

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable John C. Hayes, Circuit Court Judge

SANDY LYNN WESTMORELAND,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2019-001251

APPENDIX

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APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL

- I. Whether the court erred by allowing the coroner, who admitted he had never testified about the manner of death in a prior case, to opine, where he was not qualified as an expert, that the cause of the decedent's death was a homicide since this was impermissible opinion by a lay witness that was extraordinarily prejudicial where appellant's defense was accident, and the jury was charged on the law of accident?

- II. Whether the court erred by instructing the jury that voluntary intoxication was not a defense where the evidence in this case was undisputed that appellant was heavily medicated in the hospital emergency room for medical purposes, and was nonetheless allowed to leave to drive home, since this instruction on voluntary intoxication should not have been charged given the facts of this case, and it was consequently was very confusing and misleading?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

- I. Whether the trial court erred when it allowed the county Coroner to testify as a lay witness that he ruled the victim's death a homicide. The Coroner is statutorily required to rule on the manner of death. His testimony does not comprise an expert opinion and constitutes merely one piece of evidence before the jury's consideration.
- II. Whether the trial court erred by instructing the jury on voluntary intoxication. The evidence presented at trial created a question for the factfinder as to whether Appellant was or was not intoxicated at the time of the hit and run, and it was appropriate to thereafter instruct the jury on the implications of finding that Appellant was voluntarily intoxicated.

STATEMENT OF THE CASE

Appellant Sandy Lynn Westmoreland was indicted by the Spartanburg County Grand Jury for the charges of murder and hit and run with death. (R. pp. 388 – 391 Indictments). A third charge for second-degree assault and battery was severed prior to trial. (R. p. 15, lines 1-10).

Assistant Public Defender Matthew Shealy represented Westmoreland at a jury trial which began December 1, 2014, before the Honorable Roger L. Couch in Spartanburg County. (R. p. 1). Abel Gray and Megan Moricle of the Seventh Circuit Solicitors Office prosecuted the case which lasted four days. (R. p. 1).

The jury returned with a verdict of guilty on each charge. (R. p. 374, lines 16-24). Judge Couch sentenced Westmoreland to thirty years for murder and a concurrent twenty-five years for hit and run with death, and gave him credit for time served. (R. p. 380, lines 11-18). This appeal follows. (R. pp. 381 – 382 Notice of Appeal).

STATEMENT OF FACTS

Appellant Sandy Lynn Westmoreland visited the emergency room at Mary Black Hospital in Spartanburg complaining of abdominal pain and blood in his stool. (R. p. 158, lines 5-10). It was 5:56 pm when he arrived, and his initial treating doctor administered two doses of Dilaudid for pain, and Zofran to combat any nausea. He received his first dose at roughly 6:00 pm, and the second at 7:18 pm. (R. p. 159, lines 1-23). Eventually he was treated by Dr. Mark Rody, who administered no additional medication to Appellant. (R. p. 160, line 13 – p. 161, line 7).

Appellant awaited treatment in Room 4. (R. p. 42, lines 5-6). At some point in the four hours and 45 minutes between Appellant's last dose of pain medication and discharge, a hospital security guard witnessed a Mr. Michael Daniels stumble out of Room 4, crying, upset, and with a bloody nose. (R. p. 40, line 20 – p. 41, line 25; R. p. 161, lines 4-10). A deputy was called, but Mr. Daniels did not wish to press charges against Appellant. Instead, he wished to leave, and did so. (R. p. 42, line 19 – p. 43, line 18).

According to Appellant, he picked up Mr. Daniels, his best friend and lover of eighteen years, from work at a dialysis clinic that day in March of 2012. (R. p. 220, line 8 – p. 221, line 7; R. p. 223, lines 5-18). They went to the emergency room together for Appellant's abdominal pain. (R. p. 224, lines 20-25). At some point during the course of Appellant's treatment, he and Mr. Daniels began to bicker about money and Mr. Daniels' alleged purchase of a phony crack rock. (R. p. 229, lines 3-23). According to Appellant, he was twirling his cane around on the end of the bed. Mr. Daniels jumped up during their argument the cane struck Mr. Daniels in the nose. (R. p. 229, line 19 – p. 230, line

16).

A deputy responding to the altercation asked Mr. Daniels to wait outside for Appellant to be escorted out of the hospital “and then they would both be free to leave.” (R. p. 52, lines 11-19). The deputy escorted Appellant to his vehicle after he was discharged, but Mr. Daniels was not there waiting. (R. p. 52, lines 21-24). The deputy refused Appellant’s next request to charge Mr. Daniels with car breaking; Mr. Daniels had apparently removed the tape from a broken window in Appellant’s car, taken some of his personal belongings from the car, re-taped the window, and went on his way. (R. p. 53, lines 1-14). Appellant, appearing agitated with that particular chain of events, also left. (R. p. 53, lines 9-14).

By the time Appellant departed the hospital, he did not act impaired by multiple accounts. The deputy who walked him to his car reported no stumbling or slurred speech. (R. p. 53, line 23 – p. 54, line 3). According to Dr. Rody, who discharged Appellant after the altercation, the painkillers he was administered during the first part of his hospital stay would not “have [had] any impact on the patient after four hours especially when [it is administered via] IV because its half life is . . . quick enough to where it’s gonna be out of your system at that point.” (R. p. 162, lines 3-9). Over the course of his four hour and 45 minute observation period, Dr. Rody “watched [Appellant] get up and walk to the bathroom . . . 30 yards away, and he walked over there just fine. He had no problem doing that. He was communicating with [Dr. Rody] and the nurses just fine. There was no alteration in his mental status.” In Dr. Rody’s opinion, Appellant did not suffer from any impairments at “any of the times [he] saw him and certainly not at discharge.” (R. p. 165, lines 15-21).

Petitioner, however, also regularly took large amounts of additional prescribed medication for a host of chronic ailments.

He was on Lantus for his diabetes. He was on Nexium probably for ulcers or gird. Singular is an asthma medication. Aspirin once a day. Spiriva is for asthma or COPD. Advair is an inhaled steroid for asthma or COPD. Symbicort is another inhaled steroid for asthma or COPD. Proventil is a rescue inhaler for COPD or asthma. Requip is a psych medication as is, as is Cymbalta, and he's on Lortab 10s three times a day.

So, somebody takes Lortab 10[, the strongest dose of Lortab available,] three times a day is gonna have, you know, a greater tolerance for the medication and probably not respond to those lower doses of narcotics . . . versus somebody who is never on narcotics and gets a shot of Dilaudid. They would tend to be more zonked by it.

(R. p. 162, line 12 – p. 163, line 3).

And then . . . as we continue the list, he was on Vitamin B daily, Magnesium daily, Glyburide Metformin, which is a diabetic oral . . . hypoglycemic agent for Type II diabetics, and he was on Diazepam, which is Valium, 10 milligrams twice a day, [and] Lisinopril for his blood pressure

(R. p. 166, lines 7-12; R. pp. 386 – 387).

Dr. Rody opined that an individual who takes that amount of Lortab, a narcotic painkiller, “consistently, three times a day,” would “build up a tolerance in terms of how that next dose of pain medication would” affect him.” (R. p. 163, lines 15-21). The longer Appellant had been taking Lortab, the “more impressive” his tolerance to prescription painkillers would be. (R. p. 163, lines 23-25). Appellant was also on a “pretty big dose” of Diazepam, or Valium twice daily according to Dr. Rody. (R. p. 166, lines 16-19). A “five [milligram dose] would be kind of more your conventional dose of Valium to take at one time.” (R. p. 166, lines 21-23). According to Appellant, his pills and the two intravenous doses of Dilaudid “still didn’t ease the pain” that day in the hospital. (R. p.

275, lines 13-20).

Regardless, Dr. Rody felt comfortable discharging Appellant given the applicable standard of evaluating a patient for impairments:

[I]t depends on what they look like and . . . a big job of [his] in emergency medicine is evaluating how a patient looks or Gestalt to the patient, and getting an idea of how they interact with [the physician], and what their mental status is, how they walk.

Since [Dr. Rody] talked to [Appellant] multiple times, watched him walk, interacted with him, and had him under [his] care for . . . three hours and 45 minutes . . . [,] with that length of time watching and observing him, [the doctor] can make a determination whether he's safe to go and drive and so forth[.]

(R. p. 175, lines 1-16).¹

It was close to midnight when Appellant was discharged and escorted to his vehicle. (R. p. 161, line 7; R. p. 259, lines 6-12). According to Appellant, he “got in the car and left as [the deputy and doctor] wanted [him] to do.” (R. p. 235, lines 4-5). He did not have his glasses because he had given them to Mr. Daniels for safekeeping while at the hospital. It was dark, and Appellant maintained that he had astigmatism or macular degeneration and could not see well without his glasses. (R. p. 235, lines 9-23). Appellant testified that he “turned to the right to leave to go back towards town” in his Ford, which had a manual transmission. (R. p. 236, lines 13-18). Appellant testified that he “jerked the car to pull over and pick [Mr. Daniels] up because he saw a glimpse of him walking away from the hospital. (R. p. 236, lines 18-25; see R. p. iv, State’s Exhibit 55). This is what

¹ Appellant testified at trial that the Dilaudid injections made him feel high for “[a] while” because he did not usually take that particular narcotic. Appellant also recalled that the Dilaudid injections were supposed to move in and out of his system fairly quickly. (R. p. 274, line 14 – p. 276, line 10). But, Appellant testified that he took no additional pain pills after the Dilaudid dosage. (R. p. 276, lines 24-25).

Appellant stated happened next:

When I jerked the car over and stuff, I felt a bump. I realized I was in the field. I jerked it back around. I was scared that I'd get stuck and gave it a little gas and got back on the road. I said oh, my God, you know, what happened. I turned around and came back. He was dead.

(R. p. 237, lines 2-6; *see* R. p. iv, State's Exhibit 55).

Appellant never called 911, never went back to the hospital to tell anyone what happened, never called for aid. (R. p. 253, line 4 – p. 254, line 25). Instead, he “flipped out” out and left. (R. p. 237, line 21 – p. 238, line 5). At some point, he ripped the bug guard off of the front of his vehicle and threw it in the back of the car. (R. p. 238, line 23 – p. 239, line 1). Then, he got pulled over at 12:37 am for a missing headlight—Appellant told the officer he hit a deer and that he was planning on replacing the light. (R. p. 58, lines 17-20; R. p. 239, lines 15-25). He was freed of the traffic stop, ticketless, by 12:49 am. (R. p. 59, lines 5-6).

That morning after daybreak, a pedestrian noticed a man lying “flat on his back” behind some shrubbery near the emergency room. (R. p. 38, lines 7-13; *see* R. p. iv, State's Exhibit 55). He reported it to a hospital worker. (R. p. 38, lines 14-19). A paramedic was dispatched to the scene and found “a male patient [lying] supine behind a row of shrubbery next to the roadway.” (R. p. 62, lines 13-24).

It appeared that a vehicle had traveled through the shrubbery, about five to ten feet above where the patient was found, and exited through the shrubbery about 30 to 40 feet below the patient. EMS requested the Coroner's Office, the Sheriff's Office, the Highway Patrol, and secured the scene till they got there . . . and cleared the call.

(R. p. 63, lines 4-10; R. p. iv, State's Exhibit 55). The body was “inside away from the roadway” near the hospital and there was “a number of bits and pieces of what looked to

be vehicular parts or component parts thereof." (R. p. 65, lines 5-24).

Mr. Daniels' head was dislocated from his neck as if he'd been hung. (R. p. 99, line 11 – p. 100, line 1). An autopsy conducted that afternoon showed contusions to the eye and nose, abrasions from brush beginning at the nipples and extending down to the crease of the left leg, and a stretch type abrasion resulting from his skin hyperextending almost to the point of tearing. (R. p. 99, lines 4-18). Mr. Daniels also suffered a fractured left leg and blood in the left plural cavity. (R. p. 100, lines 19-21). Moreover, he hemorrhaged from the neck all the way down to the first thoracic vertebra, and sustained a number of vertebra fractures, and a large bruise and hemorrhage to the back of his head from impact with a solid object. (R. p. 101, lines 1-25). It was the fractured base of the skull and first cervical vertebra and related laceration, however, which caused his death. (R. p. 102, lines 13-19). The forensic pathologist opined that Mr. Daniels, while standing, suffered an impact to the back of his fractured leg causing him to bend backwards in relation to the bottom half of his body and creating the stretch type abrasion. In other words, he was hit from behind. (R. p. 102, lines 1-12).

Appellant became a suspect once law enforcement received information at the crime scene that Mr. Daniels had been with him in the emergency room the night before. (R. p. 87, lines 14-22). An investigator was able to match Appellant to a Ford Explorer registered to Appellant's residence. Law enforcement went to Appellant's house. At some point Appellant walked outside and cooperatively confirmed his identity, and law enforcement transported him to the Sheriff's Office for questioning. (R. p. 78, line 6 – p. 81, line 1). Appellant was Mirandized in the patrol car and immediately began to converse with law enforcement. (R. p. 93, lines 2-18).

First, Appellant told the officers that he and Mr. Daniels “got into a fuss at Mary Black [Hospital] and that Mike [Daniels] had walked off and left” and “that he had hit a deer later that evening.” (R. p. 107, lines 10-14). At the station, this version of events was memorialized by Deputy Jason Bryant in writing and signed by Appellant. (R. p. 108, line 1 – p. 110, line 22; R. pp. 383, State’s Exhibit 110). But later, Appellant changed his story.² (R. p. 109, lines 23-25). Appellant admitted in an audio recorded statement that he did not hit a deer, but rather “accidentally” hit Mr. Daniels with his Ford Explorer as he was pulling over to pick him up. He also said he “got out to see if Mike [Daniels] was okay, but he wasn’t breathing” and he never called 911. (R. p. 111, line 1 – p. 112, line 20).

At the crime scene, Corporal Michael Duncan with the Highway Patrol’s Multidisciplinary Accident Investigation Team (M.A.I.T.) observed no skid marks, but there were “definite tire tracks going off into the grass at a sharp angle.” (R. p. 122, line 15 – p. 123, line 3; *see* R. p. iv, State’s Exhibit 60). These marks extended up to the bushes and past Mr. Daniels’ body. (R. p. 123, lines 4-9). Something “other than the car went through the type of bushes.” Mr. Daniels probably traveled through the air once hit, then rolled or slid. (R. p. 125, lines 13-25; *see* R. p. iv, State’s Exhibit 55). This was demonstrated by an additional marking in the grass, which led to where Mr. Daniels

² In total, Appellant provided what can be counted as four statements. First, during transport to the Sherriff’s Office, Appellant told officers he hit a deer. This same story was recorded in writing and signed by Appellant. (R. p. 114, lines 4-17). The third statement was verbally made to Deputy Bryant and was not recorded. In that third statement, there is some question as to whether Appellant mentioned that his hitting Mr. Daniels with his car was an accident. (R. p. 111, lines 1-14; R. p. 114, line 21 – p. 115, line 24). In the fourth, audio-recorded statement which was not played at trial, Appellant did state that his hitting Mr. Daniels was an accident. (R. p. 111, lines 17-25).

“came to a rest.” (R. p. 123, lines 10-15).

Corporal Duncan “could tell the vehicle continued on through the bushes on back out on the other side of the bushes and back out onto the road.” (R. p. 123, lines 16-14). There was “no stopping to it at all.” (R. p. 123, line 23; R. pp. 384 – 385, State’s Exhibit 111). In fact, acceleration marks were visibly present in the furrowing in the grass. (R. p. 124, lines 1-8; R. p. 130, lines 6-25). The vehicle’s speed was calculated to be between 29 and 37 miles per hour. (R. p. 125, lines 11-12). There was also “severe steering input” on the part of the driver “into where the pedestrian was.” (R. p. 127, lines, 1-7). It was apparent to the M.A.I.T. team that the vehicle turned off of the road at an acute angle ranging from 22 to 28 degrees. (R. p. 127, lines 10-15; *see* R. pp. 384 - 385 State’s Exhibit 111).

The M.A.I.T. team’s consensus was that Mr. Daniels sustained “a fender vault” where his body hit the vehicle at or near the right fender. (R. p. 126, lines 14-20). As for the driver, “there was no breaking prior to or afterwards. It was one continuous motion.” (R. p. 126, lines 21-23; R. p. 131, lines 8-9). And, there existed no physical evidence that the driver turned around and pulled back onto the grass after impact. (R. p. 130, lines 1-5; R. p. 132, lines 1-10).

As for the Ford Explorer examined at Appellant’s home, investigators documented berries under the headlight housing and in the front of the radiator, and a broken twig underneath the car. (R. p. 178, line 15 – p. 179, line 8). A multitude of pieces from the Ford Explorer were collected from the scene, including a headlight lens cover and assembly, painted pieces of the vehicle, and a piece of bug guard. Personal items of Mr. Daniels’ were found scattered about the scene and additionally taken into evidence,

including eyeglass frames and a lens, a busted cell phone, sneaker, and bag of clothing.³
(R. p. 197, line 18 – p. 203, line 9).

Also at the scene, the Spartanburg County Coroner and his investigators documented the tire tracks and Mr. Daniels' condition before transporting his body for autopsy. (R. p. 148, line 20 – p. 150, line 22). Based upon these observations, Coroner Rusty Clevenger ruled Mr. Daniels' death a homicide. (R. p. 145, line 1).

³ Although Appellant testified that Mr. Daniels held Appellant's false teeth, wallet, and perhaps a fake crack rock at the time he walked away from the hospital, none of these items were recovered from the crime scene. (R. p. 226, line 13 – p. 227, line 8; R. p. 300, lines 1-10).

ARGUMENT

- I. The trial court committed no error in allowing the county coroner to testify that he ruled the victim's death a homicide because his reporting the manner of death is statutorily required, does not constitute an expert opinion, and is merely one piece of evidence before the jury's consideration.**

How the Issue Arose

In this case, the trial court correctly ruled that Coroner Clevenger would not be allowed to offer an opinion absent expert qualification, but that he could report his finding on the victim's manner of death. (R. p. 143, line 3 – p. 145, line 10). The ruling arose from Appellant's objection to the Coroner's qualification as an "expert in testifying as to the manner of death" on the basis that the Coroner "is an elected position." (R. p. 143, lines 3-7). At the time of Appellant's trial, the Coroner had never before testified regarding the manner of death.⁴ (R. p. 142, lines 10-12). The State chose not to qualify the Coroner as an expert once the objection was raised. (R. p. 143, lines 16-23). In line with the trial court's ruling, the State articulated that it did not intend to elicit an opinion from the Coroner. The State would only ask the Coroner "[w]hat his findings were." (R. p. 143, lines 8-11). The Coroner then testified over Appellant's renewed objection that he "ruled this case a homicide," and that he cannot determine whether a homicide is intentional "all the time." (R. p. 144, line 21 – p. 145, line 10).

Standard of Review

"The admission or exclusion of evidence is a matter within the trial court's sound

⁴ In laying its foundation for moving to so qualify the Coroner, the State elicited testimony that the Coroner was a former sheriff's deputy who left the violent crime detective division to begin a career as an investigator with the Solicitor's office in 1997. He remained an investigator until elected Coroner in 2009. (R. p. 141, lines 10-19). The Coroner also testified that he attended a number of continuing education courses in homicide investigations throughout his career. (R. p. 142, lines 5-9).

discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a ‘manifest abuse of discretion accompanied by probable prejudice.’” *State v. Commander*, 396 S.C. 254, 262-63, 721 S.E.2d 413, 417 (2011) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006)). “An abuse of discretion occurs when the trial court’s ruling is based on an error law or, when grounded in factual conclusions, is without evidentiary support.” *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011).

A. A coroner is required by law to make a determination as to a victim’s manner of death, and that testimony does not fall outside the purview of Rule 701, SCRE.

The trial court’s ruling does not constitute an abuse of discretion. Rather, the court correctly categorized the challenged testimony as merely reporting a finding required by law. (R. p. 145, lines 5-10). Every person is generally competent to testify as a witness so long as their testimony is supported by personal knowledge. Rules 601 and 602, SCRE. In this case, the county coroner embodied the appropriate knowledge to testify that he reported the victim’s death a homicide because he is statutorily responsible for reporting it. If a person dies as a result of, *inter alia*, violence or in any suspicious or unusual manner, the county coroner must be notified immediately, as he “shall make an immediate inquiry into the cause and manner of death and shall reduce the findings to writing on forms provided for this purpose.” S.C. Code Ann. § 17-5-530.

A coroner’s finding must represent “manner of death,” which is defined as “the means or fatal agency that caused a death” and is categorized as either being natural, accidental, homicidal, suicidal, or undetermined. S.C. Code Ann. § 17-5-5(9); S.C. Code Ann. § 17-7-30. As stated by the Coroner in this case, his “responsibility is [to] make

sure that a cause [of death] is identified,” (R. p. 142, lines 15-16), a determination which must be made regardless of any ability for the Coroner to determine whether the death was intentional. (R. p. 144, lines 21-23). Because the duty to determine a victim’s manner of death rests with the Coroner, his testimony on that topic is appropriate. By virtue of his statutorily defined role, the Coroner exemplified the personal knowledge necessary to report that the manner of death was ruled homicide.

Given the Coroner’s role at the scene of a deceased, the trial court’s ruling was rationally based on the Coroner’s performance of his statutory duties and did not require expert qualification.

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

Rule 701, SCRE.

Expert testimony is appropriate where the subject matter is beyond the ordinary knowledge of the jury. *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). In the event that an area of testimony requires special knowledge in order for the jury to apply it to the case at bar, an expert is allowed to opine on that topic to assist the trier of fact. Rule 702, SCRE. But the Coroner’s isolated testimony that he ruled the victim’s manner of death a homicide fails to require the application of any specialized skill or expertise which would require expert qualification.⁵ Furthermore, the Coroner did

⁵ In contrast, the State qualified its forensic pathologist as an expert witness before providing an opinion on cause of death which was premised upon medical expertise. *State v. Commander, infra* at 258, n.4, 721 S.E.2d 413, 415, n.4 (parties stipulated to

not render opinion testimony, but rather simply reported an inference based upon his own perception of the crime scene. Therefore, Coroner Clevenger's testimony constitutes that of a lay witness.

The Coroner's testimony can be viewed in the same vein as the admissible lay testimony of an experienced forensic interviewer. *State v. Douglas*, 380 S.C. 499, 671 S.E.2d 606 (2009). In *Douglas*, our Supreme Court determined that a forensic interviewer could testify as a lay witness to her utilization of an established method to build rapport with the child victim, her interview with that victim, and "that based on the interview, it was her opinion the victim needed to [undergo] a medical exam." *Id.* at 502, 671 S.E.2d at 608. The Supreme Court found that the forensic interviewer's testimony "simply was not required to be presented by an expert witness" because the interviewer "testified only as to her personal observations and experiences, and her interview with the Victim in [that] case." *Id.* at 502-03; 671 S.E.2d at 608. The *Douglas* court concluded it was "unnecessary" for that witness to be qualified as an expert. *Id.*; see *State v. Kromah*, 401 S.C. 340, 357 n.5, 737 S.E.2d 490, 499 n.5 (2013) ("we can envision no circumstance where [a forensic interviewer's] qualification as an expert would be appropriate").

Our case law does dictate that lay witness testimony oversteps the bounds of Rule 701, SCRE, where the lay witness delves into the reason for its determination. Contrast the holding from *Douglas, supra*, with that regarding a fire chief's lay testimony in *Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 764 S.E.2d 249 (Ct. App. 2014)

expert qualifications of forensic pathologist/chief medical examiner). But the pathologist's testimony did not extend to manner of death, instead opining only that the victim was hit from behind and that the cause of death was a ". . . laceration secondary to a cervical spine fracture at the base of the skull . . ." (R. p. 102, lines 11-19).

reh'g dismissed (Oct. 24, 2014). In *Fowler*, the trial court permitted a fire chief to explain to the jury “his observations of the fire and his rationale for his entries on the [resulting] Report” *Id.* at 407, 764 S.E.2d at 251. But this Court found it erroneous to allow the fire chief to testify regarding his opinion *on the cause of the fire* without first being qualified as an expert. *Id.* at 410 & nn. 2-3, 764 S.E.2d at 252 & nn. 2-3. Statements that a “V pattern” indicated the fire’s origin and that he did not “see or smell” anything that made him think the fire was intentional “were not mere perceptions observed by Chief Wright, but instead constituted opinions that ‘require special knowledge, skill, experience or training’ to properly be made.” *Id.* (quoting Rule 701, SCRE).

Our case law does not demonstrate a limitation on a county coroner to testify as the Coroner did in this case. While a coroner should not testify to the *cause* of death absent expert qualification as a physician or forensic pathologist, *see State v. Griggs*, 184 S.C. 304, 313, 192 S.E.2d 360, 364 (1937), Coroner Clevenger’s testifying solely as to the reported manner of death based on his crime scene observations and autopsy review does not demand expert qualification.

Mississippi agrees, rejecting the theory that a coroner must be qualified as an expert in order to testify that he or she ruled a victim’s death a homicide. In *Tillis v. State*, 176 So.3d 37 (Miss. Ct. App. 2014), *cert. denied* (Oct. 15, 2015), the Mississippi Court of Appeals held that a coroner may testify at trial that she ruled victim’s death a homicide “as part of her duties and in the normal course of her business.” *Id.* at 47-48. That testimony “failed to constitute a matter requiring an expert opinion” and instead “simply reflected that [the victim] died due to another person’s actions.” *Id.* In the same vein, the Court of Criminal Appeals of Alabama has held that defense counsel did not perform

deficiently in failing to object to a coroner allegedly improperly opining that the manner of death was ruled a homicide and “not ruled an accident.” *Miller v. State*, 1 So.3d 1073, 1077 (Ala. Crim. App. 2007), *cert. denied* (Apr. 14, 2006) (PCR case which was remanded on other grounds). The coroner in that case additionally testified that “[h]omicides for medical legal purposes is not the case as a court defining murder.” *Id.* at 1078. That court found the challenged testimony “was not admitted in error.” *Id.*

Coroner Clevenger merely synthesized the autopsy report and his crime scene observations to record the manner of death required by law. He testified within the bounds of his perceptions. Rule 701, SCRE. His testimony assisted the factfinder in winnowing out whether the victim died as a result of accident, recklessness, or by the intentional act of another. *Id.* Coroner Clevenger did not delve into any reasoning which led him to report the manner of death a homicide as was found erroneous in *Fowler, supra*. The Coroner also did not give any technical basis for his finding which would require an expert rendition to the jury. *See* Rule 702, SCRE; *Cf. Tillis v. State, supra*. His testimony was limited to the single word reported in accord with S.C. Code Ann. §§ 17-5-530, 17-7-30, and a brief explanation of how that ruling comports with his duties as coroner. (R. p. 142; lines 15-21). Here, the Coroner’s review of the victim’s autopsy and his investigative team’s observations of the crime scene do not rise to the level of technicality requiring expert qualification.

B. A coroner’s testimony that he ruled a victim’s manner of death a homicide does not go to the ultimate issue at trial.

Coroner Clevenger’s testifying that he ruled the death a homicide did not extend to either an expert opinion or an opinion on the ultimate issue as Appellant states. (Br. of

Appellant, p. 14). Opinion testimony in any event shall neither render an opinion outside of the witness' area of expertise, nor touch upon a defendant's guilt. *E.g. State v. Ellis*, 345 S.C. 175, 177-79, 547 S.E.2d 490, 491 (2001) (error for expert in crime scene processing and fingerprint identification, not accident reconstruction, to testify that his crime scene measurements and observations led him to a conclusion regarding the position of the victim's body at his time of death); *Fowler v. Nationwide Mut. Fire Ins. Co.*, *supra*.

"Generally, '[t]estimony 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.'" *State v. Commander*, 396 S.C. at 264, 721 S.E.2d at 418 (2011) (quoting Rule 704, SCRE). Appellant cites to *Commander* for the proposition that the Coroner's lay testimony also constitutes a comment on Appellant's criminal culpability, thus invading the province of the jury and unduly confusing them or persuading them to convict on the basis of the Coroner's ruling. Appellant argues that the testimony at issue is prejudicial because a normal lay juror would view the Coroner's reporting the death a homicide "as ruling out that the decedent died as a result of an accident." (Br. of Appellant, p. 15).

In *State v. Commander*, a county medical examiner duly qualified as an expert witness was permitted to testify that he used "anecdotal history relayed by officers at the scene, together with the lack of normal indicators of physical violence" to opine as to a particular cause and manner of death. *Commander* at 258-60, 266-67, 721 S.E.2d at 415-16, 419-20. Within that case, our Supreme Court adopted

a rule whereby an expert in forensic pathology's opinion testimony as to cause and manner of death is admissible under Rule 702, SCRE, so long as the expert does not opine on the criminal defendant's state of mind or guilt or testify on matters of law in such a way that the jury is not permitted to reach its own conclusion concerning the criminal defendant's guilt or innocence.

Commander at 269, 721 S.E.2d at 421.

In so adopting, the *Commander* court pointed out that "testimony that an individual died from 'homicide' means simply that he or she died 'by the act, procurement, or omission of another' without regard to the criminality of the killing or culpability of the killer." *Id.* at 265, 721 S.E.2d at 419 (quoting 23 S.C. Jur. Homicide § 2 (2011); Black's Law Dictionary 661 (5th ed. 1979)); *Cf. Miller v. State, supra*. Coroner Clevenger's testimony comports with the limitations contemplated by *Commander* because our court has determined that use of the word homicide does not comment on the ultimate issue before the trier of fact. *Id.* The use of the term "homicide" by any coroner is a term of art. That is, a witness testifying that he reported the victims' death was a homicide, without more, does not comment on a defendant's criminal culpability. Just because Coroner Clevenger was not an expert witness does not preclude him from testifying in the same benign term. *See id.* at 721, S.E.2d at 421 (citing *State v. Scott*, 206 W.Va. 158, 164, 522 S.E.2d 626, 632 (W.Va. 1999), for the proposition that homicide is a "neutral" term admissibly used by a medical examiner reporting the manner of death). In fact, Coroner Clevenger additionally testified that cannot always determine whether any death is intentional, and that he merely "ruled this case a homicide." (R. p. 144, line 21 – p. 145, line 3).

Utilization of the term “homicide” does not go to the ultimate issue to be determined by the trier of fact—Coroner Clevenger did not opine who contributed to the fate of the deceased. And, the Coroner did not in any way opine as to precisely what about the condition of the victim and crime scene led him to report homicide as the manner of death. When analogizing the Coroner’s permissible lay witness testimony to the rule denoted in *Commander*, no error results in the trial court’s allowing Coroner Clevenger to testify in this case. Coroner Clevenger’s employing the word “homicide” merely meant that the victim’s death occurred by the hand of another. His testimony plainly did not impinge upon the province of the jury or go to the ultimate issue before the trier of fact.

C. If found in error, the coroner’s testifying that he ruled the victim’s death a homicide caused no prejudice so as to warrant reversal.

“To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., there is a reasonable probability the jury’s verdict was influenced by the wrongly admitted or excluded evidence.” *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005) (internal citations omitted). The factors to be considered in a harmless error analysis include “the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and of course the overall strength of the prosecution’s case.” *State v. Mizzell*, 349 S.C. 326, 333, 563 S.E.2d 315, 318 (2002) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431 (1986)). The Court should uphold a

conviction if it determines, beyond a reasonable doubt, the error complained of did not contribute to the verdict obtained. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967).

Appellant argues that because he premised his defense upon that of an accident, the trial court's allowing the coroner's testimony manifestly prejudiced that defense. Appellant's argument presupposes that the Coroner's testimony confused the jury and caused it to rule out the legal defense of accident. But to establish prejudice, Appellant must demonstrate "that there is a reasonable probability that the jury's verdict was influenced by the challenged evidence." *State v. Commander*, 384 S.C. 66, 74, 681 S.E.2d 31, 35 (Ct. App. 2009), *harmless error analysis upheld by State v. Commander*, *supra* (quoting *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)).

Consider the totality of the evidence. The State began its case with testimony showing that Appellant gave his partner a bloody nose during an altercation in the emergency room where Appellant was being treated. (R. p. 40, line 20 – p. 41, line 25; R. p. 161, lines 4-10). Appellant was discharged and asked to leave the hospital thereafter, which he did. (R. p. 161, line 7; R. p. 259, lines 6-12; R. p. 235, lines 4-5). Then, according to Appellant's own testimony, he "jerked the car to pull over and pick [Mr. Daniels] up because he saw a glimpse of him walking away from the hospital." (R. p. 236, lines 18-25). In doing so, Appellant struck the victim from behind with his vehicle, dragging him and causing mortal hemorrhaging to the victim's back and neck. (R. p. 99, line 11 – p. 102, line 12; R. p. 123, lines 10-15; R. p. 125, lines 13-25).

While Appellant maintained at trial that it was an "accident" and that he was

driving impaired at the time due to being on pain medication, being forced to leave by the police after his emergency room altercation, and due to the victim having Appellant's glasses for safekeeping at the time, (R. p. 234, line 15 – p. 236, line 25; R. p. 245, lines 3-7), ample evidence contradicted Appellant's accident defense. "For a homicide to be excusable on the ground of accident, it must be shown that the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon." *State v. Wharton*, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009).

As a whole, Appellant's actions, to which he testified directly, reveal the malice necessary to return a guilty verdict on the charge of murder. *See* S.C. Code Ann. § 16-3-10 (murder is the killing of another with malice aforethought). That is, Appellant acted with "wickedness and excluding a just cause or excuse. The term malice indicates a formed purpose and design to do a wrongful act under the circumstances that exclude any legal right to do it." *State v. Fennell*, 340 S.C. 266, 275 n.2, 531 S.E.2d 512, 517 n.2 (2000). Appellant never called for assistance in any way, never calling 911 or going back to the hospital to report that he struck someone. (R. p. 253, line 4 – p. 254, line 25). Instead, he "flipped out" and left. (R. p. 237, line 21 – p. 238, line 5). Adding insult to injury, Appellant himself testified that he removed the bug guard from his vehicle and threw it in the back of the car. (R. p. 238, line 23 – p. 239, line 1). Then, he got pulled over at 12:37 am for a missing headlight, but told the officer that he hit a deer so that he could go on his way without incident. (R. p. 58, lines 17-20; Tr. p. 140, lines 5-6; Tr. p. 330, lines 15-25). When questioned by law enforcement, Appellant twice repeated his story about hitting a deer and recorded it in writing. (Tr. p. 197, lines 4-17; R. p. 383). It was not until later that Appellant altered his story, first stating he hit the victim with his

car, and later in an audio recorded statement saying he “accidentally” hit the victim and that he went back to check on him. (R. p. 111, lines 1-25; R. p. 114, line 21 – p. 115, line 24).

As for the path of the vehicle itself, M.A.I.T. testimony showed that the impact sustained by the victim required an overtly intentional act. (R. p. 127, lines, 1-7). Coroner Clevenger’s testimony merely corroborated the totality of the investigators’ testimony put forward by the State on this point. In this case, the “vehicle had traveled through the shrubbery, about five to ten feet above where the patient was found, and exited through the shrubbery about 30 to 40 feet below the patient.” (R. p. 63, lines 3-7; R. p. iv, State’s Exhibit 55). The consensus was that Mr. Daniels sustained “a fender vault” where his body hit the vehicle at or near the right fender. (R. p. 126, lines 14-20; R. pp. 384 – 385). The M.A.I.T. investigator “could tell the vehicle continued on through the bushes on back out on the other side of the bushes and back out onto the road” without stopping “at all.” (R. p. 123, lines 16-23; R. p. 126, lines 21-23; R. p. 131, lines 8-9; R. p. 384 – 385). In fact, acceleration marks were visibly present in the furrowing in the grass, the speed was calculated at a range between 29 and 37 miles per hour, and the angle at which the Ford Explorer turned off the road was calculated as between 22 to 28 degrees. (R. p. 124, lines 1-8; R. p. 125, lines 11-12; R. p. 127, lines 10-15; R. p. 130, lines 6-25). And, there existed no physical evidence that Appellant turned around and pulled back onto the grass after impact as he testified to doing. (R. p. 130, lines 1-5; R. p. 132, lines 1-10; R. p. 237, lines 2-18).

Even given this evidence, the jury was presented with a choice between murder, involuntary manslaughter, and the defenses of accident, permanent insanity by way of

voluntary intoxication, and involuntary intoxication. (R. p. 354, lines 8-13; R. p. 356, lines 2-25). Evidence existed to support these alternate verdicts wherein it became evident through the testimony of Appellant and his treating physician that Appellant took multiple pain medications on a daily basis, in large doses, and was perhaps under the influence of these narcotics so as to render his actions negligent or reckless. (R. p. 162, line 12 – p. 163, line 25; R. p. 166, lines 7-23). See e.g. *State v. Burriss*, 334 S.C. 256, 264-65, 513 S.E.2d 104, 109 (1999) (involuntary manslaughter is an unintentional killing without malice while either (1) engaged in an unlawful act not naturally tending to cause death or great bodily harm; or (2) engaged in lawful act with reckless disregard for the safety of others); *State v. Wharton*, *supra*. Appellant also received additional doses of painkillers at the emergency room, although competing testimony demonstrated that Appellant was not impaired by the time he was discharged. (R. p. 53, line 23 – p. 54, line 3; R. p. 165, lines 15-21). Testimony from Appellant himself showed that he embodied a tolerance to pain medication resulting from the amount taken daily. (R. p. 274, line 14 – p. 275, line 25). His treating doctor's testimony echoed the same. (R. p. 163, lines 8-25). Thus, a jury had reason to believe that Appellant acted intentionally and had control of his actions at the time of impact.

Given the totality of the evidence before it, the province of the jury was not invaded; it was free to accept or reject the State's case theory. The verdict demonstrates that the State's version of events indubitably convinced the jury of Appellant's guilt on the offense of murder. Beyond a reasonable doubt, the error complained of did not contribute to the verdict in this case.

- II. **The trial court committed no error in instructing the factfinder that there was a question before them as to whether Appellant was intoxicated at the time of the hit and run, and further instructing the jury of the effect of finding that Appellant was voluntarily intoxicated.**

How the Issue Arose

During the charge conference, the parties and the court considered jury instructions on both voluntary and involuntary intoxication. (R. p. 303, lines 6-9). The trial court requested argument regarding Appellant's position on voluntary intoxication. Appellant's counsel opposed, positing that "to call this voluntary intoxication is a little disingenuous since [Appellant] was injected – I mean he was taking prescribed meds and he was also injected at the hospital." (R. p. 302, line 3 – Tr. p. 303, line 25). Before taking the requested instructions under advisement, the trial court reasoned:

The taking of pain medications, you have the right to refuse them. In other words, you – a person is not required to take pain medications. . . . I'm trying to find anything that, that would indicate though that a – because it's a prescription that you're claiming to be an intoxicant, if that takes it out of the realm of voluntary intoxication. . . . [A]gain, the medications that he took he could [have] refused.

...

[M]ost pain medications are medications that people can either take or not take. It's not something you have to take to survive. You know, in the Civil War they amputated arms and legs and gave them a bullet to bite on. So, pain medication is something that people take.

...

I can see somebody, for example, take – having a prescription drug and then abusing it, taking twice the dosage, and that certainly would be a voluntary intoxication. . . . I'm just saying that the fact that it's a prescription drug, in and of itself, would not take it out of the voluntariness is what I'm trying to say.

(R. p. 304, line 21 – p. 308, line 25). Appellant's counsel next argued the rule of lenity as

its only authority against charging voluntary intoxication. (R. p. 309, lines 11-25).

The trial court held its ruling in abeyance until after closing argument, giving the parties additional time to research the propriety of the contested instruction. (R. p. 333, lines 10-22). The trial court ultimately instructed the jury as follows:

Now, the question of intoxication has come into this case, and I want to go over with you what, what that might mean in relationship to the defenses.

First of all, under the law, insanity caused by drugs or alcohol may be a defense if the insanity is permanent and destroys the defendant's ability to know right from wrong if the, if the intoxication was voluntary. However, when voluntary intoxication has not proved—produced permanent insanity, it is not a defense to a crime. A person who voluntarily becomes intoxicated is just as responsible for the acts committed while intoxicated as the person who is not intoxicated.

Now, involuntary intoxication, however, is the opposite of that. If someone becomes involuntarily intoxicated, then it can be a defense to the charges in a crime of specific intent. And, so, if, for example, someone is intoxicated as a result of a trick, artifice, or force, or had no choice in the intoxication, then that, that could provide a defense to a crime requiring specific intent.

Also, you could find, as a jury, that intoxication was not a factor in this case, that the defendant was not intoxicated at the time of the offense, and if it's not a factor in this case at all, then it would not be a factor for you to consider at all. *In other words, the question for you, the jury, to determine is whether or not the defendant was intoxicated at the time of the event, whether or not that intoxication was either voluntary or involuntary.*

If the intoxication was voluntary, that means that the—it would not be a defense to the crime unless it produced permanent insanity. If the intoxication was involuntary—if the intoxication was involuntary, then it would be a defense to a crime requiring specific intent.

(R. p. 356, line 17 – p. 357, line 24 (emphasis added)).

Standard of Review

Turning to the merits of Appellant's second issue, "[a] jury charge is correct if, when read as a whole, the charge adequately covers the law. A jury charge that is

substantially correct and covers the law does not require reversal.” *State v. Logan*, 405 S.C. 83, 90-91, 747 S.E.2d 444, 448 (2013). “[T]his Court considers the trial court’s jury charge as a whole and in light of the evidence and issues presented at trial.” *Id.*

A. Appellant conceded his objection upon the trial court’s ruling on this issue so that the voluntary intoxication charge remains unpreserved for appellate review.

“[A]n objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge.” *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001). “Furthermore, ‘[n]o issue is preserved for appellate review if the objecting party accepts the judge’s ruling and does not contemporaneously make an additional objection.’” *State v. McCord*, 349 S.C. 477, 486, 562 S.E.2d 689, 694 (Ct. App. 2002) (quoting *State v. George*, 323 S.C. 496, 508, 476 S.E.2d 903, 910-11 (1996)). In such a circumstance, there can be no basis for appellate review, for “[a] party cannot complain of an error which his own conduct has induced.” *State v. Carlson*, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005). When “a party fails to properly object, the party is procedurally barred from raising the issue on appeal.” *State v. Johnson*, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996).

The following exchange between Appellant’s counsel and the trial court encompasses the ruling on the contested voluntary intoxication instruction:

THE COURT: Well, I mentioned to all of you the possibility of me charging the jury that they will have to make a finding of fact –

COUNSEL: And that will be fine.

THE COURT: – as to whether or not this was a voluntary or involuntary intoxication, if any at all. . . . If they find that it was voluntarily done, then it’s not a defense. If they find that

it was involuntarily done, then it would serve as a mitigating factor or a defense to the — to the statute requiring [specific] intent.

COUNSEL: Yes, sir, and that would be — we would have no real objection to that. No real objection to that.

COURT: So, you would agree to me charging in that fashion?

COUNSEL: I would.

(R. p. 337, line 14 – p. 338, line 14).

Appellant's counsel consented to the trial court's crafted instruction. Counsel also presented no exception to the instruction following its issuance to the jury. (R. p. 359, lines 18-21). By accepting the trial court's ruling that intoxication was a question for the factfinder, Appellant's objection to the voluntary intoxication instruction was waived. Consequently, this issue remains unpreserved for appellate review. *State v. McCord, supra*.

B. Evidence at trial presented a question as to whether Appellant was intoxicated at the time of the crime, requiring the voluntary intoxication instruction.

“The law to be charged is determined from the evidence presented at trial.” *State v. Todd*, 290 S.C. 212, 214, 349 S.E.2d 339, 341 (1986). In crafting a jury instruction, “judges shall not charge juries in respect to matters of fact, but shall declare the law.” S.C. Const. art. V, § 21. In doing so, “the trial judge must charge the correct and current law of the state.” *State v. Shuler*, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001). “If there is any evidence to support a charge, the trial judge should grant the request.” *Id.*

In the case of a voluntary intoxication instruction, where there exists “some evidence showing the appellant had been drinking prior” to the crime, the trial court's

decision to charge the jury on the law of voluntary intoxication is not erroneous. *State v. Todd, supra*. “[V]oluntary intoxication is not an excuse for, or a defense to a crime. This rule also extends to the voluntary ingestion of drugs.” *State v. Crocker*, 272 S.C. 344, 346, 251 S.E.2d 764, 766 (1979); *State v. Bellue*, 260 S.C. 39, 43, 194 S.E.2d 193, 195 (1973) (“Voluntary intoxication or drug use does not absolve a defendant of criminal responsibility.”). “It has been recognized, however, that insanity caused by the use of drugs or intoxication may be a defense where the insanity is permanent and destroys the defendant’s ability to know right from wrong.” *State v. Hartfield*, 300 S.C. 469, 473, 388 S.E.2d 802, 804 (1990).

Appellant’s taking a large number of prescription pain medications constitutes the voluntary ingestion of drugs. *State v. Crocker, supra; State v. Bellue, supra*. As such, a voluntary intoxication instruction was appropriate. Insofar as Appellant received intravenous pain medication at the hospital hours prior to the hit and run, that too constitutes evidence of voluntary intoxication. *See id.* Appellant had the ability to refuse additional pain treatment. He went to the hospital on his own volition and was not forced or tricked into having the medication administered. *See State v. Samuels*, 905 S.W.2d 536, 539 (Mo. Ct. App. 1995) (involuntary intoxication instruction not appropriate where, prior to the crime’s commission, the defendant consented to a medical procedure requiring his being drugged). By all indications, Appellant requested the second dose of Dilaudid at the hospital. (R. p. 275, lines 10-20). Nothing in the record indicates Appellant’s treating physician administered any drugs without permission, or to incapacitate Appellant for the purposes of major emergency treatment.

With evidence to support voluntary intoxication instruction, the decision to so

charge the jury does not prove erroneous.

C. The instruction did not serve to confuse the jury so as to constitute reversible error.

The crafted instruction also did not act to confuse the jury. “It is not error to read to the jury a statute defining a crime with which the defendant is not charged, if the purpose is to enlighten the jury regarding the issues before it; however, a non-charged offense should not be charged to the jury if it has the effect of confusing the issues the jury must determine.” *State v. Peer*, 320 S.C. 546, 553-54, 466 S.E.2d 375, 380 (Ct. App. 1996). And while a confusing or misleading jury instruction may be a basis for error, “[t]he test is what a reasonable juror would understand the charge to mean.” *State v. Rothell*, 301 S.C. 168, 170, 391 S.E.2d 228, 229 (1990).

The jury had to be instructed that if they found Appellant intoxicated, they would then be left to determine whether the intoxication was voluntary, and therefore not a defense absent evidence of permanent insanity. *See State v. Hartfield, supra*. If “the question of abuse of medications turn[s] on the resolution of disputed facts and inferences, the question [is] one within the province of the jury, not the trial court, to resolve.” *State v. McKeon*, 201 Ariz. 571, 575, 38 P.3d 1236, 1240 (Ariz. Ct. App. 2002) (state law recognized temporary intoxication as an affirmative defense so long as it derived from the non-abusive use of prescription medication). Here, the evidence initiated a threshold determination by the jury as to whether or not Appellant was intoxicated at the time of the crimes.

The trial court pointed out that the evidence showed that Appellant took prescription pain medications daily, was given additional medications at the hospital, and

testified without explanation that he felt high. But, also noted by the trial court, Appellant's emergency room doctor testified that he did not appear to be under the influence of drugs when he left. (R. p. 304, lines 7-19). Thus, it was appropriate for the trial court to craft an instruction that touched upon all possibilities stemming from that potential finding.

Of course the jury was free, as instructed, to find that intoxication was not a component to this case and therefore not a factor for them to consider at all. (R. p. 357, lines 11-19). The trial court chose to treat the instruction in a manner which assisted the finder of fact in reaching the right conclusion in the eyes of the law. While there existed no evidence of permanent insanity at trial, the correct instruction could regard all potential outcomes of that finding for purposes of enlightening the jury on that topic.

D. Any error in the intoxication instruction proves harmless given the totality of the instruction, the evidence at trial, and the jury's verdict.

"Whether or not the [erroneous jury charge] was harmless is a fact-intensive inquiry" as to whether the charge contributed to the guilty verdict rendered. *State v. Middleton*, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014). If there exists "no indication that the jury based their verdict on the erroneous part of the charge," then harmless error applies. *Id.*

Beyond a reasonable doubt, the error complained of did not contribute to the verdict in this case. As previously discussed in relation to the first issue on appeal, the State delivered a case succinctly probative of guilt. (Br. of Respondent, pp. 19-23). Ample evidence demonstrated that Appellant was not in fact operating in state of intoxication. According to his own trial testimony, Appellant embodied a tolerance to

pain medication. (R. p. 274, line 14 – p. 275, line 25). He did not undergo emergency treatment so as to render him incapacitated prior to the hit and run, or even so as to require an overnight observation. He admittedly took no additional medication between his second dose of Dilaudid and the murder. (R. p. 276, lines 24-25). Testimony also tended to show that Appellant was not under the pervasive influence of any prescription medication at the time of the murder: his treating physician cleared him for discharge and testified that Appellant's motor skills appeared normal even prior to that time. (R. p. 175, lines 1-16). Additionally, physical evidence indicated that Appellant undertook an overtly intentional act in veering off of the road towards the victim at such a sharp angle and with direct speed. (R. p. 127, lines 1-7). Appellant had to travel off-road a great distance to make contact with the victim, and maintained his speed before and after impact. (R. p. 123, lines 16-23; R. p. 126, lines 21-23; R. p. 131, lines 8-9; R. pp. 384 – 385).

Considering the above, the instruction as a whole acted to enlighten the jury as to the consequences of intoxication should they choose to find Appellant was under any influence at the time of the crimes. However, given the options between accident, involuntary manslaughter, murder, permanent insanity by voluntary intoxication, or involuntary intoxication by force or trickery, the evidence clearly points towards murder. Therefore, even if the trial court erroneously charged voluntary intoxication, this Court should find that the error was harmless beyond a reasonable doubt.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should affirm the Appellant's convictions for murder and hit and run with death.

Respectfully submitted,


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March 3, 2016
Columbia, South Carolina

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable Roger L. Couch, Circuit Court Judge

RECEIVED
MAR 03 2016
SC Court of Appeals

THE STATE,

Respondent,

v.

SANDY LYNN WESTMORELAND,

Appellant

Appellate Case No. 2014-002636.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully submitted,

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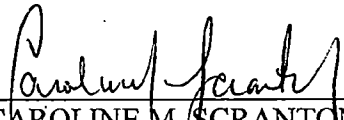
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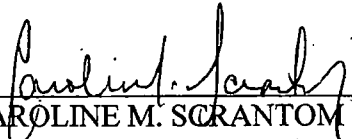
Appellate Case No. 2014-002636.

PROOF OF SERVICE

I, Caroline M. Scrantom, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appeal by depositing two (2) copies of the same in the United States mail, addressed to his attorney of record at:

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I further certify that all parties required by Rule to be served have been served.
This 3rd day of March, 2016.


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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Sandy Lynn Westmoreland, Appellant.

Appellate Case No. 2014-002636

Appeal From Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. Op. 5498
Heard April 12, 2017 – Filed July 12, 2017

AFFIRMED IN PART AND REVERSED IN PART

Chief Appellate Defender Robert Michael Dudek, of
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Attorney General Alan McCrory Wilson, Deputy
Attorney General Donald J. Zelenka, Assistant Attorney
General Caroline M. Scrantom, all of Columbia, and
Solicitor Barry Joe Barnette, of Spartanburg, for
Respondent.

THOMAS, J.: Appellant Sandy Lynn Westmoreland appeals his convictions for murder and hit and run involving a death. He argues the trial court erred by allowing the coroner to testify as a lay witness that the cause of the victim's death was a homicide and instructing the jury that voluntary intoxication was not a

defense. We affirm Appellant's conviction for hit and run and reverse his murder conviction.

FACTS/PROCEDURAL HISTORY

A grand jury indicted Appellant in October 2012 for murder and hit and run involving a death. The indictments alleged Appellant purposefully hit Michael Daniels (Victim) with his vehicle and failed to remain at the scene to give information or render aid. The murder indictment claimed Victim died due to his injuries. The solicitor called Appellant's case to trial in December 2014.

Travis Haney testified he was a security guard at Mary Black Hospital and was on duty on March 14, 2012. Haney testified he was walking down a hallway when Victim "stumbled" out of a room crying and with a bloody nose. Haney asserted Appellant was inside the room. Haney testified he contacted the sheriff's office per hospital policy. According to Haney, Victim did not want to press charges against Appellant but wanted to gather his things and leave. Haney asserted he and a deputy walked Appellant to his automobile following his discharge from the hospital and watched him drive away alone.

Deputy Jeffery Valentine testified he responded to a report of Appellant assaulting Victim inside the hospital. Valentine's testimony was consistent with Haney's testimony. Additionally, Valentine testified that when he and Haney escorted Appellant to his vehicle after the initial altercation, Appellant noticed Victim had forcibly entered Appellant's vehicle and absconded with some of Victim's possessions. Valentine claimed Appellant became "pretty upset" when Valentine declined to charge Victim with breaking into the vehicle. The following morning, someone discovered Victim dead in the bushes in the hospital parking lot.

The trial court qualified Dr. John Wren as an expert in pathology. Wren testified Victim died almost immediately due to a "vehicle versus pedestrian encounter." Wren asserted Victim was standing and facing away from the vehicle at the time of the collision.

Jason Bryant testified he was a sergeant and supervisor in the violent crime division and he went to Appellant's house shortly after the incident to question him. According to Bryant, during his initial conversation with Appellant, Appellant claimed he left the hospital without incident and hit a deer on his way home from the hospital. However, Bryant testified that, after he discussed

"discrepancies" with Appellant, he admitted he hit Victim with his vehicle when leaving the hospital. Appellant explained to Bryant he did not "drive well at night" and attempted to pull the vehicle over to allow Victim to get inside when he accidentally hit him with the vehicle. According to Bryant, Appellant claimed he stopped and checked on Victim but, after realizing Victim was not breathing, became scared and left the scene.

Michael Duncan testified he was a trooper for the highway patrol and was a member of the Multidisciplinary Accident Investigation Team (MAIT). He asserted the MAIT's primary job was reconstructing traffic incidents, and the trial court qualified Duncan as an expert in "accident reconstruction." Duncan claimed he responded to the scene of Victim's death and performed an investigation. Duncan asserted he found "tire tracks going off into the grass at a sharp angle" and there were no "skid marks" leading to where the tire tracks entered the grass. Duncan concluded the vehicle did not attempt to stop based on his observation that there were "acceleration marks in the grass" beyond where Victim's body was found. He contended the vehicle did not decelerate at the point of impact or after; "[i]t was one continuous motion." Duncan estimated the vehicle's speed at a range of twenty-nine and thirty-seven miles per hour. Duncan also surmised there was "severe steering input" to maneuver this vehicle into the grass to strike Victim. He explained this meant the vehicle "did not just drift off the road" and it was more akin to taking a right hand turn into the grass.

Rusty Clevenger testified he was the coroner for Spartanburg County. Following some preliminary testimony regarding his experience, the State offered Clevenger as an "expert in determining the manner of death." Appellant objected to admitting Clevenger as an expert based on his qualifications. After a short colloquy between the trial court and counsel, the State withdrew its attempt to admit Clevenger as an expert. However, Clevenger proceeded to testify his responsibilities as coroner included determining any deceased's manner of death. He explained any death presents five options when deciding the manner of death: natural, accident, homicide, suicide, and undetermined. Clevenger also explained the process of determining the manner of death included considering the pathologist report and the findings of investigators and law enforcement. Clevenger testified a homicide was "the intentional act of you taking the life of another." In a situation when one person takes the life of another person, he admitted he cannot always determine whether the act was intentional. Clevenger then asserted he "ruled this case a homicide." Appellant objected and claimed Clevenger gave improper opinion testimony. The trial court responded, "I think coroners are required to give rulings

on death by law" and "[h]e's stating what his ruling is. I'll overrule the, the objection."

Following the State's case, Appellant testified he was involved in a romantic relationship with Victim for approximately eighteen years. Appellant claimed he and Victim went to the hospital on the day in question because he was experiencing stomach pains and bleeding. Appellant claimed his argument with Victim in the hospital room began because Victim spent their last \$20 purchasing what he thought was a crack rock but turned out to be a piece of soap. He asserted his walking cane hit Victim's nose by accident during the argument. Appellant contended he was "high" when the hospital discharged him due to all of the medication he had taken. Appellant testified he was driving away from the hospital when he "saw a glimpse of [Victim] way off the road." Appellant claimed he "jerked the car to pull over and pick him up" and he "felt a bump." Appellant admitted he realized what happened so he "turned around and came back" to check on Victim but realized he was dead. Appellant claimed he did not seek help for Victim because he was already dead and he "just flipped out." Appellant asserted it was an accident.

After both parties rested, they discussed a potential jury charge regarding voluntary or involuntary intoxication with the trial court. Appellant objected to a charge on voluntary intoxication because he was taking prescribed medication. Following the discussion, the trial court indicated it would give Appellant time to research case law supporting his argument and would issue its ruling later. Subsequent to closing arguments, the trial court reopened the discussion on intoxication. Appellant maintained his position that a charge on voluntary intoxication would be improper because everything Appellant took was prescribed. The following colloquy then took place:

THE COURT: Well, I mentioned to all of you the possibility of me charging the jury that they will have to make a finding of fact—

[Appellant's Counsel]: And that will be fine.

THE COURT: —as to whether or not this was a voluntary or involuntary intoxication, if any at all.

[Appellant's Counsel]: And that would be fair, Your Honor.

THE COURT: Because there was evidence there was [no intoxication] according to the doctor.

[Appellant's Counsel]: Yes, sir.

THE COURT: And so if there, if there was no -- if they find that there was no intoxication, it wouldn't be a factor in their determination.

[Appellant's Counsel]: Yes, sir.

THE COURT: If they find that it was voluntarily done, then it's not a defense. If they find that it was involuntarily done, then it would serve as a mitigating factor or a defense to the—to a statute requiring general intent.

[Appellant's Counsel]: Specific intent.

THE COURT: Specific Intent.

[Appellant's Counsel]: Yes, sir, and that would be—we would have no real objection to that. No real objection to that.

THE COURT: So, you would agree to me charging in that fashion?

[Appellant's Counsel]: I would.

During the jury instructions, the trial court issued jury instructions consistent with the above-quoted colloquy. Following the jury instructions, Appellant again stated he had no objection. The jury returned guilty verdicts for murder and hit and run. The trial court sentenced Appellant to thirty years' imprisonment for murder and twenty-five years' imprisonment for hit and run. The trial court ordered the sentences to run concurrent. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err by allowing Clevenger to testify as a lay witness that he determined the cause of death was a homicide, which he defined as an intentional act?
2. Did the trial court err by instructing the jury on voluntary intoxication when there was evidence showing Appellant received medication in the hospital for medical purposes?

CLEVENGER'S TESTIMONY

Appellant argues the trial court erred by allowing Clevenger to testify he determined the manner of death was a homicide because it was impermissible opinion testimony by a lay witness. Specifically, Appellant argues Clevenger was not qualified as an expert and his opinion that Victim's death was a homicide "embraced the ultimate issue to be decided by the jury." Appellant asserts this error was "extraordinarily prejudicial" because he presented an accident defense during trial.

The State argues the trial court did not commit any error by admitting Clevenger's testimony. Specifically, the State argues the testimony was proper because a statute required Clevenger to report the manner of death. The State asserts Clevenger "exemplified the personal knowledge necessary to report that the manner of death was ruled homicide" due to "his statutorily defined role." However, the State acknowledged Clevenger's "testimony assisted the factfinder in winnowing out whether [Victim] died as a result of accident, recklessness, or by the intentional act of another." Despite this acknowledgment, the State claims any error was harmless in light of the other evidence of guilt and it did not contribute to the verdict.

A. Merits

We find the trial court abused its discretion by committing an error of law when it admitted Clevenger's testimony because it was improper opinion testimony by a lay witness in violation of Rule 701(a), SCRE. "The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a

'manifest abuse of discretion accompanied by probable prejudice.'" *State v. Commander*, 396 S.C. 254, 262–63, 721 S.E.2d 413, 417 (2011) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

If the witness is not testifying as an expert, the witness'[s] 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'[s] testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Rule 701. "Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge" *Watson v. Ford Motor Co.*, 389 S.C. 434, 445–46, 699 S.E.2d 169, 175 (2010). "On the other hand, a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training." *Id.* at 446, 699 S.E.2d at 175; *see also State v. Douglas*, 380 S.C. 499, 502, 671 S.E.2d 606, 608 (2009) ("Lay witnesses are permitted to offer testimony in the form of opinions or inferences if the opinions or inferences are rationally based on the witness'[s] perception, and will aid the jury in understanding testimony, and do not require special knowledge."). "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." *State v. Fripp*, 396 S.C. 434, 439, 721 S.E.2d 465, 467 (Ct. App. 2012) (quoting Rule 704, SCRE).

We find the trial court abused its discretion by committing an error of law when it admitted Clevenger's testimony regarding the cause of Victim's death because it constituted improper opinion testimony from a lay witness. Clevenger's opinion as to Victim's cause of death was not based on his perceptions. *See* Rule 701(a) (requiring opinion testimony from a lay witness be limited to opinions based on the witness's perceptions). Clevenger testified his determination of Victim's cause of death was based on the findings of the pathologist and the investigation of law enforcement. Thus, Clevenger's opinion regarding the cause of Victim's death was not based on his perceptions or observations but instead was based on his review of

the perceptions of others. As a result, his testimony as a lay witness was improper opinion testimony under Rule 701(a).¹ See *Douglas*, 380 S.C. at 502–03, 671 S.E.2d at 608 (finding the trial court was not required to qualify the witness as an expert because she testified only to her personal observations and experiences); *Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 468, 494 S.E.2d 835, 845 (Ct. App. 1997) (finding a lay witness could offer his opinion as to what caused a machine to malfunction because his opinion was based "upon his observations and perceptions as the [daily] operator" of the machine).

With regard to the State's claim the trial court properly admitted Clevenger's testimony because a statute requires the coroner to issue a ruling on cause and manner of death, such a statutory requirement does not necessarily render the coroner's ruling admissible during trial. Clevenger's testimony as to his ruling on cause and manner of death must still comport with the rules of evidence to be admissible. See *Bartlett v. State*, 993 So.2d 157, 164 (Fla. Dist. Ct. App. 2008) (explaining "the mere fact that [a statute] required the investigator(s) to determine whether 'there is probable cause that the force that was used was unlawful' does not automatically bootstrap this information into admissible evidence").

Additionally, we disagree with the State's argument that the trial court properly admitted Clevenger's testimony because "homicide" was a term of art and was not a comment on the criminality of Victim's death. In *Commander*, our supreme court found the trial court correctly admitted testimony from the medical examiner, who was qualified as an expert witness, asserting the victim's death was a homicide. 396 S.C. at 267–70, 721 S.E.2d at 420–21. The court explained, under the circumstances of that case, "homicide" meant only that the victim died "by the act, procurement, or omission of another" and did not comment on the criminality of the death. *Id.* at 265, 721 S.E.2d at 419. However, the court expressly recognized "that, in certain circumstances, expert medical testimony of this type has the potential to invade the province of the jury." *Id.* at 268, 721 S.E.2d at 420. As a result, our supreme court adopted the rule allowing a properly qualified expert to testify regarding cause and manner of death "so long as the expert does not opine on the criminal defendant's state of mind or guilt or testify on matters of law in

¹ Because we find Clevenger's testimony violated Rule 701(a) and the trial court erred by admitting it, we need not address whether his testimony also violated Rule 701(b) or Rule 701(c). See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (explaining an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

such a way that the jury is not permitted to reach its own conclusion concerning the criminal defendant's guilt or innocence." *Id.* at 269, 721 S.E.2d at 421.

Here, we find Clevenger's lay testimony that Victim's death was a homicide, which he defined as an intentional act, was an opinion on Appellant's state of mind and, thus, his guilt under the circumstances of this case. As discussed more fully below, with regard to Appellant's murder indictment, the main issue during trial was whether Appellant intentionally or accidentally hit Victim with his vehicle. There was no dispute that Appellant's actions led to Victim's death. Thus, Clevenger's testimony that Appellant acted intentionally was an opinion on Appellant's state of mind and guilt. Accordingly, we find Clevenger's testimony violated our supreme court's rule pronounced in *Commander*.

Accordingly, we conclude the trial court abused its discretion by committing an error of law when it admitted Clevenger's opinion testimony that Victim's death was a homicide because his testimony violated Rule 701(a).

B. Harmless Error

We find the trial court's error was not harmless as to Appellant's murder conviction because Clevenger's testimony went to the trial's main issue regarding murder and went to the heart of Appellant's defense. However, the error was harmless as to Appellant's conviction for hit and run because it could not reasonably have affected the result of that conviction.

"Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006). Where "guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached," an insubstantial error that does not affect the result of the trial is considered harmless. *Id.* A harmless error analysis is contextual and specific to the circumstances of the case: "No definite rule of law governs [a finding of harmless error]; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected

the result of the trial." *State v. Reeves*, 301 S.C. 191, 193–94, 391 S.E.2d 241, 243 (1990).

State v. Byers, 392 S.C. 438, 447–48, 710 S.E.2d 55, 60 (2011). "An officer's improper opinion which goes to the heart of the case is not harmless." *State v. Ellis*, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001).

"'Murder' is the killing of any person with malice aforethought, either express or implied." S.C. Code Ann. § 16-3-10 (2015). South Carolina requires the driver of any vehicle involved in an incident resulting in injury or death to give his name, address, and vehicle registration number to the other driver. S.C. Code Ann. § 56-5-1230 (2006). Section 56-5-1230 also requires a driver involved in an incident to render aid to any person injured due to the incident including "making arrangements for the carrying of such person to a physician." *Id.* Additionally, statute mandates a driver involved in an incident resulting in death or injury to a person shall return to and remain at the scene until he has fulfilled all requirements of section 56-5-1230. S.C. Code Ann. § 56-5-1210(A) (2006). A driver who fails to comply with section 56-5-1210(A) is guilty of a felony and "must be imprisoned not less than one year nor more than twenty-five years" when death results. S.C. Code Ann. § 56-5-1210(A)(3) (2006).

In this case, the trial court's error was not harmless with regard to Appellant's murder conviction because the error could reasonably have affected the result of the murder conviction by commenting on the main issue to be decided by the jury and discrediting Appellant's main defense. The main issue during the trial was whether Appellant intentionally or accidentally hit Victim with his vehicle. Appellant testified he was aware his vehicle hit Victim at the time of the incident. However, Appellant claimed the incident was an accident and he did not intentionally hit Victim. The State asserted Appellant intentionally hit Victim and offered physical evidence of the scene and other evidence tending to show Appellant had a motive to hurt Victim. Thus, the main issue for the jury to decide regarding the murder indictment was whether the incident was the result of an intentional act or an accident. Such a determination likely would have been the deciding factor when assessing whether Appellant acted with malice aforethought, which was an essential element of murder. Clevenger's testimony went directly to the heart of this issue.

Clevenger testified his professional responsibilities included determining a deceased's manner of death. He explained any death presents five options: natural,

accident, homicide, suicide, and undetermined. Clevenger defined the homicide option as "the intentional act of you taking the life of another." He then explained he "ruled this case a homicide." Through this testimony, Clevenger offered his opinion that this case involved a homicide, which he defined as an intentional act. Also, one of the other potential manners of death was accident, and he expressly ruled out that option by testifying the case was a homicide. Additionally, in its brief, the State admitted Clevenger's "testimony assisted the factfinder in winnowing out whether [Victim] died as a result of accident, recklessness, or by the intentional act of another." Thus, his testimony went directly to the main issue during trial and the heart of Appellant's defense that the incident was an accident. *See State v. Huckabee*, 419 S.C. 414, 430, 798 S.E.2d 584, 592–93 (Ct. App. 2017) (finding improper testimony was not harmless, in part, because it went to the heart of the appellant's defense), *petition for cert. filed*.

Although the remaining evidence tending to show Appellant intentionally hit Victim was compelling, including the physical and motive evidence, we find Clevenger's testimony could have reasonably impacted the result of the murder conviction and, thus, was not harmless. *See Ellis*, 345 S.C. at 178, 547 S.E.2d at 491 (explaining improper testimony that went to the heart of the case was not harmless). Accordingly, we reverse Appellant's murder conviction.

However, the trial court's error was harmless with regard to Appellant's conviction for hit and run. Clevenger's testimony was not direct evidence tending to show Appellant's guilt or innocence for hit and run. Also, his testimony was not an opinion on the main issue for the jury to decide regarding hit and run. Clevenger's testimony was an opinion on Appellant's intent and state of mind shortly before and at the time Appellant hit Victim with his vehicle. As noted above, this was the main issue for the murder conviction. However, whether Appellant intentionally or accidentally hit Victim was mostly irrelevant when deciding whether Appellant was guilty of hit and run. The relevant inquiries for hit and run were whether Appellant was aware he was involved in an incident involving a vehicle and did he fail to comply with section 56-5-1210(A). The hit and run statutes seek to examine a driver's actions and intent following a vehicle incident. Clevenger's testimony offered no opinion as to Appellant's actions or intent following the incident in this case.

Furthermore, Appellant admitted he realized he hit Victim and stopped to check on him. He also admitted leaving the scene without ever contacting police, rendering aid to Victim, or providing the information required by section 56-5-1210(A) and

section 56-5-1230. He claimed he failed to seek help for Victim because he "just flipped out" and Victim was already dead. Thus, Appellant's admissions provided overwhelming evidence of guilt for hit and run. Because Clevenger's testimony was mostly irrelevant with regard to the hit and run conviction and Appellant's testimony provided overwhelming evidence of guilt, Clevenger's testimony could not reasonably have impacted the result of the conviction for hit and run. Therefore, we affirm this conviction.

Accordingly, the trial court erred by admitting Clevenger's testimony because it constituted improper opinion testimony from a lay witness in violation of Rule 701(a). We reverse Appellant's murder conviction because the error was not harmless for that conviction. However, the error was harmless as to Appellant's conviction for hit and run, and we affirm that conviction.

VOLUNTARY INTOXICATION CHARGE

Appellant argues the trial court erred by instructing the jury on voluntary intoxication because the evidence was undisputed the hospital heavily medicated him for medical purposes. Appellant claims he did not waive his objection to a voluntary intoxication charge by merely consenting to a "less damaging" instruction. The State argues this issue is unpreserved because Appellant conceded any objection to the trial court's proposed jury instructions regarding intoxication.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). "An issue conceded in a lower court may not be argued on appeal." *TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998). We decline to address this issue because Appellant conceded any objection to the jury instructions. Although Appellant initially objected when the State requested an instruction on voluntary intoxication, the trial court later proposed jury instructions related to intoxication. After the trial court explained its proposed instructions on intoxication, Appellant stated, "we would have no real objection to that. No real objection to that." Subsequently, the trial court instructed the jury consistent with its proposal to the parties, and following the instructions, Appellant expressly denied having any objection. Based on these circumstances, Appellant conceded any objection he may have had to the jury instructions on intoxication. Thus, we affirm the trial court's jury instructions.

CONCLUSION

Based on the foregoing, we find the trial court erred by admitting Clevenger's testimony because it was improper opinion testimony from a lay witness in violation of Rule 701(a). We affirm Appellant's conviction for hit and run because the trial court's error was harmless as to that conviction. However, we reverse Appellant's murder conviction because the error was not harmless and could have contributed to the verdict. Additionally, we find Appellant conceded his argument regarding the jury instructions to the trial court.

AFFIRMED IN PART AND REVERSED IN PART.

LOCKEMY, C.J., and HUFF, J., concur.

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JUL 27 2017

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable Roger L. Couch, Circuit Court Judge

THE STATE,

Respondent,

v.

SANDY LYNN WESTMORELAND,

Appellant

Appellate Case No. 2014-002636.

RESPONDENT'S PETITION FOR REHEARING

Respondent seeks rehearing pursuant to Rule 221, SCACR, respectfully submitting that the Court misapprehended points of law and fact concerning the applicability of harmless error to Appellant's murder conviction. While Respondent agrees that the Coroner, who was not qualified as an expert witness, constituted the improper vehicle for the testimony offered in this case, Respondent contends that the Court misapprehended the applicability of the harmless error analysis.

I.

This Court found "Clevenger's lay testimony that Victim's death was a homicide, which he defined as an intentional act, was an opinion on Appellant's state of mind and, thus, his guilt under the circumstances of this case." (Op. at 8). This finding does not take into account the admissibility of the Coroner's testimony had he been qualified as an expert and, thus, the Court

improperly found the admission of non-expert testimony on the issue resulted in reversible error.

Under *State v. Commander*, a qualified expert's testimony "as to cause and manner of death is admissible under Rule 702, SCRE, so long as the expert does not opine on the criminal defendant's state of mind or guilt or testify on matters of law in such a way that the jury is not permitted to reach its own conclusion concerning the criminal defendant's guilt or innocence." 396 S.C. 254, 269, 721 S.E.2d 413, 421 (2011). *Commander* affirmed the application of harmless error to expert opinion testimony determined to violate the above-prescribed rule. *Commander* at 263, 721 S.E.2d at 418. While affirming on the basis of harmless error, *Commander* adopted a rule that the type of evidence offered is admissible specifically as to cause and manner of death if it does not delve into opinion on the defendant's intent.

This Court's finding that the testimony was improper under Rule 701(a), SCRE, when conjoined with the rule prescribed by *Commander*, infers testimony similar to this Coroner's testimony was admissible but-for his status as a lay witness. And, in fact, it was. The Coroner first testified that "homicide is the intentional act of you taking the life of another." (R. p. 144, lines 16-17). Next, he qualified that definition by stating that a homicide is "one human being tak[ing] the life of another human being." (R. p. 144, lines 19-20). He said he cannot determine whether a homicide is intentional "all the time." (R. p. 144, lines 21-23). And then he testified: "Well, I ruled this case a homicide." (R. p. 145, line 1). This testimony comports with the rule established in *Commander*. That is, the Coroner did not comment on the criminality of the Appellant. The Coroner did not identify Appellant, did not discuss the crime scene, did not give any reason for his finding, and did not speak to the causation of the victim's death. The Coroner's testimony did not, therefore, opine on Appellant's state of mind or guilt, or even on a matter of law. The Coroner did not speak to the crimes charges or defenses pled. He did not

address Appellant.

Because the testimony was admissible had it been offered under the right circumstances, it cannot be found to have irreparably invaded the province of the jury such that the harmless error standard cannot apply to the murder conviction obtained. It is still appropriate to weigh the Coroner's testimony in light of the remainder of the evidence presented. Additionally, had the testimony in this case been offered through a qualified expert, it would have been coupled with a special jury instruction, both at the time of the expert qualification and again during the final charge on the law, that a witness is generally not allowed to state an opinion absent expert qualification in a particular field. (*E.g.*, R. pp. 98, 348-49 (referring to witnesses who obtained expert qualification during Appellant's trial)). But because the Coroner was not qualified as an expert, no such instruction was given, and thus no special emphasis was made in conjunction with his testimony to the extent it may be construed it as an opinion.

Under *Commander*, harmless error can apply to a qualified expert's testimony which reaches to the state of mind or criminality of the defendant. Harmless error should similarly apply to the testimony in this case, which was improper lay testimony otherwise in accord with the type of expert testimony allowed by *Commander*.

II.

Respondent additionally submits that the Court overlooked the depth of evidence of intent concerning Appellant's murder conviction such that harmless error should apply. In support of its limited request for rehearing, Respondent respectfully points out the following from the record which it contends the Court overlooked in rejecting the applicability of the harmless error standard:

1. The Court misapprehended the record in this case insofar as it determined that a passerby discovered the victim's body "in the bushes in the hospital parking lot." (Op. at 2). The body was recovered from a large lawn adjacent to the emergency room parking lot. (R. p. 38, line 7 – p. 39, line 2). According to the witness who discovered the victim, the witness was "coming through the field" and saw the victim "off the road, "on the backside of the shrubs. . . ." (R. p. 38, line 22 – p. 39, line 1). Of particular import in examining the overtness of the steering act required to commit the injuries received, the body was discovered behind a hedge row which was offset from the street, and which was removed from the remainder of any area traversed by traffic. (State's Exhibit 55 (on file)).
2. The Opinion overlooked details of the M.A.I.T. investigator's testimony which corroborated the location of the victim's body and indicated the intent inherent in Appellant's act. In this case, the "vehicle had traveled through the shrubbery, about five to ten feet above where the patient was found, and exited through the shrubbery about 30 to 40 feet below the patient." (R. p. 63, lines 3-7; R. p. iv, State's Exhibit 55). The consensus was that Mr. Daniels sustained "a fender vault" where his body hit the vehicle at or near the right fender. (R. p. 126, lines 14-20; R. pp. 384 – 385). The M.A.I.T. investigator "could tell the vehicle continued on through the bushes on back out on the other side of the bushes and back out onto the road" without stopping "at all." (R. p. 123, lines 16-23; R. p. 126, lines 21-23; R. p. 131, lines 8-9; R. p. 384 – 385). In fact, acceleration marks were visibly present in the furrowing in the grass. (R. p. 124, lines 1-8). The angle at which the Ford Explorer turned off the road was calculated as between 22 to 28 degrees. (R. p. 127, lines 10-15). Of note, M.A.I.T.

concluded that the acceleration occurred after the impact. (R. p. 130, lines 6-25). And, there existed no physical evidence that Appellant turned around and pulled back onto the grass after impact as he testified to doing. (R. p. 130, lines 1-5; R. p. 132, lines 1-10; R. p. 237, lines 2-18).

3. The Opinion also overlooked evidence of Appellant's consciousness of guilt. After striking the victim but before arriving at his home, Appellant was pulled over for a missing headlight, telling the officer that he hit a deer so that he could go on his way without incident. (R. p. 58, lines 17-20; Tr. p. 140, lines 5-6; Tr. p. 330, lines 15-25). When questioned by law enforcement, Appellant twice repeated his story about hitting a deer and recorded it in writing. (Tr. p. 197, lines 4-17; R. p. 383). It was not until later that Appellant altered his story, first stating he hit the victim with his car, and later in an audio recorded statement saying he "accidentally" hit the victim and that he went back to check on him. (R. p. 111, lines 1-25; R. p. 114, line 21 – p. 115, line 24).
4. Also relevant to the determination of whether the error was harmless beyond a reasonable doubt is the inapplicability of the defense of accident to the evidence presented. Respondent submits that the Court overlooked the inapplicability of that defense in reversing the murder conviction. The legal defense of accident differs from the definition of "accident" utilized by the Coroner. (R. p. 144, lines 10-12). "For a homicide to be excusable on the ground of accident, it must be shown that the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon." *State v. Wharton*, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009). The jury was instructed regarding this legal definition and its potential

application to the crimes charged. (R. p. 356, lines 2-16). The evidence in this case did not comport with the legal defense of accident because the evidence demonstrated that the defendant was not acting with due care when he "jerked" his car off of the road. By Applicant's own testimony, he struck the victim after law enforcement forced him to leave the hospital despite having taken Lortab and Valium and Diluadid, and despite having bad eyesight. (R. p. 234, line 15 – p. 236, line 25). Applicant's own testimony undercuts the jury's potential to find that the legal defense of accident applied.

For all of the foregoing reasons, Respondent respectfully submits that this Petition for Rehearing should be granted and the finding as to the inapplicability of harmless error to Appellant's murder conviction be corrected to conclude that the Coroner's opinion did not speak to Appellant's criminality, and that harmless error applies to the murder conviction as a result.

Respectfully submitted,

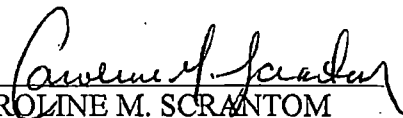
ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

CAROLINE M. SCRANTOM
Assistant Attorney General

BARRY J. BARNETTE
Solicitor, Seventh Judicial Circuit

By: 
CAROLINE M. SCRANTOM
SC Bar No. 101357

Office of Attorney General
P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

July 27, 2017
Columbia, South Carolina

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

JUL 27 2017

SC Court of Appeals

Appeal from Spartanburg County
Honorable Roger L. Couch, Circuit Court Judge

THE STATE,

Respondent,

v.

SANDY LYNN WESTMORELAND,

Appellant

RECEIVED
JUL 27 2017
SC Court of Appeals

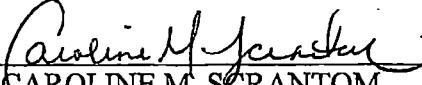
Appellate Case No. 2014-002636.

PROOF OF SERVICE

I, Caroline M. Scrantom, counsel for the Respondent, certify that I have served the within Final Brief of Respondent on Appeal by depositing a copy of the same in the United States mail, addressed to his attorney of record at:

Robert M. Dudek
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 27th day of July, 2017.


CAROLINE M. SCRANTOM
Assistant Attorney General
SC Bar No. 101357

The South Carolina Court of Appeals

The State, Respondent,

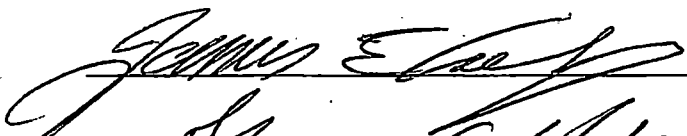
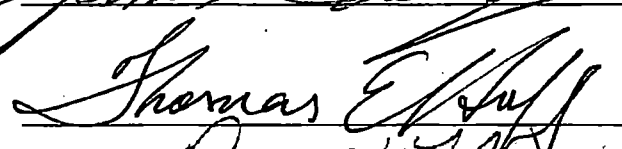
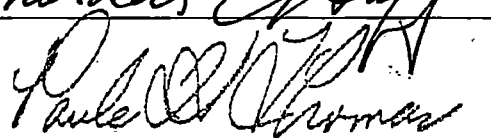
v.

Sandy Lynn Westmoreland, Appellant.

Appellate Case No. 2014-002636

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire
 Robert Michael Dudek, Esquire
 Donald J. Zelenka, Esquire
 Caroline M. Scrantom, Esquire

FILED

December 14, 2017

Barry Joe Barnette, Esquire
The Honorable Roger L. Couch



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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FAX: (803) 734-1839
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March 06, 2018

The Honorable M. Hope Blackley
PO Box 3483
Spartanburg SC 29304-3483

REMITTITUR

Re: The State v. Sandy L. Westmoreland
Lower Court Case No. 2012GS4205195, 2013GS4204625
Appellate Case No. 2014-002636

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Alan McCrory Wilson, Esquire
Robert Michael Dudek, Esquire
Donald J. Zelenka, Esquire
Caroline M. Scrantom, Esquire
Barry Joe Barnette, Esquire

STATE OF SOUTH CAROLINA)
)
 County of SPARTANBURG)
SANDY LYNN WESTMORELAND)
 Full name and prison number (if any) of Applicant)

IN THE COURT OF COMMON PLEAS

v.)
)
 State of South Carolina)

APPLICATION FOR
 POST-CONVICTION RELIEF

2018 APR -6 PM 4:30
 M. HOPE BLACKLER
 CLERK OF COURT

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention 386-REDEMPTION WAY, McCORMICK CORRECTIONAL INST.
2. Name and location of Court which imposed sentence SPARTANBURG COUNTY COURT HOUSE, 180-MAGNOLIA ST.
3. Name(s) of co-defendant(s) (if any) No.
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 13-65-42-4625 HIT AND RUN - 25 YR. SENTENCE RUNNING
 - (b) CONCURRENT.

- (c) _____
- 5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) DECEMBER - 2014
 - (b) _____
 - (c) _____

- 6. Check whether a finding of guilty was made:
 - (a) after a plea of guilty _____
 - (b) after a plea of not guilty
 - (c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence? YES

- 8. If you answered "yes" to (7), list:
 - (a) the name of each Court to which you appealed:
 - i. THE SOUTH CAROLINA COURT OF APPEALS.
 - ii. _____
 - iii. _____

- (b) the result in each such Court to which you appealed:
 - i. (MURDER) CONVICTION WAS REVERSED.
 - ii. _____
 - iii. _____

2018 APR - 6 PM 4:15
 M. HOPE BLACKLEY

- (c) the date of each such result:
 - i. APPELLATE CASE No. 2014-002636
 - ii. _____
 - iii. _____

- (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. APPELLATE CASE No. 2014-002636
 - ii. _____
 - iii. _____

- 9. If you answered "no" to (7), state your reasons for not so appealing:
 - (a) _____
 - (b) N/A

(c) the disposition thereof:

- i. ~~N/A~~
- ii. _____
- iii. _____
- iv. ~~A~~

(d) the date of each such disposition:

- i. ~~N/A~~
- ii. _____
- iii. _____
- iv. ~~A~~

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. ~~N/A~~
- ii. _____
- iii. _____
- iv. ~~A~~

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

- ~~N/A~~
- ~~A~~

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. ~~N/A~~
- ii. _____
- iii. ~~A~~

(b) the proceedings in which each ground was raised:

- i. ~~N/A~~
- ii. _____
- iii. ~~A~~

2018 APR -6 PM 4:15
 M. HOPE BLACKLEY

19. State clearly the relief you seek in filing this application:

VACATE SENTENCE AND BE RELEASED.

20. Are you now under sentence from any other court that you have not challenged?

N/O

STATE OF SOUTH CAROLINA)

County of SPARTANBURG)

VERIFICATION

I, SANDY LYNN WESTMORELAND, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Sandy Westmoreland

SWORN to and subscribed before me this 21 day of March, 2018.

[Signature] (L.S.)
Notary Public

My Commission Expires: 12/16/2019

SECRETARY OF STATE
2018 APR -6 PM 4:15
M. HOPE BLACKLEY

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Sandy Lynn Westmoreland, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

⁴¹ Sandy Lynn Westmoreland
Applicant

SWORN or affirmed to and subscribed before me this
21 day of March, 2018.

[Signature]
Notary Public

My Commission Expires: 12-16-2019

2018 APR -6 PM 4:15
M. HOPE BLACKLEY

SANDY LYNN WESTMORELAND #362335
McCormick Correctional Inst.
366 Redemption Hwy
McCormick SC 29899

April 4- 2018
571

RECEIVED
SPRINGFIELD SECURITY
2018 APR -6 PM 4:15
M. HOPE BLACKLEY

REC filing of PCR Application

DEAR HON. CLERK.

PLEASE STAMP CLOCK AND FILE THIS APPLICATION, AND SERVE A COPY BACK TO FOR MY FILE.

THANKING YOU IN ADVANCE, FOR ALL YOUR EFFORTS IN MY BEHALF.

Sandy Westmoreland

STATE OF SOUTH CAROLINA)
 COUNTY OF SPARTANBURG)
)
 Sandy Lynn Westmoreland, #362335)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

Case No.: 2018-CP-42-1200

**RETURN AND MOTION FOR
 MORE DEFINITE STATEMENT**

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 2018 AUG -3 AM 8:49
 H. M. BLACKLEY

The State (Respondent), making its Return to the application for Post-Conviction Relief filed on April 6, 2018, would respectfully show this Court:

I. Procedural History

Sandy Lynn Westmoreland (Applicant) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In 2012, the Spartanburg County Grand Jury indicted Applicant for murder (2012-GS-42-5195). Applicant was subsequently indicted in September 2013 for traffic/hit and run with death (2013-GS-42-4625). A third charge for second-degree assault and battery was severed prior to trial. Matthew W. Shealy, Esquire represented Applicant. Assistant Solicitors Abel Gray, Esquire and Megan Moricle, Esquire prosecuted the case. On December 1-4, 2014, Applicant proceeded to trial before the Honorable Roger L. Couch. The jury found Applicant guilty as indicted. Judge Couch sentenced Applicant to imprisonment for concurrent terms of thirty years for murder and twenty five years and a \$10,000 fine, along with time for credit served of 995 days.

Applicant filed a timely notice of appeal. Robert M. Dudek, Esquire, of the Office of Appellate Defense perfected the appeal The State was represented on appeal by Assistant Deputy

Attorney General Caroline M. Scrantom of the South Carolina Office of the Attorney General.

On March 2, 2016, Applicant filed a Final Brief of Appellant in the South Carolina Court of Appeals and raised the following issues:

1. Whether the court erred by allowing the coroner, who admitted he had never testified about the manner of death in a prior case, to opine, where he was not qualified as an expert, that the cause of the decedent's death was a homicide since this was impermissible opinion by a lay witness that was extraordinarily prejudicial where appellant's defense was accident, and the jury was charged on the law of accident?
2. Whether the court erred by instructing the jury that voluntary intoxication was not a defense where the evidence in this case was undisputed that appellant was heavily medicated in the hospital emergency room for medical purposes, and was nonetheless allowed to leave to drive home, since this instruction on voluntary intoxication should not have been charged given the facts of this case, and it was consequently very confusing and misleading?

The State filed its Final Brief of Respondent on March 3, 2016. Following oral arguments, the South Carolina Court of Appeals issued an opinion on July 12, 2017 affirming the conviction for hit and run and reversed the murder conviction because the trial court's error was not harmless as to Appellant's murder conviction because Clevenger's testimony went to the trial's main issue regarding murder and went to the heart of Appellant's defense. On July 27, 2017, Respondent sought rehearing, which the Court of Appeals denied on December 14, 2017. The remittitur was sent on March 6, 2018.

II. Summary of Facts Adduced at Trial

Applicant Sandy Lynn Westmoreland visited the emergency room at Mary Black Hospital in Spartanburg complaining of abdominal pain and blood in his stool. (Attachment 1, p. 242, lines 5-10). It was 5:56 pm when he arrived, and his initial treating doctor administered two doses of Dilaudid for pain, and Zofran to combat any nausea. He received his first dose at roughly 6:00 pm, and the second at 7:18 pm. (Tr. p. 243, lines 1-23). Eventually he was treated

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 SPARTANBURG COUNTY
 2018 AUG -3 AM 8:49

by Dr. Mark Rody, who administered no additional medication to Applicant. (Tr. p. 244, line 13 – p. 245, line 7).

Applicant awaited treatment in Room 4. (Tr. p. 1-04, lines 5-6). At some point in the four hours and 45 minutes between Applicant's last dose of pain medication and discharge, a hospital security guard witnessed a Mr. Michael Daniels stumble out of Room 4, crying, upset, and with a bloody nose. (Tr. p. 102, line 20 – p. 103, line 25; Tr. p. 245, lines 4-10). A deputy was called, but Mr. Daniels did not wish to press charges against Applicant. Instead, he wished to leave, and did so. (Tr. p. 104, line 19 – p. 105, line 18).

According to Applicant, he picked up Mr. Daniels, his best friend and lover of eighteen years, from work at a dialysis clinic that day in March of 2012. (Tr. p. 311, line 8 – p. 312, line 7; Tr. p. 314, lines 5-18). They went to the emergency room together for Appellant's abdominal pain. (Tr. p. 315, lines 20-25). At some point during the course of Appellant's treatment, he and Mr. Daniels began to bicker about money and Mr. Daniels' alleged purchase of a phony crack rock. (Tr. p. 320, lines 3-23). According to Appellant, he was twirling his cane around on the end of the bed. Mr. Daniels jumped up during their argument the cane struck Mr. Daniels in the nose. (Tr. p. 320, line 19 – p. 321, line 16).

A deputy responding to the altercation asked Mr. Daniels to wait outside for Applicant to be escorted out of the hospital "and then they would both be free to leave." (Tr. p. 114, lines 11-19). The deputy escorted Applicant to his vehicle after he was discharged, but Mr. Daniels was not there waiting. (Tr. p. 114, lines 21-24). The deputy refused Applicant's next request to charge Mr. Daniels with car breaking; Mr. Daniels had apparently removed the tape from a broken window in Applicant's car, taken some of his personal belongings from the car, re-taped

the window, and went on his way. (Tr. p. 115, lines 1-14). Applicant, appearing agitated with that particular chain of events, also left. (Tr. p. 115, lines 9-14).

By the time Applicant departed the hospital, he did not act impaired by multiple accounts. The deputy who walked him to his car reported no stumbling or slurred speech. (Tr. p. 115, line 23 – p. 116, line 3). According to Dr. Rody, who discharged Applicant after the altercation, the painkillers he was administered during the first part of his hospital stay would not “have [had] any impact on the patient after four hours especially when [it is administered via] IV because its half life is . . . quick enough to where it’s gonna be out of your system at that point.” (Tr. p. 246, lines 3-9). Over the course of his four hour and 45 minute observation period, Dr. Rody “watched [Applicant] get up and walk to the bathroom . . . 30 yards away, and he walked over there just fine. He had no problem doing that. He was communicating with [Dr. Rody] and the nurses just fine. There was no alteration in his mental status.” In Dr. Rody’s opinion, Applicant did not suffer from any impairments at “any of the times [he] saw him and certainly not at discharge.” (Tr. p. 249, lines 15-21).

Applicant, however, also regularly took large amounts of additional prescribed medication for a host of chronic ailments.

He was on Lantus for his diabetes. He was on Nexium probably for ulcers or gastritis. Singular is an asthma medication. Aspirin once a day. Spiriva is for asthma or COPD. Advair is an inhaled steroid for asthma or COPD. Symbicort is another inhaled steroid for asthma or COPD. Proventil is a rescue inhaler for COPD or asthma. Requip is a psych medication as is, as is Cymbalta, and he’s on Lortab 10s three times a day.

So, somebody takes Lortab 10[, the strongest dose of Lortab available,] three times a day is gonna have, you know, a greater tolerance for the medication and probably not respond to those lower doses of narcotics . . . versus somebody who is never on narcotics and gets a shot of Dilaudid. They would tend to be more zonked by it.

(Tr. p. 246, line 12 – p. 247, line 3).

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STANTON COUNTY
2018 AUG 30 AM 8:49
M. HOPE ACKLE

And then . . . as we continue the list, he was on Vitamin B daily, Magnesium daily, Glyburide Metformin, which is a diabetic oral . . . hypoglycemic agent for Type II diabetics, and he was on Diazepam, which is Valium, 10 milligrams twice a day, [and] Lisinopril for his blood pressure

(Tr. p. 250, lines 7-12; R. pp. *State's Exhibit 117).

Dr. Rody opined that an individual who takes that amount of Lortab, a narcotic painkiller, "consistently, three times a day," would "build up a tolerance in terms of how that next dose of pain medication would" affect him." (Tr. p. 247, lines 15-21). The longer Applicant had been taking Lortab, the "more impressive" his tolerance to prescription painkillers would be. (Tr. p. 247, lines 23-25). Applicant was also on a "pretty big dose" of Diazepam, or Valium twice daily according to Dr. Rody. (Tr. p. 250, lines 16-19). A "five [milligram dose] would be kind of more your conventional dose of Valium to take at one time." (Tr. p. 250, lines 21-23). According to Applicant, his pills and the two intravenous doses of Dilaudid "still didn't ease the pain" that day in the hospital. (Tr. p. 366, lines 13-20).

Regardless, Dr. Rody felt comfortable discharging Applicant given the applicable standard of evaluating a patient for impairments:

[I]t depends on what they look like and . . . a big job of [his] in emergency medicine is evaluating how a patient looks or Gestalt to the patient, and getting an idea of how they interact with [the physician], and what their mental status is, how they walk.

Since [Dr. Rody] talked to [Applicant] multiple times, watched him walk, interacted with him, and had him under [his] care for . . . three hours and 45 minutes . . . [.] with that length of time watching and observing him, [the doctor] can make a determination whether he's safe to go and drive and so forth[.]

(Tr. p. 259, lines 1-16).¹

¹ Applicant testified at trial that the Dilaudid injections made him feel high for "[a] while" because he did not usually take that particular narcotic. Appellant also recalled that the Dilaudid injections were supposed to move in and out of his system fairly quickly. (Tr. p. 365, line 14 – p.

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SPARTANBURG COUNTY
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M. HOBBS
C. ACKLEY

It was close to midnight when Applicant was discharged and escorted to his vehicle. (Tr. p. 245, line 7; Tr. p. 350, lines 6-12). According to Applicant, he “got in the car and left as [the deputy and doctor] wanted [him] to do.” (Tr. p. 326, lines 4-5). He did not have his glasses because he had given them to Mr. Daniels for safekeeping while at the hospital. It was dark, and Applicant maintained that he had astigmatism or macular degeneration and could not see well without his glasses. (Tr. p. 326, lines 9-23). Applicant testified that he “turned to the right to leave to go back towards town” in his Ford, which had a manual transmission. (Tr. p. 327, lines 13-18). Applicant testified that he “jerked the car to pull over and pick [Mr. Daniels] up because he saw a glimpse of him walking away from the hospital. (Tr. p. 327, lines 18-25; see R. p.*State’s Exhibit 55). This is what Applicant stated happened next:

When I jerked the car over and stuff, I felt a bump. I realized I was in the field. I jerked it back around. I was scared that I’d get stuck and gave it a little gas and got back on the road. I said oh, my God, you know, what happened. I turned around and came back. He was dead.

(Tr. p. 328, lines 2-6; see R. p.*State’s Exhibit 55).

Applicant never called 911, never went back to the hospital to tell anyone what happened, never called for aid. (Tr. p. 344, line 4 – p. 345, line 25). Instead, he “flipped out” out and left. (Tr. p. 328, line 21 – p. 329, line 5). At some point, he ripped the bug guard off of the front of his vehicle and threw it in the back of the car. (Tr. p. 329, line 23 – p. 330, line 1). Then, he got pulled over at 12:37 am for a missing headlight—Applicant told the officer he hit a deer and that he was planning on replacing the light. (Tr. p. 139, lines 17-20; Tr. p. 330, lines 15-25). He was freed of the traffic stop, ticketless, by 12:49 am. (Tr. p. 140, lines 5-6).

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367, line 10). But, Appellant testified that he took no additional pain pills after the Dilaudid dosage. (Tr. p. 367, lines 24-25).

backwards in relation to the bottom half of his body and creating the stretch type abrasion. In other words, he was hit from behind. (Tr. p. 185, lines 1-12).

Applicant became a suspect once law enforcement received information at the crime scene that Mr. Daniels had been with him in the emergency room the night before. (Tr. p. 168, lines 14-22). An investigator was able to match Applicant to a Ford Explorer registered to Applicant's residence. Law enforcement went to Applicant's house. At some point Applicant walked outside and cooperatively confirmed his identity, and law enforcement transported him to the Sheriff's Office for questioning. (Tr. p. 159, line 6 – p. 162, line 1). Applicant was Mirandized in the patrol car and immediately began to converse with law enforcement. (Tr. p. 174, lines 2-18).

First, Applicant told the officers that he and Mr. Daniels "got into a fuss at Mary Black [Hospital] and that Mike [Daniels] had walked off and left" and "that he had hit a deer later that evening." (Tr. p. 190, lines 10-14). At the station, this version of events was memorialized by Deputy Jason Bryant in writing and signed by Applicant. (Tr. p. 191, line 1 – p. 193, line 22; R. pp. *State's Exhibit 110). But later, Applicant changed his story.² (Tr. p. 192, lines 23-25). Applicant admitted in an audio recorded statement that he did not hit a deer, but rather "accidentally" hit Mr. Daniels with his Ford Explorer as he was pulling over to pick him up. He also said he "got out to see if Mike [Daniels] was okay, but he wasn't breathing" and he never called 911. (Tr. p. 194, line 1 – p. 195, line 20).

² In total, Applicant provided what can be counted as four statements. First, during transport to the Sheriff's Office, Applicant told officers he hit a deer. This same story was recorded in writing and signed by Applicant. (Tr. p. 197, lines 4-17). The third statement was verbally made to Deputy Bryant and was not recorded. In that third statement, there is some question as to whether Applicant mentioned that his hitting Mr. Daniels with his car was an accident. (Tr. p. 194, lines 1-14; Tr. p. 197, line 21 – p. 198, line 24). In the fourth, audio-recorded statement which was not played at trial, Applicant did state that his hitting Mr. Daniels was an accident. (Tr. p. 194, lines 17-25).

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At the crime scene, Corporal Michael Duncan with the Highway Patrol's Multidisciplinary Accident Investigation Team (M.A.I.T.) observed no skid marks, but there were "definite tire tracks going off into the grass at a sharp angle." (Tr. p. 205, line 15 – p. 206, line 3; *see* R. p.*State's Exhibit 60). These marks extended up to the bushes and past Mr. Daniels' body. (Tr. p. 206, lines 4-9). Something "other than the car went through the type of bushes." Mr. Daniels probably traveled through the air once hit, then rolled or slid. (Tr. p. 208, lines 13-25; *see* R. p.*State's Exhibit 55). This was demonstrated by an additional marking in the grass, which led to where Mr. Daniels "came to a rest." (Tr. p. 206, lines 10-15).

Corporal Duncan "could tell the vehicle continued on through the bushes on back out on the other side of the bushes and back out onto the road." (Tr. p. 206, lines 16-14). There was "no stopping to it at all." (Tr. p. 206, line 23; R. p. *State's Exhibit 111). In fact, acceleration marks were visibly present in the furrowing in the grass. (Tr. p. 207, lines 1-8; Tr. p. 213, lines 6-25). The vehicle's speed was calculated to be between 29 and 37 miles per hour. (Tr. p. 208, line 11-12). There was also "severe steering input" on the part of the driver "into where the pedestrian was." (Tr. p. 210, lines, 1-7). It was apparent to the M.A.I.T. team that the vehicle turned off of the road at an acute angle ranging from 22 to 28 degrees. (Tr. p. 210, lines 10-15; *see* R. pp. *State's Exhibit 111).

The M.A.I.T. team's consensus was that Mr. Daniels sustained "a fender vault" where his body hit the vehicle at or near the right fender. (Tr. p. 209, lines 14-20). As for the driver, "there was no breaking prior to or afterwards. It was one continuous motion." (Tr. p. 209, lines 21-23; Tr. p. 214, lines 8-9). And, there existed no physical evidence that the driver turned around and pulled back onto the grass after impact. (Tr. p. 213, lines 1-5; Tr. p. 215, lines 1-10).

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As for the Ford Explorer examined at Applicant's home, investigators documented berries under the headlight housing and in the front of the radiator, and a broken twig underneath the car. (Tr. p. 265, line 15 – p. 266, line 8). A multitude of pieces from the Ford Explorer were collected from the scene, including a headlight lens cover and assembly, painted pieces of the vehicle, and a piece of bug guard. Personal items of Mr. Daniels' were found scattered about the scene and additionally taken into evidence, including eyeglass frames and a lens, a busted cell phone, sneaker, and bag of clothing.³ (Tr. p. 284, line 18 – p. 290, line 9).

Also at the scene, the Spartanburg County Coroner and his investigators documented the tire tracks and Mr. Daniels' condition before transporting his body for autopsy. (Tr. p. 232, line 20 – p. 234, line 22). Based upon these observations, Coroner Rusty Clevenger ruled Mr. Daniels' death a homicide. (Tr. p. 228, line 1).

III. Allegations Raised and Relief Sought

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
2. "Unconstitutional sentence double jeopardy"
3. "Fifth, Sixth and 14th Amendment U.S.C.A Violation"

As requested relief, Applicant states he is seeking to "vacate sentence and be released."

Attached to this Return and incorporated by reference are the records of the Spartanburg County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the trial transcript, Applicant's appellate records, and the application. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

³ Although Applicant testified that Mr. Daniels held Applicant's false teeth, wallet, and perhaps a fake crack rock at the time he walked away from the hospital, none of these items were recovered from the crime scene. (Tr. p. 317, line 13 – p. 318, line 8; Tr. p. 391, lines 1-10).

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III. Response to the Allegations of Ineffective Assistance of Counsel

Respondent submits Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690): The proper measure of performance is whether the attorney provided representation within the range of competence required in Cherry cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant can satisfy neither requirement of the Strickland test.

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However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV. Motion for a More Definite Statement

Respondent also hereby moves for a more definite statement. Applicant has failed to set forth any facts to "support each ground" or to explain with any specificity whatsoever the facts upon which his claims are based. The Uniform Post-Conviction Procedure Act requires the Applicant to "*specifically set forth the grounds upon which the application is based.*" S.C. Code Ann. § 17-27-50 (1985) (emphasis added). Respondent respectfully submits that it is incumbent upon Applicant, through counsel, to amend his application to set forth specific facts upon which his allegations are based so that Respondent may adequately prepare for an evidentiary hearing. Therefore, Respondent requests that Applicant be required to amend his application to set forth specifically the grounds on which his claims are based.

V. Any Future Amendments

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRPC. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRPC. Pro se filings will not be considered at the PCR hearing. Respondent reserves the right to request that any

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amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRC.P.

VI. Response to Any and All Other Allegations

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

VII. Request for an Evidentiary Hearing

WHEREFORE, Respondent requests that an evidentiary hearing be held on the claims of ineffective assistance of trial counsel.

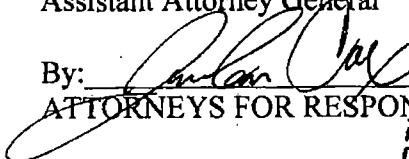
Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JORDAN A. COX
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

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SPARTANBURG COUNTY
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M. HOPE BLAKEY

August 1, 2018

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 SANDY WESTMORELAND; #362335)
)
 Applicant,)
)
 vs)
)
 STATE OF SOUTH CAROLINA,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS

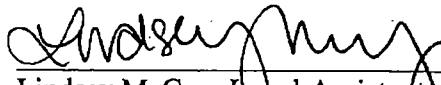
2018-CP-42-1200

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Rodney Wade Richey, Esquire
Richey & Richey, PA
Post Office Box 10916
Greenville, South Carolina 29603-0916

DATED this 1st day of August, 2018.


 Lindsey McCoy, Legal Assistant

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 SPARTANBURG COUNTY
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 M. HOPE BLACKLEY

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Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O. Box 3483
Spartanburg, SC 29304-3483



Phone (864) 596-2591
Fax (864) 596-2239

M. Hope Blackley
Clerk of Court

August 6, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

7TH JUDICIAL CIRCUIT

Sandy Lynn Westmoreland

Applicant

CASE # 2018-CP-42-1200

vs
State

Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the *Return*
In this action dated *8-1*, 2018 on *8-6-18*

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Megan Jameson

8-6-18
(Date)

Cecile Seay
(Signature)

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STATE OF SOUTH CAROLINA)	IN THE COURT OF
)	COMMON PLEAS
COUNTY OF SPARTANBURG)	OF THE SEVENTH
)	JUDICIAL CIRCUIT
)	
SANDY LYNN WESTMORELAND,)	
)	
Petitioner,)	TRANSCRIPT OF RECORD
)	2018-CP-42-1200
vs.)	
)	
STATE OF SOUTH CAROLINA,)	
)	
Respondent.)	
)	

May 13, 2019
Spartanburg, South Carolina

B E F O R E:

HONORABLE J. MARK HAYES, II, Judge.

A P P E A R A N C E S

RODNEY W. RICHEY, ESQUIRE
For The Petitioner

JOHNNY E. JAMES, JR., Assistant Attorney General
For The Respondent

Julie A. Cendroski,
Circuit Court Reporter
Seventh Judicial Circuit

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EXHIBITS

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NO EXHIBITS PROFFERED

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SANDY LYNN WESTMORELAND VS. THE STATE

MR. JAMES: May it please the Court?

THE COURT: (Nods head up and down.)

MR. JAMES: Your Honor, this is the matter of Sandy Lynn Westmoreland versus State of South Carolina, Docket Number 2018-CP-42-01200. Mr. Westmoreland is present here in the courtroom today and is represented by Mr. Rodney Richey, Esquire.

Mr. Westmoreland was indicted at the 2012 -- in 2012 for murder. He was subsequently indicted in September 2013 for hit and run from a scene resulting in death. A third-degree charge for second-degree assault and battery, was served prior to trial, but ultimately was prosecuted, is my understanding.

He was represented on these charges by Matthew W. Shealy. The case was prosecuted by Abel Gray and Megan Moricle of the Seventh Circuit Solicitor's Office. He proceeded to trial before the Honorable Roger L. Couch on December 1st, 2014. And on December 4th, 2014, the jury found him guilty as indicted for murder and for the hit and run.

Judge Couch sentenced him to imprisonment for concurrent terms of 30 years for the murder and 25 years for the hit and run. He filed a timely notice of appeal, and that appeal was perfected by Robert M. Dudek,

1 Esquire at the office of Appellate Defense.

2 The results of that appeal at the South Carolina
3 Court of Appeals was an opinion that they affirmed the
4 conviction for hit and run, but vacated the conviction
5 for murder. The State sought rehearing of that opinion
6 and that petition was denied. Remittitur was sent on
7 March 6th, 2018.

8 Upon review of the records that have been
9 provided to the Court, I was looking at the South
10 Carolina Department of Corrections records, the copy
11 that he gave me is a bit outdated. It still lists the
12 murder conviction and that he is serving it. He is, in
13 fact, not serving that murder conviction because it was
14 vacated by the Court of Appeals. Consequently, his
15 max-out date is not 2042, but it is June 20, '34, so I
16 just wanted to correct that on the record now.

17 Your Honor, the State, as part of its return,
18 filed a Motion For a More Definite Statement because the
19 allegation was simply a fraud claim of ineffective
20 assistance of appellate counsel. I did receive an
21 e-mail from PCR counsel Rodney Richey, indicating that
22 he wishes to proceed on four allegations in satisfaction
23 of the State's motion.

24 And those allegations are: one, lawyer told him
25 he would get five years; two, if he had known that he

1 would get life he would have taken 20 years; three, he
2 did not talk about -- he, referring to Mr. Westmoreland
3 -- did not talk about this case with his lawyer; and
4 that, four, his lawyer did not discuss testimony with
5 him.

6 If there are any other additional allegations, I
7 would respectfully request that Mr. Richey place them on
8 the record at this time. Otherwise, the State is ready
9 to proceed.

10 MR. RICHEY: We're ready to proceed. We call Mr.
11 Westmoreland, Your Honor.

12 THE COURT: Mr. Westmoreland, come right up here.

13 (Defendant comes forward.)

14 If you would, just stand -- you can put the
15 folder down on the banister and place your right hand on
16 the -- place your left hand on the Bible and raise your
17 right hand. (Complies.)

18 Solemnly swear that the testimony you're about to
19 give the court will be the truth, the whole truth, and
20 nothing but the truth?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Thank you, sir. Watch your step as
23 you're stepping up and have a seat in the red chair and
24 pull the red chair up to the microphone, if you would,
25 sir.

1 SANDY LYNN WESTMORELAND,
2 having been duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY MR. RICHEY:

5 Q. Sir, would you state your name please.

6 A. Sandy Westmoreland.

7 Q. And, Mr. Westmoreland, are you in the Department
8 of Corrections right now?

9 A. Yes, sir.

10 Q. And what are you there for? What charges are you
11 there for?

12 A. For a hit and run involving death.

13 Q. And you were tried in Spartanburg County?

14 A. Yes, sir.

15 Q. Who represented you on those charges?

16 A. Matthew Shealy.

17 Q. And you filed an application for post-conviction
18 relief because it's your position he did not effectively
19 represent you; is that correct?

20 A. Yes, sir.

21 Q. And in the trial on this, you are asking the
22 Court to grant you a new trial; is that correct?

23 A. Yes, sir.

24 Q. Okay. And you believe that his representation
25 prejudiced your case, correct?

1 A. Yes, sir.

2 Q. And let me go through these issues with you.

3 Number one is, do you recall discussing the case with
4 your attorney?

5 A. Yes, sir.

6 Q. And during those discussions, at any point did he
7 tell you, you could get zero to five?

8 A. We discussed zero to five, yes, sir.

9 Q. Okay. Did you have any expectations of getting
10 that sentence or talking to him about that would be the
11 outcome of your case?

12 A. That's what I was expecting.

13 Q. Okay. And was it -- did you all -- was it
14 because you all was trying to get an involuntary
15 manslaughter, is that what it is?

16 A. I think that was it.

17 Q. Okay. And so, so it was your position you
18 believe that was, that was the sentence, right, as you
19 were gonna get it?

20 A. Yes, sir.

21 Q. Just briefly, the facts. This incident occurred
22 at the hospital; is that correct?

23 A. Yes, sir.

24 Q. And it is alleged that you hit one of your
25 friends with a car and killed him; is that correct?

1 A. Yes, sir. I had two shots lodged in me, for me
2 to be actually be behind the wheel. The police brought
3 me to the car and said leave or go to jail. It was my
4 only option.

5 Q. And let me ask you, why were you at the hospital?

6 A. I had a knot in my side. I was passing blood and
7 it was hurting real bad.

8 Q. And when you went to the emergency room, what did
9 they do?

10 A. They gave me one shot of Dilaudid. They took me
11 back for tests and stuff. Came back, they gave me
12 another shot of Dilaudid.

13 Q. Okay. And what is that?

14 A. Pain killer.

15 Q. Okay. And so you took that and then you went
16 out. They told you, you had to leave, correct?

17 A. They told me leave or go to jail, was my only
18 option.

19 Q. And, and did you have any kind of fight or
20 altercation with anyone at the emergency room?

21 A. Yes, sir. Me and my friend Mike, we got into an
22 alternate [sic]. I took the cane and shook it at him
23 and accidentally hit him on the nose. The police came.
24 He came out of the room and told the police. The police
25 asked what happened. He said, he hit me. He said, do

1 you want to prosecute? He said, no, absolutely not. It
2 was an accident, he did not mean to do it. We've been
3 friends for 18 years. And he said, I'm just going for a
4 walk to calm down.

5 Q. Who was that, Mike?

6 A. That was Mike.

7 Q. Okay.

8 A. And when he went for a walk, that's when they
9 brought the papers. And the security guard and police
10 officer both walked me to the car and told me to leave
11 or go to jail, that was my only options.

12 Q. Okay, and you left. And supposedly Mike was hit,
13 right, by a car?

14 A. Yes, sir.

15 Q. And that's the basis of the charges against you,
16 correct?

17 A. Yes, sir. Yes, sir.

18 Q. Okay. And, and were you, in fact, offered 20
19 years on this case?

20 A. Yes, sir.

21 Q. And, and did you accept that 20 years?

22 A. No, sir.

23 Q. And why did you not accept it?

24 A. Because I was expecting about five. And, I mean,
25 it was an accident. I sure didn't mean to do it.

1 Q. Did you know that you could receive life without
2 parole on a murder charge?

3 A. No, sir, I didn't. I've never been in trouble.
4 This is the first time I've ever been to jail in my
5 life.

6 Q. Well, hold on. Now, you did get a lawyer. Did
7 they explain the charge against you? Did your lawyer
8 explain the charge against you?

9 A. Yes, somewhat. I, I've got -- I didn't
10 understand the way I should have.

11 Q. Did he understand -- did he tell you what the
12 maximum and minimum charge for each case was?

13 A. I don't really remember exactly.

14 Q. You were never told that you could get a life
15 without parole for murder?

16 A. Not as I remember.

17 Q. And at the trial you testified, correct?

18 A. Yes, sir.

19 Q. And, and in looking over your testimony, do you
20 believe that testimony was in your best interest?

21 A. No, sir, absolutely not.

22 Q. And, and prior to you testifying, did you and
23 your attorney go over your testimony, over what you
24 would say?

25 A. A little bit, not enough.

1 Q. You went over it, but not enough?

2 A. Not enough.

3 Q. Okay. Did he tell you about the dangers of you
4 testifying?

5 A. He thought it would be in my best interest to
6 testify.

7 Q. Did you all do any preparations in regard to your
8 testimony?

9 A. A little, but not -- I didn't understand
10 everything exactly.

11 Q. So, so you're saying the discussions you had with
12 your lawyer, you didn't understand about the
13 maximum/minimum sentence, correct?

14 A. No, sir.

15 Q. About testifying and how that affects your case?

16 A. Yes, sir. I didn't understand that.

17 Q. And the 20-year offer?

18 A. No, sir.

19 Q. Okay. And, and then sitting there today, do you
20 believe the 20-year offer was within your best interest
21 in light of all the facts of the case?

22 A. Yes, sir.

23 Q. But you believe that, that you should, that you
24 should be entitled to a new trial right now; is that
25 correct?

1 A. Yes, sir.

2 Q. Thank you. Answer any questions the attorney
3 general has.

4 CROSS-EXAMINATION

5 BY MR. JAMES:

6 Q. Good morning, Mr. Westmoreland.

7 A. Good morning.

8 Q. Just to briefly go into a few more of the facts
9 that were elicited at trial, you did ultimately admit to
10 striking the victim in this case, correct?

11 A. Correct, I did.

12 Q. And your argument was that it was an accident,
13 correct?

14 A. Yes, it was an accident.

15 Q. And you were stopped by law enforcement after
16 striking the victim in this case, correct?

17 A. Yes, sir.

18 Q. Okay. And you told them that you had hit a deer,
19 correct?

20 A. Yes, sir.

21 Q. All right. And at trial you testified that you
22 had lied to him because you panicked after realizing
23 what you had done, correct?

24 A. Yes, sir.

25 Q. Okay.

1 A. Yes, sir. I've never been to jail in my life
2 until, until this.

3 Q. So you hit your friend and just lost it. You
4 couldn't figure out what to do?

5 A. I couldn't figure out what to do. I was high. I
6 had those two shots in me. I was high. I jumped out.
7 I tried to do CPR, but he was dead. It killed him
8 instantly. They testified to that. I, I never thought
9 I could have left the scene like that, but under the
10 circumstances you don't know what you -- what to, you
11 know...

12 Q. You indicated that you had some difficulty
13 understanding what your attorney was trying to
14 communicate to you; is that correct?

15 A. Yes, sir.

16 Q. Okay. What sort of education do you have?

17 A. Seventh grade.

18 Q. Seventh grade?

19 A. (Nods head up and down.)

20 Q. Is there a reason why you did not have any
21 education beyond the seventh grade?

22 A. Um, went to work.

23 Q. Okay.

24 A. I was working full-time.

25 Q. What sort of work did you do?

1 A. I started out as a bag boy at Bi-Lo and worked my
2 way up to grocery manager. That's when I quit school
3 to, to do my job.

4 Q. Have you ever been diagnosed with any kind of
5 learning disability or...

6 A. Yes, sir.

7 Q. Okay. By whom?

8 A. I was in special ed in school, when I was in
9 school, learning disability.

10 Q. Have you ever received any treatment for that,
11 for your learning disability?

12 A. No, sir.

13 Q. Do you know with any specificity what kind of
14 learning disability it is or...

15 A. I don't have no idea, sir.

16 Q. Okay.

17 A. I signed up to try to get my GED so I can get a
18 better education.

19 Q. Since going to prison?

20 A. Yes, sir.

21 Q. Okay.

22 A. It's working in the law library, you know, trying
23 to figure out the right things without the education.

24 Q. Sir, I'm glad to hear that you're trying to get
25 your GED while you're in the Department of Corrections.

1 I have no further questions for this witness.

2 THE COURT: Any redirect limited to what he went
3 into?

4 MR. RICHEY: No, sir, no further questions.

5 THE COURT: Thank you. Just watch your step as
6 you're stepping down.

7 THE WITNESS: Thank you.

8 THE COURT: Yes, sir.

9 MR. RICHEY: We call Mr. Shealy.

10 (Witness comes forward.)

11 THE COURT: Mr. Shealy, just place your files on
12 the ledge, raise -- place your left hand on the Bible
13 and raise your right hand. (Complies.)

14 Solemnly swear that the testimony you're about to
15 give the Court will be the truth, the whole truth and
16 nothing but the truth?

17 THE WITNESS: I do, Your Honor.

18 THE COURT: Thank you, sir. Watch your step as
19 you're stepping up and have a seat in the red chair.
20 Pull the red chair up to the microphone.

21 THE WITNESS: Yes, sir. Thank you.

22 MATTHEW W. SHEALY,
23 having been duly sworn, testified as follows:

24 DIRECT EXAMINATION

25 BY MR. RICHEY:

1 Q. Mr. Shealy, do you recall representing Sandy Lynn
2 Westmoreland?

3 A. I do.

4 Q. And you represented him on the charges that have
5 been listed by the Attorney General; is that correct?

6 A. Yes, sir.

7 Q. And I'm gonna go straight to the issues. Did you
8 and Mr. Westmoreland have any conversations by him
9 pleading or being convicted of involuntary manslaughter?

10 A. Yes, sir.

11 Q. And, and did, based on those conversations, do
12 you believe that he could reasonably believe that he
13 would be in that sentence range, zero to five?

14 A. He could have reasonably believed it, yes, even
15 if he was convicted of involuntary manslaughter if
16 everything went the way that we wanted it to.

17 Q. So, so those discussions about the zero to five,
18 they were not saying, hey, you're gonna get your five;
19 you all were anticipating getting an involuntary
20 manslaughter conviction?

21 A. We were hoping that if he had to go to trial on
22 the murder, he could get an involuntary manslaughter;
23 that we would basically try to plead to the hit and run
24 along with it so that, hopefully, we could convince a
25 judge five years was sufficient.

1 Q. And you heard Mr. Westmoreland's testimony. When
2 you discussed the case with him, did you consider the
3 fact of his educational level, and were you comfortable
4 that he understood what you all's conversations were?

5 A. Yes, sir.

6 Q. Yes to both of them?

7 A. Yes, both. I didn't have any concerns as to
8 whether he understood the things that I said.

9 Q. He -- do you recall a 20-year being made on this
10 case?

11 A. I didn't, but I looked through and I found it, so
12 yes, sir.

13 Q. And the testimony, do you believe that offer was
14 in his best interest at the time?

15 A. Well, it was my position that, I mean, based on
16 what he had told me, that we could certainly go to trial
17 on murder. We could try to get the hit and run. You
18 know, we would be convicted of the hit and run. But if
19 he was not convicted of murder, he might get, get better
20 than negotiated 20.

21 Having said that, it looks like I delivered it on
22 the 28th of July. He said no. I told him to think
23 about it. When I tell somebody to think about it, that
24 generally means that it's a serious offer that you need
25 to take. So I imagine that would have been the tenor of

1 my conversation with him. I went back on the 31st and
2 he turned it down.

3 Q. Did you discuss with him the maximum sentence
4 that he could receive for his charges?

5 A. Yes, sir. And the way that I handle every case
6 is the way that dad -- my dad taught me years and years
7 ago, which is when you go in, you go over the
8 maximum/minimum penalties of each charge. The A&B
9 third, zero to three. The hit and run is up to 25. And
10 then the murder's 30 to life and it's day-for-day. Then
11 go over 85 percent in serious, most serious, violent,
12 things like that immediately because, you know, they
13 have to know what they're facing.

14 Q. Okay.

15 A. And then we go over rights, such as the
16 preliminary hearing, indictment, trial rights, subpoena,
17 testimony, things like that. And then we go over
18 appeals and post-conviction relief.

19 Q. So it's your testimony you told him about -- he
20 knew about the maximum sentence for murder at the time
21 that 20-year plea offer was presented to him?

22 A. Yeah. And that's whenever I present plea offers,
23 I also go over, again, all the various things because
24 you can't know the benefits of the plea unless you know
25 what you're actually looking at now.

1 Q. Okay. In terms of at the trial, Mr. Westmoreland
2 did testify; is that correct?

3 A. That's correct.

4 Q. And did, did you believe that his testimony was
5 favorable to him in the trial?

6 A. Well, I thought that he had to testify because
7 our defense was involuntary intoxication; that, you
8 know, that he was shotted up with Dilaudid; that they
9 knew that he shouldn't be driving and that they sent him
10 out and had him drive. So I didn't think that he could
11 avoid testifying.

12 Also, he had a story to tell. You know, he and
13 Mike were in a relationship together; that they were
14 kind of the only thing that each one had, that sort of
15 thing. Ultimately, we went over the fact that he needed
16 not to get angry.

17 The solicitor, he -- that he didn't need to
18 address things like, I think at one point he starts
19 talking about the photographs that were in evidence. I
20 mean, he went a little off the reservation at times.
21 But ultimately -- and, no, it wasn't helpful that he
22 lost everything, but it wasn't -- it wasn't avoidable.

23 He had to testify to set the stage, because
24 otherwise all they had in front of him is a police
25 report that says that his guy got hit by a car traveling

1 in the -- I've forgotten how fast, and that his neck had
2 broke. So I think that they needed him to testify.

3 Q. And so -- and to -- when did -- did you all make
4 a decision for him to testify before the trial date? Do
5 you recall?

6 A. Yeah. Well, I mean, we had talked about it for a
7 while. Because, again, for that kind of defense we were
8 going to practice. Now, all of this is in regard to the
9 murder, quite frankly.

10 Q. Right.

11 A. The hit and run we were sunk on. We got --
12 again, he gets pulled over in front of the
13 administrative office, though he tells the police that
14 he hit a deer. They trace it back. They find the dead
15 body. They recall the tracing back. He confesses. You
16 know, as to the hit and run, basically our defense was
17 to throw ourselves on the mercy of the judge. As to the
18 murder, though, yeah, he had to testify. And we talked
19 about that throughout the entire series of the case, the
20 entire pendency of the case he needed to testify. And
21 how he had to tell his story, that he had to.

22 Q. So the 20 years was on the hit and run?

23 A. It would have been on everything. I mean, here I
24 can pull out the -- and this was from the different
25 solicitor than what was ultimately -- this was a Derrick

1 Bulsa offer. He e-mailed me on July 28th that the State
2 would accept a negotiated 20-year sentence. It would be
3 open through August 4th term of court and we should let
4 them know so they could schedule it. So I assume they
5 would have knocked it down to a voluntary and plead into
6 a hit and run as well.

7 Q. So, so this case was essentially about the murder
8 charge, correct?

9 A. Correct.

10 Q. Thank you. Answer any questions the Attorney
11 General has for you, please.

12 CROSS-EXAMINATION

13 BY MR. JAMES:

14 Q. It's always dangerous to say I will be brief as
15 an attorney, but I will try to be brief. About how many
16 times did you meet with Mr. Westmoreland in the course
17 of your representation?

18 A. I think it was 8 to 10, based on the numbers of
19 noted conversations that I have.

20 Q. And you made it clear to him that he could get
21 well above five years if he were convicted or pled
22 guilty?

23 A. He had -- no. What I imagine he's talking about,
24 whenever you start representing somebody they tell you
25 kind of what they want. He was an older fella. He's

1 also not in good health at all. To give you an idea,
2 when we went to ask him about his sizes, he said he
3 hadn't worn regular pants for years, and that was
4 because of his health.

5 So I believe that that conversation was probably
6 he didn't want to get any more than ten in that context.
7 So, you know, I mean I always tell them, look, the only
8 way we could possibly get that is if they dismiss the
9 murder and beg for something on that hit and run.

10 Q. And he rejected the 20-year offer?

11 A. Twice.

12 Q. And you indicated before that you all were sunk
13 on the hit and run. You explained to him the likelihood
14 that he would be convicted on the hit and run, correct?

15 A. Yes. We went over that fairly regularly. He
16 understood that his confession made it very difficult,
17 as well as the other facts surrounding it; that he
18 ultimately matched pieces from the wreck scene to his
19 vehicle, the vehicle they knew he had been driving in
20 proximity.

21 And the hospital we're talking about is Mary
22 Black, so they had a pretty solid timeline as to when
23 this accident occurred, and when he got pulled over in a
24 vehicle showing fresh damages that he claimed was from a
25 deer. And the involuntary intoxication wouldn't have

1 been a defense to a hit and run, to the extent that it's
2 a defense to anything in South Carolina.

3 Q. You indicated some familiarity of his educational
4 background. Did he ever indicate that he had any kind
5 of learning disability or mental health issue or...

6 A. I don't know that we talked about that. I don't
7 have a note, but he may very well have told me that.
8 Yet we talked a number of different times. Quite
9 frankly, I always found him to be pretty receptive to
10 the things that I had said. I mean, he wrote me
11 letters. He was literate to the extent he could suggest
12 things. He asked for, I believe he asked for a copy of
13 his discovery a couple of times, things like that.

14 Q. So in your judgment you never saw anything that
15 made you stop and think, oh, maybe I should have this
16 guy evaluated or...

17 A. No.

18 Q. Okay.

19 A. You've got to be pretty bad off to be
20 incompetent.

21 MR. JAMES: I have no further questions for this
22 witness.

23 THE COURT: Any redirect limited to what he went
24 into?

25 MR. RICHEY: No, sir. And that's all the witness

1 we have.

2 THE COURT: Thank you.

3 Mr. Shealy, you may step down. Watch your step
4 as you're stepping down.

5 THE WITNESS: Thank you.

6 (Witness leaves witness stand.)

7 THE COURT: Does the State intend to call any
8 witnesses?

9 MR. JAMES: Nothing from the State, Your Honor.

10 THE COURT: All right. I will take a look at it
11 and let you know.

12 MR. JAMES: Thank you, Your Honor.

13 THE COURT: Thank you.

14 (Court concluded at 11:40 a.m.)

15

16 --- THIS ENDS REQUESTED TRANSCRIPT ---

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1 COURT REPORTER CERTIFICATE

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I, the undersigned Julie A. Cendroski, Court Reporter for the Seventh Judicial Circuit Court of the State of South Carolina, do hereby certify that to the best of my ability the foregoing is a true, accurate, and complete transcript of record of all the proceedings and evidence introduced in the hearing and/or trial of the captioned case, relative to appeal, in the court of Common Pleas, for Spartanburg County, South Carolina, on the 13th day of May, 2019.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

s/Julie A. Cendroski
Julie A. Cendroski
Circuit Court Reporter
Seventh Judicial Circuit

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG)	
Sandy Lynn Westmoreland,)	Case No.: 2018-CP-42-01200
S.C.D.C. No. 362335,)	
)	
Applicant,)	
)	ORDER OF DISMISSAL
v.)	
)	
State of South Carolina,)	
)	
Respondent.)	

This matter comes before the Court by way of an application for post-conviction relief filed by Sandy Lynn Westmoreland ("Applicant") on April 6, 2018. Respondent made its return on or about August 1, 2018. The Court convened an evidentiary hearing into the matter on Monday, May 13, 2019, at the Spartanburg County Judicial Center in Spartanburg, South Carolina. Applicant was present at the hearing and represented by Rodney W. Richey, Esq. Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Matthew W. Shealy, Esq. ("Counsel") also testified. The Court had before it Applicant's records from the South Carolina Department of Corrections, a copy of the original trial transcript, the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, and the pleadings. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the October


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2012 term of the Spartanburg County Grand Jury for murder (2012-GS-42-05195). Applicant was further indicted at the September 2013 term for traffic/hit and run with death (2013-GS-42-04625). Matthew W. Shealy, Esq. represented Applicant. Abel O. Gray and Megan Moricle, Esqs., of the Seventh Circuit Solicitor's Office, prosecuted the case. On December 1, 2014, Applicant proceeded to trial before the Honorable Roger L. Couch and a jury. The jury found Applicant guilty as indicted on December 4, 2014. Judge Couch sentenced Applicant to imprisonment for concurrent terms of 30 years for murder and 25 years for the hit and run.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Robert M. Dudek, Esq., who raised the following issues:

1. Whether the court erred by allowing the coroner, who admitted he had never testified about the manner of death in the prior case, to opine, where he was not qualified as an expert, that the cause of the decedent's death was a homicide since this was impermissible opinion by a lay witness that was extraordinarily prejudicial where appellant's defense was accident, and the jury was charged on the law of accident?
2. Whether the court erred by instructing the jury that voluntary intoxication was not a defense where the evidence in this case was undisputed that appellant was heavily medicated in the hospital emergency room for medical purposes, and was nonetheless allowed to leave to drive home, since this instruction on voluntary intoxication should not have been charged given the facts of this case, and it was consequently was very confusing and misleading?

The parties proceeded to oral arguments on April 12, 2017. Applicant was represented by attorney Dudek and the State was represented by Caroline M. Scrantom, Esq., of the South Carolina Attorney General's Office. By opinion decided July 12, 2017, the South Carolina Court of Appeals affirmed Applicant's conviction for hit and run, but reversed and vacated the murder conviction. State v. Westmoreland, 421 S.C. 410, 807 S.E.2d 701 (Ct. App. 2017). The State petitioned for rehearing on July 27, 2017, which was denied by the Court of Appeals by Order filed December 14, 2017. The Remittitur was issued on March 6, 2018.


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Present Application

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
2. "Unconstitutional sentence double jeopardy"
3. "Fifth, Sixth and 14th Amendment U.S.C.A. Violation"

Applicant requests relief as follows:

- "vacate sentence and be released"

At the evidentiary hearing, Applicant proceeded forward on allegations informally amended by way of an e-mail and read into the record by Respondent:

1. Ineffective assistance of counsel, in that:
 - a. Lawyer told him he would get 5 years.
 - b. If Applicant had known he could get life he would have taken 20 years.
 - c. He did not talk about case with lawyer.
 - d. Lawyer did not discuss testimony with him.

Applicant proceeded on the allegations as articulated by the State.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of


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counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove that counsel's performance was deficient. Strickland, 466 U.S. at 686; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing Strickland, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. Cullen v. Pinholster, 563 U.S. 170, 196 (2011); Harrington v. Richter, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough at 6; see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance

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need not be optimal to be reasonable.”). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced Applicant such that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. “The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury.” United States v. Basham, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir. 2011)).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id. at 696-97.

1. Misadvice as to Potential Sentencing Outcomes, Plea Offer

Applicant's claim that Counsel misadvised him as to the potential sentencing outcomes of pleading guilty versus proceeding to trial is without merit. A defendant has the right to effective assistance of counsel during the plea bargaining process. Davie v. State, 381 S.C. 601, 608 678 S.E.2d 416, 419 (2009) (citing Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996)); Lafler v. Cooper, 566 U.S. 156, 162 (2012) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)). Misadvising a defendant such that he rejects a plea offer and instead proceeds to trial may constitute deficient performance. See, e.g., Lafler, 566 U.S. at 161 (counsel misadvised defendant “that the prosecution would be unable to establish his intent to murder [the victim]

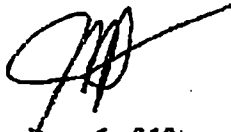

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because she had been shot below the waist.”); Lee v. United States, 137 S.Ct. 1958 (2017) (counsel misadvised a noncitizen defendant that he would not be deported as a consequence of his guilty plea). To show prejudice from the improvident rejection of a plea offer based upon the misadvice of counsel, an applicant must show (1) that but for the ineffective advice there is a reasonable probability the plea offer would have been presented to the court, (2) that the court would have accepted its terms, and (3) that the conviction, sentence, or both would have been less severe under the terms of the plea than was in fact imposed. Lafler, 566 U.S. at 164.

At the evidentiary hearing, Applicant testified he discussed the possibility of receiving a sentence between zero and five years with Counsel, and so that is what he expected if he went to trial and was convicted. Applicant recalled that he was offered the opportunity to plead guilty in exchange for a sentence of twenty years, but he rejected the offer because he expected only five years. Applicant testified that Counsel “somewhat” explained the charges against him, but that he did not understand the charges as well as he should have. On cross-examination, Applicant admitted he lied to law-enforcement and that the victim was dead when Applicant found him. Applicant testified that he had a seventh-grade education, and that he dropped out of school to go to work. Applicant testified he started as a bag boy and eventually rose to be a grocery manager. Applicant recalled he attended special education classes while still in school. Applicant testified he was trying to get his G.E.D. When asked, Applicant could not say what, if any, particular learning disability he suffered from.

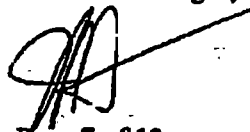
Counsel testified that he discussed the possibility of a conviction for the lesser-included offense of voluntary manslaughter with Applicant. Counsel explained that involuntary manslaughter was a possible outcome if everything went right at trial, and that such a conviction was the hoped-for outcome. Counsel testified he received the twenty-year-offer from the State



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and delivered it to Applicant on July 28, 2014. Counsel recalled that after Applicant rejected the offer that day, Counsel advised him to take some time to think it over, and that it was a good deal. When Counsel again discussed with offer with Applicant on July 31, 2014, Applicant again rejected the offer. Applicant testified he went over the minimum and maximum sentences Applicant was facing, and again went over the sentencing consequences as they related to the plea offer. Counsel testified that Applicant was "sunk on hit and run," and that Applicant understood the undeniable hit and run case against him. On cross-examination, Counsel made clear that Applicant was told he could get much more than five years. Counsel testified Applicant did not want a sentence of more than ten years. Counsel testified he had no notes in his file to indicate any discussion or concern that Applicant had any learning disability. Counsel described Applicant as literate and receptive, such that there was no need for an evaluation. Counsel testified Applicant understood that his confession to law enforcement made beating the hit and run conviction impossible.

The Court finds that Counsel's trial strategy from the beginning was to fight the murder charge in the hopes of a conviction for the lesser-included offense of involuntary manslaughter. If Counsel was successful in that regard, his strategy was to then persuade the sentencing judge to sentence Applicant to only five years for the hit and run. However, the jury convicted Applicant of murder and the trial judge sentenced Applicant to twenty-five years for the hit and run. Counsel accurately explained to Applicant his potential sentencing exposure—that Applicant was facing life—and advised him to accept the plea offer. The offer to plead in exchange for a twenty year sentence was twice presented and twice rejected by Applicant. Applicant wouldn't accept any offer for more than ten years. The Court finds that even though Applicant suggested he suffered from intellectual challenges, it does not appear that these



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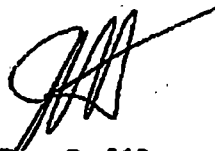
claimed challenges interfered with his ability to communicate in writing and orally with his attorney. Applicant understood his conversations with Counsel, what he was facing, and the merits of the plea offer. Nothing in Applicant's conduct in consultations gave Counsel reason to believe there was any misunderstanding or inherent inability on Applicant's part to understand their conversations. Applicant's allegation of deficiency is credibly refuted by Counsel's testimony, as is any claim of prejudice from the deficiency alleged. For all of these reasons, Applicant's request for relief by way of this allegation is **DENIED**.

2. Failure to Communicate

Applicant's claim that Counsel failed to adequately communicate with him regarding his case is without merit. "The brevity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." Smith v. State, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (Ct. App. 2012) (citing Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008)). An applicant alleging he was prejudiced by inadequate time spent in consultation with counsel must present evidence of how additional communication would have resulted in a different outcome. Id. (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998); Skeen v. State, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997)).

Applicant testified at trial, and the substance of his testimony is well enough summarized in the Court of Appeals opinion's harmless error analysis. See Westmoreland, 421 S.C. at 424, 807 S.E.2d at 708-09. Of note, the Court of Appeals concluded that Applicant's "testimony provided overwhelming evidence of guilt" with respect to the hit and run conviction. Id.

At the evidentiary hearing, Applicant testified to the facts of the case in a manner roughly consistent with his testimony at trial. Applicant asserted that testifying at trial was not helpful.



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 SPARTANBURG COUNTY
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Applicant recalled talking about testifying with Counsel, but claimed that they did not talk about it enough. Applicant testified Counsel encouraged him to testify.

As noted in the prior section, Counsel testified that Applicant was "sunk on hit and run," and that their strategy at trial was to argue Applicant was involuntarily intoxicated, and that the collision with the victim was not intentional. Counsel testified he prepared Applicant to testify, emphasizing in his discussions that Applicant needed to not get angry during his testimony. Counsel recalled that Applicant "went off reservation." On cross-examination, Counsel testified he met with Applicant somewhere between eight and ten times.

The Court finds Applicant has failed to present evidence adequate to support this allegation, and finds Counsel's credible testimony refutes what little was presented. Given the defense "theory of the case," the Counsel's advice to Applicant that he testify was justified. Applicant's trial testimony on direct examination was consistent with the theory that he sought to support. However, the State's cross-examination was aggressive and cast doubt on the direct testimony and the defense theory. Counsel objected appropriately throughout, but the trial court's rulings, especially regarding the medications and tolerances to medication, were not helpful to the defense. Prior to trial, the Court finds Counsel adequately met with Applicant on a number of occasions, and wisely advised Applicant on how to approach trial testimony. That Applicant was unable to stick with Counsel's advice under the pressure of effective cross-examination is Applicant's own shortcoming, not Counsel's. For all of these reasons, Applicant has failed to meet his burden of proof as to either prong of Strickland, and his request for relief by way of this allegation is **DENIED**.



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III. CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 19th day of August, 2019.

J. MARK HAYES
Presiding Judge
Seventh Judicial Circuit

Spartanburg, South Carolina

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SPARTANBURG COUNTY
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WITNESSES

Spartanburg County Sheriff's Department

1. SUBSCRIBER

2. REPRESENTATIVE

3. GUARANTOR

4. JURY

5. CHAIRMAN

6. CLERK

7. JURY

ARREST WARRANT NUMBER

M758322

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury OCT 18 2012

Date:

VERDICT

GUILTY

Foreperson of Petit Jury 12-4-14

Date:

DOCKET NO. 12-GS-42-5195

The State of South Carolina

County of Spartanburg

Barry J. Barnette, Solicitor

COURT OF GENERAL SESSIONS

OCT 23 2012

TERM

THE STATE

v

Sandy Lynn Westmoreland

Indictment for

MURDER

SC Code 16-03-0010, 0020

CDR Code 116

Class FEL-EXM

FILED CLERK OF COURT SPARTANBURG COUNTY 2012 OCT 23 AM 8:56 M. HOPE BLACKLEY

RECEIVED

DEC 12 2014

SC Court of Appeals

Handwritten initials

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

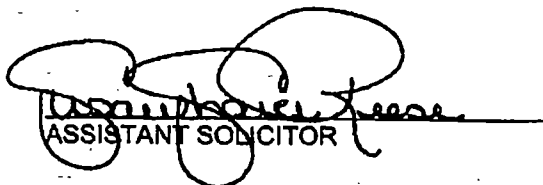
INDICTMENT

At a Court of General Sessions, convened on 001 18 2012 the
Grand Jurors of Spartanburg County present upon their oath:

MURDER

That Sandy Lynn Westmoreland did in Spartanburg County on or about March 15, 2012, feloniously, willfully, and with malice aforethought, kill Michael Daniels by striking the victim with a vehicle, and he died as a proximate result thereof, all in violation of §16-3-0010, 0020, *The South Carolina Code of Laws*, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR

WITNESSES

Spartanburg County Sheriff's Office

Kevin L. [Signature]

ARREST WARRANT NUMBER

Direct Indictment

ACTION OF GRAND JURY

True Bill

Harold [Signature]
Foreperson of Grand Jury SEP 27 2013
Date:

VERDICT

Foreperson of Petit Jury
Date:

DECK NO. **13-GS-42-4625**

The State of South Carolina

County of Spartanburg

Barry Barnette, Solicitor

COURT OF GENERAL SESSIONS

TERM

THE STATE
vs.

Sandy Westmoreland

Indictment for
TRAFFIC/HIT AND RUN
WITH DEATH

SC Code: 56-5-1210 (A) (3)
CDR Code: 2463
Class FEL/B

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)


INDICTMENT

At a Court of General Sessions, convened on _____ the
Grand Jurors of Spartanburg County present upon their oath:

TRAFFIC/HIT AND RUN WITH DEATH

That Sandy Westmoreland did in Spartanburg County on or about March 15, 2012, having been the driver of a vehicle involved in an accident resulting in the death of Michael Daniels, did willfully and unlawfully fail to stop the vehicle at the scene or as close as possible to the scene or to return to the scene to give information and render aid as required under Section 56-5-1230 of the South Carolina Code of Laws, (1976), as amended. Such acts being in violation of Section 56-5-1210 (A)(3) of the South Carolina Code of Laws, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


DEPUTY SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG VS. STATE

Sandy Lynn Westmoreland

AKA:

Race: WHITE Sex: M Age: 52

DOB: SS#: [REDACTED]

Address:

City, State, Zip:

DL#: SID#:

*CDL Yes No CMV Yes No Hazmat Yes No

In disposition of the said indictment comes now the Defendant who was TO: Murder / Murder

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2012GS4205195

A/W#: M758322

Date of Offense: 3/15/2012

S.C. Code § : 16-03-0010; 16-03-0020

CDR Code #: 0116

SENTENCE SHEET

CONVICTED OF or PLEADS

in violation of § 16-03-0010; 16-03-0020 of the S.C. Code of Laws, bearing CDR Code # 0116

NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC w/minor 1st or Lewd Act) §17-25-45

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentation to Grand Jury.

The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: GRAY, ABEL SC Bar# 12164 Defendant [Signature] Attorney for Defendant [Signature] SC Bar# 77764

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center, for a determinate term of 30 days/months/years or under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on: The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections. 995 days

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP Total: \$ plus 20% fee: \$ Payment Terms: Set by SCDPPPS

Table with columns for Fine, Description, and Amount. Includes items like § 14-1-206 (Assessments 107.5%), § 14-1-211(A)(1) (Conv. Surcharge) \$100, § 14-1-211(A)(2) (DUI Surcharge) \$100, § 56-5-2995 (DUI Assessment) \$12, § 56-1-286 (DUI Breath Test) \$25, Proviso 47.9 (Public Def/Prob) \$500, § 14-1-212 (Law Enforce. Funding) \$25, § 14-1-213 (Drug Court Surcharge) \$150, § 50-21-114(BUI Breath Test Fee) \$50, § 56-5-2942(J) (Vehicle Assessment) \$40/ea, Proviso 90.5 (SCCJA Surcharge) \$5, 3% to County (if paid in installments) \$390, TOTAL \$13390

days/hours Public Service Employment Obtain GED Attend Voc. Rehab. or Job Corp. May serve W/E beginning Substance Abuse Counseling Random Drug/Alcohol testing Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ beginning \$ paid to Public Defender Fund Other:

Appointed PD or appointed other counsel, § 47.12 requires \$500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Court Reporter: SCCA/217 (03/2011)

Presiding Judge Judge Code: 2152 Sentence Date: 12/4/14

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STATE OF SOUTH CAROLINA)
 COUNTY OF SPARTANBURG)
 STATE VS.)
 Sandy Lynn Westmoreland)
 AKA:)
 Race: WHITE Sex: M Age: 52)
 DOB: [REDACTED] SS#: [REDACTED])
 Address:)
 City, State, Zip:)
 DL#: [REDACTED] SID#:)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2013GS4204625 ✓
 A/W#: 2013GS4204625
 Date of Offense: 3/15/2012
 S.C. Code § : 56-05-1210(A)(3)
 CDR Code #: 2463

SENTENCE SHEET

*CDL Yes No CMV Yes No Hazmat Yes No
 In disposition of the said indictment comes now the Defendant who was
 TO: Traffic / Hit and run, duties of driver involved in accident with death

CONVICTED OF or PLEADS

in violation of § 56-05-1210(A)(3) of the S.C. Code of Laws, bearing CDR Code # 2463
 NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS Mandatory GPS(CSC §17-25-45
 w/minor 1st or Lewd Act)

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury. (defendant's initials)

The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.

ATTEST: Abel Gray 12/16/14 [Signature] 77 Feb 9
 GRAY, ABEL SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center,
 for a determinate term of 25 days/months/years or under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$ 10,000.00; provided that upon the service of _____ days/months/years and/or payment
 of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
 probation, which are incorporated by reference.

CONCURRENT or CONSECUTIVE to sentence on: 12/14/14
 The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
 by the State Department of Corrections. 995 days
 The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
 Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

RESTITUTION: Deferred Def. Waives Hearing Ordered PTUP _____
 Total: \$ _____ plus 20% fee: \$ _____
 Payment Terms: _____
 Set by SCDPPPS _____

Recipient: _____

*Fine:		\$ 10,000.00
§ 14-1-206 (Assessments 107.5 %)		\$ 10,750.00
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$ 25.00
§ 14-1-213 (Drug Court Surcharge)	\$150	\$
§ 50-21-114(BUI Breath Test Fee)	\$50	\$
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCA Surcharge)	\$5	\$ 5.00
3% to County (if paid in installments)		\$ 624.50
TOTAL		\$ 21474.50

_____ days/hours Public Service Employment
 Obtain GED
 Attend Voc. Rehab. or Job Corp. _____
 May serve W/E beginning _____
 Substance Abuse Counseling
 Random Drug/Alcohol testing
 Fine may be pd. in equal, consecutive weekly/monthly
 pmts. of \$ _____ beginning _____
 \$ _____ paid to Public Defender Fund
 Other: _____

Appointed PD or appointed other counsel,
 § 47.12 requires \$500 be paid to Clerk
 during probation.

Clerk of Court/ Deputy Clerk [Signature]
 Court Reporter: [Signature]
 SCCA/217 (03/2011)

Presiding Judge _____
 Judge Code: 2135
 Sentence Date: 12/14/14