

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

MIMI JOE MARSHALL,

PETITIONER

Appeal from Richland County

Robert E. Hood, Circuit Court Judge

Opinion No. 2020-UP-241

Filed August 12, 2020

PETITION FOR REHEARING

Petitioner respectfully requests the Court to rehear this case pursuant to Rule 221(a) SCACR because this Court may have overlooked the fact that there is evidence on which an involuntary manslaughter was appropriately based, and because it further appears that this Court may have misapprehended petitioner's argument regarding the evidence of blood pattern analysis.

Involuntary Manslaughter Charge

First, the Court found "Appellant said he was holding his gun in the front room of the trailer because the trailer park is an unstable place." State v. Mimi Joe Marshall, Op. No. 2020-UP-241, at p. 4 (filed August 12, 2020), (*internal quotations omitted*). However, the record establishes that Investigator Clarke told the jury that the petitioner provided a statement, State's Exhibit. 3,

indicating the gun was merely present in the front room and that the decedent was the party who “grabbed” the gun. *See* State’s Ex. 3, p. 2, R. at 566, ll. 14-17. Further, this Court found “there [was] no evidence in the record that [Petitioner] was lawfully armed in self-defense.” State v. Mimi Joe Marshall, Op. No. 2020-UP-241, at p. 7 (filed August 12, 2020). However, respondents introduced State’s Exhibit 3, which is the petitioner’s statement to police, and in so doing, established evidence from which the jury could have concluded that petitioner was lawfully armed. *See* State’s Ex. 3, p. 2, R. at 566, ll. 14-17.

The standard for a whether an instruction must be given on involuntary manslaughter is the “any evidence” standard. Even where there is conflicting testimony and evidence involved, the test remains whether there was any evidence before the jury of the lesser-included offense or self-defense. *See* State v. Knoten, 347 S.C. 396, 555 S.E.2d 391 (2001); State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493 (Ct App. 2003).

A brief review of the evidence, some cited in this Court’s opinion, is, petitioner respectfully submits, instructive: “When she came home from work last night. I had my gun in the front room, I did this cause the trailer park is an unstable place. She came at me; she grabbed the gun, it went up and it went off.” State’s Ex. 3, p. 2, R. at 566, ll. 14-17. Thus, it is clear that the petitioner told Investigator Clarke, and Investigator Clarke testified, that the gun was merely present in the front room due to the instability of the trailer park. *Id.* Petitioner further articulated that the decedent confronted him by “coming at [him]” that she then “grabbed the gun” and “...it went off.” *Id.* Thereafter, Investigator Clarke testified that petitioner told him the gun was “laying against the wall the whole time [when petitioner decided to check out around his trailer with the shotgun] and that he met decedent as she was “coming in the door” and it was at this juncture that she grabbed the gun causing it to discharge. State’s Ex. 3, p. 2, R. at 566, ll. 14-17.

The fact that petitioner provided, and the State presented, inconsistent accounts of the shooting should not have barred the petitioner from an instruction on involuntary manslaughter. *Supra*. Viewing the evidence in the light most favorable to petitioner establishes that the petitioner only became armed after the decedent “came at” and engaged him in a struggle over possession of a weapon which was merely “laying against the wall” until the decedent “grabbed it” in the course of her fateful attack. Further, to view the evidence in the light most favorable to the petitioner is to accept the inference that the petitioner only became armed during the struggle which the decedent herself initiated.

Such struggles have previously been found to provide a proper basis for jury instruction on involuntary manslaughter. See State v. Light, 363 S.C. at 330, 610 S.E.2d at 507 (finding a charge on involuntary manslaughter would be appropriate if there was evidence that a weapon discharged during the struggle between the victim and [Defendant]). The jury was entitled – given this evidence – to receive and consider an instruction on involuntary manslaughter. Petitioner respectfully requests rehearing.

Scope of Expert Witness

Next, the standard for the admissibility of opinion testimony based on scientific or specialized knowledge was aptly stated by this Court in its opinion. State v. Mimi Joe Marshall, Op. No. 2020-UP-241, at p. 10 (filed August 12, 2020). However, the Court may have misapprehended the petitioner’s argument and overlooked material evidence. First, this Court found that Timothy Lee did not exceed the scope of his expertise, yet the Record indicates that Lee was only ever admitted as an expert in crime scene processing. State v. Mimi Joe Marshall, Op. No. 2020-UP-241, at p. 11 (filed August 12, 2020).

It appears that this Court may have overlooked evidence regarding the scope of the opinion that Timothy Lee was permitted to present to the jury. At trial, petitioner objected when Lee stated a particular photo showed “the limited amount of blood staining over here...so that gives us an indication that a bloodletting occurred within.” R. 194, ll. 11-15; State v. Mimi Joe Marshall, Op. No. 2020-UP-241, at p. 9 (filed August 12, 2020). After the trial court overruled petitioner’s objections, Lee provided the following testimony:

Q: And why is that photo important?

A: The photo – my view of the scene from this location, it shows that there are limited stains, limited red-brown stains on this side of the couch compared to that side of the couch.

Q: What does that tell you?

A: That gives me an indication of where an injury may have occurred. The more blood on that side, none on this side or limited on this side – It shows me an area where the injury let the most blood out. There was a bloodletting right there. There was blood. That is where I think that I need to concentrate my searching for to look for any additional evidence.

R. 231, ll. 9-24.

This Court found that Lee did not exceed the scope of his expertise and that his testimony explained how his training led him to photograph certain areas and collect evidence. State v. Mimi Joe Marshall, Op. No. 2020-UP-241, at p. 11 (filed August 12, 2020). Petitioner, however, submits that this Court’s opinion overlooks evidence of Lee’s impermissible foray into blood spatter interpretation.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. Rule 704, S.C.R.E. However, an opinion may be offered on the ultimate issue of the case only when the witness is otherwise qualified. *See State v. Andrews*, 424 S.C. 304, 318, 818 S.E.2d 227, 234 (Ct. App. 2018),

citing *State v. Wilkins*, 305 S.C. 272, 277, 407 S.E.2d 670, 672-73 (Ct. App. 1991); see also *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001). Likewise, an expert's testimony may not exceed the scope of his expertise. See *State v. Andrews*, 424 S.C. at 813, 818 S.E.2d at 234, citing *State v. Ellis*, 345 S.C. at 177-78, 547 S.E.2d at 491.

In *Ellis*, the Supreme Court found error where an expert in crime scene processing was permitted to impart his conclusions to the jury which were drawn from his observations. See *State v. Ellis*, 345 S.C. 175, 177-78, 547 S.E.2d 490, 491 (2001); see also *State v. Andrews*, 424 S.C. 304, 818 S.E.2d 227 (Ct. App. 2018). In *Ellis*, the Court further found that experts in crime scene processing could permissibly testify to measurements taken at the scene, the recovery of shell casings, and the identification of blood stains. *Id.*

Lee's testimony went beyond measurements taken at the scene, the recovery of shell casings, and the identification of blood stains. R. 178, ll. 18-19; R. 194, ll. 11-15; R. 205, ll. 14-17; R. 207, l. 5 – R. 208, l. 6; R. 210, ll. 3-7. Respectfully, this Court's opinion overlooks the fact that Lee testified to his interpretation of where the decedent suffered her fatal injury. *Id.* The jury was entitled to deliberate without having to consider unreliable testimony introduced through an unqualified witness. Based on the foregoing, the petitioner respectfully requests a rehearing.

Reliability of Blood Pattern Evidence

The petitioner also submits that this Court may have overlooked evidence which was pertinent to a determination of whether the trial court properly admitted evidence of the decedent's location at the time of her fatal wounding. This Court found that blood pattern evidence offered through Timothy Lee and Stan Richards met the requirements of *Council, Jones, and White*, despite evidence which demonstrate that the respondent's experts failed to conform with the guidelines presented in Defendant's Exhibit 12.

A brief review of the evidence is, petitioner contends, instructive. Timothy Lee testified that the scene was not processed for blood pattern analysis,

Q: And in this case, what opinion are you going to offer to the jury?

A: I can give my opinion on my processing of the scene, on what we do as a crime scene investigator, the importance of a crime scene investigator to collect and preserve evidence to be able to present to a jury. The blood patterns that I saw there, I can give my opinion on some of that.

Q: Okay. Have you recorded that opinion in any type of report?

A: We did not do a blood pattern analysis of the scene, no.

Q: Did you do any tests in this matter in doing the blood spatter?

A: No, we did not.

Q: Did you photograph the blood with a scale?

A: No, we did not.

Q: Did you utilize the roadmapping procedures that are highlighted in your protocols?

A: No, we did not.

R. at 194-196, ll. 19-3. Petitioner's counsel communicated his specific objection to the lack of methodological compliance,

.... Beyond that, he's done no testing whatsoever. He has not processed the scene consistent with the methodology...so I don't think they can satisfy the reliability requirements that they are required to under Jones.

R. at 196, ll. 17-21.

Defendant's Exhibit 12 make no mention of deviating from the prescribed methodology in determining an area of origin or convergence, yet Lee and Richards both were permitted to offer

testimony despite admitting that they did not process the scene or do any tests in arriving at their conclusions. *See* R. at 194-196, ll. 19-3; R. at 746-752. Further, Lee specifically admitted that the scene was not processed for blood pattern evidence, such as would be required to determine an area of origin. *See Id.* Despite the existence of this evidence, this Court found both experts' opinions met the requirements of Rule 702, *Council, Jones, and White*. Because it appears that this Court may have overlooked evidence which demonstrated a major deviation from the methodology required to determine an area of convergence, petitioner respectfully requests a rehearing.

Respectfully submitted,

s/Stephen F. Krzyston

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This 25th day of August, 2020.

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case upon Don Zelenka, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and Mimi Joe Marshall, #231197, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 25th day of August, 2020.

s/Stephen F. Krzyston
Stephen F. Krzyston, S.C. Bar No. 100666
Cavanaugh & Thickens, LLC

ATTORNEY FOR PETITIONER