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Dec 23 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

GREGG PICKRELL,

APPELLANT.

APPELLATE CASE NO. 2018-001139

Appeal from Kershaw County
Honorable Alison Renee Lee, Circuit Court Judge
Honorable William A. McKinnon, Circuit Court Judge

Opinion No. 5878

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, appellant requests that this Court grant rehearing because it may have overlooked the fact the properly objected to testimony of Investigator Bailey and SLED Agent Claycomb on the “facts” surrounding the shooting were inadmissible highly prejudicial expert opinions by non-expert lay witnesses where those opinions conveyed to the jury that the shooting could not have occurred as appellant had described it to law enforcement.

In addition, the trial court committed several egregious errors of law in its analysis of the “stand your ground” provision of the immunity statute, S.C. Code §16-11-440 (C), as set forth

below, which require that appellant be granted a new immunity hearing free of the erroneous self-defense reasoning, and its corresponding inaccurate conclusions.

SLED agent Claycomb

As this Court will recall, 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 decedent's ear was located in this same area. R. 443, l. 4 – 447, l. 24.

Agent Claycomb was also 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 had "*eliminated*" the 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.

This Court concluded that Claycomb's testimony was confusing, and contradictory and therefore it reasoned it was harmless:

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.*

State v. Gregg Pickrell, Op. No. 5878, Howard's Adv. Sh. 43 at pp. 140-41 (filed December 8, 2021);(Appellant's emphasis).

Investigator Claycomb's testimony was designed to show that she 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 happened in

the living room where the .32 was found on the table. See R. 452, l. 24 – 454, l. 8. This Court should respectfully reconsider its holding that Claycomb’s testimony did not convey to the jury that the shooting did not occur as appellant told law enforcement that it happened.

Again, this 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. 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 the shooting did not occur as appellant testified it did. It is elementary that a jury being told that the defendant misled the police regarding how the fatal shooting occurred is extraordinarily prejudicial.

Claycomb’s testimony being “confusing and conflicting” does not change that fact. Respectfully, this Court’s reasoning that because Claycomb was a lousy state’s witness that her opinion on “eliminating” areas where the shooting could have occurred would be ignored by the jury should be reconsidered. This Court’s mathematical logic of weighing the real expert testimony -- Agent Green’s firearm testimony -- against Claycomb’s false testimony about areas where the shooting could have occurred being “eliminated,” and concluding the jury would have given Claycomb’s testimony no credence is respectfully not how many jurors think or go about their business.

The state put up Claycomb for the purpose of showing the SLED agent did not believe the shooting happened in the manner described by appellant. This Court should respectfully reconsider its holding that Claycomb’s testimony in this regard would have carried no weight with the jury, and therefore was not prejudicial.

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 appellant shot the decedent, and that she had called 911. R. 564, l. 17 – 565, l. 16.

On direct-examination by the solicitor, Bailey was asked what appellant told him about being assaulted when she pulled the trigger. Bailey said appellant had told him the decedent was coming after her. Bailey said this 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. Prior to the interview, I had knowledge that the deceased had been -- actually, the point of impact of the bullet was in the back. I had trouble understanding how if he was lunging forward how he was shot in the back.*

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

Defense counsel correctly objected that Bailey should not be allowed to give a conclusion or opinion about how the shooting occurred. Bailey was purely a 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 appellant when he was shot in the back.

R. 577, l. 9 – 578, l. 23. This Court concluded, in pertinent part, as to Bailey:

[E]ven assuming defense counsel's objection sufficiently preserved the issue, 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."

State v. Gregg Pickrell, Op. No. 5878, Howard's Adv. Sh. 43 at p. 137 (filed December 8, 2021).

This Court also should reconsider its holdings regarding the testimony of Bailey. His testimony required expertise, and it was not admissible as a lay opinion based merely on his perceptions.

Bailey was also not an expert witness, and he should not have been allowed to give this critical opinion which cut to the heart of appellant's self-defense case. Bailey told the jury it was difficult to understand how the decedent could have been lunging toward appellant – based on other information he had received -- where the decedent was shot in the back.

This was reversible error pursuant to this Court's opinion in State v. Andrews, 424 S.C. 304, 818 S.E.2d 227 (Ct. App. 2018), and the Supreme Court's opinion in State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001).

Again, as appellant has argued, 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.

This Court agreed in Andrews 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. The improper 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 appellant was acting in self-defense when he shot and killed the victim.

The prosecution in this case 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 appellant where he was shot in the back. This also went to the heart of appellant’s self-defense claim, the ultimate issue to be decided by the jury, and it constituted reversible error for the same reason as in State v. Andrews. The same is true as to the testimony of SLED agent Claycomb.

Similarly, in State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001), our Supreme Court also found reversible error where a police officer qualified as an expert in crime scene processing essentially testified as a crime scene reconstruction expert about the position of the victim at the time he was shot. This went to the essence of Ellis’s defense of self-defense, and the police officer was not qualified as an expert witness to give an opinion on the ultimate issue before the jury. 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).

The Court in Ellis held the error could not be harmless given the defendant’s assertion that he was acting in self-defense at the time he shot the victim. The Court wrote that: “While the state was free to argue that the evidence supported an inference that the victim was 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).” See State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001).

Here, Bailey’s improper opinion testimony also went to the heart of appellant’s self-defense case. The error therefore was not harmless. The same is true of the inadmissible

opinion testimony of SLED agent Claycomb. See State v. Westmoreland, 421 S.C. 410, 421, 807 S.E.2d 701, 707 (Ct. App. 2017)(improper opinion from the coroner that the defendant hitting the decedent with his car was a “homicide” illegitimately destroyed the defense of accident). See, also, State v. Andrews, 424 S.C. 304, 818 S.E.2d 227 (Ct. App. 2018); State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001). Rehearing should be granted on these important improper lay opinion legal issues.

Immunity from prosecution

This Court wrote:

[W]e recognize the immunity hearing court's recitation of the language from Curry—that a “claim of self-defense presents a quintessential jury question, which, most assuredly, is not a situation warranting immunity from prosecution”—may lead one to question whether the judge erroneously applied the standard by finding immunity improper when there is conflicting evidence. 406 S.C. at 372, 752 S.E.2d at 267. However, this statement was immediately followed with the judge's recognition that she was tasked with evaluating whether Appellant proved by the preponderance of the evidence that she acted in self-defense when she shot Victim. Further, a review of the order shows Judge Lee recognized she was required to determine whether Appellant could meet her burden of establishing she was entitled to immunity by a preponderance of the evidence, acknowledging the same numerous times throughout the order. A thorough review of the order convinces us Judge Lee applied the appropriate standard and did not rely upon a conflict in the evidence as a basis to automatically deny immunity. Rather, Judge Lee was well aware of, and correctly applied, the proper standard, weighing the evidence and determining Appellant failed to prove she was entitled to immunity based upon the preponderance of that evidence.

State v. Gregg Pickrell, Op. No. 5878, Howard’s Adv. Sh. 43 at p. 130. (filed December 8, 2021).

Appellant submits this Court should reconsider its holding that the immunity judge did not run afoul of the Supreme Court’s opinion in State v. Cervantes-Pavon, 426 S.C. 442, 451,

827 S.E.2d 562, 569 (2019), where it wrote, “[j]ust because conflicting evidence as to an immunity issue exists does not automatically require the court to deny immunity; the court must sit as the fact-finder at this hearing, weigh the evidence presented, and reach a conclusion under the Act.” State v. Cervantes-Pavon, 426 S.C. 442, 451, 827 S.E.2d 562, 569 (2019). While the trial court here did not have the benefit of Cervantes-Pavon at the time of appellant’s trial, its order, read as a whole in context, reveals that it erroneously determined the conflicting evidence made self-defense a jury issue.

Further, the judge’s self-defense reasoning was legally flawed. As appellant has argued, the judge erred by equating appellant’s “introduction” of a weapon -- **in her own house** --- into this domestic violence case with the situation in State v. Slater, 273 S.C. 66, 644 S.E.2d 50 (2007). In Slater, Lord Byron Slater took a loaded pistol across a high school crowded parking lot on the night of a dance where he knew a fight was occurring. Slater shot the pistol when he allegedly felt threatened during the fight where he had chosen to involve himself in that fight where he easily could have stayed far away.

State v. Slater had no application to the facts of this case. It was fundamentally unfair to equate appellant protecting herself against potentially deadly domestic violence being inflicted on her in her own home to what the defendant did in Slater. The defense here argued throughout that this was a case of domestic violence -- *it was an ongoing violent relationship involving those complex dynamics of domestic violence*.

The judge equating appellant’s actions in this domestic violence case in her own home -- while erroneously ruling appellant brought on the difficulty -- with the use of the pistol taken to a fight between strangers in a high school parking lot in State v. Slater was fundamentally flawed.

It mandates a new immunity hearing on that basis alone since it strikes at the heart of the reason for the immunity statute itself.

Appellant was and is entitled to a correct self-defense analysis given the importance the Legislature placed on a citizen's right to defend herself in her own home, with her own gun, and to stand her ground – particularly against a *domestic violence predator*.

Yet, the judge made another fundamental error in her reasoning as to domestic violence. The judge erroneously reasoned that while there was an order of protection against the decedent in Louisiana that there was no order of protection in South Carolina and that appellant “did not use the Louisiana order to seek protection from the victim.” R. 1062. Again, that was simply not true. Appellant did take the order of protection from Louisiana to the victim's advocate in Kershaw County so the Kershaw County authorities had it on file, and they were aware of it.

The judge's lack of appreciation of this being a domestic violence case was also shown by her conclusion that appellant's fear of getting hurt or killed was not reasonable considering the younger male physically fit decedent was unarmed and shot in the back from at least two feet away. R. 1062. However, again, this was a domestic violence case where it is known that the continued violence sometimes causes the battered woman to act at moments where she reasonably believes that “only the death of the batterer can provide relief . . .” Robinson v. State, 308 S.C. 74, 79, 417 S.E.2d 88, 91 (1992). There was a long history of this decedent abusing this appellant.

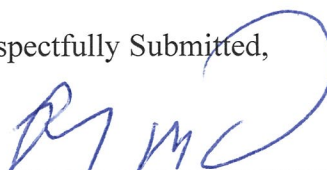
Again, this case was closest factually to State v. Jones, 416 S.C. 283, 786 S.E.2d 132 (2016), wherein the Supreme Court affirmed the grant of immunity to Whitlee Jones, where her live-in boyfriend had battered her earlier in the day. Jones decided to move out. She went upstairs to retrieve her shoes and she grabbed a knife for protection. The decedent grabbed Jones

and shook her. During a relative lull in the violence, when Jones believed the decedent was getting ready to hit her again, she grabbed the knife out of her shirt and stabbed him one time in the chest. Jones then ran out of the apartment. State v. Jones, 416 S.C. 283, 288, 786 S.E.2d 132, 135 (2016).

Our Supreme Court agreed that Jones was entitled to immunity under the Stand Your Ground provision of S.C. Code § 16-11-440(c). Jones she was not engaged in unlawful activity at the time of the attack – neither was appellant. Jones was attacked in a place where she had a right to be, as was appellant. Jones did not have a duty to retreat inside the house she shared with the victim, neither did appellant in her own home where the decedent abuser was merely a guest. Jones had the right to stand her ground and meet force with deadly force, as did appellant. Jones acted in self-defense. So did Appellant Gregg Pickrell.

The legal errors in the immunity court’s legal reasoning as to this victim of domestic violence warrant – indeed they demand -- a new immunity hearing. Appellant most respectfully requests that this Court grant rehearing, reconsider its order denying her a new immunity hearing, and grant her a new immunity hearing if it does not grant her a new trial.

Respectfully Submitted,



ROBERT M. DUDEK
Chief Appellate Defender

This 23rd day of December, 2021.

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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Mark Reynolds Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 23rd day of December, 2021.


Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT