STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Honorable Thomas W. Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JERMAINE SILAS WHITE,

APPELLANT

APPELLATE CASE NO. 2021-000452

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court abuse its discretion allowing Detective Kevin Kinard to opine regarding (1) statements made by Lennon Poland in Officer Ballard's body worn camera video and (2) statements made by appellant in his recorded jail phone call where the evidence had been played for the jury and both recordings were nearly unintelligible, because it was improper opinion testimony by a lay witness in violation of Rule 701(a), SCRE?

STATEMENT OF THE CASE

On February 28, 2019, appellant was indicted by a Colleton County grand jury for murder and possession of a weapon during the commission of a violent crime. R. 347 Appellant was tried April 19-21, 2021, before the Honorable Thomas W. Cooper, Jr., and a jury. R. 1. David Matthews represented appellant. R. 1. Ceth Utsey, assistant solicitor, and Reed Evans, assistant solicitor, represented the state. R. 1.

The jury found appellant guilty of murder and possession of a weapon during the commission of a violent crime. R. 342. Judge Cooper sentenced appellant to concurrent terms of thirty-five years' imprisonment for murder and five years' imprisonment for possession of a weapon during the commission of a violent crime. R. 345.

This appeal follows.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001); *State v. Wood*, 362 S.C. 520, 525, 608 S.E.2d 435, 438 (Ct. App. 2004). Appellate courts are bound by the trial court's factual findings unless they are clearly erroneous. *State v. Quattlebaum*, 338 S.C. 441, 454, 527 S.E.2d 105, 111 (2000); *State v. Williams*, 326 S.C. 130, 135, 485 S.E.2d 99, 102 (19997); *State v. Patterson*, 367 S.C. 219, 224, 625 S.E.2d 239, 241 (Ct. App. 2006); *State v. Landis*, 362 S.C. 97, 101, 606 S.E.2d 503, 505 (Ct. App. 2004).

The admissibility of evidence is within the sound discretion of the trial judge. *State v. Mansfield*, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. app. 2000); *State v. Patterson*, 337 S.C. 215, 228, 522 S.E.2d 845, 851 (Ct. App. 1999). Evidentiary rulings of the trial court will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant. *Mansfield*, 343 S.C. at 77, 538 S.E.2d at 263.

ARGUMENT

The trial court abused its discretion by allowing Detective Kevin Kinard to opine regarding (1) statements made by Lennon Poland in Officer Ballard's body worn camera video and (2) statements made by appellant in his recorded jail phone call where the evidence had been played for the jury and both recordings were nearly unintelligible, because it was improper opinion testimony by a lay witness in violation of Rule 701(a), SCRE.

Relevant facts

On July 15, 2018, Lennon Poland was shot in the back of the head in the area behind Williams Seafood in Walterboro, South Carolina. R. 74-75. Poland died nine days later July 24, 2018. R. 216. This area, locally called "the hole," was a place where many people congregated to buy, sell, and use drugs. R. 78.

Officer William Ballard responded to the scene and activated his body worn camera.[1] Ballard found Poland conscious, sitting in a chair and bystander, Mark McQune a few feet from Poland. R. 91-97. In the video from Ballard's body worn camera, McQune immediately named appellant as the individual that shot Poland and shortly after Poland said appellant's last name. R. 11, ll. 15-21; Court's exhibit 7. McQune also informed Ballard that appellant left in a brown car. R. 19, ll. 24-25; 62, ll. 15-16; Court's exhibit 7. Another individual claiming to be a bystander Edwin McCord named appellant as the shooter. R. 12, ll. 8-14; 261, l. 23-262, l. 7. However, McQune and McCord gave conflicting statements to police and both men told police

[1] Court's exhibit 7, includes three electronic files (1) the unredacted video from Ballard's body worn camera (2) video downloaded from Ballard's dash camera from his car, and (3) a recording of one of appellant's jail phone calls. State's exhibit 2, is video from Ballard's body worn camera redacted for trial. Both court's exhibit 7 and state's exhibit 2 are on file with this Court.

the other did not witness the shooting.[2] R. 12, ll. 2-16; 30, ll. 17-25. Also found at the scene was a single .25 caliber shell casing located near where Poland was sitting. R. 175, ll. 23-24.

The following day appellant was arrested at his father's home where he lived. During a search of the home police found a .25 caliber handgun and magazine, a box of .25 caliber ammunition, and a damaged cell phone. R. 185-188.

Before trial, defense counsel made a motion in limine to suppress the video downloaded from Ballard's body worn camera arguing the identification of appellant in the video was hearsay and unreliable. R. 12-19; 39-44.

In court's exhibit 7, the unredacted video downloaded from Ballard's body worn camera, when Ballard arrives, the following audio can be heard:

> **McQune**: Man, Jermaine shot that [expletive], man.
>
> **Ballard**: Jermaine?
>
> **McQune**: Jermaine White, Silas White's son.
>
> **Ballard**: Where'd he go?
>
> **McQune**: (unintelligible) little brown car.
>
> **Ballard**: (to dispatch) Central I got a GSW to the back of the head. Notify chain and an investigator, I need them on scene. (to Poland) Stay still, boss, stay still. (to dispatch) Did I tell you who the victim is?
>
> **Poland**: White
>
> **Ballard**: (to Poland) No, no, no. You're good. (to dispatch) That's gonna be Lennon Poland. Suspect is gonna be Jermaine Silas White. He's already GOA. Left in a brown car.

Court's exhibit 7, body worn camera video, timestamp 1:40-2:40.

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[2] The state did not call McQune to testify at trial. R. 16, ll. 7-21; 51, ll. 10-11. McCord testified under threat of being held in contempt and going to jail. R. 260, l. 11-261, l. 6.

Defense counsel argued McQune's statements in the video were inadmissible hearsay because McQune later admitted he did not witness the incident and was repeating what he was told by an individual that had witnessed the incident. R. 12. Defense counsel argued Poland's statements in the video were also inadmissible hearsay. Poland's statement of "White," was prompted by McQune's hearsay statement, naming appellant. Additionally, defense counsel argued that Poland was shot directly in the back of the head and it was impossible for him to have seen who shot him. Therefore, Poland's statement did not have the normal indicia of reliability that attaches to a dying declaration. Defense counsel also asserted the video was more prejudicial that probative and should be suppressed. R. 12-14; 39-40.

The state admitted McQune was not an eye or ear witness to the shooting but argued his statements should be admitted as an excited utterance because McQune walked up shortly after the incident. R. 15, ll. 6-22. The state contended Poland's statements were admissible as dying declarations. R. 15-17.

The court ruled McQune's initial statement to Ballard where he named appellant was inadmissible hearsay and ruled Poland's statements were admissible under the dying declaration exception to hearsay. R. 18-20; 43; 60-61. The state muted the portion of the video where McQune names appellant on state's exhibit 2, which was played for the jury during trial.

The state's theory at trial was that appellant shot and killed Poland because he believed Poland was working as an informant for law enforcement. R. 44; 217-219. The solicitor, during opening statements, told the jury it would hear "the voice of Lennon Poland himself calling out the name of a man that would take his life." R. 76, ll. 4-7. During Officer Ballard's testimony the trial court admitted state's exhibit 2, video downloaded from Ballard's body worn camera. R. 97. Ballard also testified that Poland said appellant's name numerous times and added that

when Ballard told dispatch appellant's name Poland nonverbally agreed that he was relaying the correct information. R. 98, l. 22-99, l. 1; 106, l. 23-107, l. 5. During cross-examination, Ballard admitted appellant's brother Desi White was a regular at "the hole." R. 111, l. 23-112, l. 19.

Also, at trial the state entered state's exhibit 17, three separate clips of one of appellant's jail calls. R.173.[3] The three clips played at trial were two and a half minutes of a fifteen-minute conversation appellant had with his girlfriend at the time. Additionally, a ballistics expert opined that to a reasonable degree of scientific certainty they believed that the shell casing recovered from the scene was fired by the gun recovered from appellant's father's home. R. 279.

McCord reluctantly testified that he saw appellant shoot Poland after being warned by the trial court that if he did not testify he would be held in contempt. However, he acknowledged that he was using a "good bit" of crack cocaine at the time of the incident. McCord also conceded appellant and his brother Desi White could be mistaken for one another. R. 262-268.

Kevin Kinard, the lead officer in the case testified that as part of his investigation that he reviewed all the evidence in the case including state's exhibit 2, Ballard's body worn camera video, and state's exhibit 17, three short clips from appellant's recorded jail phone call. During his testimony the following exchange occurred between Kinard and the solicitor:

> **Solicitor**: You reviewed – as part of your investigation and certainly earlier today at trial you saw and heard Mr. Ballard's body camera video, correct?
>
> **Kinard**: I did
>
> ...
>
> **Solicitor**: What, if anything, did you learn from the video that Mr. Poland said on that video?

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[3] State's exhibit 17, three clips from appellant's jail phone call is on file with this Court. Additionally, the entire phone call is included in court's exhibit 7, which is on file with this Court.

Kinard: Right. At one point in the video Ballard asked him, like why he did it, or he keeps mumbling, eating the cheese. Like he thinks I'm telling, eating the cheese, some reference to that.

Solicitor: And did that mean anything to you in your training and experience?

Kinard: It does. I mean, telling and then eating the cheese is a common term for, if you're a rat, or like a snitch or telling on somebody or like you know you would be talking to the police over some issues.

...

Solicitor: Rat and snitch are street words for informant?

Kinard: Correct.

Solicitor: And did you listen to the jail phone calls?

Kinard: I did.

Solicitor: One of which we played earlier?

Kinard: I did.

Solicitor: What, if anything, did you hear in that jail phone call?

Defense: Objection, your honor. I think that's in evidence and we can all make our own conclusions on that.

Court: you can refer to what part of it he's talking about, but it will speak for itself. It's already in evidence. It was already played.

R. 216, l. 24-219, l. 4; R. 218, 3-8.

Immediately following the court's admonishment, the following occurred:

Solicitor: Did you hear Mr. White refer to Mr. Poland as FBI?

Kinard: I did.

Solicitor: What does that mean to you?

R. 218, ll. 9-12. Defense counsel objected again and averred there was no reference to Poland in the call and that this was "pure speculation." Defense counsel went on to say, "And I'd ask the Court to instruct," and was cut off. The court sustained the objection stating, "if it's not referred to." R. 218, ll. 15-22. After that the solicitor asked the same question again and Kinard responded that he had heard the words FBI in the call. Kinard opined that in his training and experience it was another reference to appellant believing Poland was a "snitch" or "rat." R. 218, l. 23-219, l. 4.

During closing, the solicitor referred to state's 2, Ballard's body worn camera video, and state's exhibit 17, audio clips from appellant's jail call. R. 301, ll. 6-15; 303, ll. 6-13. The solicitor said "now, I know that's hard to hear, but he said exactly what Detective Kinard heard and talked about." R. 303, ll. 6-13.

Discussion

Deciphering what was heard in both the body worn camera video and in appellant's jail phone call clips was the job of the jury in this case and each piece of evidence should speak for itself. Officer Kinard was not testifying as an expert in this case. He was purely a fact witness, testifying about his involvement investigating Poland's death. Kinard was not qualified as an expert in this case and should not have been allowed to give an opinion on what the jury heard in the evidence before it, including video from Ballard's body worn camera and appellant's jail phone calls. Neither was Kinard qualified to give an opinion on what something that may, or may not, have been said in the recordings meant.

In the body worn camera video it is difficult to understand what Poland is saying. The background noise in the video is distracting and Poland, seriously injured and confused, is difficult to understand when he speaks.

The recording of appellant's jail phone call was between appellant and a woman he was romantically involved with. The contents of call revolved around her finding out that appellant was romantically involved with another woman when he was arrested. The state took appellant's phone call out of context when it played three clips totaling two and a half minutes of a fifteen-minute call. Listening to the call in its entirety makes it clear this call had nothing to do Lennon Poland or the shooting. The portion of the call where Kinard testified that appellant said "FBI," was admittedly difficult to understand in the short clip. Listening to this portion in the context of the entire conversation appellant seemingly said, "why that [expletive] have to come down and get in my business." Court's exhibit 7, appellant's jail phone call, at timestamp 14.28. Appellant is referring to the other woman, he never refers to Poland or the incident during the conversation.

If the witness is not testifying as an expert, the witness'[s] testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness'[s] testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training. Rule 701, SCRE.

"Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge...." *Watson v. Ford Motor Co.*, 389 S.C. 434, 445–46, 699 S.E.2d 169, 175 (2010). "On the other hand, a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training." *Id.* at 446, 699 S.E.2d at 175; *see also State v. Douglas*, 380 S.C. 499, 502, 671 S.E.2d 606, 608 (2009) ("Lay witnesses are permitted to offer testimony in the form of opinions or inferences if the opinions or inferences are rationally based on the witness'[s] perception, and will aid the jury in understanding testimony,

and do not require special knowledge."). "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *State v. Fripp*, 396 S.C. 434, 439, 721 S.E.2d 465, 467 (Ct. App. 2012) (quoting Rule 704, SCRE). *State v. Westmoreland*, 421 S.C. 410, 419, 807 S.E.2d 701, 706 (Ct. App. 2017)

Our Supreme Court considered a related matter in *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001), that Court found reversible error where an 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 heart of Ellis's claim 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).

Here, where these two pieces of evidence were significant to the state's case, Kinard's improper opinion testimony went directly to the heart of the case. It was the jury's job to determine whether appellant committed this crime based on the evidence. Kinard opined there was some sinister meaning to nearly unintelligible words. Throughout the trial, the state hammered the jury with these two recordings. From opening statement to closing statement the solicitor referred to the recordings weaving a thread through the trial, inferring to the jury that appellant had a motive that did not exist. Without appellant's alleged motive, trying to silence an informant, the state simply had a lot of evidence that could have pointed to appellant or his brother who also lived in the home.

Determining what was being said and what the words meant in these crucial pieces of evidence was the sole province of the jury and it was reversible error for a lay witness to give

opinion testimony. Kinard's testimony regarding these two pieces of evidence was not harmless and appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing argument, appellant requests this Court reverse his convictions and remand his case for a new trial.

Sarah E. Shipe
Appellate Defender

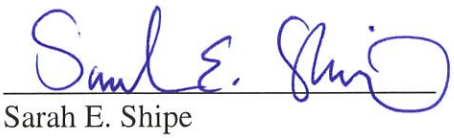
ATTORNEY FOR APPELLANT

This 14th day of June, 2022.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Brief of Appellant complies to the best of my ability with Rule 211 (b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully Submitted,



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This 14th day of June, 2022.

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