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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JOSHUA CW REHER,

APPELLANT

APPELLATE CASE NO. 2018-002254

Appeal from Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

Opinion No. 2021-UP-245

PETITION FOR REHEARING

On June 30, 2021, this Court affirmed the trial judge's decision to allow the state to introduce videotapes and photographs of a firearm experiment that was conducted by James Sullivan, an investigator with the solicitor's office. State v. Reher, Op. No. 2021-UP-245 (S.C. Ct. App. Filed June 30, 2021). Pursuant to Rule 221(a), SCACR, Petitioner respectfully requests this Court rehear the matter considering the significant points overlooked and/or misapprehended by this Court discussed below.

In affirming Petitioner's convictions, this Court held that the videotapes and photographs of the firearm experiment were "relevant to, and probative of, whether [Petitioner] shot the

victim with malice or in self-defense because the results of the experiment indicated the shooting did not occur in the location [Petitioner] alleged." Reher at 2. However, the results of the experiment did not indicate that the shooting occurred in a different location than where Petitioner maintained the shooting happened. Although Sullivan stated that it would be unlikely, based on his experiment, that a shell casing would end up exactly where the shooter was standing if they were standing in the kitchen when they fired the shot, the experiment itself, and the remainder of the Sullivan's testimony did not support this conclusion.

Sullivan's experiment had no probative value because Sullivan was only able to "determine" that, after firing the rifle, "brass hits the ground, and goes where it goes." R. 262, ll. 13 – 21. In fact, Sullivan admitted that there was no discernable pattern to the ejection of the rounds besides the rounds being extracted to the right. Sullivan acknowledged that once the shell casing came into contact with an object like a wall or the ground, it could bounce in any direction. R. 263, l. 24 – 265, l. 2.

In affirming Petitioner's convictions, this Court relied heavily on Hamrick v. State, 426 S.C. 638, 828 S.E.2d 596 (2019). Hamrick was charged with felony DUI resulting in great bodily injury for striking a road construction worker with his car. The location of the construction worker at the time of the collision was disputed with the state alleging the worker was inside the construction zone while Hamrick maintained the worker was in his lane of travel. Id. at 643, 828 S.E.2d at 598. An officer testified for the state that he documented the point of impact as having occurred in the construction zone. Hamrick responded by calling a mechanical and civil engineering expert who testified that the officer was incorrect, and that the point of impact was outside of the construction zone and in the designated lane of travel. Id. at 644-45,

828 S.E.2d at 599. Hamrick also attempted to introduce a videotape showing an experiment created by his expert witness which the trial judge did not allow. Id.

The Hamrick Court reversed based on the trial judge's error in allowing the police officer to improperly opine on the point of impact because the officer was not qualified as an expert. Id. at 650, 828 S.E.2d at 602. However, the Court also addressed the admissibility of the videotape of the experiment done by Hamrick's expert witness. While the Hamrick Court did not rule on whether the trial judge erred in excluding the video from evidence, the Court did hold that the trial judge conducted an erroneous analysis of its admissibility. The Court stated: "The video of [the expert's] experiment was clearly relevant because the video tended to prove Hamrick *could not have* struck [the victim] in the construction zone as the state claimed he did." Id. at 651, 828 S.E.2d at 602-03 (emphasis added). Significantly, the expert witness in Hamrick testified that it was *impossible* for the victim to have been struck in the construction zone, thereby enhancing the probative value.

Petitioner's case is readily distinguishable from Hamrick. Far from indicating that Petitioner's version of events was "impossible," here, the experiment only showed that there was "no pattern except for it ejects to the right, brass hits the ground, and goes where it goes." R. 262, ll. 15 – 21. Therefore, the experiment performed by Sullivan did not make Petitioner's version of events any less probable. Instead, the experiment showed only that the shells could go anywhere after ejecting from the gun to the right.

This Court further found that danger of confusing or misleading the jury was low because "the investigator who conducted the experiment testified (1) he used the same type of firearm and ammunition that [Appellant] used to shoot the victim under similar conditions and (2) the results of his experiment showed 'no definitive pattern' as to the location of the ejected shell

casings." Reher at 2. This Court incorrectly used the fact that there was "no definitive pattern" against Appellant by holding that this made the evidence less confusing and misleading. However, this is the very fact that made the probative value of this evidence non-existent. If there was no definitive pattern to the trajectory of the ejected shell casings, then the experiment did not have any probative value. Instead, the experiment only carried with it the danger of unfair prejudice. The experiment was used specifically to mislead the jury into believing that there was a discernable pattern, when there clearly was not. The solicitor explicitly argued this in his closing argument to the jury. R. 565, l. 21 – 566, l. 11.

Finally, this Court's reliance on the fact that Sullivan used the same type of firearm and the same type of ammunition in his experiment was also misplaced. Sullivan admitted that he did not know if the "results" from his experiment would have been the same had he used Appellant's gun, i.e. the actual gun that was used to shoot Myers. R. 262, l. 8 – 263, l. 11. Therefore, to the extent that Sullivan's experiment showed anything at all, Sullivan himself admitted that he could not state that whatever his experiment showed would have also been true of Appellant's gun.

Based upon the specific points overlooked and/or misapprehended by this Court in its opinion discussed above, Appellant requests this Court to rehear the matter.

Respectfully Submitted,

ADAM SINCLAIR RUFFIN
Appellate Defender

This 15th day of July, 2021.

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CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon William F. Schumacher, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Joshua CW Reher, #378523, at Goodman Correctional Institution, 4556 Broad River Road, Columbia, SC 29210, this 15th day of July, 2021.

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT