STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 2021-UP-245 (S.C. Ct. App. Filed June 30, 2021)

Lower Court Case No. 2016-GS-32-01077

THE STATE,

RESPONDENT,

V.

JOSHUA CW REHER,

APPELLANT

APPELLATE CASE NO. 2018-002254

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

ADAM SINCLAIR RUFFIN
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on August 23, 2021.

QUESTION PRESENTED

Whether the Court of Appeals erred in finding that the trial judge did not abuse his discretion in admitting videos and photographs of a firearm experiment conducted by the state's investigator where the gun used in the experiment was not the gun used in the shooting and the results of the experiment were inconclusive, and therefore, the probative value was substantially outweighed by the danger of unfair prejudice?

STATEMENT OF THE CASE

Petitioner was indicted by the Lexington County grand jury for attempted murder and possession of a weapon during the commission of a violent crime. R. 643-644. Petitioner's trial was held before the Honorable Eugene Griffith, Jr., and a jury from December 10 – 13, 2018. R. 1. Petitioner was represented by Lir Derieg and the state was represented by Robert McNair, III and Bradley Pogue. R. 1.

The jury found Petitioner not guilty of attempted murder but convicted him of the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN) and the weapons charge. R. 632. The judge sentenced Petitioner to nine years imprisonment for the ABHAN and a concurrent five-years imprisonment for the weapons charge. R. 640, l. 24 – 641, l. 3.

The Court of Appeals affirmed Petitioner's convictions in State v. Reher, Op. No. 2021-UP-245 (S.C. Ct. App. Filed on June 30, 2021). Petitioner filed a petition for rehearing on July 15, 2021. The Court of Appeals issued an Order denying the petition for rehearing on August 23, 2021.

This petition for writ of certiorari to the South Carolina Court of Appeals follows.

ARGUMENT

The Court of Appeals erred in finding that the trial judge did not abuse his discretion in admitting videos and photographs of a firearm experiment conducted by the state's investigator because the gun used in the experiment was not the gun used in the shooting and the results of the experiment were inconclusive, and therefore, the probative value was substantially outweighed by the danger of unfair prejudice.

Relevant Facts

Petitioner was accused of attempted murder for shooting his coworker, Joseph Myers, in the abdomen with a .22 caliber rifle on August 21, 2015. The eyewitnesses to the shooting gave significantly different accounts of what transpired that day.

Myers testified that he and Petitioner started drinking at around noon while at a company meeting and continued to drink together after they got off work. R. 119, l. 25 – 120, l. 10; R. 123, ll. 1 – 16. According to Myers, he and Petitioner went back to Petitioner's house at around 7:30 or 8:00 p.m. Petitioner lived with his mom, his girlfriend, Brooke, and her two sons, Jacob and Johnny. R. 123, l. 8 – 124, l. 6. Myers said that when he and Petitioner arrived at the house, some "kids" were outside which bothered Petitioner because his girlfriend would allow them to drink alcohol even though they were underage. R. 124, ll. 7 – 14. Myers said: "[Petitioner] got out yelling at them, and they really didn't take him too serious. I got out, yelled at them, with a little bass in my voice, and they pretty much took off." R. 125, l. 16 – 126, l. 20.

Myers claimed that Petitioner yelled at Brooke for allowing the teenagers to "hang out" at their house. R. 126, l. 21 – 127, l. 22. According to Myers, Brooke started crying and Myers "apologized for bringing [Petitioner] home drunk." Myers said that Brooke left the house with one of her son's friends whose name was Ian. R. 127, l. 24 – 128, l. 3. Ian was supposedly

Brooke's "pill connection" which Petitioner did not like, and so Petitioner was upset that Brooke left with Ian. R. 128, l. 7 – 129, l. 13.

Myers said he started making fun of Petitioner for enabling Brooke's pill habit and then Petitioner "went ballistic and tackled [Myers] off the chair." R. 129, l. 15 – 130, l. 6. According to Myers, he and Petitioner started fighting in the garage and in the driveway and they were both hitting each other. Myers then claimed that Petitioner went inside and then Myers heard a bang, and everything went dark. R. 130, ll. 6 – 14.

Petitioner gave a significantly different version of events after the teenagers left the house. Petitioner testified that it was Myers who yelled at Brooke about the teenagers "hanging out" over at the house. R. 426, ll. 11 – 23. Petitioner recalled that Brooke and Ian got into a car together and Brooke asked Petitioner for money so that she could buy cigarettes. Myers then accused Petitioner of enabling Brooke's pill addiction by giving her money to go buy pills. R. 427, l. 20 – 428, l. 9.

Petitioner maintained that Myers got aggressive and hit him in the face. R. 432, l. 8 – 433, l. 1. Myers and Petitioner began rolling around on the ground while Myers was choking Petitioner and Petitioner was trying to get away. R. 433, ll. 2 – 6. Myers was on top of Petitioner who was lying on his back and Myers punched Petitioner in the face multiple times while Petitioner was on the ground. R. 433, l. 10 – 434, l. 3.

Petitioner testified that he never hit Myers and was eventually able to break free from Myers. Petitioner went to the front of Myers' truck, which was parked in Petitioner's driveway. R. 435, l. 18 – 436, l. 18. Myers then attacked Petitioner a second time, tackling him to the ground and punching him in the face. R. 436, l. 19 – 437, l. 23. Petitioner testified that while

Myers was attacking him, Petitioner was calling out for help and for someone to call 911. R. 438, ll. 10 – 20.

Petitioner got away from Myers a second time and was able to run inside of his house to the kitchen where he saw one of Jacob's friends, Michael All. R. 438, l. 21 – 439, l. 19. Petitioner recalled that after he got inside the house, Myers opened the cooler in his truck and started drinking beer instead of leaving Petitioner's house. Petitioner had repeatedly asked Myers to leave and because Myers refused to leave, Petitioner retrieved his .22 caliber rifle and fired four warning shots into his toolbox.[1] R. 440, l. 3 – 443, l. 21. Myers then charged towards Petitioner and Petitioner slammed the door shut. Myers then tried to push through the door to get inside the house. R. 444, l. 24 – 445, l. 8.

Petitioner recalled:

> That's when he pushes on it [the door] for probably maybe a minute or two. And then the pushing stops. And that's when I cracked the door open to see if he's still there, and that's when he turns around and pushes the door through. He was still standing on the step. . . .
>
> That's when he turns around and comes through the door. . . .
>
> I started taking my steps back. And I raised my hand to stop him from connecting to me, and that's when I raised my gun and I shoot one time into [Myer's] stomach.

R. 445, l. 11 – 446, l. 2. Petitioner maintained that the final shot happened while Petitioner was about two steps backwards into his kitchen.[2] R. 446, ll. 18 – 22. After Petitioner shot Myers,

---

[1] All maintained that Petitioner fired his gun at Myers five times in succession from the threshold of the doorway which connected the kitchen to the carport. R. 233, l. 4 – 234, l. 11. Keith Sprinkle, a crime scene investigator with the Lexington County Sheriff's Department, found four spent .22 caliber shell casings in the garage. R. 70, ll. 12 – 16. He also found four metal fragments consistent with bullets that were all near the toolbox. R. 73, l. 13 – 76, l. 7.

Petitioner recalled: "That's when the gun drops and [Myers] falls on top of me and we kind of have a tussle right there. Eventually, I get him off of me and he gets up and he goes towards the door. And that's when I pushed him out the door and he goes to his truck." R. 446, l. 24 – 447, l. 3.

After Myers went back outside to his truck, Michael All awakened Jacob who then went outside to give Myers some water and find the keys to his truck. R. 447, ll. 4 – 9. Petitioner laid down on the floor and was hyperventilating with the gun on the floor next to him. R. 447, l. 17 – 448, l. 3. Petitioner cleared the weapon, including ejecting a live round from the chamber onto the kitchen floor.[3] R. 448, l. 18 – 449, l. 7. Brooke's son Johnny testified for the defense and largely corroborated Petitioner's version of events. R. 347, ll. 13 – 353, l. 7.

The state sought to discredit Petitioner's version of events by introducing videotapes and photographs of a firearm experiment that was done by their investigator, James Sullivan. Defense counsel moved to suppress this experiment. R. 2, ll. 21 – 24. The experiment was allegedly designed to show the way shell casings were ejected from a .22 caliber semi-automatic rifle. Counsel argued that the probative value of this experiment was substantially outweighed by the danger of unfair prejudice and that the testimony could confuse the jury. R. 4, ll. 15 – 20. Specifically, counsel pointed out that the gun used by Sullivan during his experiment was not the gun used by Petitioner, and that Sullivan's experiment only showed that the shells did not eject in any discernable pattern. R. 3, ll. 1 – 18. The judge did not rule on the motion at that time.

---

2 Sprinkle also found one spent .22 caliber shell casing inside of the residence on the floor of the kitchen. R. 82, l. 21 – 83, l. 8.

3 Sprinkle found an unspent .22 caliber round of ammunition on the floor of the kitchen. R. 83, ll. 9 – 15.

Prior to Sullivan's testimony, defense counsel renewed his objection. Counsel again pointed out that the gun used in the experiment was not the gun used by Petitioner. Furthermore, Sullivan could not testify whether the gun used by Petitioner would have a similar ejection pattern as the gun used by Sullivan during the experiment. R. 221, l. 19 – 222, l. 1. The judge nonetheless ruled that he would allow the firearm experiment under Rule 403, SCRE. R. 222, ll. 15 – 25.

During Sullivan's testimony, the state introduced two videotapes of Sullivan firing a .22 caliber rifle and photographs of the locations of the shell casings that were ejected during the experiment. R. 258, l. 5 – 259, l. 6. All these exhibits were admitted over defense counsel's objection. See State's Exhibits 73 – 76. Sullivan then testified 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. R. 261, l. 25 – 262, l. 4.

Sullivan admitted that he had never test fired the gun used by Petitioner. He further admitted that "there is no pattern except for it ejects to the right, brass hits the ground, and goes where it goes." R. 262, ll. 13 – 21. Sullivan also acknowledged that he did not know whether the gun used by Petitioner in the shooting would have the same lack of a discernable ejection pattern as the gun test fired by Sullivan. R. 263, ll. 8 – 11.

The assistant solicitor used Sullivan's experiment in his closing argument to the jury:

> You saw the pictures where Investigator Sullivan was shooting. Most of those shell casings ejected behind the line of fire. When he shot against this wall right here, he was standing at the end of this tape measurer. Those casings end up behind where he was standing. That shell casing just hit off either the door frame or the cabinets where that door was and just kicked behind him.
>
> If that didn't happen, I don't know what he'd hang his defense on. That cabinet, that's right by the door right where he was standing, right where the ejection portal on the weapon would have shot the casing out. Are we really to believe

> that if he did shoot in his kitchen, that shell casing would land in the exact place where he says the shooting happened? No. That's unbelievable.

R. 565, l. 21 – 566, l. 11.

Discussion

The Court of Appeals erred in affirming the trial court's erroneous ruling allowing the state to introduce the videos and photographs from Sullivan's firearm experiment. Rule 403, SCRE, permits relevant evidence to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, [or] confusion of the issues." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013). In State v. Kahan, 268 S.C. 240, 246, 233 S.E.2d 293, 294 (1977), the Supreme Court noted in regard to the admissibility of out of court experiments that "substantial similarity" is required between the conditions of the experiment and the conditions existing at the time of the incident in dispute.

In affirming Petitioner's convictions, the Court of Appeals 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, the Court of Appeals 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.

The Court of Appeals further found that the 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 [Petitioner] 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. The Court of Appeals incorrectly used the fact that there was "no definitive pattern" against Petitioner 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, the Court of Appeals' 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 Petitioner's gun which was in fact the gun that was used to shoot Myers. R. 262, l. 8 – 263, l. 11. Even if Sullivan's experiment had shown a discernable pattern of ejection, which it did not, Sullivan himself admitted that he did not know if that would have also been true of Petitioner's gun.

The Court of Appeals erred in affirming the trial judge's ruling allowing such misleading and confusing evidence to be introduced before the jury. The videotapes, photographs, and testimony from Sullivan regarding his experiment should not have been admitted because they had no probative value and posed extreme danger of unfair prejudice and confusion of the issues in violation of Rule 403, SCRE.

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests that this Court grant his petition for writ of certiorari to the Court of Appeals to allow full briefing on the issues presented.

Respectfully Submitted,

Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of September, 2021.

RECEIVED
Sep 23 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 2021-UP-245 (S.C. Ct. App. filed June 30, 2021)
Lower Court Case No. 2016-GS-32-01077

THE STATE,

RESPONDENT,

V.

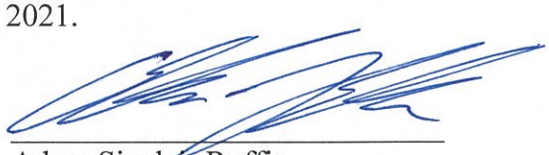
JOSHUA CW REHER,

APPELLANT

APPELLATE CASE NO. 2018-002254

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari in this case have been served on William F. Schumacher, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Joshua Cw Reher, #378523, at Goodman Correctional Institution, 4556 Broad River Road, Columbia, SC 29210; and the Court of Appeals, at 1220 Senate Street, Columbia, SC 29201, this 23rd day of September, 2021.



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER