THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Opinion No. 5760 (S.C. Ct. App. filed August 19, 2020)

Appellate Case No. 2020-_____

The State,

Respondent,

v.

Jaron Lamont Gibbs,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Pursuant to Rule 242(d)(1) of the South Carolina Appellate Court Rules, Petitioner's counsel certify that a petition for rehearing was made by Petitioner and finally ruled on by the Court of Appeals.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the trial court's decision to allow a witness who was not qualified as an expert to testifiy as to how certain firearms function?

2. Did the Court of Appeals err in affirming the trial court's decision to overrule a defense objection to improper closing and a related demonstration that were not based on evidence presented at trial?

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

STATEMENT OF THE CASE

Petitioner, Jaron Lamont Gibbs, was indicted in Pickens County on charges of murder and possession of a weapon during the commission of a violent crime. App. pp. 6-9. He was tried by a jury September 18-22, 2017, in Pickens County General Sessions Court, with Judge Letitia H. Verdin presiding. The jury found him guilty of both charges. App. pp. 517-18. Judge Verdin sentenced him to concurrent terms of 35 years and five years, with credit for 780 days of time served. App. pp. 10-11, 519.

Petitioner appealed. App. pp. iv, 525-49, 582-94. Pursuant to Rule 208(b)(7), SCACR, Petitioner advised the Court of Appeals of his intention to rely on the Supreme Court's decision in *Hamrick v. State*, 426 S.C. 638, 828 S.E.2d 596 (2019), issued after the filing of the briefs in the Court of Appeals. App. p. 596. In a published opinion filed

August 19, 2020, a panel of the Court of Appeals affirmed. App. pp. 597-604. On September 3, 2020, Petitioner filed a petition for rehearing. App. pp. 605-12. The Court of Appeals denied rehearing by order filed September 22, 2020. App. pp. 614-15.

CONSIDERATIONS GOVERNING CERTIORARI REVIEW

Rule 242(b) of the South Carolina Appellate Court Rules provides for certiorari review "where there are special and important reasons." The rule lists specific examples of the character of reasons which will be considered in determining whether to grant a writ of certiorari, including where there are novel issues of law. *See* Rule 242(b) (1), SCACR. In this case, the Court of Appeals determined that the subject of how a firearm functions is a matter for lay testimony under Rule 701, not for expert testimony under Rule 702 of the South Carolina Rules of Evidence. Whether such testimony is properly within the scope of Rule 701 or Rule 702 is a novel issue of law that warrants certiorari review.

ARGUMENT AND AUTHORITIES

These two charges stem from events that occurred August 1, 2015, in daylight, at the intersection of two busy streets in an area of Pickens County between Central and Clemson, in proximity to multiple observers. A firearm went off in a vehicle stopped at the intersection, and Robbie Porter, who was in the front passenger seat, was struck with a single bullet, resulting in his death. The facts concerning what led to the discharge of the firearm were in serious dispute, and the credibility of the state's key witnesses and the integrity of the investigation and preservation of the evidence were in serious doubt.

Hunter Raby and Kalyn Meaders, who was Porter's wife, were the primary witnesses for the state. At trial, they claimed the shooting occurred as the result of a drug deal gone bad. Their testimony, however, was in sharp conflict with the statements they

gave the police following the shooting. Following the shooting and before talking to the investigating officers, they manufactured a story to give to law enforcement, in which they claimed Petitioner had robbed them two weeks earlier and owed them money. The story they gave at trial – that the shooting was the result of a drug deal gone bad – did not emerge until almost two years later, just weeks before trial.

By all accounts, when the gun fired, Petitioner was outside the car at the driver's window, Raby was in the driver's seat, Porter was in the front passenger seat, and Meaders was in the back seat behind Porter.

The theory of the case woven by the state was that Petitioner had shorted Raby and Porter on the amount of marijuana in the purported drug deal, and they began calling Petitioner, then following the vehicle in which he was riding, in order to get their money back. When the two vehicles were stopped at an intersection, the state claimed, Petitioner got out with a gun, went to the driver's window, put the gun through the window, and intentionally fired it.

Petitioner testified in his defense. By his account, no drug transaction had occurred. Nor had he robbed the men weeks earlier. App. p. 409. Rather, a few weeks earlier, he had lost a bet to Porter and Raby over a basketball game, but he had not yet paid them. App. pp. 410-11. On August 1, he was in a car with Autumn Gilstrap, who was giving him a ride to Atlanta to see a friend who lived there. App. pp. 411-14. In his bag was an old gun he had purchased for his and the friend's protection, due to the friend's late-night work as a stripper in clubs that were not in the best places. App. pp. 415, 430, 435. As they were leaving the area, Petitioner saw Raby, Porter, and Meaders in another vehicle, pointing at him. App. p. 416. Raby started phoning Petitioner, upset and asking for money.

App. pp. 416-17. Petitioner told him he didn't have the money but would give it to him as soon as he was back from Atlanta. App. p. 417. Raby became angry and started following closely behind Gilstrap's car, driving aggressively and phoning Petitioner repeatedly. App. pp. 417-18. Petitioner decided he could give them the gun in payment of the money owed and, when they stopped at the intersection, he got out and went to Raby's window to give him the gun, which he thought was unloaded. App. p. 419. Raby was yelling and Petitioner, also yelling, was telling Raby he didn't have the money but to take the gun instead. App. p. 420. Petitioner, who is left-handed, was holding the gun in his right hand by the grip, and his hand was not on the trigger. App. pp. 419-21, 423. Petitioner pushed the gun inside the car, Raby pushed it back out, Petitioner pushed it in again, and it went off. App. p. 421. He did not know anyone was hit. App. p. 422. It was obvious Raby was not going to take the gun, so Petitioner went back to Gilstrap's car, he got in, and they left. App. p. 422. He told Gilstrap nobody was hurt, the gun just went off and hit the roof. App. pp. 422-23.

Meaders and Raby gave accounts that contradicted their initial statements to law enforcement, that were in certain respects contradictory of each other, and that were inconsistent with the other evidence gathered. Raby had prior convictions for breach of trust with fraudulent intent and shoplifting. App. p. 110. Raby initially claimed Petitioner had robbed them two weeks earlier and owed them money. App. pp. 106, 109-12. At trial, he admitted his statement was fabricated. App. pp. 111-12, 120-21, 128. He testified he and Meaders conferred immediately after the shooting and agreed not to tell of the drug transaction that, at trial, they claimed had occurred. App. pp. 111-12. By his account, they

intentionally lied to law enforcement and made no mention of drugs at all. App. pp. 111-13, 120-21, 128.

Both Meaders and Raby claimed they and Porter were headed to the lake that day and first wanted to get marijuana, and they arranged to meet Petitioner to purchase some. App. pp. 33-35, 89-91. However, this story does not square with the evidence. They already had marijuana: following the incident, officers seized quantities of marijuana from two places in the Raby vehicle and over 250 pills. App. pp. 67-69, 101, 125, 244-46, 252-56, 372-73. Raby was aware these substances were in the car. App. pp. 101, 125. He testified only part of the marijuana found in the car was what they claimed to have purchased from Petitioner. App. p. 101.

Raby's testimony was inconsistent with his prior statement in other respects. He admitted writing in his initial statement that "[Petitioner] thrusted the gun toward me and I swatted it off and it went off, hitting my friend in the passenger side." App. p. 115, lines 13-15; p. 116, lines 18-22. Raby crossed that part of his statement out because "they said that that wouldn't count." App. p. 115, line 21 – p. 116, line 1. Raby acknowledged that his statement said, "I swatted it away twice and, the second time, it went off." App. p. 117, lines 18-21. His statement said only that Petitioner thrusted the gun in his face and the gun went off, not that Petitioner pointed it or shot it or pulled the trigger. App. p. 119, lines 11-21. Raby did not testify that Petitioner pulled the trigger, instead stating he "assumed" he did. App. p. 119, lines 21-22.

Consistent with Petitioner's testimony that Petitioner did not know anyone had been shot, Raby also did not immediately know that Porter had been shot. App. p. 122, line 9 – p. 123, line 6.

Like Raby, Meaders contradicted at trial the statement she gave after the incident. She did not tell authorities it was a drug deal gone bad, stating only that Petitioner owed them money. App. pp. 53-54, 57. At trial, she stated she could not see what occurred and saw the gun only after it had fired. App. pp. 41, 57, 62. She affirmed that she did not see who pulled the trigger. App. p. 57. All she remembered was that Petitioner said something about money when he came to the car. App. p. 58. She testified that her prior statement was what Raby said and what she assumed happened. App. p. 57. She confirmed that her prior statement said the gun was "put through the window." App. p. 63. She did not deny having told an officer Raby swatted at the gun and it went off. App. pp. 63, 80-81. Both Meaders and Raby acknowledged that nothing prevented Petitioner from standing outside the vehicle and firing in, had he wanted to. App. pp. 63-65, 121.

Gilstrap, who was going to take Petitioner to Atlanta, testified that after she picked him up, another car arrived and tried to prevent them from leaving. App. p. 302. She got around it and they followed. App. pp. 302-03. The others called Petitioner multiple times. App. p. 304. When they stopped at the intersection, Petitioner got out and walked to the other vehicle with a gun. App. p. 305. He was beside the driver's side window holding the gun toward the window. App. p. 306. Once his hand went into the car, she couldn't see what occurred but heard the gun go off. App. p. 307. In the statement she gave to police two hours after the incident, she said the vehicle following them was driving aggressively and tailing her car. App. p. 317. She described one of them calling about Petitioner having his money. App. pp. 317-18. She said Petitioner got out, walked to the driver's side holding a gun and reached inside the car. App. pp. 318, 320. She testified she never heard Petitioner threaten anybody or act like he was going to harm anybody.

App. p. 321. After he returned to the car, she asked him what happened. He told her the gun went off, hit the roof, and everything was okay. App. pp. 308-09, 319. Questioned about having previously made a conflicting statement that Petitioner said he shot into the roof, she testified the correct version of what Petitioner said, repeatedly, was that the gun went off, hit the roof, and everything was okay. App. pp. 323-24.

Various witnesses were in vehicles at the intersection when the incident occurred or shortly thereafter. By all accounts, the car driven by Gilstrap was at the stop on Cambridge Drive at its intersection with Issaqueena Trail, with the SUV driven by Raby stopped behind it. Opposite them and coming to the intersection with Issaqueena from Old Shirley Road was Frederica Gibson. On Issaqueena southbound was the vehicle of Alexander and Lena Saidat. On Issaqueena northbound was Amelia Hood. These witnesses all observed the Gilstrap and Raby vehicles in their positions at the intersection and Petitioner at the driver's side window of the Raby vehicle and heard the gunshot.

Some of these witnesses described Petitioner and the driver arguing, having a heated discussion, or yelling, and they thought there had been a collision of some sort. App. pp. 139-40, 164-65, 170, 182-83. Some saw Petitioner with a gun, but no one testified he pointed it at anyone. App. pp. 165, 175, 182. What they described was consistent with Petitioner's account. Alexander Saidat testified Petitioner thrust his arm inside the vehicle with the gun. App. p. 166. He never saw the gun pointed at anybody but just saw it jammed inside. App. p. 175. Lena Saidat said he stuck it in the window. App. p. 183. She saw the hand of the driver come out, saw the driver hit the gun, and the gun went off. App. pp. 183-84.

The only reference to pointing the gun was in the questioning of Frederica Gibson about a prior statement. Gibson testified she never saw a gun and did not see anyone point a gun. App. pp. 153, 157. She acknowledged her prior statement said she saw someone point a gun, but her trial testimony was that she did not. App. p. 153. All she remembered was a hand going up and down. App. p. 153. She questioned the statement's accuracy and testified she gave her statement when she had been talking to and hugging Kalyn Meaders, with Hunter Raby right there with them. App. pp. 153, 158. An officer's report of his questioning of Gibson confirmed Gibson said she never saw a gun but heard a pow. App. pp. 157-58. Notwithstanding the other written statement, she was adamant that she never saw a gun, in keeping with what she told the officer that day. App. p. 159.

Gilstrap testified the barrel of the gun was toward the window, but she did not say it was pointed at anyone. App. p. 306. Her testimony was consistent with Petitioner's own account that when he tried to give Raby the gun, the barrel was in front of Raby's face. App. p. 426. No one testified Petitioner pointed at Raby or anyone else.

The lead investigator was Michael Arflin, who did not arrive until about 20 minutes after the shooting. App. p. 340. Crime scene tape was already up when he arrived. App. pp. 340-41. Porter had already been transported from the scene. App. p. 342. A video recording from one officer's body camera, some 15 minutes of which was filmed prior to Arflin's arrival, showed the witnesses were not separated but were milling around, talking to each other, and, as Gibson and Meaders both acknowledged, interacting with Raby and Meaders and even hugging them. App. pp. 74, 158, 332, 336, 372, 378, 387. The video and still photos lifted from it showed that various people – Raby, Meaders, and witnesses – were within the crime scene tape, together, walking around the scene, for at least 15

minutes, with no law enforcement officers separating them. App. pp. 372, 387-88. The witnesses discussed what happened among themselves. App. p. 171. Two of the witnesses drove Meaders to the hospital where Porter had been taken. App. pp. 171-72, 186.

Arflin acknowledged that, in securing a crime scene, the witnesses should be separated. App. p. 367. He acknowledged that, once a crime scene has been contaminated, it cannot be uncontaminated. App. p. 388.

Raby and Meaders were depicted inside the crime scene tape that should have secured the scene and protected it from tampering. App. pp. 385-86. Raby went back to the vehicle and removed items. App. pp. 124-25. Raby and Meaders were not separated from each other but were allowed to sit together along the edge of the woods, which is where and when they conferred and concocted the fabrication of a prior robbery and agreed not to reveal the purported drug transaction. App. p. 112.

Arflin had never before or since served as a lead detective in a homicide investigation. App. p. 369. The officers under his direction took only 40-something photographs, a total that included both the scene and Gilstrap's car. App. pp. 247, 370. Not all aspects of the scene were photographed. App. p. 257. Arflin acknowledgd that ordinarily hundreds and hundreds of photographs are taken, documenting every single aspect of a crime scene. App. pp. 369-70. The drugs found in the Raby vehicle were seized but were never tested. App. pp. 244-46, 252-56, 355. Another substance, in the crack of a seat in Raby's vehicle, was not even taken into evidence. App. p. 248.

There had been multiple cell phones and one tablet device in the Raby vehicle, but the investigators did not seize all of them to forensically analyze them or to determine the calls and text messages that had been sent and received and their content; rather, they seized

only two phones, but they did not attempt any extraction of information or forensic examination of those two phones. App. pp. 125, 240, 350, 353-55. Although Raby told Arflin there had been numerous calls between himself and Petitioner, the investigators did not seize Raby's phone. App. pp. 350-51, 367.

The investigators did not seize clothing from either Raby or Meaders for forensic analysis. App. pp. 76-77, 124, 127, 231. They did not obtain blood or urine samples from Raby or Meaders to test for drugs or alcohol. App. pp. 71-72, 123-24, 234, 374. Blood and urine testing from the hospital and autopsy revealed Porter had marijuana, benzodiazapines, and cocaine in his system. App. pp. 196, 396, 400-04.

After Raby was out of the vehicle and Porter had been transported from the scene, multiple witnesses observed Raby screaming and yelling, very agitated, and physically punching the vehicle. App. pp. 159, 176-77, 178, 331. Raby admitted he was furious with himself and slammed his fists into the vehicle. App. p. 124. This conduct was witnessed by others, including the officer with the body camera, and it was captured on the video. App. pp. 176-78, 331-32.

Raby was also depicted running his hands through his hair, and he testified he does that when he gets really panicky. App. p. 124. At some point, Raby was checked by EMS and his head was found to have been grazed, a wound that he had not been aware of and that was not serious. App. pp. 100, 200-01, 334.

Sometime after all this activity, someone put hospital-type gloves on Raby's hands. App. pp. 126, 212-13. Even later, those gloves were removed, and Raby's hands and face were swabbed for gunshot residue ("GSR"). App. pp. 210-13. Some GSR was found on his hands. App. pp. 276-78. Although the state attempted to elicit testimony from the GSR

expert that the small amount of GSR on Raby's hands was more likely from touching an object with GSR than from firing the weapon, the expert did not express that opinion. App. pp. 279-83, 287. The expert did confirm that even a small quantity of GSR could be consistent with having fired the weapon. App. pp. 279-80. No GSR was found on Raby's face. App. p. 293.

The GSR expert testified concerning the best way to preserve GSR on a person's hands. App. p. 278. He confirmed that plastic bags are not the preferred method because they can cause the hands to sweat and GSR to be removed. App. pp. 278-79. He confirmed the gloves placed on Raby's hands could have removed some of the GSR. App. p. 279. His having gloves on in the August heat and his activities, including punching the car and running his hands through his hair, all could have contributed to the removal of GSR that was initially there. App. pp. 286-87.

At trial, Arflin confirmed his earlier preliminary hearing testimony that they did not know whose hand hit the trigger. App. p. 380. He also verified there was only one shot fired. App. p. 381. He acknowledged, consistent with Petitioner's testimony, that guns are very commonly traded on the street and used as cash. App. pp. 368-69.

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DECISION TO ALLOW A WITNESS WHO WAS NOT QUALIFIED AS AN EXPERT TO TESTIFY AS TO HOW CERTAIN FIREARMS FUNCTION.

No weapon was recovered from the scene. App. pp. 219, 346-47. Some witnesses referred to the weapon they saw generically as a revolver, but there was no testimony as to what specific type of revolver the gun involved in this shooting was. Petitioner testified the gun was old and described it as a piece of junk. App. p. 435.

Arflin, the lead investigator, was not offered and was not qualified as an expert in any field. He also did not testify that he had any training specifically with revolvers. App. p. 347. During his testimony, the state asked him to explain the functioning of single action and double action revolvers. App. p. 364. The defense objected, on the basis that the witness had not been qualified as an expert in firearms. App. p. 364. The state argued it had established the witness was familiar with revolvers through his training and experience as an officer. App. p. 364. The court allowed the testimony. App. p. 364. Defense counsel further argued the objection, stating her understanding that officers are not trained on revolvers, but the court adhered to its ruling that the testimony would be allowed. App. p. 365. Arflin then testified about the cocking and discharging of single and double action revolvers. As to single action, he said, "The hammer has to be cocked and then fire -- you pull the trigger and it discharges." App. p. 365, lines 15-16. He further testified, "That's kind of the rule behind single action. It has to be cocked." App. p. 365, lines 18-19. He stated that, with double action, "When you pull the trigger, the hammer both cocks and discharges," and "it's going to be a long, heavy trigger pull." App. p. 365, line 21 – p. 366, line 1.

Petitioner appealed the trial court's admission of this testimony, arguing the trial court did not conduct the analysis required before admitting expert testimony under Rule 702 of the South Carolina Rules of Evidence. The state argued[1] and the Court of Appeals

[1] The state's argument at the appellate level was inconsistent with the position it asserted at trial. When the defense objected, the state argued Arflin was qualified to give this testimony by virtue or his training and experience as an officer, App. p. 364, an argument in keeping with Rule 702, SCRE. In the Court of Appeals, apparently in recognition of the infirmity of its position as to Arflin's qualifications based on the evidence in the record, the state changed its position and instead asserted the evidence was admissible as lay testimony under Rule 701, SCRE. App. pp. 565-68.

held that Arflin's testimony was properly admitted as lay opinion testimony under Rule 701 of the evidence rules. App. pp. 602-03. This ruling was erroneous, and the Supreme Court should grant a writ of certiorari and reverse.

The Court of Appeals held the testimony proper under Rule 701 because it was based on Arflin's personal knowledge. App. pp. 602-03. Citing Rule 602, SCRE, the Court of Appeals found the key feature of lay testimony is the witness's personal knowledge, not whether the subject of the testimony is beyond the jury's ordinary experience. App. p. 603. This holding overlooked key language of Rule 701, which provides:

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

See Rule 701, SCRE; *Hamrick v. State*, 426 S.C. 638, 646-49, 828 S.E.2d 596, 600-01 (2019). In this case, two requirements of Rule 701 are not met. As in *Hamrick*, the testimony was not rationally based on the perception of the witness, an investigator who did not arrive on the scene until some 20 minutes after the firearm discharged and who did not personally perceive the firing of the weapon. *See Hamrick*, 426 S.C. at 648, 828 S.E.2d at 601. Like the subject matter addressed in *Hamrick*, how a firearm functions and discharges is a matter requiring expertise. *See id.* 426 S.C. at 648-49, 828 S.E.2d at 601 (finding accident reconstruction to be a matter requiring expertise). The testimony given by Arflin required "special knowledge," whether gained through his experience or training, and it therefore was within the ambit of Rule 702 governing expert testimony, not Rule 701 governing lay testimony.

The Court of Appeals' own opinion acknowledged that the subject of Arflin's testimony was outside the knowledge base of ordinary jurors, specifically noting that "this subject matter may have been foreign to some members of the jury." App. p. 603. This acknowledgement goes to the heart of the issue. The functioning and manner of discharge of a firearm is a matter of technical or specialized knowledge, and it can be admitted, if at all, only under Rule 702, not Rule 701.

Rule 702 provides that matters of scientific, ***technical***, or other ***specialized knowledge*** that will assist the trier of fact are proper subjects of expert testimony, where the witness is qualified as an expert by knowledge, skill, experience, training, or education. *See* Rule 702, SCRE. The Court of Appeals misapprehended that first-hand or personal knowledge by a witness removes the subject matter from the purview of "specialized knowledge." To the contrary, as Rule 702 contemplates, an appropriate source of an expert witness's technical or specialized knowledge is ***personal knowledge***, since the witness is qualified "by ***knowledge***, skill, experience, training, or education." *See* Rule 702, SCRE (emphasis added). A medical professional's testimony about the functioning of an organ or the characteristics and progression of a disease may be based on his ***personal*** knowledge, but that does not mean his knowledge is not "specialized." What controls whether the issue falls under Rule 701 or Rule 702 is not the ***source*** of the witness's knowledge but the ***matter*** about which he is testifying – whether it is a matter involving scientific, technical, or other specialized knowledge. In this case, the functioning and mechanics of the discharge of specific firearms is a matter of technical, specialized knowledge and properly evaluated under Rule 702, not Rule 701.

As articulated in Petitioner's briefs filed in the Court of Appeals, App. pp. 538-44, 586-89, the required analysis for admission of Arflin's testimony under Rule 702 was not performed by the trial court. The trial court failed to make the necessary findings that the state established the foundation required for admission under Rule 702. *See Hamrick*, 426 S.C. at 649, 828 S.E.2d at 601-02. Moreover, a review of the evidence reveals it was utterly inadequate to establish Arflin was qualified on the subject matter about which he testified. *Cf. Hamrick*, 426 S.C. at 649, 828 S.E.2d at 602. Under the proper Rule 702 analysis, Arflin's testimony was inadmissible, and its wrongful admission was prejudicial error.

Matters of scientific, technical, or other specialized knowledge that will assist the trier of fact are a proper subject of expert testimony. *See* Rule 702, SCRE. To be admissible, such testimony must be given by a witness who has been "qualified as an expert by knowledge, skill, experience, training, or education." *Id.* In determining whether to admit expert testimony, the court must make three inquiries: (1) whether the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain it to the jury; (2) whether the witness has the requisite knowledge and skill to qualify as an expert in the particular subject matter; and (3) whether the substance of the testimony is reliable. *See Graves v. CAS Medical Systems, Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012). These required inquiries were not conducted by the trial court before it allowed Arflin's testimony.

The first of these inquiries is clearly met here. The manner and mechanics of the operation and functionality of a particular kind of firearm is a subject matter beyond the ordinary knowledge of the jury, a matter of technical and specialized knowledge, and properly a matter for expert testimony under Rule 702. The Court of Appeals tacitly

recognized this first factor was met, specifically noting the subject matter may have been foreign to members of the jury. App. p. 603.

As to the remaining inquiries, this Court has clarified and explained the role of the trial judge in admitting testimony from an expert where the alleged basis of his expert qualification is experience and training. *See State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009). Addressing the distinction drawn in earlier decisions between "scientific" knowledge and "technical" or "other specialized" knowledge under the language of Rule 702, the Court outlined exactly what is required:

> We hold that the trial courts of this state have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, whether the evidence is scientific or nonscientific. ***In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact.*** The familiar evidentiary mantra that a challenge to evidence goes to "weight, not admissibility" may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.

White, 382 S.C. at 274, 676 S.E.2d at 689 (emphasis added). In later decisions, the appellate courts have further explained, "[t]he 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." *See State v. Tapp*, 398 S.C. 376, 388, 728 S.E.2d 468, 474-75 (2012); *State v. Rose*, 423 S.C. 382, 392, 814 S.E.2d 529, 534 (Ct.App. 2018). In this case, the mandated vetting of Arflin's qualifications, the reliability of the proposed testimony, and its ability to assist the trier of fact did not occur.

The qualification of a witness as an expert and the admissibility of the expert's testimony are within the trial court's discretion. *State v. Chavis*, 412 S.C. 101, 106, 771 S.E.2d 336, 338 (2015); *State v. Schumpert*, 312 S.C. 502, 505, 435 S.E.2d 859, 861 (1993);

Rose, 423 S.C. at 392, 814 S.E.2d at 534. An abuse of discretion ordinarily occurs when the ruling of the court is controlled by an error of law or based on a factual conclusion that is without evidentiary support. *See Chavis*, 412 S.C. at 106, 771 S.E.2d at 338; *Rose*, 423 S.C. at 392, 814 S.E.2d at 534. However, the failure of the trial court to exercise discretion is in itself an abuse of discretion. *See Patton v. Miller*, 420 S.C. 471, 490, 804 S.E.2d 252, 262 (2017); *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015); *Teseniar v. Professional Plastering & Stucco, Inc.*, 407 S.C. 83, 94, 754 S.E.2d 267, 273 (Ct.App. 2014); *CEL Products, LLC v. Rozelle*, 357 S.C. 125, 591 S.E.2d 643 (Ct.App. 2004); *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct.App. 1997). Here, the discretion to evaluate the qualifications of Arflin as an expert in firearms and, in particular, in revolvers, was vested in the trial court. By failing to exercise that discretion and conduct the requisite vetting of Arflin's qualifications and the reliability of his testimony, the trial court committed an abuse of its discretion.

Had that vetting been done, the court would have found that the testimony as to the basis of Arflin's purported expertise was woefully inadequate to support a finding that he was qualified to testify about the workings of revolvers. The only testimony about his training and experience with respect to firearms was brief and conclusory:

Q Are you familiar with firearms?

A Yes.

Q Are you familiar with it, both personally and professionally?

A Yes.

Q Do you get training on firearms?

A Yes, ma'am.

Q *Are you familiar with revolvers?*

A *Yes, ma'am.*

App. p. 347, lines 8-16 (emphasis added). No testimony was offered as to the nature and extent of the firearms training Arflin had received, and no testimony was offered to establish that he had received ***any training whatsoever specifically with revolvers***. The only mention of revolvers was that he was "familiar" with them. App. p. 347, lines 15-16. There was no testimony to establish Arflin had an understanding of how revolvers operate, where he gained such understanding, or the extent of his experience with such firearms. There was no testimony to establish that he had special knowledge of the different manners of operation of different varieties of revolvers. This passage of testimony about a familiarity with firearms was an inadequate evidentiary basis for a determination that he was qualified to render expert testimony about how revolvers function or that his testimony would be reliable and would assist the trier of fact.

Our courts recognize that there are no specific qualifications mandated by the evidence rules and a person may become skilled or knowledgeable in a field in a variety of ways. *See Teseniar*, 407 S.C. at 90, 754 S.E.2d at 270-71. What must be established is that the witness has acquired by study or practical experience such knowledge of the subject matter as will enable him to give guidance and assistance to the jury. *Rose*, 423 S.C. at 393, 814 S.E.2d at 534. In determining a witness's qualification as an expert, the court should make an inquiry broad in scope. *Teseniar*, 407 S.C. at 91, 754 S.E.2d at 271. Such inquiry was not performed in this case.

The state did not formally offer the witness as an expert, and the trial judge did not make a finding that he was an expert, simply stating, "I'm going to allow him to testify to

this." App. p. 364. Had he been proffered as an expert, much more would have been required to establish his qualifications than the conclusory passage of his testimony quoted above. The party offering a witness as an expert has the burden of showing the witness possesses the necessary knowledge, skill, experience, training, or education for him to be deemed qualified to testify as an expert. *See White*, 382 S.C. at 273, 676 S.E.2d at 688; *see also Hamrick*, 426 S.C. at 649, 828 S.E.2d at 601; *Schumpert*, 312 S.C. at 505, 435 S.E.2d at 861. That burden was certainly not met here. There was no vetting of the witness's qualifications through voir dire. The defense was not afforded an opportunity to question his experience, training, and basis of knowledge prior to his testifying about how revolvers operate, in an expert capacity. Indeed, in arguing her objection, Petitioner's trial counsel expressed her understanding that officers are not trained on revolvers. App. p. 364. The witness himself did not testify he had any training with revolvers. App. p. 347. Had he been offered as an expert and properly vetted through voir dire, his training or lack of training and the nature and extent of his experience with revolvers could have been explored. The court's failure to conduct such vetting was an abandonment of its gatekeeping role and clear error. *See White*, 382 S.C. at 274, 676 S.E.2d at 689.

The court's error in allowing this testimony was extremely prejudicial. As detailed above, *supra* at 2-11, the evidence presented by the state and defense was in sharp conflict, and witnesses gave testimony that supported Petitioner's account. The state's witnesses were impeached through prior convictions and inconsistent testimony. The witnesses had the opportunity to confer with each other and influence each other's testimony. The state's two key witnesses conferred and concocted a lie to tell the authorities. The investigation was incomplete, due to failures of the officers to confiscate and analyze key pieces of

evidence. The crime scene and the GSR testing were compromised in numerous ways. The evidence was such that the jury could have accepted Petitioner's account and found the shooting occurred either through recklessness or accident. Arflin's description of the functionality of the two types of revolvers suggested to the jury that a person would have to affirmatively act to make either type of weapon discharge. This testimony suggested to the jury that it should reject Petitioner's account that the gun went off during the pushing and swatting of the gun by Raby, and it likely contributed to the jury's finding him guilty as to the murder charge rather than returning a verdict of involuntary manslaughter or an acquittal on the basis of accident. The prejudice from the court's erroneous admission of this evidence is clear. This Court should grant a writ of certiorari on the issue of Arflin's opinion testimony; reverse the Court of Appeals and find the testimony pertained to a matter requiring "special knowledge, skill, experience or training" so as to be inadmissible under Rule 701; find that the requisite foundational requirements were not met for admission under Rule 702; and find the error in the admission of this testimony was not harmless.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DECISION TO OVERRULE A DEFENSE OBJECTION TO IMPROPER CLOSING AND A RELATED DEMONSTRATION THAT WERE NOT BASED ON EVIDENCE PRESENTED DURING THE TRIAL.

In its closing argument, the prosecution conducted a brief demonstration based on Arflin's testimony about revolvers and argued to the jury: "this is what would have had to have happened for this gun to go off because guns do not accidentally go off." App. p. 454, line 22 – p. 455, line 1. Petitioner's trial attorney objected to this argument and demonstration, on the basis that a demonstration must be based on evidence and testimony and there was no evidence that a gun cannot go off accidentally, especially an old one that

had been traded on the street. App. p. 455, lines 7-15. The court overruled the objection and allowed the argument. App. p. 455, lines 16-18.

Petitioner raised a claim of error with respect to this ruling. The Court of Appeals rejected Petitioner's contention, finding the argument was permissible advocacy based on the evidence. App. pp. 603-04. This ruling was also erroneous, and the Supreme Court should grant a writ of certiorari with respect to this issue as well.

It is a fundamental and long-held principle of our jurisprudence that a solicitor may not in closing argument argue facts that are not in evidence. It is the duty of the prosecuting attorney to treat the defendant in an impartial manner and at all times to confine himself to the evidence adduced in the trial. *State v. Cannon*, 229 S.C. 614, 618, 93 S.E.2d 889, 891 (1956). The state's closing argument must be confined to the evidence in the record and the reasonable inferences that may be drawn from that evidence. *Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010); *Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004); *State v. Huggins*, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997); *State v. Copeland*, 321 S.C. 318, 326, 468 S.E.2d 620, 625 (1996); *cf. Clark v. Cantrell*, 339 S.C. 369, 384, 529 S.E.2d 528, 536 (2000) (demonstrative evidence must be "a fair and accurate representation of the evidence to which it relates"). In this case, the state's argument that guns do not accidentally go off and its related demonstration were not supported by the evidence.

If the testimony of Arflin was erroneously admitted, as argued above, there was no testimony whatsoever about the operation of revolvers on which the state's argument and demonstration could have been properly based. If, contrary to Petitioner's argument above, Arflin's testimony was properly admitted, that testimony also does not provide the

necessary evidentiary support for the state's argument that guns do not go off accidentally. While Arflin testified to the mechanics of cocking and pulling the trigger to fire different types of revolvers, he was not asked and did not express the opinion that a revolver cannot fire accidentally. Nor was he asked about malfunction that could occur due to the age or condition of a revolver, such as the one Petitioner had that was old and a "piece of junk." App. p. 435, lines 16, 19. Nor did he testify that the gun could not have discharged as the result of someone's pushing or swatting it. In fact, his testimony about how a revolver fires was not absolute but was qualified as "kind of the rule," App. p. 365, lines 18-19, and no testimony was elicited as to conditions that might create exceptions to that so-called rule and allow for a revolver to discharge accidentally or through malfunction. The record is completely devoid of evidence related to the possibility of malfunction or an accidental discharge, and the solicitor's argument was absolutely improper.

This argument was also highly prejudicial. The entire case turned on whether the jury believed Petitioner intentionally fired the weapon or it simply went off in the back-and-forth with Raby. The solicitor's improper argument went to the heart of what the jury was to determine and likely influenced its deliberations and verdict. This case is unlike *Copeland*, where objections to the solicitor's arguments were either properly overruled or, where objectionable, were corrected by a curative charge. *Cf. Copeland*, 321 S.C. at 324-26, 468 S.E.2d at 624-25 Rather, the argument in this case is comparable to the improper argument in both *Huggins* and *Cannon*, which in each case pertained to the very theory of the state's prosecution and therefore could not be deemed harmless. *See Huggins*, 325 S.C. at 107-08, 481 S.E.2d at 116-17 (reference to statement, not in evidence, that defendant had a plan and offered money to someone to kill the victim was highly prejudicial and

fundamentally unfair in her trial for his murder and for conspiring to commit his murder); *Cannon*, 229 S.C. at 617-19, 93 S.E.2d at 890-91 (argument that insurance existed and the defendant had murdered the deceased for the purpose of collecting $4,000, where there was no evidence from which that conclusion could be drawn, was prejudicial because the case was tried on the theory that insurance was the motive). Similarly, in this case, where the case turned on the jury's determination of whether Petitioner fired intentionally or the gun simply went off, the state's argument that guns do not go off accidentally, unsupported by the evidence adduced at trial, cannot be deemed harmless. The prejudice is especially clear in this case where the evidence was in conflict, the credibility of the state's witnesses was seriously called into question, and the integrity of the investigation was compromised in so many respects, all as detailed above, *supra* at 2-11. This Court should grant certiorari, reverse the Court of Appeals' determination that the argument was permissible based on the evidence, and find the trial court committed reversible error in allowing this closing argument and its related demonstration that were outside the evidence in the trial record.

III. THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRORS, IN COMBINATION, WAS SO PREJUDICIAL THAT PETITIONER WAS DENIED A FAIR TRIAL.

Petitioner raised a claim of cumulative prejudice. Because the Court of Appeals did not find error as to either of his other claims of error, it did not reach the cumulative prejudice issue. If this Court grants a writ of certiorari and finds error in the admission of Arflin's testimony and in allowing the state's closing argument based on facts not in evidence but further finds neither error sufficiently prejudicial, standing alone, to warrant reversal, it should review the cumulative effect of these two errors and find they were so prejudicial as to deny Petitioner the fairness required by due process. *See* U.S. Const.

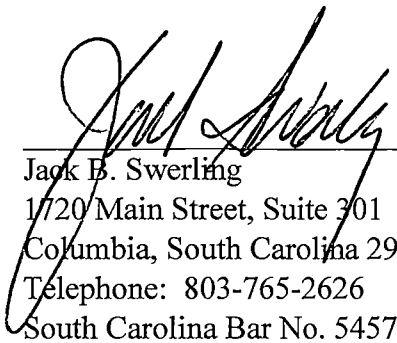
amends. V, XIV; S.C. Const. art. I, § 3; *State v. Blurton*, 342 S.C. 500, 512-13, 537 S.E.2d 291, 297-98 (Ct.App. 2000) (finding cumulative effect of improper comments in closing argument and erroneous exclusion of evidence warranted reversal), *rev'd on other grounds*, 352 S.C. 203, 573 S.E.2d 802 (2002) (finding additional error with respect to a jury charge); *State v. Freeman*, 319 S.C. 110, 123-24, 459 S.E.2d 867, 875 (Ct.App. 1995) (reversing conviction based on combined effect of court's limitation of cross-examination and court's improper comments interjected during the trial).

The cumulative error doctrine requires reversal when multiple errors, which may be found harmless in isolation, in combination prevent the defendant from receiving a fair trial and affect the outcome of his trial. In this case, the first error resulted in admission of expert testimony without the proper qualification of the witness and the other inquiries required under Rule 702 and case precedents, and the improperly admitted opinion evidence served as the basis for the state's improper demonstration and argument outside the record. The cumulative effect of these two errors was to give the jury an improper basis on which to reject Petitioner's defense. These errors viewed together so tainted these proceedings that they denied Petitioner a fair trial. This Court should grant certiorari and reverse.

CONCLUSION

For all the reasons set out above, this Court should grant a writ of certiorari, reverse Petitioner's convictions, and remand for a new trial.

Respectfully submitted,



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