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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DARRELL D. WILSON,

APPELLANT

APPELLATE CASE NO. 2022-000783

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court erred in excluding the testimony of Marjorie Rogers where the testimony regarding her opinion of Appellant's intent was relevant, where the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice to the State, and where the trial court failed to perform the requisite Rule 403, SCRE, analysis on the record?

STATEMENT OF THE CASE

During its April 2018 term, the York County grand jury indicted Appellant for one count of inflicting great bodily injury upon a child. R. (indictment). On May 23, 2022, the State, represented by Christopher Epting and Sharon Kopp O'Hayon called the case to trial before the Honorable J. Derham Cole and a jury. Appellant was represented by Melinda Butler and James Boyd. Tr. 1.

Appellant was ultimately found guilty as indicted. Tr. 398, ll. 9-13. Judge Cole sentenced Appellant to eighteen years imprisonment. App. 407, ll. 1-7. This appeal follows.

STANDARD OF REVIEW

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may only disturb a ruling admitting or excluding evidence upon a showing of a 'manifest abuse of discretion accompanied by probable prejudice.' " State v. Commander, 396 S.C. 254, 262–63, 721 S.E.2d 413, 417 (2011) (quoting 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." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

ARGUMENT

The trial court erred in excluding the testimony of Marjorie Rogers where the testimony regarding her opinion of Appellant's intent was relevant, where the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice to the State, and where the trial court failed to perform the requisite Rule 403, SCRE, analysis on the record.

Relevant Facts

Marjorie Rogers and Appellant had an "on again, off again" relationship that had ended again on December 21, 2017. That same day, Appellant[1] asked to keep Minor, a four-month-old baby boy that he had been raising with Rogers, overnight. Rogers agreed and dropped Minor off at Appellant's home around 7:30 or 8:00 on the evening of the twenty-first. Tr. 126, l. 15- Tr. 127, l. 25. The following morning, Appellant initially told Rogers that Minor was fine but then asked Rogers to come pick up Minor because he would not stop crying. Tr. 128, ll. 16-23.

When Rogers arrived to pick up Minor, she could hear him crying. Minor appeared to settle down and fall asleep once Rogers was holding him. However, when she went to put him into his car seat, he appeared unresponsive. Rogers thought they should call 911 but Appellant thought Minor was not in any distress and was breathing fine. Rogers called her mother who advised Rogers to bring Minor to her home while she called 911. Tr. 129, l. 20-Tr. 130, l. 20. EMS determined Minor was having seizures and transported him to Piedmont Medical Center (PMC) where he was stabilized and placed on life support. Tr. 119, ll. 19-22. He was then transferred to Levine Children Hospital in Charlotte, NC, where he remained for approximately six weeks. Tr. 132, l. 3-Tr. 133, l. 2.

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[1] Appellant is not the biological father of Minor. However, he was listed as the father on Minor's birth certificate. Tr. 125, ll. 12-16.

Captain Carson Neely with the York County Sheriff's Office investigated the incident involving Minor. He initially responded to Appellant's home but was unsuccessful in contacting him, so he proceeded to the hospital. Once at PMC, he spoke with the medical staff to ascertain the injuries to Minor. Based on the reported severity of Minor's injuries, Neely obtained and executed a search warrant for Appellant's home. However, no evidence of any crime was discovered in the execution of the warrant. Tr. 169, l. 24-Tr. 174, l. 4; Tr. 181, ll. 1-21. Based upon the injuries to Minor and the window of time it was believed the injuries occurred, Neely obtained an arrest warrant for Appellant. Tr. 180, ll. 12-20.

The cause of Minor's injuries was the main contention at trial. The State asserted that Minor had suffered abusive head trauma[2] at the hands of Appellant. It relied on the findings of Dr. Susan Lamb, an expert in child abuse pediatrics, to support its theory of the case. Tr. 186, ll. 11-24. Dr. Lamb opined that Minor had "widespread subdural hemorrhages and brain injuries" on the left side of his brain as well as retinal hemorrhages in the back of both eyes. She also found that there were no signs that Minor suffered any blunt force trauma to his head. Tr. 196, ll. 9-13. She opined that the injury onset was acute in time which meant Minor would have exhibited symptoms within minutes to hours of the injury occurring. Tr. 193, l. 23-Tr. 194, l. 12. She ultimately stated that based on her review of the medical records and her examination of Minor, the only explanation for his injuries was that he had suffered abusive head trauma. Tr. 191, ll. 6-11; Tr. 194, l. 15-Tr. 195, l. 1; Tr. 197, ll. 11-16.

The defense theory of the case was that Minor suffered from a pre-existing condition and complications from a virus which caused the brain injuries. The defense relied upon Dr. Joseph

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2 Abusive head trauma is a diagnosis made in instances where "children who have suffered no trauma or minor trauma have kind of catastrophic brain injuries." The term encompasses a wide variety of "inflicted head wounds" to include the outdated and no longer used diagnosis of Shaken Baby Syndrome. Tr. 187, ll. 2-14; Tr. 204, ll. 10-16.

Scheller, a pediatric neurologist, who was qualified as an expert in neurology, pediatric neurology, pediatrics, and neuroimaging to support its theory. Tr. 290, l. 17-Tr. 291, l. 15; Tr. 294, ll. 17-21. Dr. Scheller reviewed Minor's medical records from birth through his stay at Levine, including the x-rays, CAT scans, and MRI scans taken of Minor during his hospitalization. Tr. 295, ll. 1-7. In reviewing the scans, Dr. Scheller observed that the injury to Minor's brain was contained to the left side and included a blood clot inside of a vein at the top of Minor's brain and a large subdural hematoma. Tr. 300, l. 4-Tr. 301, l. 9. He further observed that there were no skull fractures or swelling of the scalp which he noted as interesting because the number one cause of a subdural hematoma is an impact injury. Tr. 301, l. 10-Tr. 302, l. 1; Tr. 299, ll. 20-25. Dr. Scheller also observed excessive fluid between the brain and the skull. Tr. 302, ll. 2-15.

In addition to the observations made from the imaging scans, Dr. Scheller noted that Minor did not have bruising, rib fractures, neck injury, or any other evidence of being violently held and shaken. He opined that it did not make sense for a child that was violently shaken to only have injury to one side of the brain. Tr. 304, l. 2-Tr. 305, l. 17. Minor's records from the incident revealed that he had a virus called metapneumovirus which Dr. Scheller stated could have caused blood clots. Tr. 308, ll. 14-17. He attributed the bruising that was observed on Minor's face to emergency personnel trying to place devices or oxygen on Minor's mouth to help him breath. Tr. 310, ll. 1-9. Dr. Scheller also stated that the subdural hematoma would not necessarily have developed quickly but could have taken anywhere from a few hours to twenty-four hours to developed. Tr. 310, l. 15-Tr. 311, l. 1.

Dr. Scheller ultimately opined that the least likely cause of the injury to Minor was from violent shaking. The second possible cause would have been an unknown blow to the left side of

the head. The most likely cause of the injury, in his opinion, was that Minor had a chronic condition of excess fluid around the brain, complicated by a viral infection that caused bleeding, which caused the seizures that led to further complications. Tr. 311, l. 17-Tr. 312, l. 4.

The State called other witnesses to elicit testimony about Minor and Appellant. Sherry Rogers, the mother of Marjorie Rogers, testified that her daughter thought Appellant was somebody she would spend her life with and that if the incident with Minor had not occurred the couple would probably still be together. She also stated that Rogers confided in Appellant. Tr. 106, ll. 5-11. Rogers testified that she and Appellant had a normal relationship. They fought, maybe a little more than normal, but it was not all bad. She stated they did not have a terrible relationship. Tr. 126, ll. 18-25.

On cross-examination, Rogers testified that she did not have any concerns about leaving Minor with Appellant overnight. Tr. 147, ll. 23-25. She conceded that she did not immediately call 911 but instead called her mother for advice. She also testified that Appellant did not attempt to stop her from calling for help but only expressed his opinion that she was overreacting. Tr. 150, l. 6-Tr. 151, l. 5. A short time later, Counsel Butler informed the trial court that her next questions were potentially objectionable, and the jury was excused. Tr. 153, l. 6-Tr. 155, l. 16. The following testimony was proffered,

> Counsel Butler: Miss Rogers, throughout the case since December was it your belief then and is it your belief now that Darrell [Appellant] would never intentionally hurt [Minor]?
>
> Rogers: I don't he would intentionally do it, no.
>
> Counsel Butler: Thank you.
>
> Rogers: He was perfect with [Minor] while I was around. I don't think he would intentionally hurt him.
>
> Counsel Butler: Thank you.

Mr. Epting: Do you believe that he did hurt [Minor]?

Rogers: Yes. I don't think it was intentional, but I do think he did. Nobody else was there.

Tr. 158, l. 15-Tr. 159, l. 10.

The State argued that the proffered testimony was speculative. It asserted that since Rogers was not present when the suspected abused occurred, she should not be able to testify as to what she thought may have been in the Appellant's mind when the incident occurred. Tr, 159, ll. 11-16. Counsel Butler argued that Rogers could testify to Appellant's character and what she knew about him. She further argued that she had already testified that she left Minor with Appellant for the evening and about statements he had made to her, so it was Appellant's "prerogative to have the jury hear the fullness of her testimony." Tr. 159, ll. 19-25.

The trial court sustained the State's objection to the proffered testimony. Counsel Butler inquired as to what grounds the court sustained the objection on, to which the trial court stated, "relevance and the fact that any probative value is substantially outweighed by the danger of unfair prejudice." Tr. 160, ll. 1-7.

Discussion

All relevant evidence is generally admissible. Rule 402, SCRE. To be relevant, the evidence must have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

Rule 701, SCRE, states that a lay 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' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training." Further, the "[t]estimony 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." Rule 704, SCRE. The appellate courts of our state have repeatedly held that lay witness opinion testimony is admissible if the three requirements of Rule 701, SCRE, are met. See State v. Blurton, 342 S.C. 500, 509, 537 S.E.2d 291, 296 (Ct. App. 2000); State v. Mitchell, 399 S.C. 410, 416, 731 S.E.2d 889, 893 (Ct. App. 2012). As our Supreme Court wrote in State v. Williams,

> **Conclusions or opinions of laymen should be rejected only when they are superfluous in the sense that they will be of no value to the jury.** The terms "fact" and "opinion" denote merely a difference of degree of concreteness of description. Some statements are not mere opinions but are impressions drawn from collected, observed facts. **A natural inference based on stated facts is not opinion evidence.**

Williams, 321 S.C. 455, 463–64, 469 S.E.2d 49, 54 (1996) (cleaned up) (emphasis added).

Rogers's opinion testimony that Appellant would not intentionally harm Minor met the requirements of Rule 701, SCRE. First, her opinion was rationally based on her personal perceptions of Appellant and his interactions with Minor. Second, her opinion would have been helpful to the jury in deciding a key fact at issue – whether Appellant had the criminal intent to harm Minor. Third, her opinion did not require any special knowledge, training, education, or skill but was merely a "natural inference" based on her experiences with Appellant.

The testimony Appellant sought to elicit from Rogers concerned a central element that the State had to prove, whether Appellant had the criminal intent to harm Minor. Therefore, the

testimony was evidence that had a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. The testimony was relevant and admissible as an opinion of a lay witness. The exclusion of the testimony would only be justified if the probative value was substantially outweighed by the danger of unfair prejudice.

In determining whether evidence is admissible under Rule 403, SCRE, the court must conduct an on the record analysis to determine "whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice." State v. King, 424 S.C. 188, 200 n.6, 818 S.E.2d 204, 210 n.6 (2018). Unfair prejudice means an undue tendency to suggest a decision on an improper basis, such as an emotional one. See State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009); State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001).

The failure of the trial court to conduct an on-the-record Rule 403 balancing test is error. State v. Spears, 403 S.C. 247, 742 S.E.2d 878 (Ct. App. 2013). In Spears, a prior bad act of the defendant was used by the State under Rule 404(b), SCRE. After ruling the prior bad act admissible, the trial court failed to conduct the requisite Rule 403 prejudice analysis. The failure to conduct the requisite on the record balancing test was found to be error requiring remand to the trial court to conduct the proper analysis.

Similarly, in Hamrick v. State, 426 S.C. 638, 651, 828 S.E.2d 596, 602 (2019), the trial court's failure to conduct a full relevancy inquiry and the requisite Rule 403 balancing test was held improper. Hamrick attempted to offer a videotape re-creating the accident that led to his criminal charges. Id. The trial court failed to determine the relevancy of the evidence and only expressed concerns about the propriety of admitting the videotape. The court declined to allow

the videotape into evidence ruling, in part, that it could mislead the jury. Id. The Supreme Court held that "if the trial court was concerned the video would mislead the jury, it was required to conduct an on-the-record Rule 403 analysis." While the Supreme Court overturned Hamrick's conviction on other grounds, it admonished the trial court to conduct the balancing test and analyze objections **under the proper legal framework.** Id. at 652.

In the case *sub judice*, the court summarily ruled that the proffered testimony was not admissible. It was only at the request of Counsel Butler that the court elaborated slightly on its ruling stating it was sustaining the State's objection on "relevance and the fact that any probative value is substantially outweighed by the danger of unfair prejudice." Tr. 160, ll. 1-9. At no point did the trial court explain why the testimony was not relevant or how the probative value of the testimony was substantially outweighed by the danger of unfair prejudice to the State. There was nothing in the record, either explicitly or impliedly, that indicated the rationale for the trial court's ruling. Nor was the ruling a "compressed Rule 403 analysis" with "some indicia of [the trial court's] consideration." State v. King, 349 S.C. 142, 156, 561 S.E.2d 640, 647 (Ct. App. 2002). The trial court merely announced it was sustaining the objection and offered no reasoning for its ruling. Further, the trial court sustained the objection on a ground not raised or argued by the State at trial. The basis of the objection was that the testimony was speculative; however, the court ruled the testimony not relevant and unduly prejudicial, without any explanation of its ruling. This was an abuse of discretion by the trial court that constituted reversible error. See Spears, *supra.*

Pursuant to Rule 403, SCRE, the testimony that Appellant sought to elicit was highly probative evidence that was not unduly prejudicial to the State. "'Probative' means tending to prove or disprove." State v. Gray, 408 S.C. 601, 609–10, 759 S.E.2d 160, 165 (Ct. App. 2014)

citing Black's Law Dictionary, 1323 (9th ed. 2009). "'Probative value' is the measure of the importance of that tendency to the outcome of a case. It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues. [T]he more essential the evidence, the greater its probative value." Id. *quoting* United States v. Stout, 509 F.3d 796, 804 (6th Cir. 2007). The probative value of the Rogers testimony cannot be overstated. At trial, the State theorized that Appellant intentionally harmed Minor but there was no direct evidence proving the theory. The State could only speculate that Appellant had the criminal intent to harm Minor. Rogers's testimony directly refuted that speculation and was necessary to help the jury properly decide the issue of intent.

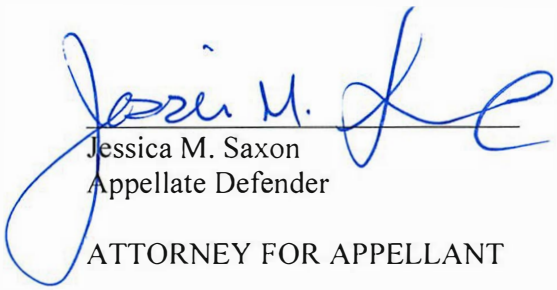
Further, the testimony was not unduly prejudicial to the State. Admittedly, the testimony was prejudicial to the State's case, however, as this Court has noted "[e]vidence cannot be excluded simply because it is prejudicial. Almost all evidence is prejudicial to somebody. Saying evidence is prejudicial is another way of saying it is relevant." State v. Bostick, 307 S.C. 226, 229, n.3, 414 S.E.2d 175, 177 n. 3 (Ct. App. 1992). "Prejudice that is 'unfair' is distinguished from the legitimate impact all evidence has on the outcome of a case." State v. Lee, 399 S.C. 521, 529, 732 S.E.2d 225, 229 (Ct. App. 2012) (internal citations omitted). "Unfair prejudice does not mean the damage to a case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis." Id. The testimony from Rogers would not have suggested that the jury make a decision on an improper basis. The testimony undoubtedly was prejudicial to the State, but it was in no way **unfairly** prejudicial.

The opinion testimony of Rogers was probative evidence that went to the crucial element of criminal intent. The testimony was admissible under Rule 701, SCRE, was relevant, highly

probative, and not unduly prejudicial to the State. As such, it should have been admitted and the trial court's exclusion of the testimony was improper. This Court should remand the matter back to the circuit court to conduct a complete analysis under the rules of evidence and require the trial court to state its findings of fact and conclusions of law in support of its ruling. Alternatively, this Court should hold that the trial court erred in excluding the testimony and remand this matter back to the circuit court for a new trial.

CONCLUSION

Based on the forgoing argument, Appellant respectfully requests this Court reversed his conviction and sentence and remand this matter back to the York County Court of General Sessions for a new trial.



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This 5th day of April, 2023.