No. COA 24-41 DISTRICT 5

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA )

)

v. ) From New Hanover County )

RAY ANTHONY SOUTHERS )

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**DEFENDANT-APPELLANT’S BRIEF**

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**DEFENDANT-APPELLANT’S BRIEF**

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ISSUES PRESENTED

I. Whether the trial court’s exclusion of Kevin Booker’s accident statements violated the Rules of Evidence and Mr. Southers’ right to present a defense?

II. Whether the State’s suggestion that Mr. Southers was lying because he waited until trial to tell his version of events violated his constitutional right to silence?

III. Whether the prosecution’s argument that Mr. Southers was disqualified from claiming accident and involuntary manslaughter requires a new trial?

**STATEMENT OF THE CASE**

 On July 27, 2020, Ray Anthony Southers was indicted for murder, kidnapping, two counts of breaking or entering to terrorize, and possession of firearm by felon. (Rpp 3-4) Mr. Southers was tried in Superior Court before the Honorable Phyllis M. Gorham. On May 19, 2023, he was found guilty only of second-degree murder based on an act inherently dangerous to life, one count of misdemeanor breaking or entering, and possession of firearm by felon. (Rpp 100-103) Judge Gorham sentenced Mr. Southers to a term of 238-298 months for murder, followed by 19-32 months for the other charges consolidated. (Rpp 106-09) Mr. Southers entered notice of appeal. (Rpp 110-12)

**STATEMENT OF GROUNDS FOR APPELLATE REVIEW**

 Mr. Southers appeals from a final judgment of the Superior Court of New Hanover County. N.C.G.S. §§ 7A-27(b), 15A-1444(a).

**STATEMENT OF FACTS**

*Occupants of the apartment house on Fourth Street*

Jody Lopez grew up in Wilmington. She was sexually abused and her parents were alcoholics. Social services placed Jody with an aunt when she was about 6. She did well until high school but then began drinking and using drugs. She eventually turned to heavy drugs and prostitution. She had three children. Kevin Booker was the father of her youngest child. (T7 pp 881-90)

Kevin Booker also grew up in Wilmington. He went to UNCG and worked in other places before returning in 2018. Jody and Booker met at the end of 2018, and from then on spent every day together. (T7 pp 999-1002) They were homeless. In October 2019, they began staying in an apartment house on Fourth Street. Bob, an old friend of Jody’s, rented Apartment C and had an extra bedroom he let Jody and Booker use. Jody and Booker did crack cocaine together just about every day, and sometimes marijuana, meth, or opioids. (T7 pp 912-15, 963, 1003, 1007) In their neighborhood, drug use was “going on everywhere there, outside, inside, all around. It wasn’t the best place to live.” (T8 p 1115)

 Booker knew Jody worked as a prostitute. He helped her find clients and “modernize” her practice. Booker worked at restaurants. Jody made more money than he did. (T7 pp 1008-11; T8 p 1095) Their baby was born in January of 2020. DSS took custody due to Jody’s drug use and unsafe home environment. Although Jody lost custody, she loved her children and tried to keep up with them. (T7 pp 904-05, 1014-16)

 Ray Southers was born in Wilmington. He came from a family of alcoholics and started drinking at age 12. He developed a crack habit after his mother died in 2013. (T12 pp 1897-98) Southers moved away but returned to Wilmington in 2019 after being released from prison in South Carolina. Southers had two prior common law robbery convictions and multiple prior misdemeanors. (Rpp 104-05; T12 p 1828; T13 pp 2021-22, 28-29) He wanted to “start over” in Wilmington. He was homeless. He couldn’t get into the shelters because of his record. He got a job at Church’s Chicken. He had trouble getting enough rest and ultimately quit his job. He was using alcohol and crack daily. Southers had limited use of the third, fourth, and fifth fingers on his right hand due to an old injury. (T12 pp 1899-2005)

 Southers got to know Bob, who was a veteran and an alcoholic, while panhandling at a corner store. Southers met Jody Lopez at the same store, along with Wesley Clark (called “Philly”) and others. Southers started visiting Bob’s apartment most every day. There he got to know Jody better and also met Kevin Booker. Southers considered them his friends. They were “tight-knit.” They hung out at Bob’s regularly, sharing drugs and alcohol. (T12 pp 1906-10, 1914) Philly slept on Bob’s couch occasionally. He was a “guy who was kind of down on his luck like we all were and didn’t really have anywhere to go.” (T7 pp 1013-14)

 Kevin Booker testified his relationship with Southers was “more or less like a brother.” “I saw him every day.” Booker, Jody, and Southers did crack together. They would help each other: “if we saw him out and he was hurting, she’d give him $20, you know, if he didn’t have it, and he would do the same for her, for us.” (T8 pp 1021-22)

 Late in 2019, Patricia Reeves moved in across the hall in Apartment D, with her daughter and her daughter’s boyfriend. Patricia was a supervisor at Taco Bell. (T7 p 1005) In early 2020, Southers and Patricia started talking and then dating. He lived with Patricia for about a week and a half before the shooting. (T12 pp 1911-17)

 Jody Lopez had a big personality. She spoke her mind and was not afraid to confront people or protect herself. Booker thought she was sometimes too aggressive. Booker said the doors of the apartment were banged up from a lot of different incidents, including his fights with Jody. (T8 pp 1119-20, 1124) Southers said Jody “was a good person. When she get drunk, she get a little out of hand, but who don’t? She was high strung. That’s just how she was.” “If you get in her lane, she’ll make sure you get out of her lane.” (T12 pp 1915-16)

 There was an incident between Southers and Jody a few weeks before April 15. Jody was upset with something Southers said and she slapped him across his face. Booker testified, “I could tell it upset Ray, but he held his composure” and that they had since been around each other with no issues. (T8 pp 1022, 1155) Southers testified this was not a major incident in their relationship; Jody apologized afterward and they remained friends. (T13 pp 2105-06)

 The shooting occurred in the early morning hours of April 16, 2020. Southers was holding a shotgun, which fired once. (T8 p 1127) The shot hit Jody Lopez in her arm and her torso. People thought at first only her arm was injured, but she died hours later from the more serious torso wounds. (T7 pp 918-20; T8 pp 1087-89; T10 p 1515)

Southers and Booker both testified about the shooting. None of the others present on April 16 were witnesses at trial.[[1]](#footnote-1)

 *Southers’ testimony about April 15-16, 2020*

In 2020, Southers drank and used drugs daily to “get the monkey off [his] back.” He usually did this at Bob’s. Southers sometimes sold a bit of his extra crack. A day or two before the shooting, a man gave Southers a shotgun as collateral for a $60 crack purchase. The man said he would return with payment and take the gun back, but he didn’t return. (T12 pp 1920-26)

Southers decided to sell the gun for crack money. On April 15, Southers got some alcohol and went to Bob’s. Philly, Bob, Jody, Booker, and another man were there. Southers played chess with Philly. Southers asked the other man if he knew anyone who wanted to buy the shotgun. The man looked at the gun but didn’t buy it. (T12 pp 1926-29)

 Southers stayed at Bob’s for a while longer, then went to talk to Patricia in her apartment. They discussed selling the gun. Philly had taken some pictures of Southers with the gun, and Southers forwarded the pictures to his brother in South Carolina. Southers and Patricia then went out to get more alcohol. He brought the gun and put it in her trunk. They rode to a couple of places and he asked people if they wanted to buy the gun. No one was interested. Southers bought $20 of crack. Then Patricia drove him back to the apartment. They were discussing some issues between them. Southers wanted to go upstairs to get a stem so he could smoke his crack, then come back and continue the conversation. He carried the shotgun upstairs, planning to put it in Patricia’s apartment. Patricia waited in the car. (T12 pp 1929-35)

When Southers got upstairs, he knocked on Bob’s door, hoping to get a stem from Booker and Jody. Southers hollered out “Yo, let me use your stem.” Booker answered, “If you want something, text me.” Southers took this as a joke. Southers then walked in the front door and saw Philly sitting there. Southers asked Philly for a stem; Philly said he didn’t have one. The two of them were going back and forth about it pretty loudly, but in a friendly way. (T12 pp 1937-40) Southers and Booker and Jody and Philly often joked and talked trash with each other. (T13 pp 2104-05)

Jody came out of the bedroom wanting to know what was going on. She said, “Ray, what you doing with that gun?” Southers said, “I’m jonesing; let me hold your stem.” She said she didn’t have one, and Southers went in the bedroom to ask Booker. Jody was walking backwards into the bedroom and stumbled. Jody was not being aggressive or yelling; she was just “fussing about the noise.” Southers’ intent was only to smoke his crack. (T12 pp 1941-43; T12 p 2057)

 The bedroom was 9’8” x 11’6” and contained a bed and a couch. (T11 p 1682; T12 p 1944; Rule 9d pp 1,4) Southers was still holding the gun when he went in the bedroom. Booker was standing by the couch. Southers asked Booker for the stem. Booker said he would but wanted to use it himself first. Southers waited restlessly for a minute or two for Booker to finish using the stem. Southers was holding the gun under his arm, pointed toward the floor. The gun slipped. He tried to adjust and it went off. He testified he did not intend to shoot it, but he must have hit the trigger. He didn’t realize at first that he hit Jody, then he saw her slowly sit down and knew she was hit. Philly came in to see what happened. Southers sat on the bed and said he didn’t mean to shoot. He was scared and shocked. Booker and Philly wanted Southers to leave so Booker could call an ambulance. Southers said he would turn himself in and he left with Philly. Philly took the gun. Southers got in the car with Patricia. After they drove around awhile, Southers told Patricia what happened (T12 pp 1944-51; T13 pp 1971-75, 1981-84, 1992; T13 pp 2067-68)

 Patricia texted her daughter, who responded that Jody was alive but might lose her arm. Southers felt somewhat relieved but still was very upset about having shot his friend. He knew he had “messed up” and “was being reckless and stupid, not paying attention.” Southers texted a friend at 1:12 a.m., saying, “Yo, Big Bro. I fucked up big time. I shot Jody. Took her arm off. I need help ASAP. No bullshit. Call Kev snitch bitch nigga telling everything.” Southers explained this was street language that he and others he knew used all their lives. Southers assumed Booker was mad that Jody was hurt and Southers was worried about what Booker would say. Southers sent a similar text to his brother at 1:18 am, saying: “Yo, can’t do it. I just body a bitch. She alive. It was a mistake.” Southers explained that in this context “body” meant “shot” and that the word “bitch” is a ghetto term used in many situations. Southers acknowledged at trial that the term sounded very disrespectful to Jody. (T9 p 1332; T11 pp 1631-32; T13 pp 1993-94, 2000-04)

Southers and Patricia sat in her parked car for about an hour. He was drinking as a way of dealing with his emotions. They eventually started to drive back to the store and got pulled. Southers testified he was then “drunk” and felt “numb.” He did not learn until hours later that Jody had died. (T13 pp 2005-10) After that, he was extremely upset and didn’t get up out of his bed in the jail for two days, missing his first court appearance. Southers testified he had privately cried about Jody, on his first night in jail and at other times since. He testified he took full responsibility for shooting Jody, but did not intend to do it. (T13 pp 2112-16)

 *Booker’s testimony about April 15-16, 2020*

Kevin Booker testified that, around 10:30 p.m. on April 15, 2020, he returned to Bob’s apartment and saw Southers in the hall, sitting on a cooler, drinking a 12-pack of Milwaukee’s Best, and polishing a gun. Booker went into his apartment, where he and Jody argued for about an hour. They were “trying to talk through” something. Bob and Philly were both there. Booker eventually laid down on the bed in the bedroom, and Jody laid on the bedroom couch. He was “about halfway asleep” when someone knocked on the door. Booker hollered out asking who it was, and Southers answered. Booker told Southers he was in bed, and to “go away and come back tomorrow.” Booker was being “playful” – Southers had joked this way earlier that day. (T7 pp 1023-32; T8 pp 1098, 1101, 1122)

Southers came in anyway. Booker could hear Southers and Philly arguing in the apartment but could not understand their words. Booker believed they were arguing about “Ray bringing the firearm into the house, pointing it – just having it, you know, in a place where he didn’t need it.” Booker testified Southers had had the same gun at their apartment before, when he was playing chess with Philly. Jody told Booker that she was a felon and didn’t want guns in the house because she could get in trouble. Booker did not recall sharing that information with Southers. (T7 pp 1032-33; T8 pp 1055, 1118-19)

 Jody got up and went out of the bedroom in an “aggressive” manner. She yelled at Southers, telling him he didn’t need to bring a gun in the apartment. From his bed, Booker then saw Jody off balance, coming backwards through the door of the bedroom. She said something to the effect that “he hit me” or “he pushed me.” Southers came in the room. Booker got up. Booker testified that Southers “points the gun in that general direction towards where Jody was, in between the bed and the couch, that’s where he pointed the weapon, and then he fired.” Booker was “trying to get between Jody and [Southers].” Jody fell. (T8 pp 1063-73, 1078)

Booker testified that, after the gun fired, Southers had a look on his face “like a kid that just broke his mom’s favorite piece of china in the kitchen.” Booker said Southers then “pointed the gun at my chest.”[[2]](#footnote-2) Booker told Southers to leave so Booker could get some help for Jody. Southers said he was going to turn himself in. Southers “put his head down and then took the gun with him and walked out of the room.” Booker immediately called 911 and tried to get help for Jody.[[3]](#footnote-3) (T8 pp 1078-84)

That was the last time Booker saw Southers until this trial. After the shooting, and learning that Jody died, Booker was “devastated.” He packed up and moved back home to Greensboro. (T8 pp 1084, 1089)

Booker said Southers didn’t seem to be impaired, at least “not outside the usual.” [[4]](#footnote-4) Jody had a crack pipe in her hand when she was hit; Booker took it from her and hid it in the couch before help arrived. Booker said he and Jody had smoked a little bit earlier that evening, but Booker did not consider himself intoxicated. (T8 pp 1031, 1087-88) Booker had felony charges in Guilford pending at the time of trial, and he accepted a 2022 plea in New Hanover to misdemeanor paraphernalia on charges of felony possession of heroin and meth. (T8 pp 1164-67)

 *Excluded evidence of accident*

 On the 911 call, Booker is heard saying “a gun discharged accidentally here in the house.” (Exh. 42A at 00:45) On bodycamera footage, Booker says at least three times it was an accident, within a few minutes of police arriving. (Exh. 13A 1:43, 2:15-16) Within the next twenty minutes Booker tells an officer he thinks it was an accident; the gun just “goes off”; and Southers said “I didn’t mean to do it.” (Exh. 13A at 12:15, 18:33, 18:48, 20:29)

 Booker was interviewed at the police department at 4:43 a.m. Booker again said, twice, that Southers said “I didn’t mean to do it” right after the gun fired. (Exh. 103A 3:40, 7:46; T11 p 1602)

 The State succeeded in excluding all of Booker’s statements that this was an accident, and his statements that Southers said he didn’t mean to do it. Details are discussed fully below.

 *Other evidence*

 After Southers and Patricia Reeves were pulled over, Southers was arrested and taken to the police department to be interrogated. Southers was Mirandized and chose not to tell police anything about the shooting. (T10 pp 1543-47) Over objection, the prosecution elicited the fact that Mr. Southers had not told police it was an accident. (T13 pp 2085-90, 2096-97)

 Three glass pipes were found in the bedroom. (T11 pp 22-23) The shotgun was found outside the apartment house, sticking out of a bush. (T7 p 934-39, 990) A firearms agent examined the shotgun. She said it was working properly and there was no evidence of a problem that would have caused the gun to discharge on its own. (T12 pp 1841-42, 1846-47) The “trigger weight” of the shotgun was between 3½ and 4½ pounds, typical for its type. (T18 pp 1852-54) The agent agreed unintentional firing happens even with experienced people, including law enforcement officers. (T12 pp 1862-63)

 A search of Mr. Southers’ phone revealed texts and photos related to selling the shotgun, along with the texts described above. There were no texts with Jody on his phone. (T11 pp 1629-33) There were no text messages on Jody’s phone between her and Mr. Southers. There were numerous texts on her phone relating to her prostitution business. (T12 pp 1789-91)

 *Patrick Carr, informant*

Patrick Carr was in jail with Mr. Southers for a “day or so” in April 2020. Carr had a history of drug offenses and felony B&E. He was on probation at the time of trial. Carr testified Mr. Southers confessed that he was secretly giving Jody crack in exchange for sex, and that Jody had threatened to tell Patricia. Southers was planning on “doing something” about it. One night he was smoking Boat, which gave him “the heart to do it” and he “shot [Jody] in the arm.” Southers didn’t mean to shoot her arm; he “meant to kill her.” He was going to “say it was an accident.” (T9 pp 1378-93)

 Carr said he called his lawyer after hearing Southers’ confession. He landed a deal with the DA’s office, in which he would get a probationary sentence on pending charges in exchange for testifying against Mr. Southers. Carr’s charges included selling and trafficking heroin. The State also agreed not to violate the probation Carr was then serving, so that Carr would not serve any prison time. Carr had a prior record level of V. (T9 p 1396; T10 pp 1426-33)

 Southers remembered talking to Carr in jail about the case. Southers testified he told Carr he accidentally shot Jody. Southers said nothing to Carr about intending to harm Jody. He had no sexual relationship with Jody and said nothing to Carr about having one. (T13 pp 2013-19)

 *Closing argument*

 Defense counsel argued to the jury it could reasonably find either accident or involuntary manslaughter – the latter if the jury believed Mr. Southers acted with culpable negligence. (T14 pp 2240-41)

 The prosecution stated that Mr. Southers was ineligible to claim either accident or involuntary manslaughter under North Carolina law, because he was a felon in possession of a firearm. (T14 pp 2199-2200, 2214) The prosecution also faulted Mr. Southers for not telling police the shooting was an accident at the time of his arrest and interrogation. (T14 pp 2184, 2187-88, 2198)

**ARGUMENT**

**I. THE TRIAL COURT’S EXCLUSION OF BOOKER’S ACCIDENT STATEMENTS VIOLATED THE RULES OF EVIDENCE AND MR. SOUTHERS’ RIGHT TO PRESENT A DEFENSE.**

 The only eyewitness, Kevin Booker, should have been allowed to testify to his impression that the shooting was an accident. Further, Booker’s statements that it was an accident, made at the time of the shooting, were relevant and qualified as hearsay exceptions. Booker’s statements were also admissible to impeach in part and corroborate in part his trial testimony. Finally, Booker’s statements that Mr. Southers said he did not mean to shoot Jody were admissible as corroboration of Mr. Southers’ testimony. By excluding this evidence, the trial court violated the North Carolina Rules of Evidence as described below and Mr. Southers’ right to present a defense under the state and federal Constitutions. *Crane v. Kentucky*, 476 U.S. 683 (1986); U.S. Const. amends. V, VI, XIV; N.C. Const. art. I, §§ 19, 23 and 24.

 *Standard of review*

 A trial court’s ruling on admission of evidence is reviewed for abuse of discretion. *State v. Aldridge*, 139 N.C. App. 706, 714 (2000). Constitutional issues are reviewed de novo. *State v. Gardner*, 322 N.C. 591, 594 (1988).

 *Preservation*

 Prior to trial the State filed a motion to exclude Booker’s statements that the shooting was an accident, which were documented on the 911 call and bodycamera footage. (Rpp 32-33; T1 p 30) The defense opposed, arguing Booker’s statements were admissible as present sense impressions, excited utterances, and as lay opinion. (Rpp 34-37; T1 pp 35-40) The court excluded the ‘accident’ statements. The 911 call and bodycamera footage were redacted. (T3 pp 132-33) The defense submitted the full recordings of the 911 call (State’s Exh. 42A) and the bodycamera footage (State’s Exhs. 13A, 20A, 21A) as an offer of proof. (T7 p 959; T8 pp 1045, 1104) The defense again objected when the redacted recordings were introduced. (T7 pp 928-29, 980-81, 986; T8 pp 1085-86)

Before trial, the court ruled, over defense objection, that Booker could not testify that Southers said he didn’t mean to shoot, as this was “self-serving.” When Booker testified, the defense made an offer of proof and Booker testified that Southers said “I didn’t mean to do it” right after the gun fired. (T8 pp 1122-23; 1132-34)

The defense also elicited on voir dire that the 911 call Booker made was one of the most distressing incidents of his life. Booker further said he believed the shooting was an accident because of the look on Southers’ face after the gun went off. (T8 pp 1167-69) Following this voir dire, the defense renewed its objections to excluding this evidence, again arguing it was permissible opinion, present sense impression, excited utterance, and impeachment under the Rules of Evidence and the Constitution. (T8 pp 1181-83)

The defense made another offer of proof asking a detective about Booker’s excluded statements, arguing parts were inconsistent with Booker’s trial testimony. (T12 pp 1761-69) And finally, after Mr. Southers testified, the defense asked to introduce the complete 911 tape and bodycamera footage as evidence corroborating Southers’ testimony. (T13 pp 2119-21)

The trial court denied all these defense motions. The issues are fully preserved.

**A. Booker’s testimony that he thought this was an accident was admissible as a lay opinion and a shorthand statement of fact.**

Evidence Rule 701 provides that a lay witness may testify in the form of opinions provided they are “(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.” N.C.G.S. § 8C-1, Rule 701. “A lay witness, from observation, may form an opinion as to one’s mental condition and testify thereto before the jury.” *State v. Strickland*, 321 N.C. 31, 38 (1987) (allowing testimony that a shooter was ‘in his right mind’ when the witness knew the shooter and observed the situation). *See also State v. Davis*, 321 N.C. 52, 56 (1987) (lay opinion of a defendant’s sanity admissible); *State v. McClain*, 169 N.C. App. 657, 670 (2005) (lay opinion that defendant was not ‘mentally retarded’ admissible.)

Further, “a witness may state the ‘instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time.’ Such statements are usually referred to as shorthand statements of facts.” *State v. Brown*, 350 N.C. 193, 203 (1999) (internal citations omitted). For example, a witness can testify that “it looked to him like defendant was trying to shoot [the victim] in the head.” *State v. Lesane*, 137 N.C. App. 234, 244 (2000). Other cases allow similar shorthand statements of fact. *See, e.g., State v. Roache,* 358 N.C. 243, 288 (2004) (admitting shorthand statement of perception about who the aggressor was); *State v. Eason*, 336 N.C. 730, 746-47 (1994) (allowing shorthand statement that defendant “was enjoying what he was doing”); *State v. Loren*, 302 N.C. 607, 609-11 (1981) (admitting testimony that defendant “was acting like he was trying to hide something”).

*Loren* explained it is difficult or impracticable for a witness to describe every detail observed, or how that information added up to his conclusion. *Id*.The admitted statement in *Lesane* is of the same nature as Booker’s, except Booker thought it looked like Mr. Southers was *not* trying to shoot the victim. Booker knew the people involved in the shooting and he was present before, during, and after the shooting. Booker formed an instantaneous conclusion that the shooting was an accident, based on his immediate perceptions. Booker could not easily describe every nuance about what he saw and the behavior of the people involved, so his conclusion would have helped the jury to understand his testimony. Thus, Booker could testify he thought the shooting was accidental. Booker’s accident statements should have been admitted both as lay opinion and as shorthand statements of fact.

**B. Booker’s statements that this was an accident, made at the time of the events, were admissible as exceptions to the hearsay rule.**

*Excited utterance*

 An “excited utterance” is a statement “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition” and is admissible as an exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 803(2). For a statement to qualify as an excited utterance, it must be: “(1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication.” *State v. Maness*, 321 N.C. 454, 459 (1988).

 Booker’s statements to the 911 operator and to officers arriving at the scene qualified as excited utterances. On the 911 call, made within a minute or two of the shooting,[[5]](#footnote-5) Booker says “a gun discharged accidentally here in the house.” (Exh. 42A at 00:45) On bodycamera footage, Booker says at least three times it was an accident, within a few minutes[[6]](#footnote-6) of police arriving. (Exh. 13A at 1:43, 2:15-16) Within twenty minutes Booker again said it was an accident and described that the gun went off. (Exh. 13A at 12:15, 18:33, 20:29)

The officers with Booker after the shooting said it was a “frantic situation” in which Booker was “excited and under a lot of stress” and that he was very distraught. (T8 pp 1186-87; T9 pp 1218-19) Booker himself testified he was under extreme stress. (T8 pp 1167-69)

 Under our case law, the amount of time that has passed is relevant, but the key question is whether the declarant is still excited and distressed. *See State v. Lowery*, 278 N.C. App. 333, 340 (2021) (and cases cited therein). This Court held statements on a 911 call were excited utterances, where the call was made immediately after the shooting from a room in which the victim lay dying, and where the audio exchange confirmed the “excited condition” of the caller. *State v. Wright*, 151 N.C. App. 493, 497 (2002); *see also State v. Pickens*, 346 N.C. 628, 644 (1997) (admitting statements given to police by witness of shooting that had just occurred). Booker was in this exact circumstance – his statements occurred within a few minutes of the shooting and he was clearly distressed, as anyone calling 911 after the shooting of a loved one would be. Booker’s statements were admissible under the excited utterance exception.

 *Present sense impression*

Booker’s statements, made as a firsthand observer of the shooting, were also admissible under the “present sense impression” exception. This exception permits the admission of statements “describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.” N.C.G.S. § 8C-1, Rule 803(1). Present sense impressions are considered reliable because of the closeness in time between the event and the declarant’s statement. *Pickens*, 346 N.C. at 645. A “brief lapse in time” does not disqualify a statement from falling under Rule 803(1). *State v. Morgan*, 359 N.C. 131, 155 (2004). Booker observed the shooting firsthand and up close. His 911 statement that the gun discharged accidentally was made less than two minutes after it happened, and his subsequent accident statements to first responders were made within five minutes. The statements were admissible under the present sense impression exception.

**C. Booker’s statements to police about accident were consistent in part and inconsistent in part with his trial testimony, and thus were admissible for impeachment and corroboration.**

Prior inconsistent statements of a witness are admissible for the purpose of impeachment. N.C.G.S. § 8C-1, Rule 607; *State v. Gettys*, 243 N.C. App. 590, 595 (2015). Prior consistent statements are admissible for “corroborative, nonhearsay purposes” because they tend to strengthen or confirm the witness’ testimony. *Id.* A trial court may admit prior statements for both corroboration and impeachment, “whichever the jury found.” *Id.* at 596. The Court in *Gettys* admitted a recording of defendant’s ex-girlfriend’s police interview where the recording contained some statements tending to corroborate her testimony and some tending to impeach it.

Booker’s trial testimony about accident was mixed. He testified, for example, that Southers “points the gun in that general direction towards where Jody was, in between the bed and the couch, that’s where he pointed the weapon, and then he fired.” (T8 pp 1063-73) This statement makes the shooting sound intentional and is therefore contrary to Booker’s prior statement that the shooting was an accident. Booker’s prior recorded statements that this was an accident were therefore admissible to impeach his trial testimony under *Gettys*.

Booker also testified that, after the gun fired, Southers had a look on his face “like a kid that just broke his mom’s favorite piece of china in the kitchen,” which is consistent with the shooting being an accident. (T8 pp 1079, 1083) Booker’s prior recorded statements that this was an accident confirmed and strengthened this trial testimony. The statements were therefore admissible as corroboration under *Gettys*.

**D. Booker’s statement corroborated Mr. Southers’ testimony.**

Mr. Southers testified that he said “Man, I didn’t mean to do it” after the gun discharged. (T12 p 1949) Booker’s prior statement to police – that Southers said “I didn’t mean to do it” right after the gun fired – directly corroborated Southers’ testimony. (Exh. 13A at 12:15, 18:33, 18:48, 20:29)

“The admissibility of a prior consistent statement of a witness to corroborate his testimony is a long established rule of evidence in this jurisdiction.” *State v. Medley*, 295 N.C. 75, 78 (1978) (citations omitted); *State v. Lloyd*, 354 N.C. 76, 103 (2001). The fact that Southers’ statement appears to be self-serving goes only to its weight and does not preclude admissibility. It is “for the jury to decide the weight to give the statement in deciding the issue of defendant’s guilt or innocence depending upon their assessment of the [defendant’s] credibility.” *State v. Corbett*, 376 N.C. 799, 828 (2021) (cleaned up). The trial court erred in excluding Booker’s statement to police that Southers said he didn’t mean to do it.

 **E. The exclusion of Booker’s statements was prejudicial.**

 Because this evidence was a key part of Mr. Southers’ accident defense, its exclusion is constitutional error and prejudicial unless found harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b); *State v. Silva,* 304 N.C. 122, 133 (1981). Alternatively, the prejudice standard for excluding proffered evidence is whether there is a reasonable possibility that, had the evidence been admitted, a different result would have been reached at trial. *State v. Jacobs*, 363 N.C. 815, 825 (2010)

 The State’s witnesses offered no motive for this shooting outside of the informant’s testimony, which the jury apparently disregarded. Even without Booker’s excluded statements, the jury’s verdicts (Rpp 100-01) established it did not conclude Mr. Southers had intent to harm Jody Lopez, nor the intent to commit *any* felony in the apartment. *See* N.C.G.S. § 14-54 (felony breaking requires intent to commit a felony, while misdemeanor does not).

 Booker was the only person other than Mr. Southers to testify about what happened in the apartment. Booker’s contemporaneous corroboration of accident would have bolstered Southers’ testimony and provided additional substantive evidence of accident, obviously benefitting Southers’ defense.

The exclusion of Booker’s statements was especially prejudicial due to the State’s choice at trial to argue that Mr. Southers made up a story for trial that he had not previously told. The State capitalized on the fact that the truth of what was said at the time of the shooting was excluded. (See Issue II below). This exacerbated the prejudice of excluding Booker’s statements that showed Mr. Southers said this was an accident immediately after the gun discharged.

 The exclusion of this evidence was not harmless beyond a reasonable doubt and there is a reasonable possibility its admission would have changed the outcome. Under either standard, a new trial is required.

**II. THE STATE’S SUGGESTION THAT MR. SOUTHERS WAS LYING BECAUSE HE WAITED UNTIL TRIAL TO TELL HIS VERSION OF EVENTS VIOLATED HIS CONSTITUTIONAL RIGHT TO SILENCE.**

Mr. Southers had a constitutional right not to speak to police about the shooting. When he was interviewed, he was under arrest and had received *Miranda* warnings. The State was therefore prohibited from using Mr. Southers’ silence against him. The trial court erred in allowing questions about Mr. Southers’ silence over objection, and in failing to intervene in the State’s argument capitalizing on that admitted evidence. A new trial is required.

 *Standard of review and preservation*

Constitutional issues are reviewed de novo. *Gardner*, 322 N.C. at 594. Whether the trial court errs in overruling objections to questions about a defendant’s post-arrest silence is a question of law reviewed de novo. *See State v. Shores*, 155 N.C. App. 342, 351 (2002) (reviewing same de novo).

Whether the trial court errs in failing to intervene ex mero motu when a prosecutor improperly comments on post-arrest silence is an issue of law reviewed de novo. *See State v. Mitchell*, 353 N.C. 309, 326 (2001).

Evidence admitted without objection is reviewed for plain error. Error rises to the level of plain error where it had a probable impact on the jury’s decision. *State v. Lawrence*, 365 N.C. 506, 518 (2012).

**A. Cross-examination and closing argument commenting on a defendant’s post-arrest silence both violate the Constitution.**

Citizens have a right to remain silent under the Fifth Amendment to the United States Constitution and under Article I, Section 23 of the North Carolina Constitution. *State v. Ward*, 354 N.C. 231, 266 (2001). It is “fundamentally unfair and a deprivation of due process to allow the arrested person’s silence to be used to impeach an explanation subsequently offered at trial.” *Doyle v. Ohio*, 426 U.S. 610, 618 (1976); *State v. Hoyle*, 325 N.C. 232, 236 (1989). This is so because once a person under arrest has been advised of his right to remain silent, there is an implicit promise that his silence will not be used against him. *Doyle*, 426 U.S. at 618. A “defendant’s decision to remain silent following his arrest may not be used to infer his guilt, and any comment by the prosecutor on the defendant’s exercise of his right to silence is unconstitutional.” *Ward,* 354 N.C. at 266(quoting *Mitchell*, 353 N.C. at 326).

Officers stopped Patricia Reeves’ car at about 1:30 a.m. on April 16, 2020. Mr. Southers was in the passenger seat. He was asked to get out of the car, searched, and handcuffed. (T8 pp 1192-95, 1201; T9 pp 1238-41) Southers was then driven to the police department, given *Miranda* warnings, and interviewed. (T10 p 1544) In the interview, Southers told detectives to “get out of his face” and to “go ahead and charge him with whatever [they were] going to charge him with.” He gave no information about the shooting. (T10 p 1547)

 As described above, Mr. Southers testified at trial and explained the accidental shooting in detail. On cross-examination, the prosecutor asked Mr. Southers what he told police when he was arrested:

Q. We heard you speaking to officers?

A. Yes.

Q. We didn’t hear you tell them it was a mistake.

A: And?

Q. You didn’t tell them this was all an accident.

A. I didn’t tell them anything.

Q. That’s right. You didn’t tell them it was all a big misunderstanding that the gun slipped.

A. They didn’t ask me those questions. I’m not going to volunteer information.

Q. In fact, the first time you told this story about it slipping was three years later in this courtroom, isn’t it?

 DEFENSE COUNSEL: Objection, Your Honor.

(T13 pp 2085-86) There was then a bench conference at which defense counsel argued the prosecutor’s questioning interfered with Southers’ right to remain silent. The objection was overruled. (T13 pp 2096-97)

After the bench conference, the prosecutor continued:

Q. The first time you told this story to anyone was yesterday in this courtroom, correct?

A. That is correct.

Q. You’ve had three years to think about it?

A. To think about a story? No. …

(T13 p 2086)

 The State later asked more questions along the same lines:

Q. This interview was your chance to set the record straight, wasn't it?

A. The interview with the police.

Q. Yeah.

A. Set the record straight? I didn’t tell them anything about the case, so how could I set the record straight.

Q. Well, it was your chance to, wasn’t it?

A. No. My chance is now to set the record straight.

Q. Okay. In your own words, you knew you fucked up?

A. Oh, yeah. That’s the truth.

Q. You didn’t bother telling them the truth that night, did you?

A. I did not talk to the police about this case, once again.

(T13 pp 2089-90)

In its closing, the prosecution argued:

Three years later [Mr. Southers has] come forward and given a statement that takes the State’s evidence and just twists every detail to make himself not liable for the victim’s murder. (T14 p 2184)

 It later argued:

The State’s evidence shows the defendant pretends not to know why he’s being arrested. The defendant says, Oh, I was just fearful of police.[[7]](#footnote-7) That’s why, when I had a chance to tell them what happened, give my version of events, I didn’t tell them that. I talked to them about other things that had nothing to do with the murder. (T14 p 2188)

 Twice more in closing the State attacked Mr. Southers for “pretending not to know why he’s being arrested” and “acting like he doesn’t know what’s going on” when he is stopped by police. (T14 pp 2188, 2198)

 The State’s cross-examination and its closing argument violated Mr. Southers’ right to silence. The fact that Mr. Southers made other statements to police during his interview does not affect his right. In *Hoyle*, the defendant spoke to police after he was arrested, answering some of the questions they asked him about the incident. 325 N.C. at 239. At trial, Hoyle testified that the victim had attacked him and the gun fired accidentally when they later struggled over it. He was cross-examined on failing to tell police earlier about the initial attack. The Court held this questioning violated his right to silence. *Id*. at 237.

In *State v. Shores*, 155 N.C. App. 342 (2002), the defendant provided partial information to police before invoking his right to silence. *Id.* at 345. On cross-examination he was confronted for relaying his defense only to his lawyer. *Id.* at 346. In closing argument the prosecution argued, “Ask yourself now, ‘why on earth would I wait until now to try to tell that story if I had that kind of story?’” *Id.* at 348. This Court held “the State’s attorney’s questions and his argument to the jury violated defendant’s right to remain silent” because it “attacked defendant’s exercise of his right against self-incrimination in such a manner as to leave a strong inference with the jury that part of defendant’s testimony was an after-the-fact creation.” *Id.* at 351-52. The same was true in Mr. Southers’ trial. In fact, the prosecution did not just suggest Southers changed his story; they explicitly said he changed and twisted his story at trial to match the evidence. The prosecution violated Mr. Southers’ right to silence.

**B. Under any standard, the questioning and argument were prejudicial.**

 Mr. Southers admitted to shooting Jody Lopez. The jury had to decide whether he intended to do it. Mr. Southers did his best to explain to the jury what happened. But because the trial court (improperly) excised all of the other testimony and recordings supporting Mr. Southers’ assertion that this was an accident, Mr. Southers’ testimony stood alone. His credibility was crucial to the defense.

 The State took advantage of the trial court’s unconstitutional ruling. The State made it a theme of closing argument that Mr. Southers waited to tell his story until trial so that he could “twist” the evidence in a self-serving way. On the contrary, the prosecution twisted the evidence: it knew Mr. Southers said this was an accident immediately after the shooting, but it still argued that Southers created a new story after having “three years to think about it.” (T14 pp 2184-88) The prosecution’s questioning and argument likely caused significant harm to Southers’ credibility with the jury.

*Preservation and prejudice*

Defense counsel objected on constitutional grounds when the prosecutor asked Mr. Southers why he had not told his version to the police earlier. The trial court overrruled the objection at a bench conference. The prosecutor immediately asked additional questions involving the same violation. Defense counsel did not lodge an additional objection. In this circumstance, the issue is preserved for review under N.C.G.S. § 15A-1446(d)(10), which allows review even without objection where there is “[s]ubsequent admission of evidence involving a specified line of questioning when there has been an improperly overruled objection to the admission of evidence involving that line of questioning.” *State v. Graham*, 283 N.C. App. 271, 278 (2022).

If the Court finds the improper questioning of Mr. Southers is preserved, then the State must prove beyond a reasonable doubt that the questioning was harmless. *Hoyle*, 325 N.C. at 237. It cannot do so. As just explained, Mr. Southers’ testimony about accident stood alone, and the attack on his credibility certainly prejudiced his defense. *See Shores*, 155 N.C. App. at 352 (finding State’s questioning and argument implying that testimony was an “after-the-fact creation” not harmless where defendant’s testimony and credibility were crucial to his defense).

If this Court instead concludes the improper questioning about silence is not preserved, then review is for plain error, that which probably affected the outcome. *State v. Richardson*, 226 N.C. App. 292, 300 (2013). For the reasons already stated, the attack on Mr. Southers’ credibility probably affected the jury’s verdict. *Id.*, 226 N.C. App. at 310 (finding plain error in the questioning and argument about a defendant’s post-arrest, post-*Miranda* silence.)

 Regarding closing argument, because there was no objection, the test is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene ex mero motu. *State v. Jones*, 355 N.C. 117, 133 (2002). The attack on Mr. Southers’ credibility was a clear constitutional error arising from evidence of Mr. Southers’ silence that should never have been admitted in the first place. The trial court should have intervened to prevent the State’s argument on the improper, unconstitutional evidence.

 In sum, under any standard, the law requires a new trial.

**III. THE PROSECUTION’S ARGUMENT THAT MR. SOUTHERS WAS DISQUALIFIED FROM CLAIMING ACCIDENT AND INVOLUNTARY MANSLAUGHTER REQUIRES A NEW TRIAL.**

The prosecution misstated the law in closing argument when it said that accident and involuntary manslaughter were unavailable to Mr. Southers because he was a felon illegally possessing a firearm. If not for this error, the jury could have either acquitted Mr. Southers or found him guilty of involuntary manslaughter. A new trial is required.

*Standard of review and preservation*

 Defense counsel did not object to this argument. This Court therefore reviews to determine whether the “remarks were so grossly improper that the trial court committed reversible error by failing to intervene ex mero motu.” *Jones*, 355 N.C. at 133.

**A. The State’s argument was prohibited.**

“The district attorney, in his argument to the jury, may not make erroneous statements of law.” *State v. Harris*, 290 N.C. 681, 695 (1976). A new trial is required if the defendant shows the error was “material and prejudicial.” *Id.* It is “incumbent on the trial court to monitor vigilantly” closing arguments and to “intervene as warranted.” *Jones*,355 N.C. at 129.

The State argued to the jury, repeatedly, that North Carolina law precluded Mr. Southers from claiming either accident or involuntary manslaughter because he was a felon in possession of a firearm. (T14 pp 2199-2200, 2213)[[8]](#footnote-8) This argument was (1) incorrect and (2) contrary to the trial court’s earlier ruling allowing accident and involuntary manslaughter to be submitted to the jury.

It *is* correct that a person engaged in unlawful conduct is precluded from raising accident. However, this rule has never been applied using a status offense. The “lawful conduct” rule is applied where the defendant is already committing an assault and then claims to have fired accidentally. *See, e.g.,* *State v. Riddick*, 340 N.C. 338, 343 (1995) (defendant who fought with the victim and fired the gun once intentionally before the accidental shooting occurred could not claim accident); *State v. Robinson*, 251 N.C. App. 326, 331 (2016) (same, where defendant was physically assaulting the victim while holding a gun, during which assault the gun went off); *State v. Gattis*, 166 N.C. App. 1, 11 (2004) (same, where defendant threatened person with a gun, fired the gun, reloaded, and hit victim over the head with the gun before the unintended shot was fired). The “lawful conduct” rule is also applied where the defendant is engaged in a violent crime and intentionally uses the gun as a part of that crime. *State v. Yarborough*, 198 N.C. App. 22, 34 (2009) (defendant could not claim accident where he broke into a home to commit armed robbery and claimed his shotgun went off during a struggle).

Similar to the “lawful conduct” common law rule in the accident context, our statutes preclude self-defense when a person is committing a felony. N.C.G.S. § 14-51.4. Our Supreme recently addressed whether a felon in possession of a firearm was precluded from asserting self-defense. It limited the felony preclusion to situations where there is “an immediate causal nexus between the defendant’s commission of a felony offense and the circumstances giving rise to his or her use of force.” *State v. McLymore*, 380 N.C. 185, 187 (2022). The Court reasoned that using the status offense of illegal firearm possession to preclude self-defense would lead to absurd results – effectively “all individuals with a prior felony conviction [would be] forever barred from using a firearm in self-defense under any circumstances.” *Id*. at 199.

The “causal nexus” rule in *McLymore* logically applies in the accident context. The lawful conduct rule makes some sense where a defendant is already committing a violent crime at the time a gun discharges accidentally, as in the cases above. But applying the rule using a status offense is unjust. To do so would mean the State could seek a murder conviction even when, for example, a prior felon was simply cleaning a gun and it discharged accidentally. Put another way, the fact that Mr. Southers was a felon, and therefore not legally permitted to possess a gun, had no bearing on the fact that the accident occurred. The gun would have discharged accidentally (under Mr. Southers’ version of events) whether or not Southers had a prior felony conviction. Our courts have not applied the “lawful conduct” rule in such a circumstance, and under the reasoning of *McLymore*, this Court should not extend the rule to status offenses such as illegally being in possession of a firearm.

In addition, the trial court here had already ruled Mr. Southers’ jury could consider accident and involuntary manslaughter. The State argued against this instruction, but the defense objected and persuaded the trial court that the accident instruction should be given. (T14 pp 2148-49, 2152-53) The trial court thus ruled in this case as a matter of law that illegal firearm possession did not preclude Mr. Southers’ defenses.

Prosecutors have a duty to “refrain from improper methods calculated to produce a wrongful conviction.” *Jones,* 355 N.C. at 131. When, as here, a prosecutor argues contrary to the law, it is “especially proper for the court to intervene and exercise power to curb improper arguments.” *Id.* at 130 (quoting *State v. Miller*, 271 N.C. 646 (1967)). The State’s argument was grossly improper, and the court should have intervened to enforce its own ruling that accident and involuntary manslaughter were available verdicts.

**B. The argument was prejudicial.**

The State’s argument was prejudicial and probably affected the outcome of the trial. The second-degree murder verdict in this case cannot be trusted because the jury could well have believed the prosecutor’s statement of law was accurate. A new trial is required.

The trial court did instruct on accident and involuntary manslaughter after closing argument, but the court did not address the State’s incorrect arguments or clarify the law for the jury. (Rp 86, T14 p 2289) A prosecutor’s statements are likely to be credited and assumed true by jurors. *See Jones,* 355 N.C. at 131. The lack of objection or further explanation by the court meant the prosecutor’s statements went unanswered. As argued above, the jury did not find Mr. Southers intentionally harmed Ms. Lopez. The jury must have believed Mr. Southers, at least in part, in order to reach a verdict of B2 second-degree murder. It is highly likely the jury would have reached either manslaughter by criminal negligence or acquittal by accident if not for the State’s repeated argument that the firearm possession prevented both of those conclusions.

**CONCLUSION**

 For the foregoing reasons, the law requires a new trial.

 Respectfully submitted this 18th day of March, 2024.

Electronically submitted

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**CERTIFICATION OF WORD COUNT**

Pursuant to Appellate Rule 28(j), I certify that this Brief is set in proportional type, Century Schoolbook 13 point, and contains fewer than 8,750 words.

Electronically submitted

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 **CERTIFICATE OF SERVICE**

I hereby certify that I have this day mailed the foregoing Brief by electronically mailing same in PDF format to counsel of record using the following electronic address:

Zachary K. Dunn

Assistant Attorney General

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 This 18th day of March, 2024.

 Electronically submitted

 Kathryn L. VandenBerg

1. The State could not locate Philly. (T11 pp 1609-11) Bob was in his bedroom the night of the shooting and witnessed nothing. He reportedly died before trial. (T7 pp 1012-14) [↑](#footnote-ref-1)
2. Southers testified he did not point the gun at Booker. (T13 p 2072) [↑](#footnote-ref-2)
3. The 911 call was received just after midnight. (T7 p 912) [↑](#footnote-ref-3)
4. On cross, Booker acknowledged he told police that night that Southers was “drunk.” (T8 p 1101) [↑](#footnote-ref-4)
5. Booker estimated he called 911 less than two minutes after the shooting. (Exh. 13A at 19:52) [↑](#footnote-ref-5)
6. On the bodycamera footage, after Booker said this was an accident, Booker said the shooting happened less than five minutes earlier. (Exh. 13A at 3:21) [↑](#footnote-ref-6)
7. On direct examination, when asked about his interview with police, Mr. Southers explained:

I didn’t want to cooperate with [the police], period. I didn’t want to say anything without a lawyer being present. … I don’t trust police. … [I]t’s how I was brought up. … I was brought up not to talk to no police unless there’s a lawyer present. … I’m not saying all officers are bad. It’s a protection mechanism.” (T13 pp 2009-11) [↑](#footnote-ref-7)
8. Excerpts of argument attached in Appendix. [↑](#footnote-ref-8)