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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Kershaw County
Certiorari to the Court of Appeals
Honorable William A. McKinnon, Circuit Court Judge

Opinion No. 5878 (S.C. Ct. App. Filed December 8, 2021)
Lower Court Case No. 2015-GS-28-0795

THE STATE,

RESPONDENT,

V.

GREGG PICKRELL,

PETITIONER.

APPELLATE CASE NO. 2022-000211

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on January 26, 2022.

QUESTION PRESENTED

1.

Whether the Court of Appeals erred by affirming the trial court's rulings allowing law enforcement officials to testify that they did not believe petitioner's statements regarding how the shooting occurred since this was improper lay opinion testimony. Investigator Bailey opined he did not understand how petitioner could state that the decedent lunged at her when she shot him, where the decedent was shot in the back, since this was an improper lay opinion that went beyond the investigator's duties as a fact finder, where he was not an expert qualified to give opinion testimony?

2.

Whether the Court of Appeals erred by affirming the trial court's ruling allowing SLED agent Claycomb to testify she eliminated the shooting happening "within the bedroom" or "in the living room" since Claycomb was not an expert, and this impermissible lay opinion testimony was highly prejudicial, not harmless, since it was intended to convey to the jury that the shooting did not occur as petitioner told the police it occurred?

ARGUMENT

1.

The Court of Appeals erred by affirming the trial court's rulings allowing law enforcement officials to testify that they did not believe petitioner's statements regarding how the shooting occurred since this was improper lay opinion testimony. Investigator Bailey opined he did not understand how petitioner could state that the decedent lunged at her when she shot him, where the decedent was shot in the back, since this was an improper lay opinion that went beyond the investigator's duties as a fact finder, where he was not an expert qualified to give opinion testimony.

Procedural history

Petitioner was indicted by the Kershaw County Grand Jury for the offense of murder. R. 1304. Her case came on for trial on May 29, 2018, before the Honorable William A. McKinnon, and a jury. John Delgado and Amy Zmroczek represented petitioner. Assistant solicitors Curtis A. Pauling, III, April W. Sampson, and Jacqueline Li represented the state. R. 296.

On June 5, 2018, the jury found petitioner guilty. R. 855, ll. 17-20. Judge McKinnon sentenced petitioner to thirty-five years imprisonment. R. 864, ll. 2-7.

The Court of Appeals affirmed petitioner's convictions in State v. Gregg Pickrell, 435 S.C. 417, 867 S.E.2d 465 (filed December 8, 2021). App. 1-30. Petitioner sought rehearing in a petition filed on December 23, 2021. App. 31-43. Rehearing was denied by the Court of Appeals in its order dated January 26, 2022. App. 44.

This petition for a writ of certiorari follows.

Introduction

Petitioner Gregg Pickrell owned a horse farm with her mother in Camden. The decedent worked on the farm with petitioner, and he had been involved in a sexual relationship with petitioner. There would be strong evidence the decedent was a violent man, particularly when he was drinking and/or using drugs, and that petitioner was a battered woman.

Relevant Facts

At the conclusion of petitioner's trial, the judge charged the jury the law of murder, self-defense, and the defense of habitation. R. 837, l. 20 – 863, l. 18.

Prior to trial, there was a discussion about the proposed expert testimony of Arlene Andrews on the subject of domestic violence or battered women. The defense withdrew its request to present expert testimony on Intimate Partner Violence, and pursuant to S.C. Code § 17-23-170 which provides that evidence a person suffers from the battered spouse syndrome is admissible. Defense counsel reasoned that since petitioner and the decedent were not married or living together it appeared the "battered spouse syndrome" statute was inapplicable to this tumultuous relationship. R. 362, l. 5 – 363, l. 13.

The solicitor noted that her concern, even after the defense withdrew its request to introduce "battered spouse syndrome" evidence pursuant to the statute was with the defense nonetheless using Andrews to testify about domestic violence. R. 369, l. 2 – 371, l. 5. Assistant solicitor Sampson acknowledged having talked with Andrews about her proposed testimony before the trial. R. 370, l. 7 – 371, l. 10.

The defense also alerted the judge that there would be evidence that the decedent had been watching pornography and that "there are 28,000 pictures of porn. I counted them [on his phone]. And certainly that goes to what was driving his anger" about his difficulty performing sexually that night as he apparently acted out the pornographic sexual violence with petitioner prior to the shooting. R. 376, l. 3 – 381, l. 13.

Defense counsel Zmroczek told the judge the relevance of this was "[t]he reason she has to act in self-defense is because of what he's doing to her. It's not just beating her, it's raping her. She calls it consensual sex, but it's consensual so she stops getting beaten. It's the coercion." R. 381, ll. 1-10.

Defense counsel finally noted that the pornography showed anal rape, violent sexual activities, people being tied up, and forcible sex acts that were the decedent's state of mind during the violent sex and other violence before petitioner shot him. R. 378, l. 4 – 382, l. 5.

The Trial

Chief Deputy Marvin Brown of the Kershaw County Sheriff's Department testified on September 11, 2014, he heard the dispatch about a shooting on petitioner's farm. R. 896, l. 2 – 899, l. 1. Petitioner was outside in the yard and her mother was sitting in the driver's seat of their automobile when Brown arrived. R. 901, ll. 7-24. Brown confirmed on cross-examination that petitioner's bedroom was a "very small, little bedroom." R. 910, l. 23 – 911, l. 12.

Petitioner had called 911 after she fired the single shot, and the 911 call was transferred by Sumter County to Kershaw County. Petitioner's farmhouse was apparently just on the county line between Kershaw and Sumter Counties. R. 912, l. 3 – 913, l. 7. The 911 tape, State's Exhibit 11, was played for the jury. That tape is on file with this Court to review. R. 920, l. 11 – 921, l. 7.

Petitioner was described by EMS EMT Leann Triber as being "notably upset," and "she refused transport to the hospital after the shooting." R. 960, ll. 14-20.

Coroner Johnny Fellers testified that the decedent was found "sitting on the floor propped up against a -- leaning up against a bed." He was face up when propped up against the bed and he had one bullet hole in him where he sat propped up in the bedroom. There was no assertion this placement was staged – this is how the decedent slid to the floor after being shot. R. 968, l. 2 – 969, l. 22.

Dr. Janice Ross testified that the decedent was five foot six, 180 pounds. He had a bullet wound to his back which was sixteen inches from the top of his head. R. 976, l. 2 – 977, l. 12. Dr. Ross said that as far as the position of the decedent when he was shot: *"It's difficult to put a position when you have two people who can turn and bend and whatever."* She said "one scenario" could be that the shooter could have been standing and the decedent could have been bent over. R. 979, l. 8 – 980, l. 25. (emphasis added).

However, Dr. Ross admitted there could be "several conceivable scenarios" as to how the entrance and exit wounds occurred. She could not rule out that the decedent was moving when he was shot. R. 994, l. 22 – 995, l. 13. All the pathologist could say for sure was that because there was no stippling that the decedent was shot from two feet away or more. R. 995, ll. 9-13. Dr. Ross also stated that the decedent had a blood alcohol reading of .168 and he had THC from marijuana use in his system. R. 993, l. 23 – 995, l. 13.

Rachell Abstance and Stephanie Owen testified about the decedent's cab ride to petitioner's farm on the night of September 10, 2014, and the ride he expected on the morning of September 11, 2014 when he was shot.[1] Rachell testified she dropped the decedent off at 10:38 p.m. at petitioner's mailbox, the decedent removed twenty-two dollars from an envelope in petitioner's mailbox, and he paid Rachell for the cab ride. R. 388, l. 10 – 393, l. 18.

Stephanie Owen testified about her sexual relationship with the decedent. She admitted the decedent cursed a lot when he was drinking. She admitted to defense counsel that "no matter how bad" the decedent treated her she would always go back to him. R. 427, ll. 23-24.

Owen took the verbal abuse, and she would text the decedent to be sure "he was at home safe." She had warned the decedent about police being in his neighborhood, but she denied she did crack cocaine with him. Owen admitted the decedent sent her a text the night before the fatal

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[1] These two witnesses also testified during the immunity from prosecution Castle Doctrine hearing which is not an issue before this Court.

shooting complaining about her expressing her attraction to him, and about her constantly contacting him: "I'm tired of having to tell you this shit now. I still ask you to stop and you don't listen. I'm going to tell you again, exclamation point. You tried that bullshit the other day and I told you to stop. You pissing me the fuck off." R. 422, l. 8 – 427, l. 24.

SLED investigator Dawn Claycomb also testified that after the fatal shooting the decedent's body was located in the back bedroom where there were three footlockers. The decedent was "in a sitting position leaned against the bed and a chair that was located next to the bed." "A cartridge case that we located in a laundry basket that was on top of this trunk here right when you walk into the room." An earring similar to the one found in the victim's ear was located in this same area. R. 443, l. 4 – 449, l. 25.

As seen in issue two infra, Claycomb was also called upon by the solicitor to give an impermissible lay opinion essentially stating she did not believe petitioner's version of how the shooting transpired in self-defense, and that she "eliminated" shooting happening in the living room where the gun was located, and also in the bedroom where petitioner said the decedent was beating her. R. 452, l. 24 – 454, l. 8.

Opinion testimony by Investigator Bailey

During the testimony of Investigator Richard Bailey, he noted he had information that the decedent was found "in a seated position facing towards the door." Bailey said he had limited information that there had been an argument, that petitioner shot the decedent, and she called 911. R. 564, l. 17 – 565, l. 16.

On direct-examination by the solicitor, Bailey was asked what petitioner told him about being assaulted when she pulled the trigger. Bailey said petitioner had told him the decedent was coming after her and he said it bothered him because the point of impact "of the bullet" did not match up. The following then occurred between Bailey and the solicitor:

Q: What do you mean it didn't match up?

> A: *I found it hard to believe if he was coming at her --*
>
> MR. DELGADO: Objection, Your Honor. Asking for a conclusion.
>
> MS. SAMPSON: I'm asking for his conclusion, not an evidentiary –
>
> THE COURT: Tell me what your objection is.
>
> MR. DELGADO: I'm sorry?
> THE COURT: Your objection is?
>
> MR. DELGADO: He was about ready to give a conclusion about based on what he has heard as to why she may have shot him. We can talk about facts, but now why he's being able to shoot – or why she, I'm sorry, is being able to shoot. It is a conclusion on his part.
>
> THE COURT: Ask the question one more time.
>
> MS. SAMPSON: I asked why -- he stated that there was some concern or he kept asking about the trigger. And I asked him why was there a difference -- I think my question, maybe Debbie can tell me. My question was something to the effect of, Why did you -- was that a concern that there was -- what she said about going at him and he was explaining that, why that was a concern to him. That was it.
>
> THE COURT: I'm going to allow the question.
>
> BY MS. SAMPSON:
>
> Q: You can go ahead.
>
> A: I'm sorry. During the interview, I wanted to get as much detail as what happened that led up to the event of actually pulling the trigger. *Her response was that he pulled up and he kind of lunged at her. She never said, He came at me, but she motioned that he kind of lunged towards her.* <u>Prior to the interview, I had knowledge that the deceased had been -- actually, the point of impact of the bullet was in the back.</u> *I had trouble understanding how if he was lunging forward how he was shot in the back.*

R. 577, l. 9 – 578, l. 23 (emphasis added).

Court of Appeals

The Court of Appeals "questioned" whether this issue was preserved for appellate review, writing: "Defense counsel never raised any argument concerning evidentiary Rule 701, the propriety of lay testimony, or the inadmissibility of Investigator Bailey's `opinion' that it was difficult to reconcile Appellant's statement concerning Victim coming at her with the knowledge that Victim had been shot in the back." State v. Pickrell, 435 S.C. 417, 867 S.E.2d 465, 480 (2021). App. 24.

Nonetheless, the Court concluded:

> We disagree with Appellant's assertion that Investigator Bailey's testimony constituted improper lay testimony. The investigator's answer did not offer a conclusion about either why or how Appellant may have shot Victim. Rather, it answered the solicitor's question of why Appellant's interview statements regarding what was occurring at the time she pulled the trigger raised a concern for the investigator. Thus, Investigator Bailey simply conveyed his perception that Appellant was indicating in her statement that Victim was coming toward her when Victim was shot, which caused him concern based upon his knowledge that Victim was shot in the back. This did not require specialized knowledge, skill, experience or training. *See* Rule 701, SCRE ("If the witness is not testifying as an expert, the witness' testimony in the form of opinions 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."); Huffman v. Sunshine Recycling, LLC, 426 S.C. 262, 281, 826 S.E.2d 609, 619 (2019) (finding the officers' testimony based upon their perceptions of their interactions with an individual complaining of theft "did not require special knowledge, skill, experience, or training [] and did not stray into the realm of expert testimony"); Rule 704, SCRE ("Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.").

State v. Pickrell, 435 S.C. 417, 867 S.E.2d 465, 480-81 (2021). App. 25.

The Court of Appeals also "found any error harmless" because Investigator Bailey repeated his opinion on cross-examination that he "found it hard to believe that he was told by Appellant that Victim was lunging at her given the fact that Victim was shot in the back, and he maintained that was `where he had the issue [problem]." The Court also noted that Investigator Taylor testified that the information "Appellant provided to her was not consistent" with other investigators interviews, including Bailey's interview. State v. Pickrell, 435 S.C. 417, 867 S.E.2d 465, 480-81 (2021). App. 26.

Discussion

Defense counsel correctly objected that Investigator Bailey should not be allowed to give a conclusion or opinion about how the shooting occurred. Bailey was purely a law enforcement fact witness. He was not an expert. The judge overruled the objection and Bailey opined he had trouble understanding how the decedent could have been lunging forward towards petitioner when he was shot in the back. R. 577, l. 9 – 578, l. 23.

Bailey's improper lay opinion cut to the heart and it cut the heart out of petitioner's self-defense case. Bailey told the jury it was difficult to understand how the decedent could have been lunging toward petitioner – based on other information he had received -- where the decedent was shot in the back. The Court of Appeals erred in finding this was not inadmissible lay opinion. See State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001); State v. Andrews, 424 S.C. 304, 818 S.E.2d 227 (Ct. App. 2018).[2]

In Ellis, this Court specifically held that a police officer who was qualified as expert in crime scene processing and fingerprint identification was not qualified to testify as expert with respect to crime scene reconstruction. That officer exceeded the scope of his expertise in testifying to his conclusion that victim had been riding bicycle at time he was shot. In the context of the that case it meant to convey that the victim was not a threat to Ellis as claimed. The improper opinion testimony regarding the position the victim was in at the time he was shot was

2 *Affirmed as modified on other grounds in* State v. Andrews, 427 S.C. 178, 830 S.E.2d 12 (2019).

not harmless error. See State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001), *citing* State v. Wilkins, 305 S.C. 272, 407 S.E.2d 670 (Ct. App. 1991).

In Andrews, witness Graham was qualified as an expert in the field of EMS. Therefore, Graham was qualified to testify as an expert as to prehospital emergency care administered to the victim, and to the resulting medical observations of his body and injury.

However, the Court of Appeals in Andrews held that the circuit court judge abused his discretion by allowing expert testimony from the EMT paramedic Graham regarding the victim's location at the time of the shooting. That opinion that the victim was standing on the porch when he was shot exceeded the scope of her expertise in emergency medical services, and it went to the ultimate issue of whether the defendant was acting in self-defense when he shot and killed the victim. That error was not harmless.

The prosecution here wanted to stress its theme that because the decedent was shot in the back, the jury should rule out self-defense. However, as Dr. Ross attempted to explain, there were other scenarios where the decedent may have been moving when he was shot, and it followed that the seemingly normal inference from being "shot in the back" did not apply.

Yet, Investigator Bailey, who was not qualified as an expert in anything, was allowed to state he found it difficult to believe that the decedent was coming towards petitioner where he was shot in the back. This also went to the heart of petitioner's self-defense claim, the ultimate issue to be decided by the jury,[3] and it constituted reversible error for the same conceptual reasons as in State v. Ellis and State v. Andrews.

As this Court noted in State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001): "While the state was free to argue that the evidence supported an inference that the victim was

---

3 Petitioner fully understands that because testimony goes to the ultimate issue to be decided by the trier of fact does not make that testimony inadmissible where it is otherwise admissible. See Rule 704, SCRE. Here, however, the testimony was inadmissible under Rule 701 and it went to the ultimate issue of self-defense or the lack of it making it extraordinarily prejudicial.

astride the bicycle when shot, and while the jury could certainly have concluded he was, Sergeant Walters was not qualified to give such an 'expert' opinion. An officer's improper opinion which goes to the heart of the case is not harmless." *citing* Fordham v. State, 254 G.A. 59, 325 S.E.2d 755 (1985).

Here, Bailey's improper opinion testimony went to the heart of petitioner's self-defense case. The solicitor referenced Bailey's testimony for why the jury not believe the decedent "lunged" at petitioner immediately before she shot him during her closing argument. R. 809, l. 25 – 811, l. 4. The Court of Appeals found that Bailey's testimony was not improper lay opinion testimony, and it then found any error harmless because Bailey doubled down and repeated his assertion that he did not believe the decedent could have been lunging at petitioner when she shot him because he was shot in the back. The defense does not forego cross-examining a witness because of the fear that witness will not abandon his earlier improper opinion testimony that he gave to the solicitor on direct examination. Bailey doubling down on his improper lay testimony that he did not believe petitioner's statement about how the shooting occurred did not make the error harmless.

The Court also noted as to harmless error that Investigator Taylor testified that the information petitioner provided to her was not consistent with "[o]ther investigators interviews, including Bailey's interview." State v. Pickrell, 435 S.C. 417, 867 S.E.2d 465, 480-81 (2021). App. 26. Lay law enforcement witnesses should not be allowed to compare and contrast witness statements to the police and to opine to the jury who law enforcement believed and why. This Court should grant certiorari on this important issue of lay law enforcement opinion evidence.

2.

<u>The Court of Appeals erred by affirming the trial court's ruling allowing SLED agent Claycomb to testify she eliminated the shooting happening "within the bedroom" or "in the living room" since Claycomb was not an expert, and this impermissible lay opinion testimony was highly prejudicial, not harmless, since it was intended to convey to the jury that the shooting did not occur as petitioner told the police it occurred.</u>

Relevant facts

SLED investigator Dawn Claycomb testified that the decedent's body was located in the back bedroom where there were three footlockers. The decedent was "in a sitting position leaned against the bed and a chair that was located next to the bed." "A cartridge case that we located in a laundry basket that was on top of this trunk here right when you walk into the room." An earring similar to the one found in the victim's ear was located in this same area. R. 443, l. 4 – 449, l. 25.

Claycomb was called upon by the solicitor to give an impermissible lay opinion essentially stating she did not believe appellant's version of how the shooting transpired in self-defense, and that she "eliminated" shooting happening in the living room where the gun was located, and also in the bedroom where appellant said the decedent was beating her. R. 452, l. 24 – 454, l. 8.

The objectionable testimony

On direct examination by the solicitor, SLED agent Claycomb was asked about eliminating areas "that the shooter may have been," and Claycomb was asked the location where the shooter may have been." R. 452, ll. 14 – 23.

The following occurred between the solicitor and Claycomb:

> Q: So what did *that eliminate for you as to where the shooting would have occurred*?

> A: Well, saying –
>
> MS. ZMROCZEK: Your Honor, I object to the fact -- I believe it's outside the scope of her -- I believe they have an expert coming in to talk about that. I believe this would be outside the scope of -- if we're talking about trajectory and --
>
> MS. SAMPSON: I'm not. I didn't ask trajectory. *I literally asked what places did it eliminate the shooting could have come from.*
>
> MS. ZMROCZEK: But that would be based on the trajectory.
>
> MS. SAMPSON: Well, if I can lead her, then I can ask the specific question.
>
> MS. ZMROCZEK: No, Your Honor. The rules don't allow it.
>
> THE COURT: Just limit it to the shell casing. I'm going to allow the question.
>
> BY MS. SAMPSON:
> Q: What areas did it eliminate that the shooting could have happened at?
>
> A: *Within the bedroom*, saying that if the cartridge case was not moved or tampered with at that point.
>
> Q: *And all I meant was, in other words, it didn't happen in the living room?*
>
> *A: Correct.* If you would find the cartridge case in the bedroom, yeah, it would not occur in the living room had it not been touched or moved, anything like that.
>
> Q: *And you already told us that the gun was where you found it?*
>
> *A: Yes, ma'am. It was within -- right when you come in the front door on a table in the living room.*

R. 452, l. 24 – 454, l. 8. (emphasis added).

Court of Appeals opinion

The Court of Appeals wrote:

> Appellant contends the trial court erred in allowing Agent Claycomb to testify that she eliminated the shooting from happening "within the bedroom" or "in the living room" since the agent was not an expert and her impermissible lay testimony was

highly prejudicial, as it was intended to convey to the jury that the shooting did not occur as Appellant told law enforcement. Conceding that this testimony by Agent Claycomb was "very confusing," Appellant maintains the motive for the question and answer was clearly to show the shooting-as deduced from the agent's view of the forensic evidence – did not match Appellant's version.

After a thorough review of the record, we find any error in the admission of Agent Claycomb's testimony in this regard was harmless. First, the testimony elicited from the agent in this matter was confusing and somewhat contradictory. Agent Claycomb undermined her own statement that she did not find anything that would indicate where the shooter was and she could not "necessarily tell where the shooter was located" by testifying she could eliminate areas where the shooting occurred. Then, when she was allowed to answer the solicitor's question concerning what areas could be eliminated from where the shooting occurred, it appears she misunderstood the question and stated "within the bedroom." It appears Agent Claycomb may have thought the question asked was what areas were not eliminated by the location of the cartridge casing and the solicitor recognizing the confusion over the question-attempted to clarify the matter by asking, "And all I meant was, in other words, it didn't happen in the living room? "On this point, Agent Claycomb agreed with the solicitor, assuming the cartridge case had not been moved.

Further, the testimony of Agent Claycomb concerning any significance of the location of the fired cartridge casing was refuted by the testimony of SLED Agent Green, a forensic firearm examiner who was qualified as an expert in the fields of firearms and tool mark identification. Agent Green testified that SLED did not perform ejection pattern tests for cartridges, noting all the variables involved that could not be replicated. He then stated, based on the specific characteristics of the firearm used to shoot Victim, there was no way to tell where the ejected cartridge case would go. Thus, Agent Green's expert testimony effectively refuted Agent Claycomb's lay testimony regarding the significance of the location of the cartridge in regard to the location of the shooter. Finally, we agree with the State that the testimony complained of on appeal was insignificant and irrelevant to any critical issue in dispute. Given the confusing and conflicting nature of Agent Claycomb's testimony, we disagree with Appellant's assertion that it conveyed to the jury that the shooting did not occur as Appellant told law enforcement. The only evidence submitted at the trial concerning where Appellant was specifically located when she shot Victim was in Appellant's statement to law enforcement. Appellant told Investigator Bailey

> that she stood in the doorway of the bedroom when she pulled the trigger.

State v. Pickrell, 435 S.C. 417, 867 S.E.2d 465, 482-83 (2021). App. 28-29.

Discussion

The Court of Appeals erred by concluding Agent Claycomb's testimony was only confusing. It was designed to show that Agent Claycomb had eliminated the shooting from happening "within the bedroom" where the violent sex and the beating at the decedent's hands occurred. Claycomb also eliminated the shooting from it having occurred in the living room where the .32 was found on the table.

Rule 701, SCRE provides: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions 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."

If the testimony was admittedly confusing as the Court of Appeals found it then it was not helpful to a clear understanding of the witness' testimony pertaining to a fact in issue. As in State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001) and State v. Andrews, 424 S.C. 304, 818 S.E.2d 227 (Ct. App. 2018), supra, the witness was not qualified to give this opinion testimony.

In the context of this record it was prejudicial opinion testimony as was the opinion testimony in State v. Westmoreland, 421 S.C. 410, 421, 807 S.E.2d 701, 707 (Ct. App. 2017) where the coroner gave lay testimony that the car hitting the decedent was a "homicide." A homicide is an intentional act – and the coroner was giving an improper lay witness opinion where the jury had to determine whether it believed the defendant accidently hit the decedent with his car or whether he hit him on purpose. The improper opinion testimony in Westmoreland was very confusing and consequently prejudicial, as it was in this case.

This testimony by SLED agent Claycomb did impermissibly stray into the realm of expert testimony. Cf. State v. Fripp, 396 S.C. 434, 438-39, 721 S.E.2d 465, 467 (Ct. App. 2012) (identification by two witnesses who knew the defendant "very well" and had a "good shot" at his face on the surveillance tape was not impermissible lay testimony pursuant to Rule 701, SCRE). This law enforcement opinion testimony was meant to relate to the jury that the shooting did not occur in the living room, where the gun was if appellant quickly grabbed the gun and immediately shot the decedent since the cartridge case was found in the bedroom. Agent Claycomb then said the gun was found "right when you come in the front door on a table in the living room."

The point of Claycomb's opinion was that shooting did not occur as petitioner testified it did. While the testimony was admittedly very confusing it imparted to the jury Claycomb's opinion *that shooting did not occur as petitioner said it did* as Claycomb *deduced from her view of the forensic evidence.* That was very prejudicial. Law enforcement lay opinions on what evidence or witness statements the law enforcement witness found credible or not credible is very dangerous and prejudicial. Law enforcement witnesses are traditionally expected to be neutral objective witnesses, and their testimony as lay witnesses should not impermissibly place the thumb on the prosecutions side of the scale given the elements of Rule 701, SCRE. Petitioner respectfully submits this is a matter – improper law enforcement lay opinion testimony on which witness statements law enforcement believes and which witness statements law enforcement does not believe -- worthy of this Court's consideration before it gets further abused in the trial courts of this state.

However it is sliced, Claycomb gave improper opinion testimony, and it was meant to convey to the jury that Claycomb did not believe appellant was telling the truth about the shooting, where Claycomb was giving her improper "expert" testimony. See State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001) and State v. Andrews, 424 S.C. 304, 818 S.E.2d 227 (Ct. App.

2018) which are discussed at length above. Both cases were reversed because improper "expert" opinions were given by experts in areas outside of their respective areas of expertise.

Here, Claycomb was not an expert in anything, she was a fact witness investigator. Yet, as in Andrews and in Ellis, the solicitor used Claycomb to undermine appellant's self-defense case by giving improper "expert" opinion testimony. Claycomb's improper opinion testimony, where she was not an expert witness, was very prejudicial.

Signaling to the jury, subtly or otherwise, through improper "expert" testimony that the witness has deduced from the evidence before the jury a forensic opinion that the defendant's statement or statements are not to be believed can be extremely prejudicial, and even destroy a defense. See State v. Westmoreland, 421 S.C. 410, 421, 807 S.E.2d 701, 707 (Ct. App. 2017) (lay testimony by the coroner that the offense was a "homicide," an intentional act, was an improper opinion where the jury had to determine whether it believed the defendant accidently hit the decedent with his car or hit him intentionally).

This Court should grant certiorari on this important legal issue which is becoming increasingly problematic in the criminal trial courts of our state. See State v. Andrews, 424 S.C. 304, 818 S.E.2d 227 (Ct. App. 2018); State v. Westmoreland, 421 S.C. 410, 421, 807 S.E.2d 701, 707 (Ct. App. 2017); State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001).

CONCLUSION

By reason of the foregoing arguments, this Court should grant certiorari.

Respectfully Submitted,

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ATTORNEY FOR PETITIONER

This 21st day of March, 2022.