STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Kershaw County

Honorable William A. McKinnon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GREGG PICKRELL,

APPELLANT

APPELLATE CASE NO. 2018-001139

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by denying appellant immunity from prosecution pursuant to S.C. Code § 16-11-440(c) and S.C. Code §16-11-450 and where it erred as a matter of law by ruling that immunity had to be denied where "the claim is disputed," since appellant was entitled to an immunity ruling on a correct legal basis, and, in addition, immunity should have been granted since appellant proved by the preponderance of the evidence that she was acting legally in self-defense and otherwise was entitled to immunity under the Stand Your Ground provision of S.C. Code § 16-11-440(c)?

2.

Whether the court erred by allowing Kershaw Investigator Richard DeVors to opine he did not understand how appellant could state that the decedent lunged at her when she shot him, where the decedent was shot in the back, since this was an improper lay opinion that went beyond the investigator's duties as a fact finder, where he was not an expert qualified to give opinion testimony?

3.

Whether the court erred by allowing SLED agent Dawn Claycomb to testify she eliminated the shooting happening "within the bedroom" or "in the living room" since Claycomb was not an expert, and this impermissible lay opinion testimony was highly prejudicial since it was intended to convey to the jury that the shooting did not occur as appellant told the police it occurred?

STATEMENT OF THE CASE

Appellant was indicted by the Kershaw County Grand Jury for the offense of murder. R. 1304. Her case came on for trial on May 29, 2018, before the Honorable William A. McKinnon, and a jury. John Delgado and Amy Zmroczek represented appellant. Assistant solicitors Curtis A. Pauling, III, April W. Sampson, and Jacqueline Li represented the state. R. 296.

On June 5, 2018, the jury found appellant guilty. R. 855, ll. 17-20. Judge McKinnon sentenced appellant to thirty-five years imprisonment. R. 864, ll. 2-7.

This appeal follows.

ARGUMENT

1.

The court erred by denying appellant immunity from prosecution pursuant to S.C. Code § 16-11-440(c) and S.C. Code §16-11-450 where it erred as a matter of law by ruling that immunity had to be denied where "the claim is disputed," since appellant was entitled to an immunity ruling on a correct legal basis, and, in addition, immunity should have been granted since appellant proved by the preponderance of the evidence that she was acting legally in self-defense and otherwise was entitled to immunity under the Stand Your Ground provision of S.C. Code § 16-11-440(c)

Standard of review

"A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review." State v. Curry, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013); see State v. Duncan, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011) (recognizing that the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence). 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. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007); State v. Jones, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016).

Introduction

Appellant Gregg Pickrell owned a horse farm with her mother in Camden. The decedent worked on the farm with appellant, and they had been involved in a sexual relationship. There

would be strong evidence the decedent was a violent and "mean" person, particularly when he was drinking and/or using drugs, and that appellant was a battered woman.

Relevant Facts

Defense counsel Delgado filed a motion for immunity from prosecution and motion to dismiss pursuant to the Protection of Persons and Property Act § 16-11-410, South Carolina Code of Laws (2006), on August 9, 2016. R. 1014. In this motion, counsel noted appellant had been in an intimate relationship with Decedent Robert Lamont Demary (Monty), who was employed on her farm as a laborer for several years leading up to the fatal occurrence. "The relationship between the two had crescendoed into one of a chronic history of emotional and verbal abuse, sexual exploitation, and physical assault by the date of September 10, 2014." R. 1014.

The motion revealed that in September 2008, the decedent was arrested in Bossimer Parish, Louisiana, for assaulting appellant [during training for a horse race there], and he spent forty-five days in jail. When the decedent returned to South Carolina from Louisiana, he again persuaded appellant to allow him to work on her horse farm. "As a consequence, she continued to suffer abuse at the hands of Demary. He held great power over Ms. Pickrell as a result of her fear of him and shame of herself; he controlled her with threats of killing her, killing her elderly mother who lived on the farm, and/or killing her livestock. This abuse continued on his return to South Carolina after confinement in Louisiana." R. 1014.

The motion revealed that appellant documented "by cell phone photos and audio many of the results of the choking, beating and kicking incidents subsequently inflicted by Demary." R. 1014. However, appellant sought to disguise the physical effects of being beaten by the decedent

by wearing scarves around her neck, "the wearing of turtleneck shirts, the use of long sleeves and sunglasses." R. 1015.

The decedent's grandmother wrote appellant a note advising her to "get out of the abuse as soon as you can." R. 1015. The decedent repeatedly abused appellant by holding her hostage "for several hours of repeated sexual assaults, choking, assaulting her in the face and body with his fists, kicking her, and shoving her into furniture or onto the floor. The defendant had developed a coping mechanism over the course of these assaults by trying to placate and calm Demary from getting violent by providing him food and attempting to make peace." R. 1015.

On September 10, 2014, the decedent again verbally accosted appellant, kicked her, and beat her in appellant's small home. In the early morning hours of September 11, 2014, after the decedent forced appellant to have sexual intercourse and threatened "[t]o kill her and her mother, Demary was shot once by Ms. Pickrell. She immediately called 911 for assistance and aid for Demary and stayed at the scene until law enforcement and EMS personnel arrived." R. 1016.

The motion also noted that appellant was interviewed by video and audio recording at the Kershaw County Sheriff's Department for approximately two hours later on September 11, 2014. She was also "forensically evaluated at the Kershaw County Memorial Hospital and prescribed medication for her injuries." R. 1016.

The motion argued appellant was immune from prosecution pursuant to S.C. Code § 16-11-410 et seq, the Protection of Persons and Property Act. R. 1016-1018.

The immunity hearing

An immunity hearing was held January 26-27, 2017, before the Honorable Alison Lee. John Delgado represented appellant, and April Sampson and Curtis Pauling were the assistant solicitors. R. 1.

At the beginning of the immunity hearing, defense counsel noted the exhibits to his motion for immunity. These included Exhibit A, which was an incident report from the Bossimer, Louisiana city police department about an incident where the decedent called appellant a "bitch," "slut," "cunt," and other offensive words. The decedent also told appellant "fuck you," several times. In addition, the decedent threw a Gatorade bottle that was half full -- which struck appellant on the right side of her face -- and which left a distinct black mark and swelling near appellant's right eye. Appellant told the police the decedent also punched her in the ribs, that there was one witness to her being hit by the decedent, and to the decedent's cursing her. The incident report was dated September 25, 2008. R. 13; r. 1021.

The exhibits to the immunity motion also contained photographs of the marks left on the abused appellant. In addition, the decedent's grandmother wrote appellant on June 10, 2008, advising appellant to "[g]et out of abuse as soon as you can . . ." "I'm going to talk to Monty and see if he will try and get some help for his temper because he wasn't raised like that." R. 14-16; r. 1036.

Exhibit E was an incident report wherein Tyrone Pearson, another one of appellant's farm workers, told the police that the decedent telephoned him on November 20, 2008, stating he was on his way back to Camden, South Carolina, to kill Pearson. See Attachment E to motion, R. 1041.

The judge read the contents of the exhibits into the record. She observed that to be admissible, the altercations must take haven place between the decedent and appellant or their specific acts must have been known to appellant and affected her state of mind. R. 29, l. 3 – 37, l. 19.

Defense counsel Delgado argued appellant was entitled to immunity under S.C. Code § 16-11-440(c), which was the Stand Your Ground portion of the statute. R. 45, l. 1 – 47, l. 13.

Appellant testifies

Appellant took the stand in her own defense during the immunity hearing. She was sixty-three-years old. R. 56, l. 19 – 57, l. 1. She lived on Baynard Boykin Road in Kershaw County. She admitted she shot the decedent on September 11, 2014, because "[h]e was going to kill me, and he was going to kill my mother." Appellant's mother was eighty-nine years old on September 11, 2014. R. 57, ll. 6-25.

Appellant testified she moved to Camden "from the Mexican border of Arizona to the farm with an entire ranch operation." Appellant was a "horse trainer" by trade. She had between twenty and thirty horses on the farm in September of 2014. R. 58, ll. 16-22.

Appellant described how one of her horses won a race in Shreveport, Bossier City, Louisiana, on October 9, 2008, while ridden by legendary jockey Patrick Valenzuela. It was the 400th win of Valenzuela's career. R. 59, ll. 12-24. Appellant was accompanied to Louisiana for the horse race by the decedent and another employee, Tyrone Pearson. R. 60, ll. 3-24.

The decedent was incarcerated that weekend in Louisiana because he hit appellant and he "told Tyrone Pearson that he was going him kill him . . ." R. 62, l. 16 – 63, l. 3. The police report was made in Louisiana about the incident where the decedent "hit me in the ribs with a closed fist . . . he threw a Gatorade bottle and hit me in the right side of my face." R. 64, l. 18 – 65, l. 22. The decedent was incarcerated in Louisiana for about sixty days as a result of this assault and battery upon appellant. R. 66, ll. 10-11.

The decedent returned to appellant's farm in "mid-May or midyear 2011." "He came to the farm. He wanted part-time work, which is really all I could handle. I didn't have any other

people really working for me." The decedent was therefore rehired to work part-time on the farm. R. 67, l. 16 – 68, l. 8.

Altercations and "horrendous arguments" began with the decedent again, and "I started taking pictures. I took pictures of myself. . . . I needed to have a record for my mother because I felt -- I was in fear that I would end up dead in my house, and I wanted my mother to have some sort of a map that would tell her what had happened to me." R. 68, ll. 4-13. Appellant contacted the police and she had the *victim's advocate, Barbara Jones, file the order of protection she had from Louisiana in Kershaw County.* R. 68, l. 14 – 69, l. 5.

Appellant identified photographs showing where the decedent left marks and bruises on her neck from almost strangling her. R. 69, l. 27 – 71, l. 7; r. 72, l. 5 – 74, l. 21. Appellant also identified a letter from the decedent's grandmother, Estelle Belton, which was attached to her immunity motion, where Belton urged appellant to take care of herself against the decedent's abuse. R. 76, l. 18 – 78, l. 20. Appellant added that the decedent had a "explosive" temper problem. R. 78, ll. 18-20.

On September 10, 2014, appellant worked on the farm all day and the decedent arrived at her farmhouse shortly after ten o'clock that night. R. 78, l. 21 – 79, l. 4. Appellant described her farm as a 123-acre farm on which her mother lived in another house. It was undisputed that the farmhouse, and appellant's bedroom were small. The decedent arrived that night in a taxi, and it was not unusual for the decedent to walk from the mailbox on the road to appellant's house. One cab driver later explained that the decedent did not want the car lights to "spook the horses." R. 78, l. 21 – 81, l. 23.

Appellant related that the decedent came to her house when he wanted to come over, and "you didn't tell Monty to leave . . . Monty did what he wanted to do and that was that." R. 82,

l. 17 – 83, l. 4. Appellant remembered between ten o'clock and midnight that evening, "We had poured a drink and we were outside at the table on this side of the house." R. 85, ll. 9-15.

The sheriff of Kershaw County, Sheriff Matthews, lived on a nearby farm and his dog "started to howl." The decedent was angry "about everything going on that night, the sheriff, the President was speaking about ISIS. He was -- he was very, very angry about everything, and the howling dog was -- basically, was -- I knew I had to get up after there was an altercation or an argument about the howling hound, which is just down -- it's down the road in -- in the forest down there." R. 86, ll. 6-22.

Appellant got up from the table and started walking away when the decedent came behind her and "[g]rabbed my hair and he thrust me into the door and he said 'you don't get up and leave without announcing.' And it -- that's – [how] the whole episode started. There was [were] several episodes that night, but that was the start of the -- the violence, the fear. . . . I conditioned myself to just deal with it, and I became obedient. I was submissive. I -- I just wanted him to not beat me up and explode." Appellant related "it was a telltale setting *that happened hundreds of times before with Monty.*" R. 86, l. 14 – 87, l. 22. (emphasis added).

Appellant related how she tried to placate the decedent. So, between midnight and two in the morning this time she put on a movie for them to watch. Appellant ultimately went and laid down on her bed. She next saw the decedent standing over her bed, "and he demanded sex." Appellant said she could "never, never" refuse to have sex with the decedent. R. 90, ll. 15-24. Appellant had a urinary tract infection at the time and "when Monty forced himself on me and in me for hours and I -- I begged him. I screamed in agony -- in agony from the sex." R. 90, l. 22 – 91, l. 6.

Appellant described her state of mind at the time, which included her clear memory from five weeks prior to this incident, in August of 2014, when the decedent had driven onto her property -- drunk without a driver's license -- in car of another person. Appellant called the police and they told her that they could have the decedent arrested for trespassing if he came on the property again. R. 92, l. 3 – 93, l. 15.

Appellant explained that calling the police and having the decedent arrested for trespassing would only have made things much worse. She said that the decedent hated law enforcement and if he went to jail again, "he was going to make it worth it. He was going to kill me and my mother." R. 92, l. 3 – 93, l. 15.

The next morning, appellant said she heard the decedent banging things around her house and she quickly learned he was angry because: "I can't find my fucking [diamond] earring. . ." Appellant told the decedent, "Monty, you've lost earrings. I've lost earrings. I can find it for you. I will find it in the house." The decedent repeated, "I'm going to find my fucking earring and I'm going to find it now and I don't care." R. 97, ll. 2-24.

Appellant followed the decedent back into the bedroom as he "was in a frenzy over this earring, and I kept pleading with him and I kept begging him. We have got to go. My mother is about to arrive. Please, let's go. And I just kept saying I'll find the earring." Instead, the decedent "thrust me face first into the trunk, which I still have the indentation in my cheek from that thrust impact. And then as I -- I was down. I was actually down on the ground, and I started to cry. This hurt like -- *it's almost unbelievable how it hurt I mean, and then I was trying to get up and he kicked me. He kicked me in the back.* He kicked me in the back and I -- I was on my -- *I was on my belly.*" R. 98, l. 2 – 99, l. 21. (emphasis added).

Appellant said as she tried to pull herself off the floor the decedent "grabbed my ankle and he yanked my ankle back and it sort of did a -- it just -- it went around the side of the corner of the trunk or the side of the trunk and it yanked it." R. 100, ll. 4-10. Appellant remembered:

> So I was yanked back at him. He yanked me back and *I just kept struggling and he was yelling.* He was spewing profane, profane words about me and my mother and you fucking cunt and you worthless piece of shit and your mother is -- I mean just the biggest bag of the world and she's a cunt too, and on and on and on.
>
> And I got myself here and I'm saying to myself, *you're going to die, Gregg. You're going to die. I was -- I was scared. I was scared. The terror in my mind* -- I was thinking a million things as this was going on, a million things, and I'm thinking I have -- I've got to protect myself. *I've got to save myself.* I have to -- I have to get through this.

R. 100, ll. 11-23. (emphasis added).

Appellant said she remembered that she kept a .32 Beretta behind a boombox on a desk. R. 100, l. 24 – 102, l. 5. Appellant was able *to pull herself up, grab the gun, and with her "equilibrium completely off" she pointed the gun and shot one time.* She saw the decedent's body move and she ran. She grabbed her cell phone and while she was running, she dialed 911. R. 102, l. 1 – 103, l. 22. (emphasis added).

Appellant explained that when decedent saw her with the gun in her hand, he said, "You wouldn't fucking fire that. You wouldn't fucking shoot it. You wouldn't shoot me," and "[h]e moved" and appellant shot him. R. 108, l. 17 – 109, l. 16.

Appellant described how she gave a statement to the police at the police station that day and how her attorney came to the police station while she was being interviewed. R. 112, l. 10 – 114, l. 2. Appellant said she only shot the decedent because "He was going to kill me. He was

going to kill my mother." R. 114, ll. 3-5. The transcripts of those two statements are at R. 1064-1265.

On cross-examination, appellant said the investigators were "very kind people" and they told her they knew she had been through "a traumatic experience and you may well go away from here and remember things that you wanted to say to me." Appellant told the solicitor the experience "that I had just gone through over the last 11 hours was beyond comprehension, ma'am." R. 152, l. 11 – 154, l. 3. Appellant said the combination of pain and fear made her nauseous but that she had done her best to relate the terror she had been through to the investigators. R. 153, l. 23 – 156, l. 15.

Appellant testified that the decedent had hit her in the head with several objects just before the shooting. R. 157, l. 17 – 159, l. 24. Appellant further explained that she had Meniere's disease, which was "totally debilitating" for someone with a head injury since it apparently caused further dizziness. R. 157, ll. 17-23. Appellant repeated to the solicitor that the sex before the shooting was forced, and she said this was "the only way you could deal with Monty" as she tried to explain the difference between technically consensual sex and forced sexual intercourse. R. 159, l. 19 – 160, l. 18.

Appellant also told the solicitor during cross-examination that when she went to the hospital following the shooting she was given "an antibiotic for the urinary tract infection . . . a painkiller [which was Oxycodone], a muscle relaxer, and I believe an anti-inflammatory [medication]." R. 202, ll. 12-19.

The pathologist, Dr. Janice Ross, testified the background information she was given was that the decedent "was shot in the back allegedly by his girlfriend with a .32 caliber handgun." R. 207, ll. 8-16. Dr. Ross found a single gunshot into the decedent's left midback, which went

through both lungs and the heart and killed the decedent. The bullet did not leave the decedent's body. R. 207, l. 25 – 209, l. 9.

Dr. Ross opined the decedent would have had his back turned to the shooter and he was likely bent over when he was shot. R. 210, ll. 15-20. The state used this explanation to urge that the decedent was looking for his earring at the time he was shot. However, on cross-examination, Dr. Ross admitted the decedent could have been moving when the gun discharged, there were other possible scenarios that could have occurred but she repeated that the gunshot would have had to have been from two feet or further away given no stippling was found on the decedent.[1] R. 215, l. 9 – 216, l. 1.

The decedent had a blood alcohol reading of .16 and he had marijuana in his system. R. 212, l. 13 – 213, l. 13. Dr. Ross refused to elaborate further on the effects of marijuana with the alcohol on the decedent, stating, "I'm not a toxicologist." R. 213, ll. 8-20.

The state also called Stephanie Owen, who was a cab driver in Camden. R. 216, l. 25 – 222, l. 15. Owen also had had a sexual relationship with the decedent. Owen offered hat the decedent was an alcoholic, and that their sexual relationship had "broken up her marriage." Owen added that the decedent had other "lady friends" -- "He loved women and women loved him." She admitted she had called the decedent a "gigolo," and she acknowledged the decedent could become mean and "nasty mouthed" when he was drinking. Owen had told the police that the decedent had never hit her. R. 230, l. 22 – 242, l. 23.

Owen recalled that on the morning of the shooting, September 11, 2014, that she received two text messages from the decedent. "The first one was about 8:20 something and a second one

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[1] Dr. Ross also told the jury: Dr. Ross said that as far as the position of the decedent when he was shot: *"It's difficult to put a position when you have two people who can turn and bend and whatever."* She said "one scenario" could be that the shooter could have been standing and the decedent could have been bent over. R. 979, l. 8 – 980, l. 25. (emphasis added).

at 8:30 something." R. 224, ll. 1-6. Owen said she had seen the decedent the day before and that "he admitted he was going to look for another job. He'd just got laid off from his job." R. 226, ll. 7-12.

Rachel Abstance was the City Cab driver who picked up the decedent at 10:17 p.m. and dropped him off at appellant's farm at 10:38 on the night of September 10, 2014. R. 248, l. 7 – 251, l. 24. Rachel remembered she dropped decedent off at appellant's mailbox, that the decedent retrieved an envelope from the mailbox with money in it, and he paid her the twenty-two-dollar cab fare. R. 252, ll. 5-24. Rachel said the decedent did not want her to drive him up to the farmhouse because "He made a statement something about the lights would spook the horses." R. 253, ll. 12-19.

Investigator Rick DeVors also testified as a state's witness that he interviewed appellant on the day of the shooting. R. 257, ll. 7-13. DeVors said he did not know whether appellant was a "victim rather than a suspect" at the time. "She was visibly upset, but she was very cooperative and very coherent." Victim's advocate Karen DeVors, Investigator DeVors's ex-wife, was also present during the interview. R. 258, l. 17 – 259, l. 21. DeVors remembered that appellant's attorney arrived during the interview -- so he stopped the interview as a courtesy to counsel, and appellant was taken to the hospital. R. 260, l. 12 – 263, l. 17.

Investigator Miles Taylor testified that he thought the decedent's earring was recovered from appellant's kitchen. R. 277, ll. 8-14.

Finally, Investigator Rick Bailey admitted he told appellant during the interview that there was no doubt in his mind, or in anybody else's mind, that appellant was physically abused by the decedent before she shot him. R. 281, l. 21 – 282, l. 10. Bailey acknowledged in his

experience as a domestic violence investigator, "these things happen in moments of extraordinary trauma and are very volatile." R. 282, ll. 6-10; r. 283, ll. 10-22.

Immunity taken under advisement

The judge then noted she had a memorandum from the defense on granting immunity, but she did not have any written memorandum for the state. The judge asked for proposed memorandums. Defense counsel then played for the judge portions of appellant's videotaped statements. He told the judge, "It shows her mannerisms, her regret, her sensitivity. And then I want to say this to you, Your Honor. Your Honor, this isn't a close case. This is not just a preponderance of the evidence. This is an extraordinarily overwhelming evidentiary case for the defendant. I'll leave it with that with the playing of this video, Your Honor." R. 289, l. 18 – 290, l. 14. The videotapes of appellant's interviews, and the transcripts, Defendant's Exhibits 1 and 2, are on file with this Court to review.

The solicitor claimed: "If there's questions of fact, you should not grant immunity." R. 290, l. 25 – 292, l. 19. The judge told defense counsel: "I really don't need rebuttal. Just put everything you want to -- me to consider in the proposed order that you provide." R. 292, l. 24 – 293, l. 25.

Order denying immunity

The judge issued an order denying immunity that was filed January 3, 2018. R. 1050. The order stated the "defendant told Investigator Bailey that when she pointed the gun at the victim, he looked like he was going to come after her, said, 'you're not fucking shooting me,' and moved towards her, so she shot him." R. 1054.

In finding appellant was not without fault in bringing on the difficulty for purposes of self-defense, the order quoted "State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (2007), [wherein] the

Court ruled that bringing a loaded weapon into an argument could be reasonably calculated to bring on the difficulty and would bar the defendant from asserting self-defense. By bringing a loaded weapon into the situation, Defendant cannot say she was without fault in bringing about the difficulty when the victim was not assaulting her or even facing her when she retrieved the weapon." R. 1060.

Finally, the judge wrote, "The Court was clear in Curry[2] that when, as in this case, the defendant is claiming self-defense *and the claim is disputed, the case should be submitted to a jury* 'with the claim of self-defense being fully presented, and the State having the burden to disprove at least one element of self-defense beyond a reasonable doubt.' Id. at 372, 752 S.E.2d at 267." R. 1062. (emphasis added).

Discussion

The court erred as a matter of law by ruling that disputed evidence during the immunity hearing mandated that immunity be denied, and that the jury decide the issue of self-defense. In State v. Cervantes-Pavon, 426 S.C. 442, 827 S.E.2d 562 (2019), the Supreme Court clarified that just because there was conflicting evidence as to immunity, that did not require the judge to deny immunity automatically. The Supreme Court wrote, "[j]ust because conflicting evidence as to an immunity issue exists does not automatically require the court to deny immunity; the court must sit as the fact-finder at this hearing, *weigh the evidence presented, and reach a conclusion under the Act.*" State v. Cervantes-Pavon, 426 S.C. 442, 451, 827 S.E.2d 562, 569 (2019).

The defendant's burden of proof pursuant to State v. Duncan, 392 S.C. 404, 709 S.E.2d 662 (2011), was by a preponderance of the evidence that he or she was entitled to immunity under the Act. Here, S.C. Code § 16-11-440(c), the Stand Your Ground Provision. Pursuant to

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[2] State v. Curry, 406 S.C. 346, 752 S.E.2d 263 (2013)

State v. Cervantes-Pavon, this case should be remanded for a new immunity hearing in the Kershaw County Court of General Sessions to determine whether Appellant Pickrell is entitled to immunity under the act.

Further, the court erred by equating appellant's "introduction" of a weapon into this domestic violence case with the situation in State v. Slater, 273 S.C. 66, 644 S.E.2d 50 (2007). In Slater, Lord Byron Slater took a loaded pistol across a crowded parking lot on the night of a dance where he knew a fight was occurring. Slater shot the pistol when he allegedly felt threatened during the fight he chose to involve himself in between strangers. State v. Slater has no application to the present situation, and it respectfully was very unfair to equate appellant protecting herself against potentially deadly domestic violence being inflicted on her in her own home to what the defendant did in Slater.

The defense argued throughout that this was a case of domestic violence -- it was an ongoing violent relationship involving those complex dynamics. As seen, appellant would often give in to the decedent because she feared violence from him, and she tried to placate him. There was evidence that the decedent had very rough sex with appellant, and then he was abusing her a few hours later the next morning by banging her head into a trunk and onto other objects.

In a moment of quick thought, appellant grabbed her .32 caliber pistol, she turned and shot the decedent as he moved. Dr. Ross admitted on cross-examination that although the decedent was shot in the back, he could have been moving at the time. This was not therefore a clear-cut case of a decedent unnecessarily being shot in the back. As stressed throughout this case, domestic violence is much more complex than that. Thus, the judge equating appellant's actions in this domestic violence case in her own home -- while ruling appellant brought on the

difficulty -- with the use of the pistol taken to a fight between strangers in parking lot in State v. Slater also constituted reversible error.

Further, the court noted there was an order of protection against the decedent in Louisiana but that there was no order of protection in South Carolina and that appellant "did not use the Louisiana order to seek protection from the victim." R. 1062. That was not true, as shown above, since appellant did take the order of protection from Louisiana to the victim's advocate in Kershaw County so the Kershaw County authorities had it on file, and were aware of it.

The judge also found that appellant's testimony that she feared getting hurt or killed was not reasonable considering the decedent was unarmed and shot in the back from at least two feet away. R. 1062. However, again, this was a domestic violence situation where it is well known that the continued violence sometimes causes the battered woman to act at moments where she reasonably believes that "only the death of the batterer can provide relief . . ." Robinson v. State, 308 S.C. 74, 79, 417 S.E.2d 88, 91 (1992).

While appellant was not married to the decedent, or living with him, they were engaged in a continuing relationship in which there was strong evidence appellant was a battered woman. Regardless, the immunity judge dismissively ignored evidence appellant was crawling on the ground after being beaten by the decedent, and she reached for the gun and shot him during the continued violence.

Respectfully, this immunity case is closest factually to State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016), wherein the Supreme Court affirmed the grant of immunity to Whitlee Jones, where her live-in boyfriend had battered her earlier in the day. Jones decided to move out. She went upstairs to retrieve her shoes and she grabbed a knife for protection. The decedent grabbed

Jones and shook her. During a relative lull in the violence, when Jones believed the decedent was getting ready to hit her again, she grabbed the knife out of her shirt and stabbed him one time in the chest. Jones then ran out of the apartment. State v. Jones, 416 S.C. 283, 288, 786 S.E.2d 132, 135 (2016).

In that situation, given those facts, the Supreme Court agreed that Jones was entitled to immunity under the Stand Your Ground provision of S.C. Code § 16-11-440(c), because she was not engaged in unlawful activity at the time of the attack, she was attacked in a place where she had a right to be, she did not have a duty to retreat, but, rather, she had the right to stand her ground and meet force with deadly force and, she acted in self-defense.

Appellant also showed in this case by a preponderance of the evidence that 1) she was not engaged in unlawful activity at the time of the attack; 2) she was attacked in a place where she had a right to be, her home; 3) she did not have a duty to retreat inside her home, and she had a right to stand her ground and meet force with deadly force, and she acted in self-defense.

Appellant was inside her own home, and the decedent had unlawfully battered her and injured her in her own home. Appellant reasonably feared from the history of domestic violence -- and from the decedent acting irrationally and in conformity with his explosive temper at the time appellant shot him -- that the decedent was going to attack her again. A reasonable person in appellant's situation, in this domestic violence case, would have reasonably believed she had to act as she did when she shot the decedent.

Again, Dr. Ross on cross-examination did agree that the decedent could have been moving when he was shot in the back. Thus, that may have been the only reason decedent was shot in the back. Indeed, other evidence showed the decedent was leaning face-up against the bed when he was found by the police.

Appellant proved in this case that she was entitled to immunity pursuant to S.C. Code §16-11-440(c) and S.C. Code §16-11-450 by a preponderance of the evidence, and this Court should therefore issue an order granting appellant immunity. In the alternative, since the judge erred as a matter of law by ruling that conflicting evidence mandated that immunity be denied, appellant is entitled to a new immunity hearing. Further, as an additional sustaining ground, given the other errors in the judge's order denying immunity highlighted above, appellant's case should be remanded to the Kershaw County Court of General Sessions for a new immunity hearing.

2.

The court erred by allowing Kershaw Investigator Richard DeVors to opine he did not understand how appellant could state that the decedent lunged at her when she shot him, where the decedent was shot in the back, since this was an improper lay opinion that went beyond the investigator's duties as a fact finder, where he was not an expert qualified to give opinion testimony, and it directly attacked appellant's self-defense case.

Standard of review (Issue two and three)

"In criminal cases, the appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. Id.

"'The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.'" State v. Fripp, 396 S.C. 434, 438, 721 S.E.2d 465, 467 (Ct. App. 2012) (quoting State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006)).

"Rule 701 of the South Carolina Rules of Evidence explains when lay witness testimony is admissible." Id. at 439, 721 S.E.2d at 467.

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

Rule 701, SCRE.

"Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge...." Watson v. Ford Motor Co., 389 S.C. 434, 445-46, 699 S.E.2d 169, 175 (2010). "On the other hand, a lay witness may

only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training." State v. Westmoreland, 421 S.C. 410, 419, 807 S.E.2d 701, 706 (2017).

Relevant Facts

At the conclusion of appellant's trial, the judge charged the jury the law of murder, self-defense, and the defense of habitation. R. 837, l. 20 – 663, l. 18.

Prior to trial, there was a discussion about the proposed expert testimony of Arlene Andrews on domestic violence or battered women. The defense withdrew its request to present expert testimony on Intimate Partner Violence, and under S.C. Code § 17-23-170 on admitting evidence of the battered spouse syndrome. R. 362, l. 5 – 131, l. 13.

The solicitor noted that her concern was with Andrews testifying about domestic violence. "I did file a motion to exclude her, but she's not here." R. 369, l. 2 – 371, l. 5. Assistant solicitor Sampson acknowledged having talked with Andrews about her proposed testimony before the trial. R. 370, l. 7 – 371, l. 10.

The defense also alerted the judge that there would be evidence that the decedent had been watching pornography and that "there are 28,000 pictures of porn. I counted them [on his phone]. And certainly that goes to what was driving his anger" about his difficulty performing sexually that night as he apparently acted out the pornographic sexual violence with appellant prior to the shooting. R. 376, l. 3 – 381, l. 13.

Defense counsel Zmroczek told the judge the relevance of this was "[t]he reason she has to act in self-defense is because of what he's doing to her. It's not just beating her, it's raping her. She calls it consensual sex, but it's consensual so she stops getting beaten. It's the coercion." R. 381, ll. 1-10.

Defense counsel also told the judge that the pornography showed anal rape, violent sexual activities, people being tied up, and forcible sex acts that were the decedent's state of mind during the violent sex and other violence before appellant shot him. R. 378, l. 4 – 382, l. 5.

The Trial

Chief Deputy Marvin Brown of the Kershaw County Sheriff's Department testified on September 11, 2014, he heard the dispatch about a shooting on appellant's farm. R. 896, l. 2 – 899, l. 1. Appellant was outside in the yard and her mother was sitting in the driver's seat of their automobile when Brown arrived. R. 901, ll. 7-24. Brown confirmed on cross-examination that appellant's bedroom was "very small, little bedroom." R. 910, l. 23 – 911, l. 12.

Appellant had called 911 after she fired the single shot, and the 911 call was transferred by Sumter County to Kershaw County. Appellant's farmhouse was apparently just on the line between Kershaw and Sumter Counties. R. 912, l. 3 – 913, l. 7. The 911 tape, State's Exhibit 11, was played for the jury. That tape is on file with this Court to review. R. 920, l. 11 – 921, l. 7.

Appellant was described by EMS EMT Leann Triber as being "notably upset," but "she refused transport to the hospital after the shooting." R. 960, ll. 14-20.

Coroner Johnny Fellers testified that the decedent was found "sitting on the floor propped up against a -- leaning up against a bed." He was face up when propped up against the bed and he had one bullet hole in him where he sat propped up in the bedroom. There was no assertion this placement was staged – this is how the decedent slid to the floor after being shot. R. 968, l. 2 – 969, l. 22.

Dr. Janice Ross testified that the decedent was five foot six, 180 pounds. He had a bullet wound to his back which was sixteen inches from the top of his head. R. 976, l. 2 – 977, l. 12.

Dr. Ross said that as far as the position of the decedent when he was shot: *"It's difficult to put a position when you have two people who can turn and bend and whatever."* She said "one scenario" could be that the shooter could have been standing and the decedent could have been bent over. R. 979, l. 8 – 980, l. 25. (emphasis added).

However, Dr. Ross admitted there could be "several conceivable scenarios" as to how the entrance and exit wounds occurred. She could not rule out that the decedent was moving when he was shot. R. 994, l. 22 – 995, l. 13. All the pathologist could say for sure was that because there was no stippling that the decedent was shot from two feet away or more. R. 995, ll. 9-13. Dr. Ross also stated that the decedent had a blood alcohol reading of .168 and he had THC from marijuana use in his system. R. 993, l. 23 – 995, l. 13.

Rachell Abstance and Stephanie Owen again testified about the decedent's cab ride to appellant's farm on the night of September 10, 2014, and the ride he expected on the morning of September 11, 2014 when he was shot. As stated, Rachell testified she dropped appellant off at 10:38 pm at appellant's mailbox, the decedent removed twenty-two dollars from an envelope in appellant's mailbox, and he paid Rachell for the cab ride. R. 388, l. 10 – 393, l. 18.

Stephanie Owen testified about her sexual relationship with the decedent. She admitted the decedent cursed a lot when he was drinking. She admitted to defense counsel that "no matter how bad" the decedent treated her she would always go back to him. R. 427, ll. 23-24.

Owen took the verbal abuse, and she would text the decedent to be sure "she was at home safe." She had warned the decedent about police being in his neighborhood, but she denied she did crack cocaine with him. Owen admitted the decedent sent her a text the night before the fatal shooting complaining about her expressing her attraction to him, and about her constantly contacting him: "I'm tired of having to tell you this shit now. I still ask you to stop and you

don't listen. I'm going to tell you again, exclamation point. You tried that bullshit the other day and I told you to stop. You pissing me the fuck off." R. 426, l. 5 – 427, l. 24.

SLED investigator Dawn Claycomb also testified that the decedent's body was located in the back bedroom where there were three footlockers. The decedent was "in a sitting position leaned against the bed and a chair that was located next to the bed." "A cartridge case that we located in a laundry basket that was on top of this trunk here right when you walk into the room." An earring similar to the one found in the victim's ear was located in this same area. R. 443, l. 4 – 217, l. 24.

As seen in issue 3 infra, Claycomb was also called upon by the solicitor to give an impermissible lay opinion essentially stating she did not believe appellant's version of how the shooting transpired in self-defense, and that she "eliminated" shooting happening in the living room where the gun was located, and also in the bedroom where appellant said the decedent was beating her. R. 452, l. 24 – 454, l. 8.

Opinion testimony by Investigator Bailey

During the testimony of Investigator Richard Bailey, he noted he had information that the decedent was found "in a seated position facing towards the door." Bailey said he had limited information that there had been an argument, that appellant shot the decedent, and she called 911. R. 564, l. 17 – 565, l. 16.

On direct-examination by the solicitor, Bailey was asked what appellant told him about being assaulted when she pulled the trigger. Bailey said appellant had told him the decedent was coming after her and he said it bothered him because the point of impact "of the bullet" did not match up. The following then occurred between Bailey and the solicitor:

Q: What do you mean it didn't match up?

A: *I found it hard to believe if he was coming at her --*

MR. DELGADO: Objection, Your Honor. Asking for a conclusion.

MS. SAMPSON: I'm asking for his conclusion, not an evidentiary –

THE COURT: Tell me what your objection is.

MR. DELGADO: I'm sorry?

THE COURT: Your objection is?

MR. DELGADO: He was about ready to give a conclusion about based on what he has heard as to why she may have shot him. We can talk about facts, but now why he's being able to shoot – or why she, I'm sorry, is being able to shoot. It is a conclusion on his part.

THE COURT: Ask the question one more time.

MS. SAMPSON: I asked why -- he stated that there was some concern or he kept asking about the trigger. And I asked him why was there a difference -- I think my question, maybe Debbie can tell me. My question was something to the effect of, Why did you -- was that a concern that there was -- what she said about going at him and he was explaining that, why that was a concern to him. That was it.

THE COURT: I'm going to allow the question.

BY MS. SAMPSON:

Q: You can go ahead.

A: I'm sorry. During the interview, I wanted to get as much detail as what happened that led up to the event of actually pulling the trigger. *Her response was that he pulled up and he kind of lunged at her. She never said, He came at me, but she motioned that he kind of lunged towards her.* Prior to the interview, I had knowledge that the deceased had been -- actually, the point of impact of the bullet was in the back. *I had trouble understanding how if he was lunging forward how he was shot in the back.*

R. 577, l. 9 – 578, l. 23 (emphasis added).

Discussion

Defense counsel correctly objected that Bailey should not be allowed to give a conclusion or opinion about how the shooting occurred. Bailey was purely a fact witness. He was not an expert. The judge overruled the objection and Bailey opined he had trouble understanding how the decedent could have been lunging forward towards appellant when he was shot in the back. R. 577, l. 9 – 578, l. 23.

Bailey was not an expert witness, and he should not have been allowed to give this critical opinion which cut to the heart of appellant's self-defense case. Bailey told the jury it was difficult to understand how the decedent could have been lunging toward appellant – based on other information he had received -- where the decedent was shot in the back. This was reversible error pursuant to State v. Andrews, 424 S.C. 304, 818 S.E.2d 227 (Ct. App. 2018), and State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001).

In Andrews, witness Graham was qualified as an expert in the field of EMS. Therefore, Graham was qualified to testify as an expert as to prehospital emergency care administered to the victim, and to the resulting medical observations of his body and injury.

However, this Court agreed in Andrews, that the circuit court judge abused his discretion by allowing expert testimony from the EMT paramedic Graham regarding the victim's location at the time of the shooting. That opinion that the victim was standing on the porch when he was shot exceeded the scope of her expertise in emergency medical services, and it went to the ultimate issue of whether appellant was acting in self-defense when he shot and killed the victim.

The prosecution here wanted to stress its theme that because the decedent was shot in the back, the jury should rule out self-defense. However, as Dr. Ross attempted to explain, there

were other scenarios where the decedent may have been moving when he was shot, and it followed that the seemingly normal inference from being "shot in the back" did not apply.

Yet, Investigator Bailey, who was not qualified as an expert in anything, was allowed to state he found it difficult to believe that the decedent was coming towards appellant where he was shot in the back. This also went to the heart of appellant's self-defense claim, the ultimate issue to be decided by the jury, and it constituted reversible error for the same reason as in State v. Andrews.

Similarly, in State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001), our Supreme Court also found reversible error where a police officer qualified as an expert in crime scene processing essentially testified as a crime scene reconstruction expert about the position of the victim at the time he was shot. This went to the heart of Ellis's defense of self-defense, and the police officer was not qualified as an expert witness to give an opinion on the ultimate issue before the jury. See State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001), *citing* State v. Wilkins, 305 S.C. 272, 407 S.E.2d 670 (Ct. App. 1991).

The Court in Ellis held the error could not be harmless given the defendant's assertion that he was acting in self-defense at the time he shot the victim. The Court wrote that: "While the state was free to argue that the evidence supported an inference that the victim was astride the bicycle when shot, and while the jury could certainly have concluded he was, Sergeant Walters was not qualified to give such an 'expert' opinion. An officer's improper opinion which goes to the heart of the case is not harmless." *citing* Fordham v. State, 254 G.A. 59, 325 S.E.2d 755 (1985). State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001).

Here, Bailey's improper opinion testimony went to the heart of appellant's self-defense case. The solicitor referenced Bailey's testimony during her closing argument. R. 809, l. 25 –

811, l. 4. The error was not harmless, and appellant should be granted a new trial. State v. Andrews; State v. Ellis, supra.

3.

The court erred by allowing SLED agent Dawn Claycomb to testify she eliminated the shooting happening "within the bedroom" or "in the living room" since Claycomb was not an expert, and this impermissible lay opinion testimony was highly prejudicial since it was intended to convey to the jury that the shooting did not occur as appellant told the police it occurred.

Relevant Facts

As seen, on direct examination, Claycomb was asked about eliminating areas "that the shooter may have been," and Claycomb was asked the location where the shooter may have been." R. 452, ll. 14 – 23. The following occurred between the solicitor and Claycomb:

> Q: So what did *that eliminate for you as to where the shooting would have occurred*?
>
> A: Well, saying –
>
> MS. ZMROCZEK: Your Honor, I object to the fact -- I believe it's outside the scope of her -- I believe they have an expert coming in to talk about that. I believe this would be outside the scope of -- if we're talking about trajectory and --
>
> MS. SAMPSON: I'm not. I didn't ask trajectory. *I literally asked what places did it eliminate the shooting could have come from.*
>
> MS. ZMROCZEK: But that would be based on the trajectory.
>
> MS. SAMPSON: Well, if I can lead her, then I can ask the specific question.
>
> MS. ZMROCZEK: No, Your Honor. The rules don't allow it.
>
> THE COURT: Just limit it to the shell casing. I'm going to allow the question.
>
> BY MS. SAMPSON:
>
> Q: What areas did it eliminate that the shooting could have happened at?

A: *Within the bedroom*, saying that if the cartridge case was not moved or tampered with at that point.

Q: *And all I meant was, in other words, it didn't happen in the living room?*

A: Correct. If you would find the cartridge case in the bedroom, yeah, it would not occur in the living room had it not been touched or moved, anything like that.

Q: *And you already told us that the gun was where you found it?*

A: Yes, ma'am. It was within -- right when you come in the front door on a table in the living room.

R. 452, l. 24 – 454, l. 8. (emphasis added).

Discussion

Investigator Claycomb's testimony was designed to show that she had eliminated the shooting from happening "within the bedroom" were the violent sex and the beating at the decedent's hands occurred. Claycomb also eliminated the shooting from it having occurred in the living room where the .32 was found on the table.

This testimony was meant to relate to the jury that the shooting did not occur in the living room, where the gun was if appellant quickly grabbed the gun and immediately shot the decedent since the cartridge case was found in the bedroom. Claycomb then said the gun was found "right when you come in the front door on a table in the living room." The point of Claycomb's opinion was that shooting did not occur as appellant testified it did. This testimony, admittedly, was very confusing. The motive of the question of answer, however, were clear: Where the shooting occurred did not match appellant's version of the shooting as Claycomb *deduced from her view of the forensic evidence.*

However, it is sliced, it was improper opinion testimony, and it was meant to convey to the jury that Claycomb did not believe appellant was telling the truth about the shooting, where

she was giving her improper "expert" testimony. See State v. Andrews, 424 S.C. 304, 818 S.E.2d 227 (Ct. App. 2018); State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001).

State v. Andrews, 424 S.C. 304, 818 S.E.2d 227 (Ct. App. 2018) and State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001) are discussed at length above. Both cases were reversed because improper "expert" opinions were given by experts in areas outside of their expertise. Here, Claycomb was not an expert in anything, she was a fact witness investigator. Yet, as in Andrews and in Ellis, the solicitor used Claycomb here to undermine appellant's self-defense case by giving improper "expert" opinion testimony.

Claycomb's improper opinion testimony, where she was not an expert witness, was very prejudicial. While the opinion testimony could have been confusing -- at a minimum -- to the jury, it was calculated to convey that the presence of the victim's body and the shell cartridge could eliminate what actually occurred as being consistent with the appellant's statement about what occurred.

Signaling to the jury, subtly or otherwise, through improper "expert" testimony that the witness has deduced from the evidence before the jury a forensic opinion that the defendant's statements or statements are not to be believed can be extremely prejudicial, and even destroy a defense. See State v. Westmoreland, 421 S.C. 410, 421, 807 S.E.2d 701, 707 (Ct.App. 2017) (In the context of the record, lay testimony that the offense was a "homicide," an intentional act, was an improper opinion where the jury had to determine whether it believed the defendant accidently hit the decedent with his car). Appellant should be granted a new trial. See State v. Andrews, 424 S.C. 304, 818 S.E.2d 227 (Ct. App. 2018); State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001).

CONCLUSION

By reason of the foregoing arguments, the judge's order denying immunity should be reversed, and this Court should issue an order granting appellant immunity pursuant to S.C. Code §16-11-440(c) and S.C. Code §16-11-450. In the alternative, appellant's conviction should be reversed, and this case remanded to the Kershaw County Court of General Sessions for a new immunity hearing. In the second alternative, appellant's conviction should be reversed, and this case remanded to the Kershaw County Court of General Sessions for a new trial.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd day of April, 2020.