shotguns, there's multiple pellets compared to just one projective with an individual bullet. That gives me an indication of I need to look further in this area to see if I can find this stuff.

(R. p. 222, line 17 – p. 223, line 7).

The court followed up asking Lee: "How does your training and your course work help you process through what you just told me?" (R. p. 223, lines 8-12). Lee answered:

> We've had blood stain analysis, we've had reconstruction courses and they help us to analyze the area the look for evidence. So my training that I've received through the years, through my experience on crime scenes, whether it's a suicide scene, and accidental scene or, you know, a robbery where we have shootings impacts projectiles, things like that give us an area to start our looking for other evidence. So based on my experience, based on my training, that gives me a location to begin.

(R. p. 223, lines 16-24).

Lee went on to opine *in camera* that the victim was shot on the sofa, based upon:

> the way the stains were radiating out from that location, where the shot wadding was located, where the skull and the brains are located, and just based on the spatter area, she couldn't have been standing. She couldn't have been walking around. The void behind the body when we moved the body out, if she was standing, there would surely be blood back there as well and there wasn't. There was a voided area. . . .
>
> We've gone through testing. We've had actual instructi[ion] come in [during training], and they show us if you have a puddle of blood right here and you have a post here and a post here and you hit the blood with a hammer and the blood sprays out like this and then you remove those posts, you're going to have a void. So there are things that we look for.
>
> Along with the coroner, we can tell if the body has been moved around when we start to move the body because we can't move the body without the coroner's assistance. So when we did move the body and placed her on the floor, there was that voided area . . . on the back of the sofa.

(R. p. 226, line 3 – p. 227, line 4).

The court ruled Lee's testimony admissible, finding that his coursework certified him to speak about the location of the body as presented during his *in camera* testimony. (R. p. 228, lines 21-25). The court did not alter or re-specify Lee's expert qualifications beyond that as an expert in crime scene processing. (R. p. 231, lines 1-19).

In front of the jury and over Appellant's renewed objections, Lee's testimony continued: the photograph gave him "an indication of where any injury may have occurred." (R. p. 231, lines 5-16). "It shows [him] where an area where the injury let the most blood out. There was a

bloodletting right there. That is where I think that I need to concentrate my searching for to look for any additional evidence." (R. p. 231, lines 20-24). He testified over Appellant's continued objection that, based upon his training, varying concentrations of blood at the scene focused him on where to look for evidence to document. (R. p. 233, line 2 – p. 236, line 17).

Because Lee began to work the scene with the victim present and continued to photograph it after the body was removed by the Coroner's Office, Lee's testimony about the varying concentrations of bloodletting at the scene in relation to the victim's body was not based upon any scientific analysis, but rather was derived from Lee's own personal observations at the scene and was not an expert opinion. Rules 701 and 702, SCRE. Without objection, Lee testified in the same manner about the location of the body in relation to the shotgun wadding he photographed, as well as the shotgun pellets. (R. p. 213, line 8 – p. 214, line 9; R. p. 218, lines 13-24). He was not testifying about the protocols included in conducting a site-specific blood stain pattern analysis, but rather what about the crime scene—including the victim—tipped him off to look for and photograph other evidence in a certain area in the room. Blood is evidence of injury just as birdshot is evidence of the discharge of a shotgun. Identifying both are within the purview of a crime scene processor. To that end, Lee did not offer an opinion on what evidence meant but rather about the fact that he has been trained to hone in on and document evidence at a crime scene. Such testimony is distinguishable from rendering an opinion about where the victim was when she was shot. *State v. Ellis*, *supra*; *State v. Andrews*; *supra*. Here the crime scene processor saw the body in relation to the blood and had to decide, based on his training, what to document and where to look for evidence. His testimony was admissible for that purpose.

B. As to any remainder of Lee's testimony, harmless error controls the outcome due to its cumulative nature and absence of self-defense.

Even if wrongly admitted by the trial judge, an investigator's expert opinion may constitute harmless error. *State v. Tapp*, 398 S.C. at 389-90, 728 S.E.2d at 475. (harmless error applied to admission of expert testimony "before vetting it for its reliability"). "Whether an error is harmless depends on the circumstances of the particular case." *Id.* (quoting *State v. Mitchell,* 378 S.C. 305, 316, 662 S.E.2d 493, 499 (2008)). The relevant inquiry does not focus on whether the State proved its case beyond a reasonable doubt, "but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict." *State v. Tapp*, 398 S.C. 376, 389–90, 728 S.E.2d 468, 475 (2012). "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. Error is harmless when it 'could not reasonably have affected the result of the trial.'" *State v. Mitchell, supra* (quoting *State v. Key,* 256 S.C. 90, 180 S.E.2d 888 (1971)).

Factors for consideration 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 prosecutions' case." *Delaware v. Van Ardsall,* 475 U.S. 673, 684, 106 S.Ct. 1431, 1438 (1986).

First, any error in Investigator Stan Richard's qualification as an expert witness is harmless as blood stain pattern analysis is a nationally recognized field of expertise and as the record cited herein demonstrates that Richards was duly qualified to testify in that field regardless of the trial court's ruling upon his expert qualification. *See State v. Myers*, *supra* at 258, 391 S.E.2d at 555 n.1 ("Depriving the jury of expert testimony regarding

the bloodspatters clearly hampered its ability to evaluate the facts before it in this case."); *compare*, 9 A.L.R.5th 369 ("Admissibility, in criminal prosecution, of expert opinion evidence as to 'blood splatter' interpretation") (Originally published in 1993); *contra State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001) (pre-*White* case finding witness should not have been admitted as expert on barefoot sole impressions and deeming that field unreliable where there were no known standards appropriate for comparison).

Second, harmless error applies when the testimony targeted as improperly admitted is merely cumulative to other properly admitted testimony. *State v. Page*, 378 S.C. 476, 484, 663 S.E.2d 357, 360-61 (Ct. App. 2008); *State v. McLeod*, 362 S.C. 73, 84-85, 606 S.E.2d 215, 221 (Ct. App. 2004). Here, any opinion given by Lee that exceeded his area of expertise as a crime scene processor was duplicative of that of Investigator Stan Richards, the duly qualified and properly admitted blood stain pattern analyst.[5] (R. pp. 485, line 5 – p. 516, line 2). Harmless error is especially applicable here, where the two experts testified they worked a single crime scene in tandem. (R. p. 250, lines 2-20; R. p. 486, lines 13-18; R. p. 502, lines 20-25). Also, Lee's testimony notably goes nowhere near as far as that of Investigator Richards.[6] (*Cf.* R. p. 233, lines 9-25). Moreover, Lee's testimony which Appellant identifies as being outside the

[5] Respondent refers to the following testimony by Lee in regards to this harmless error argument: Without verbal indicators to identify which exhibit he was referring to and whether the victim was present in the photograph, Lee testified the victim was "here" and "there's a lot of blood here," and "she was injured in this area" where there was a lot of blood. (R. p. 233, lines 9-11). He testified that a "void" is an area where blood is missing and that such an area would cause him to "ask why" because no blood in an otherwise bloody scene indicates that something is missing. (R. p. 234, lines 3-14). He did not identify a "void" in any photo presented during direct examination. (R. p. 234, lines 15-18). He also testified that one photograph documented the "overall" scene, but that it showed less blood in one area than that next to the victim's body, indicating that blood traveling across the room "can slow down." (R. p. 236, lines 1-11).

[6] Lee may have testified *in camera* that the decedent "couldn't have been standing," but offered no such opinion before the jury. (R. p. 226, lines 6-7; R. p. 233, lines 9-25).

scope of his expertise in crime scene processing is also cumulative to Lee's earlier testimony about processing the shotgun wadding found on the sofa at the crime scene. Lee testified that the location of the wadding on the sofa told him "that the shot occurred within the parameter of where the body was at." (R. p. 218, lines 13-21).

Third, Appellant was permitted to impeach the quality of Lee's investigation during voir dire, cross-examination, re-cross examination, and through the presentation of his own expert in blood spatter analysis. (R. p. 201, line 17 – p. 204, line 5; R. p. 243, line 15 – p. 267, line 24; R. p. 271, line 25 – p. 272, line 25; R. p. 617, lines 5-9; R. p. 621, lines 20-25; R. p. 625, lines 8-11). However, the photographic evidence introduced at trial fails, to the untrained eye, to corroborate in any way the course of events testified to by Appellant's blood spatter analyst and Appellant's statement to law enforcement. (State's Exhibits 15-29, 84-85, 95).

Finally, any error in this case is distinguishable from that found in the scope of opinion testimony by the crime scene processors at issue in *Ellis* and *Andrews* because, unlike in those cases, self-defense was not at issue. The Supreme Court found in both aforementioned cases that the crime scene processor's opinions on the position of the victim undermined those defendants' self-defense claims. *Ellis*, 345 S.C. at 178-79, 547 S.E.2d at 491; *Andrews,* 424 S.C. at 318, 818 S.E.2d at 235. But here, Appellant provided a statement that he placed the victim on the sofa after the gun went off. (R. p. 570, lines 1-3). This sofa is where the crime scene processor testified he located the coagulation of blood. (R. p. 232, line 7 – p. 233, line 11). In this way, Appellant's claim of accident is not so diametrically opposed to the crime scene processor's testimony as Ellis and Andrew's self-defense claims were to the opinions of the crime scene processor in their respective cases, and is an additional consideration regarding the application of harmless error.

Any error in the scope of Lee's testimony cannot be determined to have contributed to the verdict obtained due to its cumulative nature and the properly admitted photographs of the crime scene.

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 firearm by a person convicted of a violent felony.

Respectfully submitted,

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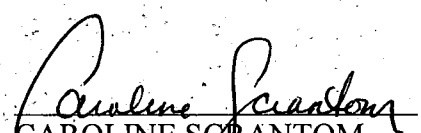

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February 4, 2019
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Robert E. Hood, Circuit Court Judge

RECEIVED
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SC Court of Appeals

THE STATE,

Respondent,

v.

MIMI JOE MARSHALL,

Appellant

Appellate Case No. 2017-002329.

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,

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