RECEIVED
May 26 2022
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSHUA CW REHER,

APPELLANT

APPELLATE CASE NO. 2021-001052

BRIEF OF PETITIONER

ADAM SINCLAIR RUFFIN
Appellate Defender

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

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

ISSUE PRESENTED

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

STATEMENT OF THE CASE

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

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

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

Petitioner filed a petition for writ of certiorari with this Court on September 23, 2021. The state filed its return on October 18, 2021. This Court granted certiorari on April 28, 2022.

This brief of petitioner follows.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Appellate courts are bound by a trial judge's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (citing State v. Quattlebaum, 338 S.C. 441, 442, 527 S.E.2d 105, 111 (2000)). "The appellate court does not re-evaluate the facts based on its own view of the evidence but simply determines whether the trial judge's ruling is supported by any evidence." State v. Lyles, 379 S.C. 328, 333, 665 S.E.2d 201, 204 (Ct. App. 2008).

"[I]n order for this Court to reverse a case based on the erroneous admission or exclusion of evidence, prejudice must be shown." State v. Taylor, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998). "To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof." State v. White, 372 S.C. 364, 374, 642 S.E.2d 607, 611 (Ct. App. 2007) (citing Fields v. Regional Medical Center Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)).

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Whitner, 399 S.C. at 557, 732 S.E.2d at 866.

ARGUMENT

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

Background

Petitioner was accused of attempted murder for shooting Joseph Myers in the abdomen with a .22 caliber rifle on August 21, 2015. Petitioner and Myers worked together at Agnew Lake Service as welders. R. 116, l. 24 – 117, l. 5. The shooting happened at Petitioner's house on a Friday evening after they got off work. Several eyewitnesses testified, including both Petitioner and Myers, and gave significantly different accounts of what happened.

Myers testified that, on the day of the shooting, he and Petitioner worked together "[l]ike any other day," and they had a company meeting around noon which lasted a few hours. R. 119, ll. 11 – 24. Alcohol was served at the meeting and Petitioner and Myers were both drinking. R. 119, l. 25 – 120, l. 10. After the meeting, Myers and Petitioner went to do a "side job" together to make some extra money. R. 120, ll. 18 – 22. Myers then recalled: "We were headed back to the house. Then we decided to go have a beer at Hemingway's and shoot a few games of pool." R. 122, ll. 21 – 25. Myers was drinking beer at Hemingway's and Petitioner was drinking mixed drinks. R. 123, ll. 1 – 16.

Petitioner and Myers left Hemingway's around 7:30 or 8:00 p.m. and went back to Petitioner's house. R. 123, l. 8 – 124, l. 6. When they arrived at Petitioner's house, there were

"[k]ids out in front of the house" which had long been a sore subject for Petitioner.[1] R. 124, ll. 7 – 14. Myers said: "[Petitioner] got out yelling at them, and they really didn't take him too serious. I got out, yelled at them, with a little bass in my voice, and they pretty much took off." R. 125, l. 16 – 126, l. 20.

After the "kids" left, the facts of what occurred became disputed. Myers claimed that Petitioner went inside the house and yelled at his girlfriend, Brooke, for allowing the teenagers to "hang out" at his house. R. 126, l. 21 – 127, l. 22. Myers said: "Brooke came out all upset and crying. And I apologized for bringing Josh home drunk. And she left and Ian left with her." R. 127, l. 24 – 128, l. 3. Ian was one of Jacob's friends and was supposedly Brooke's "pill connection." R. 128, ll. 7 – 13. For this reason, Myers claimed that Petitioner did not like Brooke associating with Ian and Petitioner was upset that they left together. R. 128, l. 14 – 129, l. 13. Myers then began making fun of Petitioner for enabling Brooke's pill habit while still complaining about it. R. 129, l. 15 – 130, l. 4.

Myers claimed that after he started making fun of Petitioner for enabling Brooke's drug addiction, Petitioner "went ballistic and tackled me off the chair." R. 130, ll. 4 – 6. The two of them then started fighting and Myers asserted:

> [I]t started in the garage and it escalated out into the driveway. We were rolling around, hitting each other. I rolled [Petitioner] over and I hit him with my elbow. He said, [Myers], let me up, and I let him up. And he ran in the house. I went to start getting my stuff together.
>
> Next thing I know, I heard a bang, and I turned around. And everything is dark from there . . .

R. 130, ll. 6 – 14.

---

[1] Petitioner lived with his girlfriend, Brooke, and her two sons, Jacob and Johnny. Jacob, a seventeen-year-old, would frequently have friends over to Petitioner's house and Brooke would let them drink alcohol there. This frustrated Petitioner because he was the only person in the household who worked and paid the bills.

Petitioner gave a significantly different version of events after the teenagers left the house. According to Petitioner, it was Myers who went inside the house and yelled at Brooke about the teenagers hanging out over at the house. R. 426, ll. 11 – 23. Petitioner then recalled:

> That's when Brooke and Ian come out, and [Myers] followed them outside. And that's when Brooke went and got into the car. And she was sitting there crying. And that's when I walk over to the car and she asked me for money to go to the gas station because she was wanting to get cigarettes. . . .
>
> That's when Ian pops his head out of the car and tells me that I let it happen and it's my fault. And that's when [Myers] turns his head at me and insinuates that it's my fault that I let the kids be there and that I give Brooke money to go get pills. So he sits there and he says that I'm an enabler.

R. 427, l. 20 – 428, l. 9. Petitioner recalled that Myers began to get aggressive and hit him in the face. R. 432, l. 8 – 433, l. 1. Myers and Petitioner began rolling around on the ground while Myers was choking Petitioner and Petitioner was trying to get away. R. 433, ll. 2 – 6. Myers was on top of Petitioner who was lying on his back and Myers punched Petitioner in the face multiple times while Petitioner was on the ground. R. 433, l. 10 – 434, l. 3.

Petitioner never hit Myers back and he was finally able to break free from Myers. Petitioner got to the front of Myers' truck which was parked in Petitioner's driveway. R. 435, l. 18 – 436, l. 18. Myers attacked Petitioner a second time, tackling him to the ground and punching him. R. 436, l. 19 – 437, l. 23. Petitioner testified that while Myers was attacking him, Petitioner was calling out for help and for someone to call 911. R. 438, ll. 10 – 20.

Petitioner got away from Myers again and was able to run inside of his house to the kitchen where he saw Michael All.[2] R. 438, l. 21 – 439, l. 19. Petitioner testified that after he got inside the house, Myers opened the cooler in his truck and started drinking beer instead of leaving Petitioner's residence. Petitioner had repeatedly asked Myers to leave by that point. R.

---

2 Michael All was a friend of Jacob who testified for the state.

440, ll. 3 – 22. Because Myers was refusing to leave after being told to by Petitioner, Petitioner retrieved his .22 caliber rifle and fired four warning shots into his toolbox.[3] R. 440, l. 23 – 443, l. 21. At that point Myers charged at Petitioner's door and Petitioner slammed the door shut. Myers was trying to push through the door to get inside the house. R. 444, l. 24 – 445, l. 8.

Petitioner recalled:

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

R. 445, l. 11 – 446, l. 2. Petitioner maintained that the final shot happened while Petitioner was about two steps backward into his kitchen.[4] R. 446, ll. 18 – 22. After Petitioner shot Myers, Petitioner recalled: "That's when the gun drops and [Myers] falls on top of me and we kind of have a tussle right there. Eventually, I get him off me and he gets up and he goes towards the door. And that's when I pushed him out the door and he goes to his truck." R. 446, l. 24 – 447, l. 3.

After Myers went back outside to his truck, Michael All awakened Jacob who then went outside to give Myers some water and find the keys to his truck. R. 447, ll. 4 – 9. Petitioner laid

---

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

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

down on the floor and was hyperventilating with the gun on the floor next to him. R. 447, l. 17 – 448, l. 3. Petitioner cleared the weapon, including ejecting a live round from the chamber onto the kitchen floor.[5] R. 448, l. 18 – 449, l. 7.

Brooke's sons, Johnny and Jacob,[6] both testified for the defense. Johnny testified that Myers came inside and was screaming at Brooke about letting the teenagers hang out at the house. R. 345, ll. 4 – 24. After this, Brooke left to go to the store and Johnny recalled: "[F]irst I heard screaming outside, and then all of a sudden I heard [Petitioner] scream somebody help me; Mike, call the cops." R. 346, l. 11 – 347, l. 12. Johnny looked out the window and saw Myers on top of Petitioner hitting him in the face. R. 347, ll. 13 – 24. Johnny also heard Petitioner tell Myers to leave. R. 349, ll. 11 – 25. Johnny testified that Petitioner broke free from Myers and got inside. R. 352, ll. 3 – 22. Petitioner was holding the door shut and Myers was trying to force his way in; when Myers finally got through the door and started coming into the kitchen, that was when Petitioner shot Myers. R. 352, l. 23 – 353, l. 7.

Relevant Facts

Defense counsel made a pretrial motion to suppress videotapes and photographs of a firearm experiment that was done by James Sullivan, who was an investigator with the Lexington County Solicitor's Office. R. 2, ll. 21 – 24. The firearm experiment in dispute was allegedly designed to show the manner in which shell casings were ejected from a .22 caliber semi-automatic rifle. State's Exhibits 73 and 74 (videotapes of Sullivan's experiment); State's Exhibits 75 and 76 (photographs of Sullivan's experiment). Counsel argued that the probative

---

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

6 Jacob testified that he was asleep through the incident and did not wake up until after the shots had been fired. R. 394, l. 22 – 395, l. 1.

value of this experiment was substantially outweighed by the danger of unfair prejudice and that the testimony could confuse the jury. R. 4, ll. 15 – 20. Specifically, counsel pointed out that the gun used by Sullivan during his experiment was not the gun used by Petitioner, and also that Sullivan's experiment only showed that the shells did not eject in any discernable pattern. R. 3, ll. 1 – 18. The judge did not rule on the motion at that time.

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

During Sullivan's testimony, the state introduced two videotapes of Sullivan firing a .22 caliber rifle and photographs of the locations of the shell casings that were ejected during the experiment. R. 258, l. 5 – 259, l. 6. All these exhibits were admitted over defense counsel's objection. See State's Exhibits 73 – 76. Sullivan then testified that it would be unlikely, based on his experiment, that a shell casing would end up exactly where the shooter was standing if they were standing in the kitchen when they fired the shot. R. 261, l. 25 – 262, l. 4.

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

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

> You saw the pictures where Investigator Sullivan was shooting. Most of those shell casings ejected behind the line of fire. When he shot against this wall right here, he was standing at the end of this tape measurer. Those casings end up behind where he was standing. That shell casing just hit off either the door frame or the cabinets where that door was and just kicked behind him.
>
> If that didn't happen, I don't know what he'd hang his defense on. That cabinet, that's right by the door right where he was standing, right where the ejection portal on the weapon would have shot the casing out. Are we really to believe that if he did shoot in his kitchen, that shell casing would land in the exact place where he says the shooting happened? No. That's unbelievable.

R. 565, l. 21 – 566, l. 11.

Discussion

The Court of Appeals erred in affirming the trial court's erroneous ruling allowing the state to introduce the videos and photographs from Sullivan's firearm experiment. Rule 403, SCRE, permits relevant evidence to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, [or] confusion of the issues." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013).

In State v. Kahan, 268 S.C. 240, 246, 233 S.E.2d 293, 294 (1977), this Court noted that in order for an out of court experiment to be admissible, "substantial similarity" is required between the conditions of the experiment and the conditions existing at the time of the incident in dispute. See also Weaks v. South Carolina State Highway Dept., 250 S.C. 535, 159 S.E.2d 234 (1968) ("The rule laid down by this court for the introduction of evidence and an experiment out of court requires that the experiment be made under conditions and circumstances similar to those prevailing at the time of the occurrence involved in the controversy"); McDowell v. Floyd, 240 S.C. 158, 163, 125 S.E.2d 4, 7 (1962) ("If ... the requirement of substantial similarity is not satisfied, the courts have uniformly refused to admit experimental evidence").

The location of Petitioner when he fired the shots was in significant dispute. According to the state's theory, Petitioner fired all five shots from the same location, the threshold of the door leading from the kitchen to the carport. R. 233, l. 4 – 234, l. 11. According to Petitioner, the first four warning shots were fired from the doorway leading to the carport, but the final shot was fired from two steps back into the kitchen. R. 440, l. 23 – 443, l. 21; R. 446, ll. 18 – 22.

As was noted above, crime scene investigator Sprinkle found four spent shell casings in the carport along with metal fragments near the toolbox. R. 70, ll. 12 – 16; R. 73, l. 13 – 76, l. 7. This physical evidence corroborated Petitioner's version of events which was that he fired four warning shots at the toolbox. Sprinkle also found one spent shell casing inside the residence on the floor of the kitchen which was also consistent with Petitioner's version of events that the final shot was fired from inside the kitchen while Myers was forcing entry and attempting to attack Petitioner. R. 82, l. 21 – 83, l. 8.

In an effort to combat the fact that Petitioner's version of events was corroborated by the physical evidence collected from the scene, the state sought to "explain" this by using Sullivan's extremely misleading and confusing experiment. The problem, of course, was that there was nothing conclusively shown by Sullivan's experiment other than the fact that "brass hits the ground, and it goes where it goes." Furthermore, Sullivan's experiment was conducted using a different gun than the one used by Petitioner and Sullivan admitted that he did not know whether the gun used by Petitioner in the shooting would have the same lack of a discernable ejection pattern as the gun test fired by Sullivan. R. 263, ll. 8 – 11.

In affirming Petitioner's convictions, the Court of Appeals held that the videotapes and photographs of the firearm experiment were "relevant to, and probative of, whether [Petitioner] shot the victim with malice or in self-defense because the results of the experiment indicated the

shooting did not occur in the location [Petitioner] alleged." Reher at 2. However, the results of the experiment did not indicate that the shooting occurred in a different location than where Petitioner maintained the shooting happened. Although Sullivan stated that it would be unlikely, based on his experiment, that a shell casing would end up exactly where the shooter was standing if they were standing in the kitchen when they fired the shot, the experiment itself, and the remainder of the Sullivan's testimony did not support this conclusion.

Sullivan's experiment had no probative value because Sullivan was only able to "determine" that, after firing the rifle, "brass hits the ground, and goes where it goes." R. 262, ll. 13 – 21. In fact, Sullivan admitted that there was no discernable pattern to the ejection of the rounds besides the rounds being extracted to the right. Sullivan acknowledged that once the shell casing came into contact with an object like a wall or the ground, it could bounce in any direction. R. 263, l. 24 – 265, l. 2.

The Court of Appeals relied heavily on Hamrick v. State, 426 S.C. 638, 828 S.E.2d 596 (2019) in its decision to affirm Petitioner's convictions. Hamrick was charged with felony DUI resulting in great bodily injury for striking a road construction worker with his car. The location of the construction worker at the time of the collision was disputed with the state alleging the worker was inside the construction zone while Hamrick maintained the worker was in his lane of travel. Id. at 643, 828 S.E.2d at 598. An officer testified for the state that he documented the point of impact as having occurred in the construction zone. Hamrick responded by calling a mechanical and civil engineering expert who testified that the officer was incorrect, and that the point of impact was outside of the construction zone and in the designated lane of travel. Id. at 644-45, 828 S.E.2d at 599. Hamrick also attempted to introduce a videotape showing an experiment created by his expert witness which the trial judge did not allow. Id.

This Court reversed based on the trial judge's error in allowing the police officer to improperly opine on the point of impact because the officer was not qualified as an expert. Id. at 650, 828 S.E.2d at 602. However, this Court also addressed the admissibility of the videotape of the experiment done by Hamrick's expert witness. While this Court did not rule on whether the trial judge erred in excluding the video from evidence, this Court did hold that the trial judge conducted an erroneous analysis of its admissibility. This Court stated: "The video of [the expert's] experiment was clearly relevant because the video tended to prove Hamrick *could not have* struck [the victim] in the construction zone as the state claimed he did." Id. at 651, 828 S.E.2d at 602-03 (emphasis added). The expert in Hamrick testified that it was *impossible* for the victim to have been struck in the construction zone, thereby enhancing the probative value.

Petitioner's case is readily distinguishable from Hamrick. Far from indicating that Petitioner's version of events was "impossible," here, the experiment only showed that there was "no pattern except for it ejects to the right, brass hits the ground, and goes where it goes." R. 262, ll. 15 – 21. Therefore, the experiment performed by Sullivan did not make Petitioner's version of events any less probable. Instead, the experiment showed only that the shells could go anywhere after ejecting from the gun to the right.

The Court of Appeals further found that the danger of confusing or misleading the jury was low because "the investigator who conducted the experiment testified (1) he used the same type of firearm and ammunition that [Petitioner] used to shoot the victim under similar conditions and (2) the results of his experiment showed 'no definitive pattern' as to the location of the ejected shell casings." Reher at 2. The Court of Appeals incorrectly used the fact that there was "no definitive pattern" against Petitioner by holding that this made the evidence less confusing and misleading. However, this is the very fact that made the probative value of this

experiment non-existent. If there was no definitive pattern to the trajectory of the ejected shell casings, then the experiment did not have any probative value. Instead, the experiment only carried with it the danger of unfair prejudice. The experiment was used specifically to mislead the jury into believing that there was a discernable pattern when there clearly was not. The solicitor explicitly argued this in his closing argument to the jury. R. 565, l. 21 – 566, l. 11.

In Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000), this Court dealt with the admissibility of a videotaped animation of a car accident in a civil case that was sought to be used as demonstrative evidence by the defendant. The trial judge refused to admit Cantrell's videotaped animation of the accident which she sought to admit through her expert witness. Specifically, the plaintiffs objected to the video arguing that it did not accurately reflect the witness testimony. The trial court agreed and determined that the inaccuracies in the video would mislead and confuse the jury. Id. at 382, 529 S.E.2d at 535.

In analyzing this issue, the Cantrell Court noted:

> Computer animation allows attorneys to convert witnesses' verbal testimony into dynamic, visual demonstrations capable of mentally transporting jurors to the scene. . . . *However, a computer animation can mislead a jury just as easily as it can educate them. An animation is only as good as the underlying testimony, physical data, and engineering assumptions that drive its images.* The computer maxim "garbage in, garbage out" applies to computer animations.

Id. at 383-384, 529 S.E.2d at 536 (quoting G. Ross Anderson, Jr., *Computer Animation; Admissibility and Uses*, South Carolina Trial Lawyer Bulletin 9 (Fall 1995)) (emphasis added). This Court continued:

> The extreme vividness and persuasiveness of motion pictures . . . is a two-edged sword. *If the film does not portray original facts in controversy, but rather represents a staged reproduction of one party's version of those facts, the danger that the jury may confuse art with reality is particularly great.* Further, the vivid impressions on the trier of fact created by the viewing of the motion pictures will be particularly difficult to limit or, if the film is subsequently deemed to be inadmissible, to expunge by judicial instruction.

Id., at 369, 384, 529 S.E.2d at 536 (quoting State v. Trahan, 576 So.2d 1, 8 (1990)) (emphasis added).

This Court in Cantrell affirmed the trial judge's refusal to admit the evidence and noted that potential problems with computer animations include "the potential to mislead by an inaccurate portrayal of the facts, [and] the potential to create lasting impressions that unduly override other testimony or evidence . . ." Id. at 384, 529 S.E.2d at 536. This Court then established a new rule regarding the admissibility of computer animations:

> We hold that a computer-generated video animation is admissible as demonstrative evidence when the proponent shows that the animation is (1) authentic under Rule 901, SCRE; (2) relevant under Rules 401 and 402, SCRE; (3) a fair and accurate representation of the evidence to which it relates, and (4) its probative value substantially outweighs the danger of unfair prejudice, confusing the issues, or misleading the jury under Rule 403, SCRE.

Id. This Court also urged trial judges to give a limiting instruction that "the animation represents only a re-creation of the proponent's version of the event; it should in no way be viewed as the absolute truth." Id. at 387, 529 S.E.2d at 537.

Although this case does not deal with a computer-generated animation of the incident, Cantrell is still instructive as to the importance of subjecting demonstrative recreations of events that are in dispute to the requirements of Rule 403, SCRE. Sullivan's experiment was not performed under conditions that were substantially similar to those conditions which existed at the time of the shooting, contrary to the requirement of State v. Kahan, 268 S.C. 240, 233 S.E.2d 293 (1977). Unlike the actual conditions present at the time Petitioner fired the rifle, Sullivan's experiment took place in the controlled environment of an indoor shooting range. Furthermore, the experiment performed by Sullivan was not a fair and accurate representation of the evidence to which it related; and therefore, it should have been excluded.

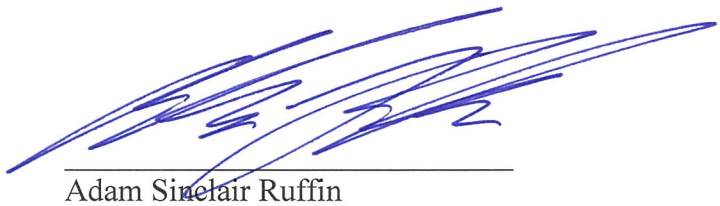
Finally, the Court of Appeals' reliance on the fact that Sullivan used the same *type* of firearm and the same *type* of ammunition in his experiment was also misplaced. Sullivan admitted that he did not know if the "results" from his experiment would have been the same had he used Petitioner's gun. R. 262, l. 8 – 263, l. 11. Even if Sullivan's experiment had shown a discernable pattern of ejection, which it did not, Sullivan himself admitted that he did not know if that would have also been true of Petitioner's gun. Therefore, Sullivan's testimony undermines the Court of Appeals' suggestion that it may reasonably be inferred that the gun Sullivan used in his experiment would have a similar ejection pattern to Petitioner's gun.

Petitioner's case is thus distinguishable from State v. Kahan, 268 S.C. 240, 246, 233 S.E.2d 293, 294 (1977), where this Court upheld the use of an out-of-court experiment done by the state's investigator to determine the maximum distance the alleged murder weapon could deposit gunshot residue on clothing. Id. at 245, 233 S.E.2d at 294. In Kahan, the investigator fired *the alleged murder weapon* at an article of clothing that was "made of similar material and of a similar weave pattern as the gown worn by the deceased" from various distances. This Court determined that the experiment was substantially similar to the conditions existing at the time of the incident and was properly admitted. Id. Unlike in Kahan where the experiment was performed with the defendant's gun, the state in this case conducted an experiment with a different gun which had no bearing on how Petitioner's gun may have operated.

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

CONCLUSION

By reason of the foregoing arguments, Petitioner's convictions should be reversed, and this case remanded to the Lexington County Court of General Sessions for a new trial.



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of May, 2022.