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**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM PICKENS COUNTY  
The Court of General Sessions  
Honorable Letitia H. Verdin, Circuit Court Judge

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Appellate Case No. 2020-001399

THE STATE,.....RESPONDENT,

v.

JARON LAMONT GIBBS,.....PETITIONER.

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**BRIEF OF RESPONDENT**

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## **PETITIONER'S STATEMENT OF ISSUES PRESENTED**

- 1.** Did the Court of Appeals err in affirming the trial court's decision to allow a witness who was not qualified as an expert to testify as to how certain firearms function?
- 2.** Did the Court of Appeals err in affirming the trial court's decision to overrule a defense objection to improper closing and a related demonstration that were not based on evidence presented at trial?
- 3.** Was the cumulative effect of the trial court's errors, in combination, so prejudicial as to deny Petitioner a fair trial?

## **RESPONDENT'S COUNTERSTATEMENT OF ISSUES PRESENTED**

- 1.** Whether the Court of Appeals correctly affirmed the trial court's conclusion that a Clemson City Police detective's limited explanation of how revolvers are fired was properly classified under Rule 701, SCRE, because it was based solely on his personal knowledge of revolvers?
- 2.** Whether the Court of Appeals correctly affirmed the trial court's conclusion that the Solicitor's closing argument of "guns do not accidentally go off" and the accompanying demonstration were permissible advocacy based upon and supported by evidence in the record?
- 3.** Whether the Court of Appeals correctly held that Petitioner had not properly preserved his cumulative error doctrine claim for review, and that even if he had, no errors existed to combine for review?

## STATEMENT OF THE CASE

The Pickens County Grand Jury indicted Petitioner in October of 2015 for the August 1, 2015 murder of Robby Porter and for possession of a weapon during the commission of a violent crime. (2015-GS-39-01893 and 01895; App. 6-9). Petitioner proceeded to trial by jury from September 18, 2017 to September 22, 2017, pursuant to which Petitioner was found guilty as charged. (App. 12-13; 517-518). The Honorable Letitia H. Verdin sentenced him to 35 years and five concurrent years with credit for 780 days time served. (App. 10-11; 519). Thirteenth Circuit Assistant Solicitors Brandi Hinton and Britni McCall prosecuted the case while Druanne White, Esq., and Ashlea White, Esq., represented Petitioner. (App. 12). Petitioner timely appealed. (App. 5). After briefing and without oral argument, the Court of Appeals affirmed Petitioner's convictions and sentence in an opinion filed August 19, 2020. (App. 596-604; *State v. Gibbs*, 431 S.C. 313, 847 S.E.2d 495 (Ct. App. 2020)). The South Carolina Court of Appeals denied Petitioner's petition for rehearing on September 22, 2020. (App. 605-15). Petitioner then timely moved this Court for a writ of certiorari, and Respondent made a timely return. This Court granted Petitioner's request and Petitioner submitted his brief to this Court. Respondent now responds in kind.

## STATEMENT OF FACTS

For purposes of this brief, Respondent relies on the summary of facts of the crime, investigation, and trial as the South Carolina Court of Appeals set out in the direct appeal opinion:

### Events Giving Rise to Charges

The circumstances of this mid-day shooting were disputed, but multiple witnesses testified the case arose out of a drug transaction. On a Saturday in August 2017, Hunter Raby, Robby Porter, and Kalyn Meadors were going to the lake near Clemson when they contacted Gibbs—the defendant—to buy drugs. Raby drove his white Ford Explorer with

Porter in the front passenger seat. Meadors rode in the rear passenger seat. They met Gibbs near Clemson.

Gibbs gave them marijuana and pills in exchange for money. After the transaction, the occupants of Raby's Explorer weighed the marijuana they purchased. Believing they had been shorted, they drove Raby's Explorer back to the purchase location to look for Gibbs and saw him in a Chrysler. They contacted Gibbs by phone and began following the Chrysler.

According to Raby, the phone calls with Gibbs became heated. Shortly thereafter, the two cars arrived and stopped at a four-way intersection. At that point, Gibbs exited the Chrysler's front passenger seat, walked behind the Chrysler, and walked up to the Explorer's driver's side window where Raby was seated. Witness accounts differ as to what happened next.

Raby said Gibbs pulled out a gun, put the gun inside the Explorer's driver's side window, and yelled that Raby had messed up and “was really close to losing [his] life over it.” Raby said that the gun was a silver revolver, Gibbs held the gun in his right hand, and Gibbs held the gun along the left side of Raby's face. Raby said he used both of his hands to push the gun away as Gibbs was threatening him. At that point, Raby said the gun fired. Raby denied touching the gun's trigger. Meadors—the Explorer's backseat passenger—could not see the gun from her seat and only realized what it was after it fired. She assumed Raby had taken the gun away from Gibbs.

Gibbs's story was significantly different. He said Raby and Porter called him and demanded he settle up for an unpaid bet made at a social event a few weeks earlier. Gibbs said he told them he was on his way to Atlanta and would pay the bet later, but he claimed Porter would not take “no” for an answer. He said Raby and Porter got increasingly upset as their phone calls went on and they began following closely behind Gibbs and driving aggressively.

Gibbs said the reason he got out of the Chrysler was to offer the gun as payment for the alleged bet. Gibbs purportedly thought the gun was unloaded. He agreed that he held the gun in his right hand but explained he was left-handed, he held the pistol by the grip, and his finger was never on the trigger. Gibbs said he pushed the gun inside the car in front of Raby's face and that Raby pushed the gun back out. Gibbs said the gun fired when this occurred a second time. Gibbs claimed he had no idea anyone had been shot after the gun fired.

Three other cars were stopped at the intersection when the shooting happened. The occupants of those cars all recalled waiting on a silver sedan—the Chrysler—to proceed through the intersection. All saw Gibbs exit the Chrysler from the passenger side, walk up to the driver's side of the Explorer, and address the driver.

Alexander Saidat, an off-duty EMT waiting at the intersection in his car with his wife and children, recalled seeing Gibbs exit the Chrysler's passenger side and walk to the back of the vehicle. Saidat said Gibbs had a gun in his right hand that looked like a silver revolver.

Saidat testified Gibbs and the driver of the Explorer had an argument that lasted several seconds. He then witnessed Gibbs “thrust his right arm inside the vehicle with the gun” and heard the gunshot.

Although the remaining witnesses did not recall seeing a gun, they did recall hearing a gunshot. Saidat's wife said she witnessed yelling before she “saw the hand of the driver come out, and the gun went off.” She also testified that “[w]hen the gun went off, the male who was in the Chrysler who had shot ran back to the Chrysler and they drove away.” Another witness also recalled “seeing a hand go up and down.”

The bullet grazed the top of Raby's head, leaving only a minor injury. However, the bullet struck Porter—the front seat passenger—in the left side of his temple, just above his ear. Porter died at the hospital the following day.

Autumn Gilstrap—the Chrysler's driver—testified Gibbs contacted her earlier that day requesting a ride to Atlanta. She noticed the Explorer trying to stop her from leaving the place where she picked up Gibbs. Gilstrap said that she drove around the Explorer, it kept following them, and Gibbs told her to keep driving as he answered a number of phone calls. Gilstrap said the Explorer was directly behind her when they reached the intersection where the shooting occurred.

Gilstrap saw Gibbs walk from her car to the Explorer and saw that he was armed. She said that Gibbs and the people in the Explorer were yelling at each other, and she saw Gibbs point the gun towards the Explorer's window. Gilstrap heard the gun go off and watched Gibbs walk back to her car and get in. Gilstrap said she did not see the gun when Gibbs got back in the car. Gibbs told Gilstrap to drive off and explained that the gun had gone off and hit the top of the Explorer's roof. Gilstrap testified she took Gibbs to Greenville Hospital to meet some other people and declined to drive him to Atlanta “because [she] was unsure of what really happened” at the intersection. Gilstrap said she drove directly to the Clemson Police Department and gave a statement.

Authorities recovered pills and other illegal substances from the Explorer. Raby and Meadors initially told officers that Gibbs had robbed them a few weeks earlier and owed them money. Both of them said later that their initial story was not true, and that the incident in fact stemmed from the aforementioned drug transaction. Gibbs was arrested in Atlanta two days after the shooting. No gun was recovered.

### **Revolver Testimony**

Detective Michael Arflin testified at Gibbs's trial about his investigation of the shooting. The State asked Detective Arflin during direct examination if he was familiar with single action and double action revolvers. Gibbs objected, arguing Detective Arflin had not been qualified as an expert witness. The State responded that the detective had already testified he was “familiar with revolvers through his training and experience as an officer.” Gibbs argued he was not aware of any officers that had been trained on revolvers, only semi-automatic weapons and rifles. The trial court overruled the objection and noted Gibbs's standing objection on record.

The following exchange then took place:

State: Detective Arflin, how do you fire a single action gun? Detective Arflin: The hammer has to be cocked and then you fire – you pull the trigger and it discharges. State: Will it fire without you cocking it? Detective Arflin: That's kind of the rule behind single action. It has to be cocked. State: A double action? Detective Arflin: When you pull the trigger, the hammer both cocks and discharges. State: Does it have a light trigger pull, [or] a heavy trigger pull? Detective Arflin: In double action, it's going to be a long, heavy trigger pull.

### **Closing Argument**

The solicitor made the statement during closing argument that “guns do not accidentally go off.” She then demonstrated the necessary steps for single and double action revolvers to fire. She argued that if the gun was a single action, “[Gibbs] would have had to have gotten out of the car, [and] cocked it before he put it to [Raby's] head. That's intent. That is a conscious effort.” She then described what was necessary for a double action revolver to discharge, arguing:

“Raby testified he pushe[d] the gun up like this. He would have to push the gun up like this, wrap his fingers around where the trigger [was], pull it back and pull it up at the same time if this was a double action revolver. That simply does not make sense.” Gibbs objected to the State's argument and demonstration on the basis that there was no evidence a gun could not go off accidentally, especially an old gun that could have been traded on the street. The trial court overruled the objection. The jury convicted Gibbs of murder and of the weapons charge.

*State v. Gibbs*, 431 S.C. 313, 316-320, 847 S.E.2d 495, 496-499 (Ct. App. 2020).

## STANDARD OF REVIEW

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); *State v. Wilson*, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). "The admission or exclusion of evidence is an action within the sound discretion of the circuit court and will not be disturbed on appeal absent an abuse of discretion." *State v. Tapp*, 398 S.C. 376, 385, 728 S.E.2d 468, 473 (2012); *State v. Williams*, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010). An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions. *State v. Douglas*, 369 S.C. 424, 429-430, 632 S.E.2d 845, 848 (2006). It is well settled that the trial judge has very broad discretion in determining the admission or exclusion of evidence. *State v. Bottoms*, 260 S.C. 187, 194-195, 195 S.E.2d 116, 119 (1973).

## ARGUMENT

- I. The Court of Appeals appropriately found no manifest abuse of discretion accompanied by probable prejudice by the trial court when it permitted a detective to testify to his personal knowledge of the actions and force he rationally perceived were necessary to fire typical revolvers. It was proper lay witness testimony under Rule 701, SCRE, as it was derived from a thought process common to ordinary men.**

This entire case boils down to two very simple questions:

- (1) What is proper lay witness testimony?; and
- (2) Is a basic explanation of how to fire a typical revolver lay testimony?

Under Rule 602, SCRE, a witness may testify to any matter as long as there is any evidence introduced to support a finding that they have personal knowledge of the matter. Rule 602, SCRE. “Evidence to prove personal knowledge **may, but need not, consist of the witness’ own testimony.**” *Id.* Detective Arflin testified that he had been in law enforcement since 1996, had 16 years of experience in law enforcement at the time of the trial, testified he also had military experience, and then testified that he had personal knowledge of how both single and double revolvers worked. (App. 343, 340). The detective did not elaborate on *how* he acquired his personal knowledge of revolvers because the trial court found elaboration unnecessary: Detective Arflin’s personal knowledge of firearms was clear from the length and extent of his prior experiences. Also, Rule 602 does and did not require him to elaborate. The detective stated he had personal knowledge of revolvers while under oath<sup>1</sup> and the trial court found his

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<sup>1</sup> The detective and the solicitor shared the following exchange at the beginning of the detective’s testimony:

- Q:** “Are you familiar with firearms? **A:** Yes.  
**Q:** Are you familiar with [them], both personally and professionally? **A:** Yes.  
**Q:** Did you get training on firearms? **A:** Yes, ma’am.  
**Q:** Would you expect to find spent shell casings when dealing with a revolver?  
**A:** No, ma’am.” (App. 347).

affirmance sufficiently supported by the nature of his personal and professional history. The court then determined the subject matter of his testimony was properly classified under Rule 701, SCRE, because it was based on his rational perception of how typical revolvers were fired, could help the jury determine a fact in issue, and did not require special knowledge, skill, experience or training to acquire, as any average person could learn to fire a revolver. That factual conclusion should not be disturbed on appeal as it is supported by testimony and is not clearly erroneous. The trial court did not abuse its discretion and this Court should affirm the Court of Appeals.

The Petitioner would have this Court believe that all testimony based on personal knowledge pursuant to Rule 602 is subject to Rule 703, but that is simply not true. The text of Rule 602 states: “This rule is subject to the provisions of Rule 703, relating to opinion testimony by *expert* witnesses.” The text of the rule does *not* say that lay witness testimony based on personal knowledge is subject to Rule 703. That is because Rule 703 addresses the quality of the specific facts and data an expert should base his or her opinion on. Here, the detective was proffering testimony based solely on his personal knowledge of the times he actually held a revolver in his hands and fired it. It simply was not complicated enough to trigger Rule 702.

#### Rule 701, SCRE – Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness’ testimony in the form of opinion 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.

The bulk of the detective’s testimony on direct regarding revolvers is as follows:

**Q:** I believe we’ve already established that you are familiar with revolvers, correct? **A:** Yes, ma’am. **Q:** And are you familiar with whether revolvers are single action or double action or

both? **A:** They can be both or either. It depends on the year, make, and the model. **Q:** Are you familiar with how both single action and double action work? **A:** Yes, ma'am. **Q:** Can you tell me –

**Ms. D. White:** I'm going to object. This witness has not been qualified, Your Honor, as an expert in firearms. I object to any firearms testimony. **Ms. Hinton:** Judge, we've already established that he's familiar with revolvers through his training and experience as an officer. **The Court:** I'm going to allow – I'm going to allow him to testify to this. We'll just see how far it goes. I don't know if we're going much further with this. **Ms. D. White:** Your Honor: I'm not aware of any officers that are trained on revolvers. There are semi-automatic weapons and rifles. **The Court:** He says he understands so I'm going to allow him to testify to it. If we go much further, then we'll revisit your objection. **Ms. D. White:** May I have a standing objection to all of this, Your Honor? **The Court:** Yes, ma'am . . . . No need to re-object.

**Ms. Hinton:** **Q:** Detective Arflin, how do you fire a single action gun? **A:** The hammer has to be cocked and then you fire – you pull the trigger and it discharges. **Q:** Will it fire without you cocking it? **A:** That's kind of the rule behind single action. It has to be cocked. **Q:** A double action? **A:** When you pull the trigger, the hammer both cocks and discharges. **Q:** Does it have a light trigger pull, a heavy trigger pull? **A:** In double action, it's going to be a long, heavy trigger pull. **Q:** And do you shoot weapons? **A:** I do. **Q:** Are you right-handed or left-handed? **A:** I'm right-handed. **Q:** And do you shoot with your right hand only? **A:** No.

(App. 364-366) (emphasis added).

The trial court determined the detective had rationally perceived how single and double action revolvers fired because he had personal experience firing them. The trial court also determined his testimony would be helpful to the jury as it would help them decide a fact in issue: whether *a* revolver (not *the* specific revolver in question) was a type of firearm that could go off by design when it was knocked around or whether more effort was required to fire it. Finally, the trial court determined the detective did not need to proffer whether he had special knowledge, skill, experience or training before he gave his opinion as he was simply describing the basic steps one would have to take to fire a typical single or double action revolver. The basic steps any person would be able to articulate had they fired a revolver once or twice before.

No objection was made to whether the detective had personal knowledge of revolvers. It is not disputed that he knew how to fire both types of revolvers. The only objection was to his

particularized training and experience regarding revolvers. However, a witness does not have to testify to their specific training and experience when the trial court, in their discretion as gatekeeper, decides the reasoning behind the opinion is from a process familiar to everyday life. Therefore, the Petitioner is attempting to create an issue that is not apparent from the record. “[E]xpert testimony is only essential where the topic is not a matter within the common knowledge and experience of most lay persons.” Advisory Committee’s Notes, Rule 701, SCRE (2021); *See, e.g., Spartanburg Regional Med. Center v. Balsa*, 308 S.C. 322, 325, 417 S.E.2d 648, 650 (Ct. App. 1992) (finding the process of how to treat severe burns and how much it costs is a matter outside the common knowledge and experience of most lay persons); *Armstrong v. Union Carbide*, 308 S.C. 235, 238, 417 S.E.2d 597, 599 (Ct. App. 1992) (finding the medical effect of inhalation of ethylene glycol is not a matter within the common knowledge of most individuals).

“[T]he distinction between lay and expert witness testimony is that lay testimony ‘results from a process of reasoning familiar in everyday life,’ while expert testimony ‘results from a process of reasoning **which can be mastered only by specialists in the field.**’” *United States v. Yanez Sosa*, 513 F.3d 194, 200 (5th Cir. 2008). “As explained by the Second Circuit, ‘**a lay opinion must be the product of reasoning processes familiar to the average person in everyday life.**’” *Id.* (quoting *United States v. Garcia*, 413 F.3d 201, 215 (2d Cir. 2005)). A lay opinion must be based on personal perception, must be one that a normal person would form from those perceptions, and must be helpful to the jury. *United States v. Riddle*, 103 F.3d 423, 428 (5th Cir. 1997); *United States v. Cuti*, 720 F.3d 453, 460 (2d Cir. 2013) (lay opinion testimony was proper, because the “witnesses testified based only on their experiences with matters pertinent to this case, and their reasoning was evident to the jury”).

Here, the simple process behind how to fire a revolver is not a process that can only be mastered by firearms specialists. Detective Arflin testified that if the revolver is a single action, one must cock it before pulling the trigger. That is a one-two step operation. Detective Arflin then testified if the revolver is a double action, one must pull the trigger long and hard (with effort) in order to fire it. That one-step operation simply requires a little muscle. That is a reasoning process familiar to an average person in everyday life. The evidence needed to make that conclusion is not scientific, “depending upon the ‘degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom.’” *State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979). How to fire a revolver is certainly not a topic that would require, *e.g.*, publications and peer review of the technique or the explanation of quality control procedures used to ensure reliability. *See State v. White*, 372 S.C. 364, 376, 642 S.C. S.E.2d 607, 613 (Ct. App. 2007).

The evidence needed to figure out how a revolver fires also does not depend on the reliability of any facts or data, as the process of how to fire a revolver is plainly discernable to the average person. *See State v. Mealor*, 425 S.C. 625, 647, 825 S.E.2d 53, 65 (Ct. App. 2019). It is not a matter “beyond the scope of the jury’s good judgment and common knowledge.” *State v. Henry*, 329 S.C. 266, 273, 495 S.E.2d 463, 466 (Ct. App. 1997); *White*, 372 S.C. at 377, 642 S.E.2d at 613. **In fact, “Experts may *not* testify as to matters of common knowledge or experience . . . .”** *McBeth v. TNS Mills, Inc.*, 319 S.C. 388, 392, 458 S.E.2d 52, 54 (Ct. App. 1995) (cleaned up). “[S]o long as the jury, by virtue of common experience, is capable of resolving a factual issue, it will *not* be prevented from doing so because of the absence of expert testimony.” *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052, 1055 (4th Cir. 1986).

The Court of Appeals affirmed the trial court on this issue and agreed that the detective's limited testimony was properly classified under Rule 701, SCRE. "Here, the testimony is nothing more than the most rudimentary explanation of how someone discharges a revolver. Detective Arflin's limited testimony about single and double action revolvers was admissible as proper lay testimony." *State v. Gibbs*, 431 S.C. 313, 322, 847 S.E.2d 495, 499 (Ct. App. 2020). "A common distinction between expert witnesses and lay witnesses is that most lay witnesses do not state 'opinions.' Even so, the evidentiary rules allow a lay witness to offer an opinion if certain criteria are met." *Id.* at 321, 847 S.E.2d at 499. "The testimony at issue here concerns the basic function of certain firearms . . . . [t]he key feature of lay testimony is the witness's personal knowledge, not whether the subject of the testimony is beyond the jury's ordinary experience." *Id.* "The detective directly stated this testimony was based on his own knowledge . . . . *We note Detective Arflin never offered anything resembling an opinion as to who may have pulled the revolver's trigger or what caused the revolver to fire.* For that reason, this case differs from cases in which emergency responders made statements that went beyond their direct observations." *Id.* at 322, 847 S.E.2d at 499.<sup>2</sup> (emphasis added). "[W]e find no abuse of discretion in allowing the officer to testify based on his experience with revolvers." *Id.* at 316, 847 S.E.2d at 496.

The Petitioner argues the key to properly classifying testimony under Rule 701 or under Rule 702 is the *subject matter* to which the witness will testify. (Petition at 13-15). Respondent agrees. However, Petitioner automatically assumes that *any* testimony regarding how a firearm

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<sup>2</sup> The Court of Appeals cited *Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 407, 410, 764 S.E.2d 249, 251-252 (Ct. App. 2014) (reversing and remanding for a new trial after a volunteer fire chief speculated that a fire was unintentional (along with the area of origin, cause of ignition, equipment involved in ignition, etc.) without being first qualified as an expert) and *State v. Kelly*, 285 S.C. 373, 374-375, 329 S.E.2d 442, 443 (1985) (reversing and remanding for a new trial after an officer improperly speculated and gave his opinion on the cause of the accident, not his direct observations alone, without being first qualified as an expert.)

functions should automatically be classified as “technical or specialized” because anything to do with firearms evidently requires special knowledge and expertise to understand, and that the Court of Appeals erred in failing to recognize this. Petitioner then further argues the State, therefore, had the burden of showing Detective Arflin did in fact possess that necessary knowledge, skill, experience, training, or education for him to be deemed qualified to testify as an expert. (Petition at 19). This is simply not true under the law. The State did not offer the detective as an expert, but as a layperson. Therefore, the State placed no burden of elaboration upon itself. The trial court, as gatekeeper, had the duty to assess not only the subject matter, but also the level of complication into which the witness would delve into the subject matter, when making its Rule 701 or 702 classification. The trial court did so in this case.

**The Court:** I’m going to allow – I’m going to allow him to testify to this. We’ll just see how far it goes. I don’t know if we’re going much further with this. **Ms. D. White:** Your Honor: I’m not aware of any officers that are trained on revolvers. There are semi-automatic weapons and rifles. **The Court:** He says he understands so I’m going to allow him to testify to it. If we go much further, then we’ll revisit your objection.

(App. 366).

#### *Examples of Proper Lay Testimony in South Carolina*

What is considered proper lay testimony in this state?

- This Court found that a personal injury plaintiff (testifying as a layperson) properly testified to, and legally established, the extent of his own injuries after an accident even though the physician’s testimony was incompetent. *Gentry v. Watkins-Carolina Trucking Co.*, 249 S.C. 316, 154 S.E.2d 112 (1967).
- This Court found a forensic interviewer could, and should, testify pursuant to Rule 701 regarding the established method utilized to build rapport with a child victim, as the interviewer was only testifying to her personal observations and experiences. *State v. Douglas*, 380 S.C. 499, 503-503, 671 S.E.2d 606, 608 (2009).

- The Court of Appeals found that a SLED special agent in charge of enforcing video gambling properly testified under Rule 701 that, in his experience and according to his personal knowledge and observations, it was common for illegal gambling operations to unplug the machines before agents arrived. *South Carolina Dept. of Rev. v. Meenaxi, Inc.*, 417 S.C. 639, 657-658, 790 S.E.2d 792, 801 (Ct. App. 2016).
- The Court of Appeals found a lay witness could offer his opinion under Rule 701 as to what caused a machine to malfunction because he was a daily operator of the machine and had the necessary knowledge and experience to explain how the machine worked to the jury. *Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 468-69, 494 S.E.2d 835, 845 (Ct. App. 1997).

Detective Arflin's testimony was properly classified under Rule 701, SCRE. He did not go into why he thought that specific revolver went off or offer an opinion as to whom he thought pulled the trigger. *See State v. Kelly*, 285 S.C. at 374-375, 329 S.E.2d at 443 (a lay witness police officer may not testify to his opinion of what caused an accident). He also did not attempt to rely on the perceptions of the Petitioner (who testified that the weapon was a "piece of junk") or other eyewitnesses regarding the condition of the revolver and *then* offer an opinion about whether he thought a "piece of junk" revolver could accidentally go off (compared to a new revolver, *e.g.*). *See State v. Westmoreland*, 421 S.C. 410, 420, 807 S.E.2d 701, 706-707 (Ct. App. 2017) (coroner improperly gave a lay opinion that was "based upon review of the perceptions of others"). The record clearly shows that Detective Arflin offered an opinion that was based on his own personal knowledge and experiences with revolvers. The record also clearly shows the trial court was aware of the limits of how far his testimony could go without crossing over into testimony properly classified under Rule 702, SCRE. This Court should affirm the Court of Appeals and find the trial court properly admitted the testimony under Rule 701, SCRE.

**II. The Court of Appeals appropriately found no abuse of discretion by the trial court when it denied the Petitioner's motion for a mistrial as the solicitor's closing argument that "guns do not accidentally go off" and the accompanying demonstration were permissible advocacy fully supported by properly admitted evidence in the record.**

Disputing the defense's theory that the driver of the victim's car, Hunter Raby, pulled the trigger, the State argued in a brief demonstration at closing that "if this was a single action, this is what would have had to have happened for this gun to go off because guns do not accidentally go off. Guns go off when the trigger is pulled . . . ." (App. 454-456). Petitioner objected, arguing the facts in evidence did not support the State's statement concerning accident. (App. 455). The trial court allowed the statement "in a limited fashion." (App. 455). Petitioner re-raised this objection in its post-trial motions, qualifying it by stating, "the demonstration in the closing argument [was not based upon] reliable facts in the evidence." (App. 521). The trial court ruled, "the demonstration, which lasted all [of] . . . three to five seconds, did not go beyond the scope of what would just be argument by counsel." (App. 522). The trial court noted it "had previously instructed the jurors that what the attorneys said was not evidence in the case." (App. 521).

The Petitioner argues the trial court erred in finding the State remained within the bounds of permissible advocacy by making a claim that was unsupported by evidence the record. However, the Court of Appeals found "the comments here qualify as permissible advocacy based on the evidence." (App. 603; *State v. Gibbs*, 431 S.C. at 322, 847 S.E.2d at 499). "The statement 'guns do not accidentally go off' is certainly imprecise when viewed through the clear lens of hindsight because a firearm's trigger can obviously be depressed by accident. However, a reasonable juror would have no issue understanding the State's point." (App. 604; *Gibbs*, 431 S.C. at 323, 847 S.E.2d at 500). The Court of Appeals described "the thrust of this argument" and its connection to the record: First, if the revolver had been a double action, the State believed

it was unlikely Raby wrapped his finger around the trigger and applied enough force to fire the weapon when pushing the gun away from his face. Second, if the revolver was instead a single action, the only way it could have fired was if the Petitioner cocked the pistol first; demonstrating malice. One other thing bears mentioning. The Petitioner's story was that he held the gun in his non-dominant hand, held it by the grip alone, and his finger was not on the trigger. One theory of his defense was that his finger had not pulled the trigger and that Raby had inadvertently done so. (App. 603-604). The Court of Appeals mentioned this defense theory of the case "to say that it was equally fair for the State to point out that someone had to pull the trigger for the gun to fire, and maybe even cock the gun first, and it was unlikely for Raby to have done either." (App. 604; *Gibbs*, 431 S.ac. at 323, 847 S.E.2d at 500). Respondent agrees.

The Court of Appeal reached the correct conclusion. "Solicitors are bound to rules of fairness in their closing arguments." *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007). "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony," though the closing's "content should stay with the record and reasonable inferences to it." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). This includes demonstrations supported by the evidence at trial. *State v. Brisbon*, 323 S.C. 324, 332, 474 S.E.2d 433, 438 (1996) (solicitor conducted permissible demonstration with an axe during closing). The State's closing also "must not appeal to the personal biases of the jurors," nor should it "be calculated to arouse the jurors' passions or prejudices." *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996).

But even a prosecutor's closing argument which appears "aggressive" on the face of the record before the appellate court should be upheld when its assertions lie in direct response to the defense presented at trial. *State v. Navy*, 370 S.C. 398, 414, 635 S.E.2d 549, 557 (Ct. App. 2006),

*rev'd on other grnds*, 386 S.C. 294, 688 S.E.2d 838 (2010). Furthermore, once the defendant opens the door to some evidence or theory, "the solicitor's invited response is appropriate so long as it does not unfairly prejudice the defendant." *State v. Collier*, 421 S.C. 426, 436, 807 S.E.2d 206, 212 (Ct. App. 2017) (quoting *Ellenburg v. State*, 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006)); *Vaughn v. State*, 362 S.C. 163, 169-170, 607 S.E.2d 72, 75 (2004) ("Once a defendant opens the door, the relevant question in determining if a defendant's rights were violated is whether the solicitor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, (1974))). However, if an argument is determined inappropriate, it should not be found to deny the defendant due process so long as "it was responsive to statements or arguments made by the defense." *Tappeiner v. State*, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016).

Here, the solicitor's closing argument that "guns do not accidentally go off" was derived directly from properly admitted evidence. (App. 438, App. 462). The evidence at trial indicated that the gun discharged during the exchanges testified to in conflicting manners by Hunter Raby and Petitioner, and was corroborated by eyewitnesses at the four-way stop. (App. 96, App. 98; App. 166; App. 183; App. 306-307; App. 420-421). Petitioner maintained that the gun involuntarily discharged as he held it by the grip and offered it to the driver of the Ford Explorer as payment for a debt. (App. 420-421; App. 450; App. 474-478). Given this testimony, the State's closing permissibly focused on the premise that Petitioner's exit from his vehicle and his repetitious pushing of the barrel of the gun into the driver's side window of the Explorer, along with his actions following the discharge of the gun, indicated an intent to kill, an absence of

accident, and a series of unlawful acts. (App. 439-442; App. 446-462).<sup>3</sup> This was particularly clear from the State's rebuttal closing. (App. 499). It is reasonable to infer, and thus permissible to argue, that the discharge of the gun included the pulling of the trigger. *Humphries v. State*, 351 S.C. at 373, 570 S.E.2d at 166.

The record additionally reflects that the Petitioner opened the door to the testimony regarding how the gun was fired. Petitioner's trial counsel initially examined a State's witness, the EMT, concerning his experience with firearms, inviting the response that he was recreationally trained in firearms and could shoot from both his dominant and non-dominant hand. (App. 174; *see also* App. 178). Petitioner testified he held the gun by the grip in his non-dominant hand. (App. 419-420). These testimonies collectively made the manner in which the gun could have fired ripe for the State's closing, permitting the demonstration at issue. *Vaughn v. State*, 362 S.C. at 169, 607 S.E.2d at 75. Moreover, the argument pertained directly to the properly admitted testimony of Detective Arflin, who had earlier offered limited testimony about revolvers. (App. 365-366). The use of a revolver during the shooting was not in dispute at trial. Even though Petitioner identified the gun merely as a "piece of junk," other witnesses presented unchallenged testimony the gun was a silver revolver. (App. 62; App. 96; App. 165; App. 435). To this end, the prosecution's closing contained no improper speculation nor extrapolation from

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<sup>3</sup> “. . . Even if you believe his story that he was trying to give him payment for a gun, you do not pay somebody with a gun by pointing it in their face. So the law of accident does not apply.” (App. 440). “. . . Jaron Gibbs had no just cause to get out of that car and put a gun in Hunter Raby's face. He certainly did it with the intent of inflicting injury.” (App. 442). “. . . The defendant didn't say I tried to put it in his hand. The defendant said I pushed it in his face. . . .” (App. 447). “. . . They are yelling at each other. He says he's holding it by the grip. Again, he pushed it in Hunter's face. . . . twice . . . That is the intent to kill. That's not an accident. That's not a misunderstanding. This is the intent to kill. The gun goes off. There's been absolutely no testimony that there was a struggle [or] that anybody else's finger was on that trigger. . . .” (App. 450-451). “. . . And he drives off. And he goes to Atlanta to hang out with a stripper. Even after he received a phone call, he did not deny this, that, I think you shot someone.” (App. 452).

facts in evidence. *See State v. Copeland*, 321 S.C. at 325, 468 S.E.2d at 625. In the context of the entire record, the State's closing argument was wholly appropriate within the confines of the evidence presented and inferences allowable therefrom. *Donnelly v. DeChristoforo*, 416 U.S. at 645 (any excerpt of the State's closing exists as "one moment in an extended trial" and the court must conduct an "examination of the entire proceedings" in context). The prosecutor's statement that "guns do not accidentally go off" and the following demonstration directly addressed the alternative theories presented at trial, was supported by or reasonably inferred from the evidence, and was therefore not prejudicially presented in closing argument. This Court should affirm the Court of Appeals and find the solicitor's advocacy permissible.

**III. The Petitioner's cumulative error argument is not preserved and need not apply.**

"The cumulative error doctrine provides relief to a party when a combination of errors, insignificant by themselves, has the effect of preventing the party from receiving a fair trial, and the cumulative effect of the errors affects the outcome of the trial." *State v. Beekman*, 405 S.C. 11 225, 237, 746 S.E.2d 483, 490 (Ct. App. 2013). However, the issue of cumulative error is not preserved for review when the doctrine is "never specifically raised" before the trial court, or when counsel argues "for a new trial solely on the basis that the evidence did not substantiate the verdict." *Id.* at 236, 746 S.E.2d at 489. "[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). "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented . . . ." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003).

Before the Court of Appeals, Petitioner for the first time posited that the cumulative effect of the trial court's errors deprived him of a fair trial. He argues that the detective's

testimony was erroneously admitted, and the State's closing argument and demonstration were also error, but that even if the Court found that neither were error in and of themselves, combined together, the level of error would rise to a level that would justify granting Petitioner relief. The Court of Appeals did not address this issue as it found no error by the trial court in regards to the other issues raised on appeal. (App. 597-598). Additionally, Petitioner did not argue for the invocation of the cumulative error doctrine before the trial court. *Beekman*, 405 S.C. at 236, 746 S.E.2d at 489. Petitioner's post-trial motion for a new trial lacked the specificity required to preserve any objection regarding the cumulative error doctrine. (App. 520-521). The trial court addressed the errors cited by Petitioner in its post-trial motion as individual bases raised in support of a motion for new trial, and did not address cumulative error. (App. 521-522). Petitioner did not request a finding as to any alleged accumulation of prejudice. (App. 522). Thus, this issue was not ruled upon by the trial court as required by our issue preservation rules. *See Beekman*, 405 S.C. at 236-237, 746 S.E.2d at 489 (citing *State v. Price*, 368 S.C. 494, 500, 629 S.E.2d 363, 366 (2006) (recognizing axiomatic rule that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review)).

Petitioner further appears to have asked this Court to ignore longstanding preservation and waiver rules and address this issue as plain error. South Carolina has rejected the plain error doctrine and this Court should not entertain it under the guise of the cumulative error doctrine. *See, e.g., State v. Torrence*, 305 S.C. 45, 66, 406 S.E.2d 315, 327 (1991) (*eliminating in favorem vitae* review in death penalty cases and holding: "A contemporaneous objection requirement enables trial judges to make reasoned decisions by appropriately developing issues by way of

argument, both for or against any particular legal proposition. This, in turn, allows potential errors to be prevented or cured.").

This Court recently declined to apply the cumulative error doctrine in *State v. Durant*, 430 S.C. 98, 111 n.6 844 S.E.2d 49, 55 (2020) because the trial court did not commit any reversible errors *to* combine. Similarly, here, the trial court did not commit any reversible errors for this Court to combine. However, even if this Court finds that the trial court committed some type of reversible error, Petitioner has not shown *more* than error in a manner that would qualify him for reversal pursuant to *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (“Respondent must demonstrate more than error in order to qualify for reversal (pursuant to the cumulative error doctrine). Instead, the errors must adversely affect his right to a fair trial.”). Petitioner is not entitled to a perfect trial, but a fair one, and that is what he received. *Johnson*, 334 S.C. at 93, 512 S.E.2d at 803; *State v. Mitchell*, 330 S.C. 189, 199-200, 498 S.E.2d 642, 647-648 (1998); *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986).

This Court also found in *Durant* (as the Court should so find here) that the Petitioner never argued the cumulative error doctrine to the trial court, and, accordingly, found the error was not preserved for appellate review. *Durant*, 430 S.C. at 111 n.6, 844 S.E.2d at 803. If an argument is not raised and ruled on below, it may not be raised or advanced on appeal in the interests of fundamental fairness. *State v. Frelburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005); *State v. Brannon*, 388 S.C. 498, 502, 697 S.E.2d 593, 596 (2010). For that reason, if this Court would be so inclined, Respondent urges this Court to establish (as it has hinted it may in recent past) that the cumulative error doctrine will not be recognized in South Carolina for the first time on appeal.

Respondent further submits that, for the reasons discussed herein, the Court of Appeals properly affirmed Petitioner's convictions such that the cumulative error doctrine, were it preserved, need not apply. "An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine; rather, he must show the errors adversely affected his right to a fair trial to qualify for reversal on this ground." *Beekman*, 405 S.C. at 237, 746 S.E.2d at 490; *State v. Daise*, 421 S.C. 442, 466-467, 807 S.E.2d 710, 722-723 (Ct. App. 2017) ("any errors by the circuit court were not prejudicial and did not combine to affect Daise's right to a fair trial"). When a court finds no error by counsel on any claim raised, there can be no sum of either error or prejudice upon which this Court may grant relief. *See United States v. Basham*, 561 F.3d 302, 330 (4th Cir. 2009) ("When 'none of [the] individual rulings work [] any cognizable harm, . . . [i]t necessarily follows that the cumulative error doctrine finds no foothold.'" (quoting *United States v. Sampson*, 486 F.3d 13, 51 (1st Cir. 2007))). Here, the trial court committed no error that this Court may combine for review. However, even if this Court finds the trial court committed an error, Petitioner did not properly preserve his cumulative error claim in a manner that would allow this Court to grant him relief.

### CONCLUSION

For the foregoing reasons, the State requests that this Court affirm the Court of Appeals.

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