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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

ROBERT XAVIER GETER,

APPELLANT

APPELLATE CASE NO. 2018-001647

Appeal from Richland County

Honorable DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 5851

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, petitioner seeks rehearing because this Court may have overlooked the fact that, in the context of the testimonial exchange, defense counsel's objection to the testimony of Richland County Investigator Clarke opining that the defense's opening statement to the jury was the "first time" he heard of its self-defense case *was preserved* for appellate review. Second, petitioner seeks rehearing of this Court's holding that the claim of Richland County Investigator Clarke -- immediately after he accused the defense of fabricating a self-defense case for trial -- that the statements of victim Stone conversely were "absolutely consistent" was harmless. Respectfully, both opinions by Investigator Clarke were patently

improper, their improper nature was called to the attention of the trial judge by way of objection, and the trial judge still overruled even the second bolstering or vouching objection this Court correctly found proper. Fairness to the trial judge required no more than this.

Such opinions from a fact witness, the state's chief homicide investigator, that the defense attorneys in essence manufactured a defense that they revealed for the first time at trial in their opening statement while the victim's testimony and statements conversely were "absolutely consistent" should be condemned given their impermissible tendency to mislead and impact the jury. There would be nothing unfair to the trial judge in this Court doing so. Error preservation is respectfully a rule of fairness to the trial judge – fairness does not require perfection in trial objections.

In his opening statement to the jury, defense counsel Schwartz told the jurors that: "The defense here is that Robert fought back. And he was the prey for no other good reason other than accidentally stepping on somebody's shoes . . . James Lewis was absolutely beating the crap [out] of Robert Geter for no reason other than he stepped on his shoe. The fight breaks out. At some point Robert is hit in the back of the head with a beer bottle. And James Lewis and his friends continue to pummel him." R. 10, l. 20 – 11, l. 20. Defense counsel also told the jury that appellant tried to get away from the decedent, and instead, "[J]ames Lewis and Clarence Stone come after him swinging." R. 11, l. 21 – 12, l. 19.

Defense counsel emphasized: "Robert may have defended himself, but he did not murder James or attempt to murder Clarence. Murder requires malice. ... The only intentional act that night was Robert was defending himself." R. 14, ll. 14-20. Defense counsel concluded, "he is not guilty of murder. He is not guilty of attempted murder. James Lewis is dead because of

what James Lewis did that night. Mr. Stone lost an eye because of what James Lewis did not night." R. 16, ll. 5-23.

The state called Richland County Sheriff's Department Investigator Joseph Clarke as a witness. R. 200, ll. 3-24. Clarke was the "primary homicide investigator on call" on the night of March 7, 2015. R. 201, ll. 5-22. Clarke offered that, after speaking to witnesses, "At that point they were saying, Boo [appellant] did it, Boo was the one responsible for it, et cetera. And I said, Fine." R. 212, ll. 12-24.

Clarke also testified that after he received word that the decedent had died, he secured a warrant for murder against appellant and a second warrant for the attempted murder of Stone. R. 224, ll. 2-18. Appellant agreed to meet Clarke at the police station the next day, and Clarke told appellant this was "still his side to the story that we need to know about. And that was truly what I was interested in. This had happened in a bar. It happened early in the morning. And there had been a lot of people there. So we want to hear his side of this thing." R. 227, l. 2 – 228, l. 1.

Appellant gave Clarke the "bloody knife" at the police station, and he told Clarke "there was like five dudes there." R. 228, ll. 2-6. Clarke said he then advised appellant of his "Miranda[1] rights," took the knife from him, gave appellant the two arrest warrants, and "we transported him to Alvin S. Glenn Detention Center without further incident." R. 228, ll. 2-22.

On cross-examination, defense counsel showed Clarke some photographs showing appellant's injuries. Clarke acknowledged, "There appears to be some swelling to his face, no question." R. 238, l. 11 – 241, l. 17. Defense counsel asked Clarke about his experience in law enforcement and what he had done before taking out the arrest warrants. Clarke insisted, "I had

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

probable cause for the arrest." R. 232, l. 23 – 237, l. 3. Clarke offered that "evidence is like money, you always want more of it," and he said that more investigation could lead to more corroboration of one side of the story or the other. R. 237, l. 1 – 244, l. 6. When questioned about what investigation he did into appellant's self-defense case, Clarke responded that was "not relevant." The following occurred on cross-examination of Clarke:

> Q: [N]ot relevant to you because you had already taken out the warrants, right?
>
> A: Because I had probable cause for the arrest, counselor.
>
> MS. ZMROCZEK: No further questions, Your Honor.

R. 244, ll. 3-8.

On redirect examination, Clarke said, other than appellant telling him he was attacked by five men, there was no one else saying anything other than this was a "one-on-one" fight between appellant and the decedent. R. 244, ll. 13 – 17. Clarke also said he was getting other statements that corroborated what the Cullers told him had occurred. R. 246, ll. 5-15. The following then occurred in redirect examination of Clarke by the solicitor:

> Q: **And you were here in opening statements, correct?**
>
> **A: Yes.**
>
> **Q: Is that the first time you heard that story?**
>
> *A: No. Oh, that story?*
>
> *Q:* **Yes, the story that he gave about -- in opening statements?**
>
> *MS. ZMROCZEK: Your Honor, I object. Openings are not evidence, so.*
>
> *THE COURT: Overruled.*
>
> *BY MR. CATHCART:*

Q: **His scenario of the facts that Mr. Geter's attorney is now saying happened, is that the first time you have ever heard that?**

A: Yes.

Q: And you also, by the time Mr. Geter came, turned himself in, knowing that the police were looking for him, this hand that has no other injuries but is covered in blood wasn't covered in blood by the time you got to it, correct?

A: It did not appear to be covered in blood when he came to me.

Q: The clothes on him that had what appeared to be blood on them, you collected, right?

A: Correct.

Q: Including this gray undershirt, correct?

A: Correct.

Q: **You confirmed that Clarence Stone was also a victim?**

A: I did.

Q: And you spoke with him [Stone] as well?

A: I did. I took a statement at his home.

Q: And he gave a statement of what occurred?

A: He did.

Q: You saw him testify again today?

A: I did.

Q: And was that exactly what he told you?

MS. ZMROCZEK: Objection, Your Honor. Improper vouching.

THE COURT: Overruled. You are asking about the testimony that he gave?

MR. CATHCART: Yes. We watched him just a few minutes ago.

THE COURT: Overruled.

BY MR. CATHCART:

Q: The same thing he told this jury happened to him is what he told you?

A: **Seems absolutely consistent, correct.**

Q: Thank you. No further questions.

R. 247, l. 4 – 249, l. 23. (emphasis added).

This Court held that defense's counsel objection to the Investigator's claim that the first time he heard of a self-defense case was in defense counsel's opening statement was not preserved for appellate review. State v. Robert Xavier Geter, Op. No. 5851, Howard's Adv. Sh. #28 at p. 92 (filed August 18, 2021). This Court also held the investigator's testimony that the statements of victim Stone were conversely "absolutely consistent" was harmless error. State v. Robert Xavier Geter, Op. No. 5851, Howard's Adv. Sh. #28 at p. 92-94 (filed August 18, 2021).

Error Preservation

This Court found the legal issue of Investigator Clarke's improper testimony to the jury that the first time he heard the defense's "scenario of the facts" -- its self-defense case -- was during defense counsel's opening statement unpreserved. This Court noted, "Geter did not object to the question on the grounds of bolstering but only noted opening statements are not evidence." State v. Robert Xavier Geter, Op. No. 5851, Howard's Adv. Sh. #28 at p. 92. However, when viewed in the context of what Investigator Clarke said immediately after that about the victim's statements *to him throughout*, it is apparent that defense counsel's objection as to both objections was improper bolstering or vouching on the part of Investigator Clarke.

Clarke was vouching for the state's case by conveying to the jury that he heard the defense case of self-defense for the first time during the defense attorney's opening statement. This clearly signaled to the jury that the investigator found the defense case not credible, and immediately after that he stated he conversely found the statements of victim Stone "absolutely consistent," meaning credible. This is apparent from the context of the testimonial exchange at trial with Investigator Clarke. Further, the trial judge overruled both objections where, respectfully, it was clear that defense counsel was objecting to Investigator Clarke's opinions and comments on the credibility of the defense case versus the state's case.

Defense counsel objected to Investigator Clarke's opinion that the first time he heard of the defense's self-defense case was during defense counsel's opening argument. Defense counsel objected and properly called the judge's attention that opening statements were not evidence. Immediately after that, defense counsel objected that Investigator Clarke was impermissibly bolstering or vouching for the state's case by testifying that victim Stone's statements were absolutely consistent.

Given this context, and the fact that the trial judge overruled both objections to the same testimony where it is readily apparent from the record what the solicitor was improperly doing, both issues were preserved for appellate review. There would be no unfairness to the trial judge in properly finding both objections -- to this inextricably entwined improper opinion testimony -- preserved for appellate review.

An objection that opening statements were not evidence *and that the state was improperly bolstering or vouching for the state's case* would have been futile since this record showed the judge erroneously overruled the second defense objection on the basis of bolstering or vouching immediately thereafter when Investigator Clarke opined victim Stone's statements

were absolutely consistent. Where the record shows an objection would have been futile in context, the matter is preserved for appellate review. See Appellate Practice in South Carolina, Toal, Vafai, and Muckenfuss, at pp. 71-72 (1999 ed.), *citing* State v. McDaniel, 320 S.C. 33, 37, 462 S.E.2d 882, 884 (Ct.App. 1995) where this Court found two defense objections that were overruled sufficient to preserve the issue. The essential point in McDaniel, as here, is that where the judge had two chances to sustain a proper legal objection, and instead erroneously overruled them, then there is no unfairness to the trial judge in finding the issue preserved.

Again, it is apparent that the solicitor was using Investigator Clarke to improperly bolster the state's case by testifying that he first heard the defense's "factual scenario" during defense counsel's opening statement. Conversely, Clarke said that the statements of victim Stone were absolutely consistent throughout. It was apparent what the state successfully got away with in presenting these improper bolstering lay opinions to the jury through Investigator Clarke. Respectfully, this Court should grant rehearing and find both objections -- one right after another -- to Investigator Clarke's improper testimony during this testimonial exchange preserved the issue for appellate review.

Harmless Error

This Court held that Investigator Clarke's improper bolstering or vouching for the state's case by testifying victim Stone's statements were absolutely consistent was harmless error. This Court wrote:

> In this case, all of the eyewitnesses' testimony was consistent and the forensic evidence in the case matched a version of events in which Geter was the final aggressor outside on the deck that evening, acting out of revenge rather than self-defense. Additionally, the circuit court instructed the jury that it was charged with determining the credibility of the witnesses in the case. It charged "[n]ecessarily, you must determine the credibility of witnesses who have testified in this case. Credibility simply

> means believability. It becomes your duty as jurors to analyze and to evaluate the evidence and determine which evidence convinces you of its truth." This instruction did not nullify Investigator Clarke's improper statement but mitigated its impact. *See id.* at 408-09, 853 S.E.2d at 342 (explaining any bolstering of a minor witness's credibility was cured by, among other things, the court's instruction that the jury was the sole arbiter of credibility). Accordingly, we find even though the circuit court erred in allowing Investigator Clarke's statement, the error was harmless.

State v. Robert Xavier Geter, Op. No. 5851, Howard's Adv. Sh. #28 at p. 94 (August 18, 2021).

Respectfully, all of the eyewitness testimony was not consistent with appellant being the final aggressor and acting out of revenge rather than in self-defense, unless appellant's testimony is wholly disregarded. Appellant testified that the two men were beating him badly. "My eyes were shut, both my eyes were shut, and it was blurry. All I seen was a blur, like two people at the same time. And I still got the knife. So everybody come up to me, like, Man, what happened, what happened, Boo? I was like, Man, they just jumped me, Man, they just jumped me." Appellant remembered the decedent came "out the back door," saying, "Motherfucker, you just stabbed me." R. 362, l. 5 – 365, l. 14.

Further, appellant testified on cross-examination that there were a number of men "stomping me, but my only focus was on Clarence and James because they was the closest. They was getting the most licks in. They was the closest." Appellant thought there were about five men beating him that evening. R. 401, ll. 1-12.

Even Investigator Clarke acknowledged there was swelling to appellant's face as a result of the injuries he suffered during the fatal fight. R. 238, l. 11 – 241, l. 17. Further, the forensic testimony on the wounds involved otherwise did little to assist the jury in determining whether appellant's actions that night were in self-defense or as an aggressor acting with malice aforethought.

This case was a swearing match between self-defense as a defense and testimony seeking to negate that claim of self-defense by painting appellant out to be a man intent on homicidal mischief. This fight between appellant and victim Stone and the decedent, James Lewis, should not be found to be harmless error because it cannot be said that the bolstering/vouching opinion evidence of Investigator Clarke as to the lack of credibility of the self-defense case versus the absolute credibility of the victim's account of the fight being credible did not in any way contribute to the guilty verdicts. See State v. Mizzell, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002).

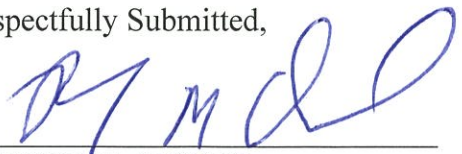
It was improper for the solicitor to ask Investigator Clarke if the defense's opening statement was the first time he heard the defense's scenario or narrative of what occurred – its self-defense case. Investigator Clarke was a fact witness and should not have been allowed to draw legal conclusions about the evidence or vouch for the consistency or veracity of one side or the other. See Rule 701(a), SCRE; State v. Westmoreland, 421 S.C. 410, 807 S.E.2d 701 (Ct.App.2017). This error was highly unusual since it seems a solicitor would know better, and it was extremely prejudicial. As an officer of the Court, undersigned counsel also avers that such vouching or bolstering of the state's theory of the case by law enforcement officers seems to unfortunately be becoming more commonplace in our trial courts.

Our Supreme Court wrote in State v. Tapp, 398 S.C. 376, 389-390, 728 S.E.2d 468, 475 (2012) that "[o]ur jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict. See State v. Mizzell, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002). Similarly, as to harmless error in a self-defense case, the Court in Porter v. State, 455 Md. 220, 166 A.3d 1044 (Ct.App. 2017), noted "Reversal is required unless the error did not

influence the verdict." Id. at 342, 941 A.2d 1107 (citation omitted). "To say that an error did not contribute to the verdict is ... to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed by the record." Id. (citation omitted). In other words, reversal is required unless we find that the error was harmless. We have explained that an "error is harmless only if it did not play any role in the jury's verdict." Id. (emphasis added) (citation omitted). The State carries the burden of proving, beyond a reasonable doubt, that the error meets this high standard. Dionas v. State, 436 Md. 97, 108, 80 A.3d 1058 (2013) (citation omitted).

Here, the homicide investigator testified that the first time he heard of appellant's self-defense case was in defense counsel's opening statement to the jury and that victim Stone conversely had been absolutely consistent in his contention that appellant acted in a cold-blooded calculated manner to commit murder. It respectfully cannot be said with any confidence that this improper opinion testimony did not play any role in the jury's verdict or that it did not contribute to the jury's verdicts. Rehearing should be granted to appellant Robert Xavier Geter.

Respectfully Submitted,



ROBERT M. DUDEK
Chief Appellate Defender

This 2nd day of September, 2021.

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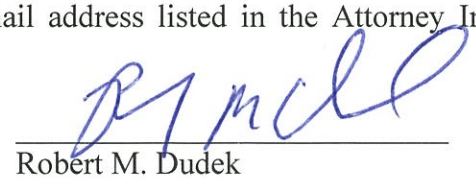
APPELLATE CASE NO. 2018-001647

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Tommy Evans, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 2nd day of September, 2021.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT