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Jul 12 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County

Honorable Brian M. Gibbons, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ARKEVUS JIMON CAUTHEN,

APPELLANT

APPELLATE CASE NO. 2022-001268

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
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Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in allowing multiple witnesses to testify that an injury on appellant's arm was a "bite mark," which constituted improper expert opinions?

STATEMENT OF THE CASE

A Lancaster County grand jury indicted appellant for murder, armed robbery, and a weapons charge and on September 6, 2022, appellant was tried before the Honorable Brian M. Gibbons and a jury. R. 1. Lisa Collins and Nichole Wine represented the State. R. 1. William Frick represented appellant. R. 1. The jury convicted appellant. R. 647. Judge Gibbons sentenced appellant to life imprisonment for murder, five years' imprisonment for the weapons charge, and thirty years' imprisonment for armed robbery, all running consecutive. R. 653. This appeal follows.

STANDARD OF REVIEW

The trial court is required to make a finding of an expert witness's qualification under Rule 702, SCRE. State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999). "We review evidentiary rulings for abuse of discretion, meaning we will only disturb them if they have caused prejudice and are the result of legal error or have inadequate factual support." State v. Warner, 430 S.C. 76, 83, 842 S.E.2d 361, 364 (Ct. App. 2020), aff'd in part and remanded in part on other grounds, 436 S.C. 395, 407, 872 S.E.2d 638, 644 (2022). Error is found where expert testimony is offered absent a finding of expert qualification under Rule 702. Hamrick v. State, 426 S.C. 638, 650, 828 S.E.2d 596, 602 (2019).

ARGUMENT

The trial court erred in allowing multiple witnesses to testify that an injury on appellant's arm was a "bite mark," which constituted improper expert opinions.

The case against appellant for the murder of John Duncan ("Duncan") was entirely circumstantial. Duncan was found dead in his apartment by his brother. R. 174. Duncan died from multiple stab wounds. R. 265. The State relied primarily on DNA evidence supposedly consistent with appellant's culled from Duncan's fingernails and finding a gun that belonged to Duncan buried in appellant's backyard. R. 456-67.

Appellant testified and vehemently denied killing Duncan. R. 572. Appellant explained the DNA on Duncan because appellant shook Duncan's hand and got a hug from him several days before Duncan's murder. R. 576-77. Appellant also explained the gun. R. 574-75. He bought the gun from the "errand boy" in the neighborhood for fifty dollars. R. 574-75. Appellant buried the gun in the yard because he had a felony conviction and did not want the police to find it. R. 574-75.

Because of their weak case against appellant, the State repeatedly emphasized wounds found on appellant when he was arrested, contending they were suffered during an altercation with Duncan. Appellant had multiple scratches on his body, but he got these from a briar patch when he went fishing. R. 572.

On the back of appellant's arm was a wound that the State claimed was a bite mark. (State's Ex. 15). At a pretrial hearing, appellant moved to suppress any reference to the wound as a bite mark. R. 684. Appellant argued the State had no expert testimony that the wound was a bite mark. R. 707. The State asked a forensic odontologist to do a bite mark comparison, but the odontologist refused. R. 707. Appellant argued that whether the wound was a bite mark was not the proper subject of lay opinion. R. 177.

The State argued that whether a wound was a bite did not require expert opinion. R. 711. The trial judge ruled witnesses could testify they thought the wound was a bite mark. R. 712. The judge said, “as a three time parent of toddlers, to me, it looks like a bite mark. I hate to—I’ve seen many bite marks in my life as a parent either received or given.” R. 712.

The trial judge erred in allowing non-experts testify about the cause of the wound. Judge Gibbons improperly substituted his own opinion that the wound was a bite mark instead of conducting a proper analysis under the rules of evidence. Had the trial court conducted such an analysis, it would have determined that lay opinions were inadmissible.

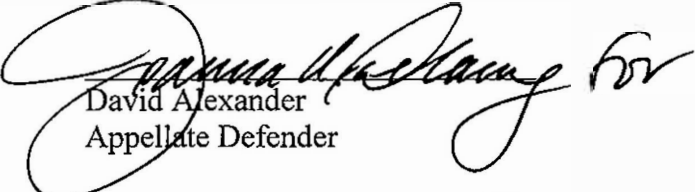
“If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.” Rule 701, SCRE. Lay witnesses could not offer an opinion on the source of appellant’s wound because it required special knowledge, skill, experience, and training under Rule 701(c). The fact that a forensic odontologist refused to conduct any analysis demonstrates that the source of the wound was properly the subject of expert testimony, but that no expert could make any conclusion. Without a real expert witness, the State attempted to back-door these opinions through lay witnesses.

In a case before the adoption of the rules of evidence, the Supreme Court found that a police officer could testify that a cut looked like it was caused by a bite. State v. McClinton, 265 S.C. 171, 217 S.E.2d 584 (1975). But the officers did not conclusively state the injury was caused by a bite. Id. McClinton recounts the officers describing the injury in terms of its indentations and “as though it had been bitten” or “similar to a tooth.” Id.

Unlike McClinton, the State had nearly every witness testify that the injury on appellant's arm was a bite mark. R. 131, 145, 146, 148, 284, 307, 309, 320, 345, 346, 360. Whether the injury was caused by a bite was important in this circumstantial case. After SLED released the crime scene to Duncan's family, his daughter found a tooth belonging to Duncan in the kitchen. R. 100, 471. Duncan was missing a tooth. R. 269. The solicitor argued that Duncan lost the tooth when he bit appellant during a struggle. R. 616. Appellant testified the wound was not caused by a bite and he likely got it from lifting weights. R. 578-79. In this entirely circumstantial case, the court erred in letting lay witnesses make a conclusion about the wound when that conclusion rested solely in the province of the jury. This Court should reverse.

CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed and this case remanded for a new trial.


David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

This 12th day of July, 2023.

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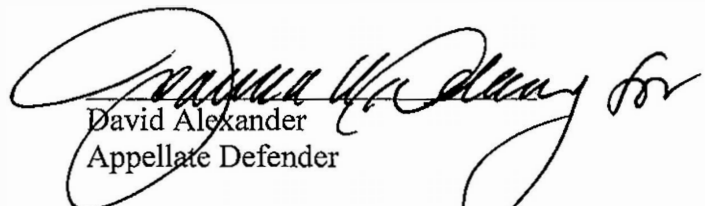
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Arkevus Jimon Cauthen states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Brian M. Gibbons, which was held on September 6 - 9, 2022, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

Wherefore, he asks the Court to relieve him as counsel for Arkevus Jimon Cauthen.

Respectfully Submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of July, 2023.

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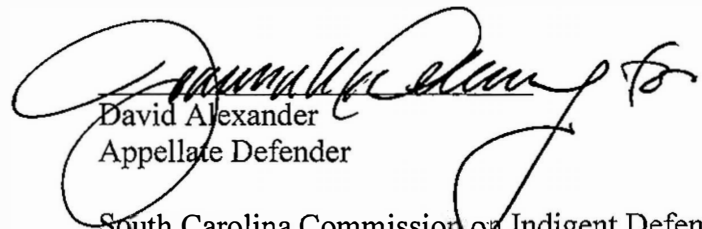
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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s):
- (2) Sentence Sheets
- (3) Pre-trial Transcript Dated August
- (4) Trial Transcript Dated
- (5) State's Exhibit #16(PHOTOGRAPH)

I certify that this designation contains no matter which is irrelevant to this appeal.



David Alexander
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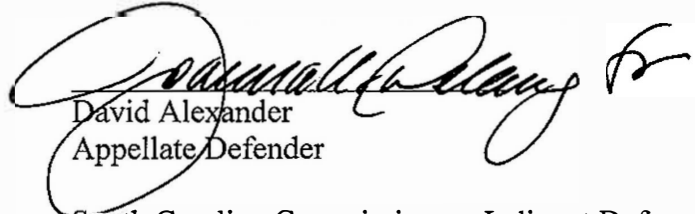
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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies 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."



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This 12th day of July, 2023.