

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

S.C. SUPREME COURT

Upon Certiorari to the South Carolina Court of Appeals
Appellate Case No. 2020-001399

The State,

Respondent,

v.

Jaron Lamont Gibbs,

Petitioner.

REPLY BRIEF OF PETITIONER

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QUESTIONS 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?

ARGUMENT IN REPLY

Petitioner has fully addressed the three questions set out above in the argument sections of his opening brief. He relies on those arguments, without repeating them here. This reply is submitted to address certain assertions made in the Brief of Respondent filed by the state and to counter some of the state's arguments.

- I. THE COURT OF APPEALS ERRED 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.

Petitioner challenges the admission of testimony of the lead investigator, Michael Arflin, concerning how certain revolvers are fired, because he was not properly qualified to testify as an expert under Rule 702 of the South Carolina Rules of Evidence and applicable case law. The Court of Appeals found the testimony was admissible under Rules 602 and 701 of the evidence rules.

In its summary of what transpired at trial on this issue, the state's brief takes liberties with respect to Arflin's actual testimony and the findings of the trial court. In the prosecutor's questioning of Arflin about training and familiarity with firearms, his

entire testimony concerning familiarity with revolvers was his answer to a single question:

Q Are you familiar with revolvers?

A Yes, ma'am.

App. 347, lines 8-16. The state claims Arflin “did not elaborate on *how* he acquired his personal knowledge of revolvers because the trial court found elaboration was unnecessary.” *See* Brief of Respondent, p. 7 (emphasis in original). No such finding was made by the trial court.

The state further claims Arflin’s “personal knowledge of firearms was clear from the length and extent of his prior experiences.” *See* Brief of Respondent, p. 7. On the contrary, Arflin stated he had a break in his law enforcement career “[f]or military service,” without further explanation or amplification of the nature or duration of that service. App. p. 339, line 25 – p. 340, line 2. Arflin’s testimony about his 16 years of law enforcement experience was in the context of testimony about his ability to recognize if a person is intoxicated. App. p. 343, lines 8-22. In these passages of testimony referenced by the state’s brief, Arflin did not describe any training or professional or personal experience with single-action or double-action revolvers, or any revolvers whatsoever.

Arflin’s testimony about familiarity with revolvers was the answer, “Yes, ma’am,” quoted above, and repeated when the state sought to have him testify about how certain revolvers are fired. App. p. 364, lines 4-6. There, the prosecutor further asked about single action and double action, as follows:

Q 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.

App. p. 364, lines 7-13. As with the earlier passage in which he merely stated he was familiar with revolvers, Arflin never explained the basis for or extent of his familiarity with single-action or double-action revolvers. He did not testify he had received any training with respect to revolvers, and the defense pointed out officers are not trained on revolvers. App. p. 365, lines 2-3. He did not give any details of his experience with revolvers for the court to have an understanding of the basis of his familiarity with them or his purported knowledge of how they operate.

The state claims Arflin “stated he had personal knowledge of revolvers while under oath and the trial court found his affirmance sufficiently supported by the nature of his personal and professional history.” *See* Brief of Respondent, pp. 7-8 (footnote omitted). The trial court did not make such a finding. Instead, when the defense objected to testimony about how revolvers work, the trial court merely stated the following:

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.

....

He says he understands so I’m going to allow him to testify to it. . . .

App. p. 365, line 23 – p. 366, line 1; App. p. 366, lines 5-6.

The state asserts, “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.” *See* Brief of Respondent, p. 8. No such determination appears on the record of these trial proceedings. In fact, when the defense objected that the witness had not been qualified as an expert, the prosecutor argued the witness’s qualification, stating the prosecution had established he was familiar with revolvers through his training and experience as an officer. App. p. 364, lines 19-22. This argument addressed the issue of qualification of an expert, a Rule 702 issue, not his ability to render testimony as a lay witness under Rule 701. The state did not argue he was being offered as a lay witness, and the trial court did not premise its finding on Rule 701.

In the double-spaced full paragraph on page 9 of its brief (beneath the passage quoted from the trial record), the state asserts various “determinations” made by the trial court in its decision to admit this evidence. *See* Brief of Respondent, p. 9 (“The trial court determined The trial court also determined Finally, the trial court determined”). While the state may be seeking to have this Court infer that the trial court made these asserted “determinations,” there is simply nothing in the actual comments made by the court when ruling on the objection to establish that it, in fact, made such “determinations.” *See* App. p. 365, line 23 – p. 366, line 1; App. p. 366, lines 5-6 (quoted *supra* at 3).

Petitioner contends Rules 602 and 701 of the South Carolina Rules of Evidence and the authorities cited in the state’s brief with respect to lay opinion testimony are not controlling of this issue, because the issue is one of admissibility of expert testimony

under Rule 702. In its brief, the state contends the subject of the functioning of single-action and double-action revolvers is a matter of common knowledge or experience. Even the Court of Appeals acknowledged this not to be the case, noting that the subject matter of the testimony – the basic function of certain firearms – may have been foreign to members of the jury. App. p. 603. This acknowledgement is important, because it goes to the heart of the distinction between testimony under Rule 701 and 702 – whether the matter is the subject of “special” or “specialized” knowledge.

Rule 701 is inapplicable to matters that “require special knowledge, skill, experience, or training.” See Rule 701, SCRE; *Hamrick v. State*, 426 S.C. 638, 646-49, 828 S.E.2d 596, 600-01 (2019). Rule 702 applies where “scientific, technical, or other specialized knowledge will assist the trier of fact” and the witness is “qualified as an expert by knowledge, skill, experience, training, or education.” See Rule 702, SCRE. How firearms function is a matter of special or specialized knowledge, for purposes of these rules, and the question before the Court falls under Rule 702, not Rule 701. As argued in the opening brief, the precedents of this Court dictate a finding that this evidence was inadmissible under Rule 702, because the prosecution failed to adequately demonstrate the qualifications of Arflin to render testimony about the functioning of revolvers, and the trial court failed to exercise its gatekeeping role in admitting this evidence without making findings on the threshold foundational requirements for expert testimony. See *Hamrick*, 426 S.C. at 649, 828 S.E.2d at 601-02; *Graves v. CAS Medical Systems, Inc.*, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012); *State v. Tapp*, 398 S.C. 376, 388, 728 S.E.2d 468, 474-75 (2012); *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009); *State v. Rose*, 423 S.C. 382, 392, 814 S.E.2d 529, 534 (Ct.App. 2018); *Teseniar*

v. Professional Plastering & Stucco, Inc., 407 S.C. 83, 90-91, 754 S.E.2d 267, 270-71 (Ct.App. 2014).

The state contends the testimony of Arflin was not “technical or specialized.” However, it is disingenuous to argue that an explanation of what is necessary to discharge a firearm is not technical or specialized in nature. Arflin described the mechanics of cocking and pulling the trigger to fire one type of revolver and the kind of trigger action required to fire another type of revolver. His assertion that pulling the trigger was necessary to discharge a revolver supported an inference that such a firearm could not discharge as the result of being swatted by Hunter Raby as the gun was pushed back and forth between Raby and Petitioner, which multiple witnesses testified occurred in this case. This testimony was clearly within the purview of expert testimony under Rule 702, not lay testimony under Rule 701, and it was improper to admit it without the requisite foundation as to Arflin’s technical and specialized knowledge about how such firearms operate.

The state acknowledges the trial court had a duty as gatekeeper to assess both the subject matter and the level of complication, and the state contends the trial court fulfilled this duty with its ruling quoted above (*supra* at 3), emphasizing the court’s statement: “He says he understands so I’m going to allow him to testify to it.” *See* Brief of Respondent, p. 13; App. p. 366, lines 5-6. On the contrary, this ruling of the trial court falls far short of the gatekeeping function outlined in *White* and its progeny, cited and discussed in Petitioner’s opening brief.

Petitioner’s opening brief sets out the prejudice that resulted from admission of Arflin’s challenged testimony, and the state does not address or challenge Petitioner’s

prejudice argument. On the basis of the evidence presented at trial, detailed in the opening brief at pages 2-11, and for the reasons outlined in the argument of this issue in that brief at pages 20-22, the admission of this testimony was extremely prejudicial, and the error in its admission was not harmless. This Court should reverse and remand the case for a new trial.

II. THE COURT OF APPEALS ERRED 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 DURING THE TRIAL.

Petitioner contends the trial court erred in allowing a demonstration by the solicitor and the accompanying argument that “guns do not accidentally go off,” in contravention of the requirement that closing argument must be confined to the evidence presented at trial and the reasonable inferences that may be drawn therefrom. *See Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010); *Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004); *State v. Huggins*, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997); *State v. Copeland*, 321 S.C. 318, 326, 468 S.E.2d 620, 625 (1996); *State v. Cannon*, 229 S.C. 614, 618, 93 S.E.2d 889, 891 (1956); *see also Clark v. Cantrell*, 339 S.C. 369, 384, 529 S.E.2d 528, 536 (2000). The state’s argument that guns do not accidentally go off and its related demonstration were not supported by the evidence.

The state contends the demonstration and argument pertained directly to the testimony of Arflin, and it emphasizes that the Court of Appeals found it was fair for the state to point out that someone had to pull the trigger and maybe even cock the gun first. If Arflin’s testimony was erroneously admitted, as Petitioner contends in argument I above, there is no evidentiary basis for such argument and the related demonstration by the state.

However, if the testimony of Arflin was properly admitted, what the prosecutor was arguing, which excluded the possibility of discharge by accident or malfunction, is unsupported by the evidence. There was no testimony whatsoever about the impossibility of accidental discharge or malfunction. The absence of such testimony was particularly problematic because the only evidence about this particular firearm was that it was old and a “piece of junk.” App. p. 435. Even the Court of Appeals acknowledged the possibility of accidental discharge, as the state points out in its brief. *See* Brief of Respondent, p. 15; App. p. 604. Contrary to the Court of Appeals holding, the challenged argument was simply not within the bounds of permissible advocacy because it was outside the scope of the evidentiary record.

As it did in its brief in the Court of Appeals, the state contends Petitioner opened the door to the testimony about how guns are fired and to the demonstration conducted by the prosecutor. The questions and testimony on which the state relies – about a person shooting a gun with his dominant hand or non-dominant hand – have nothing to do with the mechanics of operating a revolver and what action is required to make it fire. That line of questioning could not possibly be construed to open the door to Arflin’s testimony or the solicitor’s demonstration, neither of which addressed what hand is used to shoot a firearm.

The state summarily asserts the argument, including the demonstration, was “not prejudicially presented in closing argument,” without directly addressing Petitioner’s prejudice argument. *See* Brief of Respondent, p. 19. The unwarranted assertion that “guns do not accidentally go off” went to the very issue before the jury for decision – intent – and negated the theory of the case supported by the evidence presented by the

defense – that the gun simply went off in the back-and-forth between Petitioner and Raby, either through being struck by Raby or through malfunction or accident. The prosecutor’s argument, not premised on evidence in the record, is clearly prejudicial and likely affected the jury’s verdict. The Court should find reversible error on this issue.

III. THE CUMULATIVE EFFECT OF THE TRIAL COURT’S ERRORS, IN COMBINATION, WAS SO PREJUDICIAL THAT PETITIONER WAS DENIED A FAIR TRIAL.

Petitioner raised a claim of cumulative prejudice. The state contends the issue is not preserved, citing traditional rules of error preservation. However, the state fails to address Petitioner’s argument that a claim of cumulative prejudice is uniquely an appellate concept, different in nature from other claims of error with respect to rulings made during the course of a trial. Apart from a footnote in *State v. Durant*, 430 S.C. 98, 110 n.6, 844 S.E.2d 49, 55 n.6 (2020), this Court has not addressed preservation in the context of a claim of cumulative prejudice, and the authority cited by the Court in *Durant* did not announce a rule of error preservation in the context of a claim of cumulative prejudice. Petitioner posits that the unique nature of the cumulative error doctrine does not comport or align with imposing a threshold requirement of raising cumulative prejudice in the lower court, because the nature of the lower court’s determinations of individual objections do not turn on weighing of prejudice (except in the context of Rule 403, SCRE, not applicable here), but instead turn on application of evidentiary rules and other legal doctrines. Petitioner is asking this Court to squarely address what is required to preserve a claim of cumulative error for appeal and to hold that, where each individual error claimed to contribute to the cumulative prejudice was properly preserved for review in its own right, the claim of cumulative prejudice is also preserved. If the Court so

holds, it should also find the cumulative effect of the two errors articulated in arguments I and II, if not individually so prejudicial as to require reversal, in combination deprived Petitioner of a fair trial. *See* U.S. Const. amends. V, XIV; S.C. Const. art. I, § 3; *State v. Blurton*, 352 S.C. 203, 573 S.E.2d 802 (2002), and 342 S.C. 500, 512-13, 537 S.E.2d 291, 297-98 (Ct.App. 2000) (reversed on other grounds); *State v. Freeman*, 319 S.C. 110, 123-24, 459 S.E.2d 867, 875 (Ct.App. 1995).

CONCLUSION

For the reasons set out above and in Petitioner's opening brief, this Court should reverse his convictions and remand for a new trial.

Respectfully submitted,



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