STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chesterfield County

Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RASHAWN MONTEZ LITTLE,

APPELLANT.

APPELLATE CASE NO. 2021-001385

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in allowing a witness, qualified as an expert in firearm analysis, to testify that a particular bullet was fired by a particular firearm to the exclusion of all other firearms rather than limiting her testimony to the fact that a bullet was consistent with being fired from a particular firearm?

2. Did the trial judge err in allowing an agent to testify as to the statement made by a non-testifying witness about who shot him when the statement did not meet a hearsay exception pursuant to Rule 803, SCRE?

STATEMENT OF THE CASE

In September of 2016, the Chesterfield County Grand Jury indicted Appellant, Rashawn Montez Little, for six counts of attempted murder, two counts of murder, three counts of possession of a weapon during the commission of a violent crime, and one count of unlawful possession of a firearm by a person convicted of a violent offense, indictments #2016-GS-13-545-556. (R. pp. **). On November 15, 2021, Appellant proceeded to jury trial before the Honorable Craig Brown. S. Boyd Young, Emily Kuchar and William Frick represented Appellant at trial. Kernard Redmond, Mary Thomas Johnson Lee, and Elizabeth Munnerlyn prosecuted the case. After all of the indictments were read to the jury during jury selection, after opening statements, and after the State presented two witnesses the State moved to withdraw the indictment for unlawful possession of a firearm by a person convicted of a violent offense, conceding that Appellant did not have a conviction for a violent offense pursuant to the statute. (Tr. p. lines 5-23). The judge granted the State's motion to withdraw indictment #2016-GS-13-556 for unlawful possession of a firearm by a person convicted of a violent. (Tr. p. 113, lines 6-9). The jury found Appellant guilty of the other charges. Judge Brown sentenced Appellant to life on the two murder indictments, thirty (30) years concurrent for each of the six attempted murder charges, and five (5) years concurrent for the weapon charge not associated with the murder charges for which Appellant received a life sentence. A timely notice of intent to appeal was served on November 19, 2021. This appeal follows.

STANDARD OF REVIEW

1. The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted). The circuit court's decision to admit expert testimony will not be reversed on appeal absent "a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006) (citations omitted). An abuse of discretion occurs when the circuit court's conclusions "either lack evidentiary support or are controlled by an error of law." State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (quoting Douglas, 369 S.C. at 429–30, 632 S.E.2d at 848) (internal quotation marks omitted). "A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." State v. Grubbs, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing Means v. Gates, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct.App.2001)). To show prejudice, the appellant must prove "that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citing Means, 348 S.C. at 166, 558 S.E.2d at 924).

2."The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. at 429–30, 632 S.E.2d at 848.

FACTS

On October 25, 2015, between 7:00 and 8:00 PM, officers with the Chesterfield County Sheriff's responded to a call about shots fired and a subject being hit at a trailer park on the outskirts of Pageland. (Tr. p. 72, line 12 – p. 73, lines 1-3; p. 74, lines 11-16). When they arrived the officers saw that Luther Chambers had been shot in the arm. (Tr. p. 73, lines 2-2-15). Chambers was described as "very uncooperative." (Tr. p. 74, lines 1-2). Chambers did not testify at trial.

Officers then heard additional shots fired from inside the trailer park. (Tr. p. 75, lines 2-25). As the officers headed in the direction of the gunshots they saw Tyvon Threatt laying in the arms of a female, later identified as Megan McManus, on the front porch of a trailer. (Tr. p. 76, lines 1-14). Threatt had been shot and later died. (Tr. p. 76. lines 11-14). As the officers were clearing other trailers for safety, gunshots rang out from inside a trailer. (Tr. pp. 78-82). Captain Wayne Jordan testified that as the officers took cover a black male opened the front door of the trailer and began shooting. (Tr. p. 81, lines 10-12). Captain Jordan identified the shooter as Appellant. (Tr. p. 81, lines 19-25). Officers returned fire. (Tr. p. 82, lines 12-13).

Captain Jordan then testified that they saw Appellant coming from around the corner of the trailer with his hands up, unarmed. (Tr. p. 83, lines 14-25). Although Appellant did not comply with orders, Captain Jordan ordered the other officers not to shoot as Appellant was not armed. (Tr. p. 84, lines 4-12). Captain Jordan testified that Appellant got into a parked Cadillac and sped away. (Tr. p. 84, lines 13-22). Officers shot at the Cadillac. (Tr. p. 84, line 23 – p. 85, line 1). Captain Jordan also testified that they did not chase after Appellant because they needed to check the trailer for another shooter. (Tr. p. 85, lines 18-25).

When the officers entered the trailer they found a deceased female, later identified as Appellant's wife, Shannon Little, and her three children. (Tr. p.86, lines 1-11). The three children

were interviewed and the videos and transcripts of those interviews were admitted in evidence without objection. (Tr. p. 383, lines 10-21). Although not present when the officers entered the trailer, they later learned that Marques Tyson had been in the trailer at the time of the shooting. (Tr. p. 87, lines 1-10). Tyson was interviewed and charged with two counts of attempted murder and possession of a weapon during the commission of a violent crime. (Tr. p. 324, line 18 – p. 325, lines 1-13).

A short time later the Cadillac was found abandoned on the side of the road with the engine running, lights on, the driver's side door open, and the right front tire blown. (Tr. p. 219, lines 8-16; p. 220, lines 6-7). SLED blood hounds and helicopter were called to assist in finding the suspect. (Tr. p. 225, line18 – p. 226, lines 1-4). At approximately 5:30 AM agents located Appellant and, after an encounter with Egor the K9 officer and an agent's taser, Appellant was arrested.

At the trailer officers found a MMP Body Guard 380 semiautomatic handgun under the left side of the neck of the deceased, Shannon Little. (Tr. p. 281, lines 7-14). The gun was admitted in evidence at trial, without objection, as State's exhibit #41. (Tr. p. 281, lines 16-22). After interviewing Marques Tyson, Agent Todd Schenk returned to the crime scene and discovered more evidence. (Tr. p. 343, lines 17-24). Agent Schenk testified that after receiving additional information he returned to the crime scene and found a Ruger Security Six 357 revolver in the yard behind the trailer, labeled Marker A . (Tr. p. 282, lines 13-16; p. 300, lines 2-12; p. 302, lines 14-20). This gun was also admitted in evidence at trial, without objection. (Tr. p. 282, lines 17-21).

ARGUMENTS

1. **The trial judge erred in allowing a witness, qualified as an expert in firearm analysis, to testify that a particular bullet was fired by a particular firearm to the exclusion of all other firearms rather than limiting her testimony to the fact that a bullet was consistent with being fired from a particular firearm.**

Appellant objected to the testimony of the firearms examiner from SLED, Suzanne Cromer, that a particular bullet was fired by a particular firearm on the ground that the testimony lacked scientific reliability. (Tr. p. 433, line 25 – p. 434, lines 1-9). The State proffered the testimony of Agent Cromer. (Tr. pp. 434-450). The judge overruled the objection. (Tr. p. 447, line 14 – p. 448, 449, 450, lines 1-22).

Before the jury Agent Cromer testified that seven firearms were submitted: 1.) a 40 caliber Glock belonging to Officer Robinson; 2.) a 40 caliber Glock belonging to Officer Cruz; 3.) a 45 caliber H and K submachine gun belonging to Officer Burns; 4.) a Phoenix Arms 25 auto caliber firearm found on the bed in the trailer; 5.) a Highpoint brand 45 auto caliber found in the Caravan vehicle at the scene; 6.) a Ruger Revolver 357 Magnum caliber labeled Marker A, State's exhibit #40; and 7.) a Smith and Wesson 380 semiautomatic M and P Body Guard pistol found under the deceased, State's exhibit #41. (Tr. p. 463, line 1 – p. 464, lines 1-10).

Agent Cromer testified that multiple cartridge cases or shell casings were collected at the scene and submitted for examination. (Tr. p. 464, lines 20-21). The agent then testified that certain casings matched certain firearms. She testified that eleven of the 40 S and W caliber cartridge cases were fired by Officer Robinson's firearm. (Tr. p. 464, lines 21-23). She testified that four of the 40 caliber cartridge cases were fired by Officer Cruz's firearm. (Tr. p. 465, lines 3-7). She testified that three of the items were fired by Officer Burns' firearm. (Tr. p. 465, lines 11-15). The agent testified that three items submitted were unsuitable for identification. (Tr. p. 466, lines 12-22). She testified that four of the cartridge cases were fired by the same gun but not any of the

guns submitted. (Tr. p. 467, lines 1-23). The agent testified that four of the cartridge cases were fired by the 380 semiautomatic pistol, State's exhibit #41. (Tr. p. 469, lines 15-17; p. 470, lines 6-10). The agent additionally testified that the bullet jacket recovered at the autopsy of Shannon Little was fired by the 380 semiautomatic pistol, State's exhibit #41. (Tr. p. 471, line 19 – p. 472, lines 1-10). Appellant renewed his objection to the testimony. (Tr. p. 471, line 25 – p. 472, line 1). The judge should have limited the agent's testimony to consistencies she observed rather than matches.

While firearm identification testimony has generally been found admissible, the reliability of this kind of expert testimony has come under scrutiny. See David H. Kaye, Firearm-Mark Evidence: Looking Back and Looking Ahead, 68 Case W. Res. L. Rev. 723, 724 (2018). As the United States District Court for the District of Massachusetts wrote:

> Courts have understandably been gun shy about questioning the reliability of firearm identification evidence. See Santiago, 199 F.Supp.2d at 111–12 ("The Court ... can only imagine the number of convictions that have been based, in part, on expert testimony regarding the match of a particular bullet to a gun seized from a defendant or his apartment."). Accord United States v. Foster, 300 F.Supp.2d 375, 377 n. 1 (D.Md.2004) (noting that "[b]allistics evidence has been accepted in criminal cases for many years"); United States v. O'Driscoll, 2003 WL 1402040 at *1, 2003 U.S. Dist. LEXIS 3370 at *4 (M.D.Pa. Feb. 10, 2003). Storm clouds, however, are gathering. See Sexton v. State, 93 S.W.3d 96 (Tex.Cr.App.2002) (rejecting matching of cartridge cases based on magazine marks alone without recovery of underlying magazine); Ramirez v. State, 810 So.2d 836 (Fla.2001) (rejecting toolmark analysis matching knife to fatal stab wounds).

United States v. Monteiro, 407 F. Supp. 2d 351, 364 (D. Mass. 2006)(n. 1 citing United States v. Green, 405 F. Supp. 2d 104 (D. Mass. 2005) omitted).

In limiting the firearm identification testimony in United States v. Green, 405 F. Supp. 2d 104, 124 (D. Mass. 2005), the United States District Court for the District of Massachusetts wrote:

> Putting together this precedent with the evidence I have heard, suggests admission but with limitations, limitations identical to those I adopted in *Hines*. O'Shea is a seasoned observer of firearms and toolmarks; he may be able to identify marks that

> a lay observer would not. But while I will allow O'Shea to testify as to his observations, I will not allow him to conclude that the match he found by dint of the specific methodology he used permits "the exclusion of all other guns" as the source of the shell casings. Defense will be permitted full and fair cross-examination.

Agent Cromer's qualification as an expert was not challenged. (Tr. p. 437, lines 14-15). The agent could testify about her observations. As in Green, however, Agent Cromer should not have been allowed to testify about matches between casings and firearms.

In limiting the firearm identification testimony in Monteiro the Massachusetts District Court explained that, "[b]ecause an examiner's bottom line opinion as to an identification is largely a subjective one, there is no reliable statistical or scientific methodology which will currently permit the expert to testify that it is a 'match' to an absolute certainty, or to an arbitrary degree of statistical certainty[,]" and "[a]llowing the firearms examiner to testify to a reasonable degree of ballistic certainty permits the expert to offer her findings, but does not allow her to say more than is currently justified by the prevailing methodology." 407 F. Supp. 2d at 372. The agent's testimony in the present case should have been limited to a reasonable degree of ballistic certainty.

The Massachusetts courts are not alone in limiting firearm identification testimony. In United States v. Ashburn, 88 F. Supp. 3d 239, 248 (E.D.N.Y. 2015), the United States District Court for Eastern District of New York wrote:

> Based on the court's review of the field of toolmark and firearms identification, including the NAS Report upon which Laurent relies, and on this court's review of Daubert proceedings performed in other cases, an instruction limiting LaCova's testimony is appropriate. See, *e.g.*, Willock, 696 F.Supp.2d at 549 (precluding expert from stating opinions and conclusions with any degree of certainty and precluding expert from stating that it was a "practical impossibility" that any other firearm fired the cartridges in question); Taylor, 663 F.Supp.2d at 1179 (limiting expert to an opinion that his conclusion was "to a reasonable degree of ballistic certainty"); *Glynn*, 578 F.Supp.2d at 574 (limiting expert ballistics opinion to statement that match was "more likely than not"); Diaz, 2007 WL 485967, at *14

(precluding experts from testifying that their conclusions were "to the exclusion of all other firearms in the world" and limiting description of certainty to a "reasonable degree of certainty in the ballistics field"); *Monteiro*, 407 F.Supp.2d at 372 (limiting testimony to a "reasonable degree of ballistic certainty"); *Green*, 405 F.Supp.2d at 124 (precluding expert from testifying that his methodology permitted "the exclusion of all other guns").

The court in Ashburn cited Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Under both Daubert and State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), Agent Cromer's testimony should have been limited to consistencies she observed. The error was not harmless.

2. The trial judge erred in allowing an agent to testify as to the statement made by a non-testifying witness about who shot him when the statement did not meet a hearsay exception pursuant to Rule 803, SCRE

The first person officers encountered when they arrived at the trailer park was Luther Chambers. Chambers had been shot in the arm. (Tr. p. 73, lines 2-15). Chambers was described by law enforcement as "very uncooperative." (Tr. p. 74, lines 1-2). Chambers did not testify at trial. At the time of the shooting John Epps Follin, III, was working as a SLED agent. (Tr. p.314, lines 12-14). At the time of trial Follin was employed as an operations manager with the Lake City Housing Authority and part time with the Fourth Circuit Solicitor's Office. (Tr. p. 313, lines 14-16). Agent Follin interviewed Chambers, also known as BAM, at the hospital the morning after the shooting. (Tr. p. 316, lines 3-22).

At trial the State asked Agent Follin if during the interview Chambers identified his shooter. (Tr. p.319, lines 2-7). Appellant objected on hearsay grounds. (Tr. p. 319, line 8). The State argued the statement met a hearsay exception pursuant to Rule 803(2), SCRE, and State v. Sims, 348 S.C. 16, 26, 558 S.E.2d 518, 524 (2002). (Tr. p. 319, lines 9-14). The judge held a

bench conference and then overruled the objection pursuant to Rule 803, SCRE. (Tr. p. 319, lines 18-19). When asked if Chambers told the agent who shot him the agent answered, "He said Shawn." (Tr. p. 320, lines 1-2). The trial judge erred in admitting the hearsay statement.

The State's reliance on State v. Sims is misplaced. In Sims the South Carolina Supreme Court found that a five-year old boy's statement to police about who else was in the apartment the night of his mother's attack was hearsay but met the excited utterance exception to the hearsay rule. The police were initially called to the scene because the young boy was found outside of his mother's apartment upset and crying. Although there could have been possibly as long as twelve hours between the attack and the boy's statement to police, the Court found the statement admissible writing:

> Given the totality of the circumstances, we find the son was under the continuing stress of excitement when he told Officer Thomas appellant was in the home the night of the attack. See State v. McHoney, supra (in determining whether statement falls within excited utterance exception, court must consider totality of circumstances).
>
> Accordingly, the trial court did not abuse its discretion in admitting the son's statement to Officer Thomas because the statement falls under the excited utterance exception to the hearsay rule. See State v. Burdette, supra (determining whether statement falls within excited utterance exception is left to sound discretion of trial court).

State v. Sims, 348 S.C. 16, 23, 558 S.E.2d 518, 522 (2002)(n. 1 omitted). The young boy testified at trial but did not testify about who else was in the apartment at the time of the attack.

In contrast, in the present case Chambers was not under the continuing stress of excitement caused by being shot in the arm when he was interviewed by Agent Follin. The shooting took place between 7:00 and 8:00 PM on October 25, 2015. (Tr. p. 72, lines 12-14; p. 74, lines 11-16). Chambers was transported to Monroe Hospital that night and then transferred to a hospital in Charlotte. (Tr. p. 359, lines 10-12). Agent Follin interviewed Chambers the next morning at the

hospital in Charlotte at 6:59 AM. (Tr. p. 337, lines 13-25). Chambers was Mirandized before Agent Follin interviewed him. (Tr. p. 337, line 13). Chambers did not testify at trial. Chambers' statement to Agent Follin was hearsay that did not meet the excited utterance exception.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(c), SCRE. Rule 802, SCRE, provides that hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State or by statute. Chambers' statement to Agent Follin about who shot him was hearsay.

Rule 803, SCRE, provides exceptions to the rule against hearsay. Rule 803(2) provides that an excited utterance, defined as 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, is an exception to the rule against hearsay. In State v. Stahlnecker, 386 S.C. 609, 623, 690 S.E.2d 565, 573 (2010), the South Carolina Supreme Court wrote:

> Three elements must be met for a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition. Id. at 21, 558 S.E.2d at 521. A court must consider the totality of the circumstances in determining whether a statement falls within the excited utterance exception. State v. McHoney, 344 S.C. 85, 94, 544 S.E.2d 30, 34 (2001). The passage of time between the startling event and the statement is one factor to consider, but it is not the dispositive factor. Sims, 348 S.C. at 21, 558 S.E.2d at 521. "Other factors useful in determining whether a statement qualifies as an excited utterance include the declarant's demeanor, the declarant's age, and the severity of the startling event." Id. at 22, 558 S.E.2d at 521.

In the present case the State failed to prove that Chambers was under the stress of excitement when he told Agent Follin Appellant shot him. The statement was made the morning after Chambers was shot in the arm, after Chambers had been transferred to a second hospital and

had been mirandized by the agent. The trial judge abused his discretion in admitting the hearsay statement.

The statement in the present case is analogous to the hearsay statement found inadmissible in State v. Washington, 379 S.C. 120, 665 S.E.2d 602 (2008). In Washington the South Carolina Supreme Court wrote:

> Cropper's statement to police does not qualify as excited utterance. Cropper made her statements in a formal interview with law enforcement at police headquarters almost ninety minutes after the events. These statements were made in response to the Officer's questions. None of the statements were independent assertions or exclamations regarding the events. Indeed, it is apparent that the Officer was seeking detailed answers regarding the specific facts of the incident as opposed to emotional, unprompted, or inherent responses. Compare State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999) (involving an eyewitness's statements to friends made two minutes after a shooting); State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991) (finding that panicked and hysterical statements made by an eyewitness who met the responding police officer at the crime scene would have qualified as an excited utterance). While we have no doubt that Cropper was certainly upset as a result of the stabbing, the trial court's finding that statements made in a formal interview or interrogation to be excited utterances greatly expands the scope of the exception.

379 S.C. at 124-24, 665 S.E.2d at 604. The trial judge's erroneous finding that Chambers' statement to the agent the next morning after being mirandized qualified as an excited utterance greatly expands the scope of the exception. Unlike the error in Washington, the error in the present case was not harmless. Although Chambers' girlfriend at the time of the shooting, Kimberly Eason Dunlap, testified that when she went to see Chambers at the Monroe hospital the night of the shooting he told her that Shawn shot him, (Tr. pp. 358-359), there is very little additional evidence linking Appellant to the shooting of Chambers. The error was not harmless.

CONCLUSION

Based on the above arguments, this Court should reverse the convictions and remand for a new trial.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of August, 2022.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chesterfield County

Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RASHAWN MONTEZ LITTLE,

APPELLANT.

APPELLATE CASE NO. 2021-001385

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 17th day of August, 2022.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

From: Stock, Chris
To: SC - BROWN MELODY; Angela Brown
Cc: Hudgins, Kathrine
Subject: Little, R. - Initial Brief of Appellant - 2021-001385
Date: Wednesday, August 17, 2022 11:17:00 AM
Attachments: Little, R. - Initial Brief of Appellant - 2021-001385 - AG Cover Letter.pdf
Little, R. - Initial Brief of Appellant - 2021-001385.pdf

Ms. Brown,

Please find attached for service the Initial Brief of Appellant and Designation of Matter for Rashawn Montez Little's appeal which will be filed today with the Court of Appeals.

Thank you.

Chris

Chris Stock
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