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. 2020-001399

The State,

Respondent,

v.

Jaron Lamont Gibbs,

Petitioner.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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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?

ARGUMENT IN REPLY

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.

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

Under Rule 701:

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

See Rule 701, SCRE (emphasis added). On the other hand, Rule 702 provides that matters of scientific, technical, or other specialized knowledge that will assist the trier of fact are a

proper subject of ***expert*** testimony, where the witness is "qualified as an expert by knowledge, skill, experience, training, or education." *See* Rule 702, SCRE. The testimony at issue here is within the ambit of Rule 702, not Rule 701.

In its decision, the Court of Appeals placed undue reliance on the personal knowledge requirement of Rule 602 in deciding the testimony of Arflin was appropriately admitted, and the state's return to the petition for writ of certiorari continues to invoke Rule 602 in defense of the Court of Appeals' holding. Rule 602 provides, in part:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.

See Rule 602, SCRE. This Rule is subject to Rule 703, which provides that an expert witness may base an opinion or inference on facts or data perceived or made known to the witness. *See id.* Rule 602 does not alter the distinction drawn by Rules 701 and 702 between lay and expert testimony – a distinction that turns on whether the subject of the testimony is technical or specialized in nature. If it is not, the testimony is properly admitted under Rule 701. If it is, the testimony is subject to the requirements of Rule 702 and the case law of this state construing the requirements of Rule 702. *See* Final Brief of Appellant, App. pp. 539-44; *Hamrick v. State*, 426 S.C. 638, 646-49, 828 S.E.2d 596, 600-01 (2019).

The state acknowledges that lay testimony oversteps the boundaries of Rules 602 and 701 when it becomes "technical" in nature, citing *State v. Kelly*, 285 S.C. 373, 374-75, 329 S.E.2d 442, 443 (1985). A witness's testimony about the mechanism and functionality that causes a weapon to fire crosses that line, providing information of a technical and specialized nature, outside the ordinary knowledge of jurors. Instead, because of the

technical, specialized nature of such testimony, it is a proper subject of expert testimony under Rule 702.

In its brief in the Court of Appeals, the state argued the trial court did not abuse its discretion in admitting Arflin's testimony because, on the record created by the trial testimony, it was ***unclear*** whether Arflin's purported experience with revolvers was derived from anything other than his personal observation and experience. *See* App. p. 567. This acknowledgement tacitly admitted the required foundation for Arflin's testimony – evidence of his qualification through knowledge, skill, experience, training, or education for admission under Rule 702 – was not established. In its return to the petition for writ of certiorari, the state takes a new position and advances a different argument, asserting that, based on the trial record, Arflin's experience with revolvers ***did not*** derive from anything other than his personal observation and experience. This position is unfounded – the record contains no evidence with respect to the source of Arflin's experience or familiarity with revolvers. Instead, the only evidence on that point was the answer "Yes" to the question "Are you familiar with revolvers?" App. p. 347, lines 15-16. No testimony was elicited as to the source of that familiarity. Because the state was the proponent of the evidence, the burden rested upon the state to establish its admissibility by laying the proper foundation as to the witness's technical and specialized knowledge of the subject matter – how particular revolvers function and discharge – so that the trial court could perform its gatekeeping duty as required under Rule 702 and case precedents. *See Graves v. CAS Medical Systems, Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012); *State v. Tapp*, 398 S.C. 376, 388, 728 S.E.2d 468, 474-75 (2012); *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009); *State v. Rose*, 423 S.C. 382, 392, 814 S.E.2d 529, 534

(Ct.App. 2018). Where, as here, the record did not show the basis for the witness's knowledge and experience with revolvers, the admission of the testimony was an abuse of discretion.

Even the case law on which the state relies with respect to a so-called "lay" witness's testimony about the functionality of a piece of equipment establishes that such testimony could only be admitted because of the foundation laid as to the "special knowledge and experience in the daily operation of the machine" by its operator, who testified about its malfunction and the cause of that malfunction. *See Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 468-69, 494 S.E.2d 835, 845 (Ct.App. 1997). Although the Court of Appeals in *Small* referred to the witness's testimony as "lay opinion testimony," that characterization was a misnomer, because the Court clearly set forth the limitation of Rule 701, and the decisions based on Rule 701, that lay opinion testimony is admissible ***only*** as to matters that do ***not*** require special knowledge. *See Small*, 329 S.C. at 468-69, 494 S.E.2d at 845, *citing* Rule 701, SCRE, and *State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (1996) (both noting requirement for admission under Rule 701 that special knowledge ***not*** be required). The Court of Appeals' conclusion in *Small* that the testimony was admissible was premised on the "special knowledge and experience" of the witness, in keeping with the requirements of Rule 702. *See Small*, 329 S.C. at 468, 494 S.E.2d at 845.

To the extent *Small* could be argued to allow testimony based on technical or specialized knowledge under Rule 701, *Small* was decided long before the seminal decisions of this Court in *White*, *Graves*, and the other precedents relied on by petitioner. For the reasons argued in petitioner's final briefs, App. pp. 538-44, 586-90, and the petition for writ of certiorari, pp. 11-20, the testimony the state elicited from Arflin concerning the

functioning of revolvers was within the purview of Rule 702, but the foundational requirements for admission of such testimony under that rule were not met. There was no vetting by the trial court of Arflin's qualifications, the reliability of his proposed testimony, or the testimony's ability to assist the trier of fact. The court abused its discretion by not performing its "gatekeeping role" before admitting this evidence. *See White*, 382 S.C. at 274, 676 S.E.2d at 689.

The state's position is that Arflin's testimony was not a technical explanation and did not lead to any inference concerning the gun that may have been involved in the shooting. It is disingenuous to argue that an explanation of what is necessary to fire a weapon is not "technical" in nature. Arflin described the mechanics of cocking and pulling the trigger to fire one type of revolver and the kind of trigger action required to fire another type of revolver. And his testimony definitely led to an inference. His assertion that pulling the trigger was necessary to discharge a revolver led to the inference that such a firearm could not fire as the result of being swatted by Raby as the gun was pushed back and forth between him and petitioner, which multiple witnesses testified occurred in this case. Arflin's testimony was clearly within the purview of expert testimony under Rule 702, not lay testimony under Rule 701, and it was improperly admitted without the requisite foundation as to his technical and specialized knowledge about how such firearms operate.

The decision of the Court of Appeals specifically acknowledged that the subject of Arflin's testimony was outside the knowledge base of ordinary jurors, noting that "this subject matter may have been foreign to some members of the jury." App. p. 603. This acknowledgement is significant, because a matter outside the knowledge and experience

of ordinary jurors is a matter of "specialized" knowledge within the scop of Rule 702, not Rule 701. Under the proper Rule 702 analysis, Arflin's testimony was inadmissible.

The petition for writ of certiorari sets out the prejudice that resulted from admission of Arflin's challenged testimony, and the state does not address or challenge the petitioner's prejudice argument. On the basis of the evidence presented at trial, detailed in the petition at pages 2-11, and for the reasons outlined in the petition's argument of this issue at pages 19-20, the admission of Arflin's testimony was extremely prejudicial, and the error in its admission was not harmless. This Court should grant a writ of certiorari, reverse the decision of the Court of Appeals, and remand the case for a new trial.

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.

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

The state contends the demonstration and argument pertained directly to the testimony of Arflin, and it emphasizes that the Court of Appeals found it was fair for the

state to point out that someone had to pull the trigger and maybe even cock the gun first. If Arflin's testimony was erroneously admitted, there is no evidentiary basis for such argument and the related demonstration by the state.

However, even if the testimony of Arflin was properly admitted, the Court of Appeals' conclusion as to what the state was pointing out, which excludes the possibility of discharge by accident or malfunction, is still contrary to the evidence. There was no testimony whatsoever about the impossibility of accidental discharge or malfunction. The absence of such testimony was particularly problematic because the only evidence about this particular firearm was that it was old and a "piece of junk." App. p. 435. The challenged argument was not within the bounds of permissible advocacy, as the Court of Appeals held, because it was outside the scope of the evidentiary record.

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

The state asserts the demonstration and argument was "not prejudicially presented in closing argument," without squarely addressing petitioner's prejudice argument. The unwarranted assertion that "guns do not accidentally go off" went to the very issue before the jury for decision – intent – and negated the theory of the case supported by the evidence

presented by the defense – that the gun simply went off in the back-and-forth between petitioner and Raby, either through being struck by Raby or through malfunction or accident. The solicitor's argument that was outside the evidence was clearly prejudicial and likely affected the jury's verdict.

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

Petitioner raised a claim of cumulative prejudice. The state contends petitioner's cumulative prejudice argument is not preserved. Although this Court recently invoked error preservation in a footnote with respect to an argument of cumulative prejudice, *see State v. Durant*, 430 S.C. 98, 110 n.6, 844 S.E.2d 49, 55 n.6 (2020), the authority on which it relied did not announce a rule of preservation in the context of a cumulative error argument. The Court should revisit this issue and hold that the cumulative error doctrine is uniquely invoked at the appellate level, rather than in the lower court, where evidentiary objections are ruled upon based on governing legal standards, without consideration of prejudice except in the context of a Rule 403 argument. At the appellate level, the doctrine of cumulative prejudice should always be in play, where each individual objection was properly preserved for appellate review. Here, each claim of error was preserved by a contemporaneous objection, and a facet of the analysis of each claim of error is whether there was resulting prejudice. If no single error resulted in sufficient prejudice to require a new trial, this Court should nonetheless determine if the errors, in combination, so tainted the outcome as to undermine the petitioner's right to a fair trial. *See* U.S. Const. amends. V, XIV; S.C. Const. art. I, § 3; *State v. Blurton*, 342 S.C. 500, 512-13, 537 S.E.2d 291, 297-98 (Ct.App. 2000) (finding cumulative effect of errors warranted reversal), *rev'd on*

other grounds, 352 S.C. 203, 573 S.E.2d 802 (2002) (finding additional error requiring reversal); *State v. Freeman*, 319 S.C. 110, 123-24, 459 S.E.2d 867, 875 (Ct.App. 1995) (reversing on basis of combined effect of court's errors). The Court should grant certiorari, find the issue of cumulative prejudice is properly before the Court due to the objections that preserved each individual claim of error raised here, and address the claim of cumulative prejudice on the merits.

CONCLUSION

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

Respectfully submitted,

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