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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions

Perry H. Gravely, Circuit Judge

Appellate Case No. 2017-002539

The State,..…………...………………………………………....……...Respondent,

v.

John Michael Hughes……………………………………………………..…Appellant.

PETITION FOR REHEARING OR REHEARING *EN BANC*

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The Appellant, John Michael Hughes (hereinafter "Hughes"), hereby respectfully moves and petitions, pursuant to Rules 219 and 221(a), SCACR, as well as all other applicable law, for an order granting rehearing or rehearing *en banc* in this case and submits the memorandum below in support of the same. Hughes, in an effort to keep this petition succinct, incorporates herein by reference his previously submitted briefs, making by reference those same arguments here.

The analysis used in the court's opinion in this case is such that the court should take a second look in this case, whether as the panel that decided it or as a whole, *en banc*. See S.C. Code Ann. §§ 14-8-80 & -90.

I. This court fell into the same trap as did the trial court in assessing Hughes' testimony about what happened as "near impossible."

The court's opinion states that Hughes' "version of events was near impossible." The court seems to have fallen into the same trap that the trial court did in this regard – taking the state's lawyer's *characterization* of testimony and evidence as fact. The state never actually adduced evidence that Hughes' "version of events was near impossible." The things cited by the court in the opinion as supporting this near impossibility do not necessarily contradict Hughes' testimony about what happened.

That the court has treated the argument of counsel for the state as fact in this regard is demonstrated by the following passage from the opinion:

> Other physical and testimonial evidence tended to show Appellant's version of events was near impossible. For one, Victim was "very large"—5'7'" and 286 pounds.

> The forensic pathologist explained "[a]n obese man with this degree of heart disease, an enlarged heart, emphysema[,] and an enlarged liver with fat could not be described as healthy." The State argued these physical limitations prevented Victim from trying to climb in a window nearly six feet off the ground, jumping down, accelerating in a threatening manner, and then resuming his charge after being shot.

No testimony or other evidence was adduced to the effect that John Ferrell's physical condition made him unable to climb or attempt to climb through a window that was a little less than six feet off the ground. At most, the forensic pathologist's quoted testimony only shows what it states: that Ferrell had some health problems. The angle of gunshot wound entry could be explained by differences in relative elevation or by Ferrell bending forward as he came toward Hughes. Hughes did not testify that Ferrell's pants were up when he shot him, and it is reasonable to assume that the entire shooting event happened rather quickly. Hughes may not have noticed if Ferrell's pants were around his ankles. And estranged husbands angry at their wives have been known to do stranger things than to de-pants while trying to break into said wives' homes.

Nor is the presence of blood in the kitchen, which was on the other side of the window Hughes testified Ferrell was dropping down from, some blatant contradiction of Hughes' account of what happened. Ferrell could well have entered the house or partially entered it while Hughes was exiting and coming around, been hit by a member of Hughes' household inside, and been escaping that situation when Hughes encountered him.

Respectfully, this court must have misapprehended or overlooked that Hughes' testimony about how the shooting happened was not shown to be "near impossible."

Since the determination of this near impossibility seems to drive the court's decision in this appeal, it is important that the court grant rehearing to revisit its determinations.

II. Admitting the leuco crystal violet (LCV) testing results was prejudicial error, not harmless error, and the opinion's harmless error analysis is at odds with precedent.

As discussed in Hughes' briefs, the trial court applied none of the appropriate analysis to whether to admit the testimony and evidence the state adduced regarding the use of leuco crystal violet (LCV) in and around Hughes' house. Per one of the state's witnesses, LCV is "a reagent and a presumptive test. It reacts to hemoglobin in blood. When you get a positive result, it will turn a violet color when sprayed and it makes contact with the suspected blood." (R. p. 137 ln. 4-8.) The use of LCV is a scientific testing process that is used for the presumptive detection of hemoglobin by the user of LCV essentially conducting a scientific experiment designed to result in the creation of visual evidence of the presence of iron or other metals in liquid that is suspected to be blood. (R. p. 137 ln. 4-8, p. 139 ln. 14-7.) Testimony about and the visual depiction of the results of LCV testing are scientific evidence under Rule 702, SCRE, just as are "DNA test results, blood spatter interpretation, and bite mark comparisons." State v. Whaley, 305 S.C. 138, 142, 406 S.E.2d 369, 371 (1991); accord State v. Council, 335 S.C. 1, 17-21, 515 S.E.2d 508 (1999) (results of mitochondrial DNA analysis are scientific evidence).

This was scientific evidence, and the trial court was required to apply the required analysis for whether to qualify the state's witness as an expert and whether to admit this scientific evidence. Graves v. CAS Medical Sys., Inc., 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012); State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813 (2001). The

trial court plainly did not do that. This court's opinion does not disagree; rather, it sidesteps the question, stating that "[w]e need not determine whether admitting the officer's testimony was error, because any error in admitting this testimony would plainly be harmless."

As noted in Hughes' reply brief, "[t]he key factor for determining whether a trial error constitutes reversible error is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." State v. Tapp, 398 S.C. 376, 390, 728 S.E.2d 468, 475 (2012) (internal quotation marks omitted). Recent decisions from this court and our state Supreme Court undermine the conclusion that admission of the LCV evidence in this case was harmless error. Last year, this court set out the harmless error standard as follows:

> An "[e]rror is harmless when it 'could not reasonably have affected the result of the trial.'" State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (quoting State v. Key, 256 S.C. 90, 93, 180 S.E.2d 888, 890 (1971)). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case." State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003) (quoting Mitchell, 286 S.C. at 573, 336 S.E.2d at 151). Accordingly, "our jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but *whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict.*" State v. Tapp, 398 S.C. 376, 389–90, 728 S.E.2d 468, 475 (2012) (emphasis added). In other words, an error is harmless "when guilt has been conclusively proven by competent evidence *such that no other rational conclusion can be reached.*" State v. Kirton, 381 S.C. 7, 37, 671 S.E.2d 107, 122 (Ct. App. 2008) (emphasis added).

State v. Bell, 430 S.C. 449, 469, 845 S.E.2d 514, 525 (Ct. App. 2020).

The harmless error standard is not *Well, there was some other evidence tending to indicate guilt, so the error was harmless*. It is not *Well, there was a lot of other evidence tending to indicate guilt, so the error was harmless*. It is "whether *beyond a reasonable doubt* the trial error *did not contribute* to the guilty verdict." Tapp, 398 S.C. at 389–90 (emphasis added).

Often, this determination involves, rightly, whether there is any evidence before the court that points to a different conclusion. This does not change just because DNA evidence is a different part of the state's case than the challenged evidence. Bell, 430 S.C. at 470 n. 17. This court rejected the contention that DNA evidence tending to prove guilt made the admission of improper testimony harmless in Bell. Id.

Indeed, to weigh evidence in a harmless error analysis would be for the appellate court to invade the province of the jury. The Supreme Court, rejecting a claim of harmless error where there was testimony inconsistent with guilt, had this to say:

> As an appellate court, we must be careful not to weigh the evidence. In assessing the State's harmless error argument, we recognize that what we refer to as plausible conflicting evidence may not be viewed as such by the jury. Fundamental to a jury's role as fact-finder is making credibility determinations, which lie in the sole province of the jury.

State v. Herndon, 430 S.C. 367, 373 n. 6, 845 S.E.2d 499, 502 n. 6 (2020).

Last year, the Supreme Court rejected the state's harmless error contention in State v. Phillips, 430 S.C. 319, 844 S.E.2d 651 (2020), in which the Court held that, "[w]hile the State presented considerable circumstantial evidence supporting Phillips' guilt, it did not offer any evidence that conclusively proved Phillips' guilt." Id. at 341. This case, the instant case against Hughes, was a circumstantial evidence case in which

the state did not offer evidence that conclusively proved Hughes' guilt. No one testified that he saw Hughes shoot Ferrell and that the shooting occurred differently than Hughes testified it did. The closest that the state came to that was the testimony of Andrew Martin about what happened inside the house, not where the shooting happened – and, as his cross-examination revealed, Martin had reason to lie and help build a case against Hughes. The state's case was circumstantial, and that cuts against an assessment of harmless error. Id.

Respectfully, this court misapprehended or overlooked that Hughes' testimony contradicted the version of events the state painted for the jury, in part through the use of the improperly admitted LCV evidence. It is not for this court to make a credibility determination – which it did – about Hughes' testimony. Herndon, 430 S.C. at 373 n. 6. Applying the correct standard on rehearing, this court cannot but determine that admission of the LCV evidence was not harmless error but was, rather, prejudicial error.

III. Rather than being "full and fair[,]" the immunity hearing was structurally defective.

Per the opinion in this case, this court determined that the trial court "conducted a full and fair hearing" regarding whether Hughes was entitled to immunity under the South Carolina Protection of Persons and Property Act, S.C. Code Ann. § 16-11-410, *et seq.* ("the Act"). The fact that the Act does not contain specific procedures for conducting such a hearing does not mean that the trial court may dispense with basic principles of law in conducting one. Dispensing with some basic principles of law is what the trial court did here, and, thus, it did not give Hughes a "full and fair hearing."

Respectfully, this court misapprehended or overlooked the following:

1) At the immunity hearing, the trial court allowed Officer Parker to testify about the LCV testing without the state even seeking to have him qualified as an expert. He did not possess the requisite qualifications, in any event.

2) The trial court made an assumption that was not supported by the evidence adduced at the immunity hearing: that there was "all this physical evidence that just absolutely shows that [Hughes'] story could not be possible[.]" (R. p. 181 ln. 4-6.) As discussed above, this determination of impossibility was *not* consistent with the evidence.

3) This court disagreed with Hughes about whether the basis for the trial court's ruling was that the Act did not apply because Hughes was in his home's curtilage, rather than inside the house, with this court stating that the trial court determined that Hughes had not met the preponderance of the evidence standard. Respectfully, this misses the point. The trial court made rather plain that it did not believe the Act applies to conduct in the curtilage, stating that "I think it may be a question whether the facts actually fit in there, too, but – since it was outside in the front yard or in the yard." (R. p. 652 ln. 16-23.) The fact that Hughes was in the curtilage of his home rather than inside is of no moment, as the Act, and thus the presumption in S.C. Code Ann. § 16-11-440, applies with equal force when the person using deadly force is in the curtilage of his home as it does when he is inside its walls. See State v. Scott, 424 S.C. 463, 470-74, 819 S.E.2d 116, 119-21 (2018). The trial court was holding Hughes to the task of proving something different from what the law required him to show. That was a structural

> defect in the proceeding, and "structural defects in the constitution of the trial mechanism defy analysis by harmless error standards." LaSalle Bank Nat'l. Ass'n. v. Davidson, 386 S.C. 276, 280, 688 S.E.2d 121, 123 (2009) (internal quotation marks omitted).

This court should grant rehearing to assess whether Hughes is entitled to a new immunity hearing. He is.

IV. The court's opinion on the improperly admitted cell phone data cannot withstand application of the correct standard.

The court's opinion determines it was not error for the court to deny Hughes' motion to supress the cell phone data uncovered through a defective warrant, and the court makes that determination on the basis of unsworn statements made by the assistant solicitor "as an officer of the court." Respectfully, the court has overlooked that the standard in this regard is based on what evidence was in the record. The assistant solicitor's status as an officer of the court does not make his statements the equivalent of testimony, as this court's opinion seems to hold. What the assistant solicitor said about this was not evidence. Trivelas v. S.C. Dept. of Transportation, 348 S.C. 125, 141, 558 S.E.2d 271, 279 (Ct. App. 2001); Higgins v. MUSC, 326 S.C. 592, 601, 486 S.E.2d 269, 273 (Ct. App. 1997); Historic Charleston Foundation v. Krawcheck, 313 S.C. 500, 508 n. 7, 443 S.E.2d 401, 406 n. 7 (Ct. App. 1994); Gilmore v. Ivey, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986).

In reviewing a challenge under the Fourth Amendment, such as a motion to suppress evidence, an appellate court must affirm if there is any *evidence* to support the ruling. State v. Anderson, 415 S.C. 441, 446, 783 S.E.2d 51, 54 (2016). In State v. Simpson, 425 S.C. 522, 540, 823 S.E.2d 229, 239 (Ct. App. 2019), this court wrote that

"if the prosecution can establish *by a preponderance of the* *evidence* that the information ultimately or inevitably would have been discovered by lawful means, . . . then the deterrence rationale has so little basis that the evidence should be received." (Emphasis added.) The State did not, however, adduce any evidence to support the facts that it claimed supported its position that the discovery of this data was inevitable or came from an independent source. (R. p. 420 ln. 20-24.) The State made it plain that "we would not be introducing those other records in the trial. We are just relying on that to establish that there was, in fact, another avenue to get these records, that it was inevitable." (R. p. 420 ln. 20-24.) At no point was the factual material that the State contended supported its assertion of inevitable discovery ever presented to the trial court. All that was presented in support of the inevitability of discovery was argument by the State's lawyer. (R. p. 420 ln. 20-24.)

It is not as though there was competing evidence on this point. The state did not offer any evidence tending to indicate discovery of the evidence it procured through its defective warrant was inevitable or that it obtained it through an independent source. Where there is no evidence, there is no preponderance of the evidence. Simpson, 425 S.C. at 540. Hughes' position is not that the state had to call any particular witnesses about this; rather, it is that, in the complete absence of evidence to support what the state argued, there was no *evidence* to support the trial court's ruling, thus entitling Hughes to reversal on this point. Anderson, 415 S.C. at 446; Simpson, 425 S.C. at 540,

Respectfully, this court misapprehended or overlooked that the words of non-testifying lawyers cannot provide the *evidence* necessary for this court to affirm on this point.

V. Whether a person sounds frantic is not the analysis of whether a statement is an excited utterance, and the opinion characterized things as evidence of a conspiracy that are not susceptible of being evidence of a conspiracy.

Respectfully, this court's opinion misapprehends or overlooks the point of the excited utterance exception to the hearsay rule, under which Jane Hughes' recorded statements from the 911 call were admitted. The point is not whether the declarant sounds frantic; rather, as the Supreme Court has explained:

> [T]here are three elements that must be met to find a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition. The excited utterance exception is based on the rationale that the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication. A court must consider the totality of the circumstances when determining whether a statement falls within the excited utterance exception[.]

State v. Ladner, 373 S.C. 103, 644 S.E.2d 684, 690-91 (2007) (internal citations and quotation marks omitted).

The state's contention was not that Jane's process of reflective thought was suspended during the 911 call, i.e., that she was "excited" as contemplated by this hearsay exception, but, rather that Jane made statements of half-truths to the 911 operator and made statements (which she did not think the 911 operator could hear but which were still captured on the recording) indicative of a conspiracy to murder Ferrell. (R. p. 427 ln. 25 through p. 428 ln. 6.) As Hughes argued, though, if Jane had the presence of mind to *lie* to the 911 operator and to direct actions in furtherance of a murder or conspiracy to commit one, then her statements on the 911 recording were

"fundamentally different from the off-the-cuff, volunteered responses to law enforcement that the Court has allowed under the excited utterance exception." State v. Washington, 379 S.C. 120, 665 S.E.2d 602, 604 (2008). The state's contention about this evidence, and the way it argued this evidence, was that the events surrounding Ferrell's death did *not* have the effect of suspending Jane's process of reflective thought. (R. p. 672 ln. 4-24.) This statement did not fall under the excited utterance exception to the hearsay rule. The 911 recording was admitted for the purpose of showing that Jane *was* lying to the 911 operator (but not lying while she thought she was not being recorded). Accordingly, if the statement indicates Jane had the presence of mind to lie, she *could not have been "excited"* under that term's definition for excited utterance purposes.

And admission of this recording was most definitely not harmless error. It was the only evidence admitted that actually tended to show the conspiracy of which Hughes was convicted. Indeed, take this recording out of evidence, as it should be, and the requirement to direct a verdict for Hughes on the conspiracy charge becomes manifest. Martin's testimony of a "multi-person assault" on Ferrell by members of the Hughes family may be evidence of an attack, but it is not evidence of an *agreement* to perpetrate an attack. And Hughes and his son's test messages about pie and dessert are, in view of the nothing that is in this to indicate that what was *really* being discussed was a plan to harm Ferrell, just irrelevant baked goods discussions.

Respectfully, this court overlooked or misapprehended that a directed verdict should have been granted on the conspiracy charge.

VI. Hughes was entitled to a jury charge on the relevant law, that a presumption under the Stand Your Ground Act applied.

Hughes sought a jury charge on the presumption of reasonable fear of death or great bodily injury under S.C. Code Ann. § 16-11-440 when the person against whom deadly force is used was in the process of unlawfully and forcibly entering a dwelling or residence. The requested charge correctly set forth the law of this state. S.C. Code Ann. § 16-11-440. As the court's opinion notes, State v. Curry, 406 S.C. 364, 373, 752 S.E.2d 263, 267 (2013), dealt with a different part of the statute than what is applicable here.

"When reviewing a jury charge for error, an appellate court considers the charge as a whole; the charge must be prejudicial to the appellant to warrant a new trial." State v. Stukes, 416 S.C. 493, 498, 787 S.E.2d 480, 482 (2016). As Hughes' account of the events of the night in question was not impossible or nearly impossible, the jury, armed with knowledge of this presumption, would have been in a position to undertake a different analysis that may well have led to a not guilty verdict.

Respectfully, the court has misapprehended the law in this regard.

VII. Rehearing *en banc* would be proper.

"A hearing or rehearing en banc is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Rule 219(a), SCACR.

Especially in light of the divergence between this case's opinion and precedent of this court and the Supreme Court on harmless error analysis, as well as with regard

to important questions like substituting the representations of counsel for testimony, rehearing *en banc* would be appropriate in this case.

WHEREFORE, Hughes prays for an order granting rehearing or rehearing *en banc* in this case.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I served the foregoing petition for rehearing or rehearing *en banc* in this case by providing a copy of it by email to opposing counsel at the email address(es) shown below and on the date shown below:

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Respectfully submitted,

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