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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Bentley Price, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DLANOR P. TILTON,

APPELLANT

APPELLATE CASE NO. 2023-000075

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse his discretion by admitting evidence Appellant was identified as a suspect through the employment of facial recognition software where the state failed to establish the admissibility of this evidence pursuant to Rule 702, SCRE, and State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), since the state witness through whom the evidence was admitted was not qualified as she was merely trained on how to operate the software and there was no evidence the facial recognition software was reliable?

STATEMENT OF THE CASE

A Horry County grand jury indicted Appellant on April 10, 2019 for two counts of armed robbery. R. * (Indictments). Appellant was tried in his absence on July 18, 2022 through July 21, 2022 before the Honorable Bentley Price, and a jury. Tr. 1; Tr. 49, l. 8 – 50, l. 20. He was tried jointly with his codefendant, Mazar Sturdivant. Tr. 1. Assistant Solicitors Joshua Holford and Elizabeth Farmer represented the state. Tr. 1. Eric Fox represented Appellant and Johnny Gardner represented Sturdivant. Tr. 1. The jury found Appellant guilty as indicted. Tr. 444, ll. 10-23. Appellant's sentence was sealed. On January 12, 2023, a sentencing hearing was held before Judge Price. Tr. 1. Appellant was sentenced to twelve years imprisonment on each count of armed robbery to be served concurrently. Tr. 5, ll. 11-20.

This appeal follows.

STATEMENT OF FACTS

On December 28, 2018, Matthew Beckoff, who was visiting family in Myrtle Beach, used Grindr, an all male social media application, to connect with another man for sex. Tr. 189, ll. 23-25; Tr. 207, l. 20 – 208, l. 24. Through Grindr, Beckoff arranged to meet a man at an address on Bryant Street. Tr. 208, l. 25 – 209, l. 4. He arrived around 10:30 that night. Tr. 209, ll. 9-13. Once Beckoff stopped his car in front of the address, he was immediately robbed at gunpoint by two men. Tr. 210, ll. 2-24. They stole his phone, his wallet, and the dollar bills in his cup holder. They told Beckoff to “Get out of here” and he drove away. Tr. 213, ll. 12-17.

Beckoff called the police about an hour and a half later after he had returned to his hotel. Tr. 214, ll. 5-17; Tr. 216, ll. 10-14; Tr. 218, ll. 14-20. He told the police that one of the men who robbed him was thirty years old and tall while the other was forty years old and stocky. Tr. 223, ll. 17-25. However, Beckoff later told the police the suspects looked “almost like teenagers.” Tr. 217, l. 13 – 218, l. 3. He also said he did not see their faces “very well.” Tr. 218, ll. 6-10.

The following evening, December 29, 2018, Christopher Ward, who was vacationing in Myrtle Beach, also used the Grindr application to connect with a man for sex. Tr. 339, ll. 8-25. He was given the address 6509 Bryant Street and arrived shortly before 8:11 p.m. Tr. 341, ll. 12-16. Once Ward parked in the driveway, two men came out of the bushes with guns and ordered him to get out of the car. Tr. 342, ll. 8-11. One of the men “ran off” right away. The other man grabbed Ward, stole his phone, and demanded his car keys. Ward refused to give the man his keys and ran. Tr. 342, ll. 12-14. The man chased Ward and struck him in the back of the head with a pistol. Ward continued running. Tr. 342, l. 21 – 343, l. 2. He jumped a fence and banged on the window of a nearby house. The homeowner called the police for him. Tr. 343, ll. 3-13.

Officers responded to this residence, which was a block from 6509 Bryant Street, and met with Ward. Tr. 240, ll. 2-25; Tr. 343, ll. 14-16. Once they learned the robbery occurred on Bryant Street, the officers drove to that address. They found Ward's car in the driveway with the doors open. Tr. 241, ll. 8-24. The glove box, where Ward kept his wallet, was also open and Ward's wallet was gone. Tr. 348, l. 23 – 349, l. 10.

Sergeant Bishop Gibson with the Myrtle Beach Police Department, who was assigned to investigate the robberies, submitted the photograph from the Grindr account both Beckoff and Ward had connected with to the South Carolina Law Enforcement Division (SLED). Tr. 184, ll. 5-24. Megan Lukacs, an analyst with SLED's criminal analytical team, uploaded the photograph to Dataworks, the agency's facial recognition program. Tr. 174, l. 6 – 175, l. 9. Lukacs explained that she was trained on how to use the software, including how to upload photographs and search for "possible matches." Tr. 175, ll. 10-19. She admitted her training was merely on how to operate the Dataworks software. She ran photographs "for practice." Tr. 175, ll. 10-22. Lukacs had no involvement with designing the facial recognition software and was unfamiliar with the company that created the program and its background. Tr. 181, ll. 13-24. She did not have any "extensive schooling" on facial recognition or Dataworks. She did not consider her work to be "scientific." Tr. 175, ll. 20-25.

After uploading the Grindr photograph in this case to Dataworks, Lukacs received at least one possible match, which she shared with Sergeant Gibson. The possible match was a "booking photo" of Appellant, Dlanor Tilton. Tr. 179, ll. 3-6. Lukacs explained that the possible match is merely "an investigative lead." Tr. 179, ll. 11-13. It is "not a positive identification" of the individual in the submitted photograph. Tr. 179, ll. 11-15. There is a "disclaimer" at the bottom of the "possible match" which reads, "This is not a positive identification. It is not probable

cause to arrest. Further investigation is needed to develop probable cause to arrest.” Tr. 180, ll. 11-17.

After receiving the “possible match” from Lukacs, Sergeant Gibson ran Appellant’s name and date of birth through the South Carolina Department of Motor Vehicles (SCDMV) database and obtained a photograph of Appellant. He also obtained another photograph of Appellant from law enforcement’s “Report Management System” as well as photographs from Facebook and Instagram. Gibson compared these photographs of Appellant to the photograph from Grindr and opined the individual in the Grindr photograph was Appellant. Tr. 185, l. 14 – 188, l. 4. Based on this identification alone, Gibson obtained arrest warrants for Appellant. Tr. 190, ll. 15-16.

On the night of December 30, 2018, in an effort to find Appellant, Officer Don Heeren and his partner parked in the driveway of 6509 Bryant Street, which was an abandoned residence. They were in “an undercover car.” Tr. 253, ll. 2-23; Tr. 255, ll. 16-19. After only a couple of minutes, they observed Appellant walking down the driveway of 6510 Bryant Street. Heeren and his partner got out of their car and identified themselves as police. Appellant ran into the house at 6510 Bryant Street. The officers pursued Appellant into the residence, encountered him in the living room, and placed him under arrest. Tr. 254, l. 1 – 255, l. 8.

During the early morning hours of December 31, 2018, after Appellant’s arrest, law enforcement executed a search warrant at 6510 Bryant Street. Appellant, who was then nineteen years old, lived at this residence with his aunts and their young children. Tr. 308, ll. 4-21; Tr. 368, l. 3 – 369, l. 1. Under the bed in the first bedroom, officers found a wallet containing Christopher Ward’s identification card and several of Ward’s bank cards. Tr. 269, l. 10 – 270, l. 13. In the second bedroom, officers found two black BB pistols. One was on a dresser, along

with three cartridges, and the other was under the bed. Both BB pistols “mimicked” real handguns. Tr. 271, l. 2 – 277, l. 20.

Appellant was interviewed by Corporal Chad Rose and Sergeant Gibson shortly after his arrest. According to Gibson, Appellant admitted to meeting men through Grindr. Appellant explained that he would convince the various men he connected with through the application that they were meeting for sex but would then “scam” the men by requesting they take him to buy fast food first before having sex and then leaving after the men bought Appellant what he wanted. Appellant “went to great pains to” explain that he was not a “homosexual” and did not engage in any sexual activities with the men he met. Tr. 202, l. 20 – 203, l. 15.

Gibson further maintained Appellant specifically admitted to meeting a man through Grindr on December 28, 2018. The two made arrangements to meet on Bryant Street. The man was white “with a New York or New Jersey accent.” When the man arrived on Bryant Street, Appellant opened the passenger door and was about to get inside the car when Appellant “changed his mind because the guy was acting sketchy, was acting weird, so [Appellant] decided to leave.” Tr. 192, l. 25 – 193, l. 24.

Additionally, Gibson claimed Appellant said he met another man through Grindr on December 29, 2018. Appellant and the man made arrangements to meet on Bryant Street. Appellant saw the man arrive and park in the driveway. The man got out of his car. Appellant allegedly told Gibson Appellant approached the vehicle “but then suddenly ran off.” Tr. 193, l. 25 – 194, l. 13. Appellant specifically denied robbing the men on December 28, 2018 and December 29, 2018 or having a weapon or using anything representing a weapon like a “toy gun” on those dates. Tr. 203, ll. 13-25.

Mazar Sturdivant, who was then seventeen years old, was at 6510 Bryant Street when law enforcement arrived to execute the search warrant on December 31, 2018. Tr. 308, ll. 7-25. Sturdivant's father was dating one of Appellant's aunts and Sturdivant frequently visited the residence. Tr. 319, l. 20 – 320, l. 20; Tr. 327, ll. 13-25. Sturdivant was arrested for armed robbery later that day. After his arrest, Sturdivant told Investigator Justin Amos that he was at 6510 Bryant Street on the night of December 29, 2018 and saw a white car, which “matched the description” of Ward's vehicle, park in the driveway. Tr. 315, l. 5 – 316, l. 14.

Christopher Ward, the man who was robbed on December 29, 2018, identified Sturdivant in the courtroom as the man who robbed him, chased him, and struck him in the head with a pistol. Tr. 345, l. 5 – 346, l. 14. Ward could not identify the second perpetrator as this person “had a hoodie on” so Ward “couldn't see him.” Tr. 352, ll. 5-8. Additionally, Ward, who was familiar with Grindr and other social media applications, explained that there is “nothing to prevent” an individual from using someone else's photograph on their Grindr account or posting an altered photograph of themselves “to make them look better, more attractive, more interesting.” Tr. 349, l. 15 – 350, l. 7.

Sturdivant testified in his defense. He explained that he was staying with his father during his Christmas break from Myrtle Beach High School from December 26, 2018 until his arrest on December 31, 2018. His father was dating Appellant's aunt who lived at 6510 Bryant Street. Sturdivant visited this residence with his father and met Appellant there. However, Sturdivant denied committing any armed robberies. Tr. 366, l. 14 – 372, l. 24. Despite being present at the house when police executed the search warrant, Sturdivant also claimed that neither of the BB pistols found inside belonged to him. Tr. 376, ll. 11-18.

The jury convicted both Appellant and Sturdivant of both armed robberies.

STANDARD OF REVIEW

“The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) (citing State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002)). “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. (citing State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)).

ARGUMENT

The trial judge abused his discretion by admitting evidence Appellant was identified as a suspect through the employment of facial recognition software where the state failed to establish the admissibility of this evidence pursuant to Rule 702, SCRE, and *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), since the state witness through whom the evidence was admitted was not qualified as she was merely trained on how to operate the software and there was no evidence the facial recognition software was reliable.

Relevant Facts

Before Megan Lukacs, the SLED analyst, testified concerning the facial recognition program and her identification of Appellant as a “possible match” to the individual in the Grindr photograph, defense counsel objected to her testimony. Counsel explained that it was his understanding that Lukacs merely used the facial recognition software, which was designed by an outside company. He contended that Lukacs was not familiar with “the algorithm” employed by the software and would not be familiar enough with the program to establish under *State v. Phillips*, 430 S.C. 319, 844 S.E.2d 651 (2020) and *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), “the scientific underpinnings” necessary for the evidence to be admissible. Counsel concluded that the evidence must meet the requirements of *Council* before it could be admitted. Tr. 171, l. 21 – 172, l. 13.

The trial judge instructed the assistant solicitor to “set a foundation” before he made a determination as to whether the evidence was admissible. Tr. 172, ll. 23-24.

As discussed above, Lukacs explained that she was trained on how to use the facial recognition software called Dataworks, including how to upload photographs and search for “possible matches.” Tr. 175, ll. 10-19. She admitted her training was merely on how to operate

Dataworks. She ran photographs “for practice.” Tr. 175, ll. 10-22. However, Lukacs had no involvement with designing the facial recognition software and was unfamiliar with the company that created the program and its background. Tr. 181, ll. 13-24. She did not have any “extensive schooling” on facial recognition or Dataworks. Tr. 175, ll. 20-25. Additionally, Lukacs was unaware of the error rate of the software, but admitted false positives were possible. Tr. 182, ll. 13-18.

After the assistant solicitor “set a foundation,” the trial judge merely ruled, “I’ll allow her to testify.” Tr. 176, ll. 23-24. When the state sought to admit State’s Exhibit Nos. 17 and 18, which were the Grindr photograph submitted to SLED and the “possible match” returned by Dataworks, the judge admitted the exhibits over Appellant’s objection. Tr. 178, ll. 15-20.

Discussion

The trial judge abused his discretion by admitting Megan Lukacs’s testimony concerning her identification of Appellant as a “possible match” to the suspect in the submitted Grindr photograph since the state failed to establish the admissibility of this evidence pursuant to Rule 702, SCRE, and State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), since Lukacs was not qualified as she was merely trained on how to operate Dataworks, the facial recognition software employed, and there was no evidence the software was reliable.

The admission of expert testimony is governed by Rule 702, SCRE, which provides: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”

“When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is

reliable.” State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999). “Reliability is a central feature of Rule 702 admissibility.” State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009) (citing State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001) (finding error in the trial court’s decision to admit “unreliable” expert evidence). “The trial judge should apply the Jones¹ factors to determine reliability. Council, 335 S.C. at 20, 515 S.E.2d at 518. “The Jones reliability factors take into consideration: (1) the publications and peer reviews of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.” State v. Jones, 343 S.C. 562, 573, 541 S.E.2d 813, 819 (2001). “Further, if the evidence is admissible under Rule 702, SCRE, the trial judge should determine if its probative value is outweighed by its prejudicial effect.” Council, 335 S.C. at 20, 515 S.E.2d at 518 (citing Rule 403, SCRE).

The trial judge here abused his discretion by allowing Lukacs to testify concerning her identification of Appellant as a “possible match” to the suspect in the Grindr photograph through her use of Dataworks since Lukacs was not qualified. Lukacs admitted she was merely trained on how to operate Dataworks and would “run” photographs “for practice.” She knew nothing about the development of Dataworks or the company that created it. She further conceded that she had no “schooling” or education concerning facial recognition.

Additionally, there was no evidence of the underlying reliability of Dataworks. Facial recognition software in general is not considered sufficiently reliable to be admissible at trial. See People v. Collins, 49 Misc. 3d 595, 611, 15 N.Y.S.3d 564, 575 (N.Y. Sup. Ct. 2015) (finding “the results of . . . facial recognition software . . . can aid an investigation, but are not considered

¹ State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979).

sufficiently reliable to be admissible at a trial”); People v. Collins, 49 Misc. 3d at 612, 15 N.Y.S.3d at 576 (N.Y. Sup. Ct. 2015) (emphasizing, “The products of . . . facial recognition technology . . . can sometimes have value, but evidence produced by those technologies is not generally accepted as reliable by the relevant scientific communities and so cannot be admitted in trials.”). The state presented no evidence addressing the Jones factors. Because the Jones reliability factors were not met, and could not have been met, the trial judge should have excluded Lukacs’s testimony.

Respectfully, since the trial judge abused his discretion by admitting this evidence, Appellant requests this Court reverse his convictions and sentence and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy _____
Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of July, 2023.