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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

Honorable R. Markley Dennis, Circuit Court Judge

Opinion No. 5988 (S.C. Ct. App. Filed June 7, 2023)

Lower Court Case No. 2014-GS-26-01125

THE STATE,

RESPONDENT,

V.

SIDNEY STCLAIR MOORER,

PETITIONER

APPELLATE CASE NO. 2019-001636

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INDEX

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on July 5, 2023. App. 22.

QUESTION PRESENTED

I.

Whether the Court of Appeals erred in affirming the admission of Grant Fredricks' expert testimony on the basis that it was unpreserved, despite Petitioner's objections made before trial, immediately before testimony, and during his testimony?

II.

Whether the Court of Appeals should have held that the trial court erred in qualifying Fredericks as an expert in forensic video analysis and allowing him to testify regarding his flawed conclusions—later refuted and shown to be unreliable by Petitioner's expert—where he suggested Petitioner's truck was seen driving to and from Peachtree Landing, and where he excluded all other vehicles based on the headlight pattern?

STATEMENT OF THE CASE

In March 2014, Petitioner was indicted by an Horry County grand jury for kidnapping. R. 1962. He proceeded to trial in 2016, but a mistrial was declared. He was then also indicted for conspiracy to kidnap. Sup. R. 2. He proceeded to trial on September 9, 2019 before the Honorable R. Markley Dennis. R. 1. Jarrett Bouchette and James Galmore represented Petitioner; Nancy Livesay and Christopher Helms appeared on behalf of the state.

Petitioner's trial lasted eight days. He was convicted of both charges. R. 1932, ll. 11 – 20. He was sentenced to thirty years on each offense, concurrent. R. 1945, ll. 18 – 24.

Petitioner timely served and filed his notice of appeal on September 26, 2023, seeking reversal of his convictions and sentences on multiple grounds. The Court of Appeals affirmed in a published opinion filed on June 7, 2023. State v. Moorer, 439 S.C. 550, 439 S.E.2d 738 (Ct. App. 2023). App. 1. A petition for rehearing was likewise timely filed, but denied on July 5, 2023. App. 15—22.

This petition for certiorari follows.

STATEMENT OF THE FACTS

At a hearing on April 18, 2016, Judge Dennis heard Petitioner's motion to suppress testimony of Grant Fredericks. Fredericks began his testimony by offering some background as to his qualifications. R. 10, l. 8—R. 31, l. 12. He indicated that he was a former police officer from Canada and now worked as a forensic video analyst. He received a bachelor's degree in communications and then worked as a television reporter and producer. R. 27, ll. 6-11. He never received a master's degree. R. 28, l. 24-29, l. 9. The state offered him as an expert in forensic video analysis. R. 26, ll. 17-19.

For purposes of Petitioner's case, Fredericks was hired to testify about reverse projection. He described this concept as "the process of overlaying contemporary images of a scene with historic images of a scene in order to make observations ... or obtain measurements." R. 31, l. 23-32, l. 11. In particular, Fredericks undertook an examination into the "headlight spread pattern analysis." R. 33, l. 10—R. 34, l. 14. Fredericks indicated that he considered himself "an expert in the examination and comparison of how light reflects off of a roadway." R. 34, ll. 21-24.

Fredericks was allowed to render his expert opinions at the pre-trial hearing. R. 41, ll. 7-21. He testified at length based upon surveillance videos gathered from Highway 814 and D&S Siteworks. R. 41, l. 23—R. 42, l. 4. He described the procedures he utilized in order to determine the class and characteristics of the vehicle shown in the videos. R. 44, l. 23—R. 46, l. 8. Fredericks testified that he was able to determine that this was a four-door truck. R. 51, ll. 2-4. He also concluded that the truck had HID headlights. R. 51, ll. 17-24. He suggested that his methods could be replicated. R. 53, ll. 13-23.

Forensic video analysts employ a methodology referred to as ACE-V, which is also used by fingerprint, footwear, and DNA analysts and other identification-based analysts. R. 54, ll. 2-5. It stands for analyze, compare, evaluate, and verify. Forensic video analysts add an R for report (ACE-VR) because a visual report is necessary in their field for peer review. R. 54, ll. 5-12. Verification is the aspect that covers quality control to ensure the reliability of their testing. R. 54, ll. 13-16.

During the pretrial hearing, before hearing any argument, Judge Dennis found the subject of Fredericks' testimony is "beyond ordinary knowledge" and that Fredericks "demonstrated a knowledge of training, background, and experience sufficient to render an opinion." R. 41, ll. 8-14. However, Judge Dennis withheld ruling on the extent of the opinion Fredericks would be permitted to render until he heard further testimony. R. 41, ll. 14-21.

Fredericks ultimately opined during the pretrial hearing that the vehicle seen on the surveillance footage from the residence on Highway 814 and D&S Siteworks during the early morning hours of December 18, 2013 was the 2013 Limited Edition Ford F-150 that belonged to Sidney and Tammy Moorer, "eliminating all others of the same class." R. 75, ll. 1-19.

Fredericks said his report was "peer reviewed" by George Reis, who is certified as a forensic video examiner by the International Association for Identification (IAI). R. 65, ll. 2-23. Reis "agreed with the methodology that was employed and with the results." R. 67, ll. 15-18. He found Fredericks' headlight spread pattern analysis was "an appropriate process." R. 67, ll. 19-21. Reis emailed his findings to Fredericks the night before the pretrial hearing. R. 71, ll. 6-23; Sup. R. 1. The email specifically stated, "The premise of the uniqueness of headlight spread patterns is well stated and illustrated." Sup. R. 1.

Following Fredericks' testimony, Petitioner called Bruce Koenig to rebut the reliability of Fredericks' findings and conclusions. Koenig received his undergraduate degree in physics and mathematics from the University of Maryland. R. 82, ll. 7-17. He obtained a master's degree in forensic science from George Washington University. Id. He also completed courses at DeVry University, George Mason University, University of Utah, University of Colorado Denver, and Massachusetts Institute of Technology. Id. He had previously been qualified approximately 390 times in the area of audio/video technology and still image analysis. R. 83, ll. 14-19.

Petitioner sought to offer Koenig as an expert in the area of video forensic analysis. R. 85, ll. 22-23. The trial judge allowed him to testify accordingly. R. 107, ll. 3-7. Based on Koenig's expertise, he disputed Fredericks' findings with regard to specificity and uniqueness. Koenig indicated that reverse projection is "an excellent technique when you have a stable camera position." R. 107, ll. 12-19. He noted that the FBI has used the test for "a long time." Id. Regarding the most recent 2013 FBI Laboratory Handbook of Forensic Services, however, no *headlight pattern analysis* examinations were listed. R. 107, ll. 20-25.

Koenig did not dispute all of Fredericks' findings. His main contention was that Fredericks could not have excluded every other vehicle in the world. R. 110, ll. 2-11. He outright decried one finding from Fredericks' report, that "[n]o two vehicles share the same headlight pattern." R. 110, ll. 7-11. Koenig plainly stated that this was not a scientific principle. Id. He denounced Fredericks' finding regarding the uniqueness of headlight spread pattern as "not a statement of fact." R. 117, ll. 4-13.

Koenig suggested that Fredericks was a good writer and ought to publish some of his work, but he ultimately testified that the conclusion that the only possible vehicle that was shown in the surveillance videos was Petitioner's was unreliable:

Q: So, based upon your experience and education as a scientist, and based upon looking for and finding no research, and based upon finding no peer review articles, would you consider headlight spread pattern analysis to be a[n] accepted scientific method?

A: **Not for uniqueness**; I think for class characteristics, it's fine, it's like any other characteristic.

R. 117, ll. 14-23 (emphasis added). Koenig reiterated that there was no research or peer-reviewed articles on this matter as to uniqueness. R. 118, ll. 22-25. The state questioned Koenig on cross-examination but did not get into detailed specifics regarding his testimony.

At the conclusion of the pre-trial hearing, the court heard argument from counsel for Petitioner:

> And what I've done is focused on headlight spread pattern analysis, and I think that we have shown that there has been no published peer-reviewed publications on that issue. The premise set forth based on his experience, not science, is that every, every single vehicle has a unique spread pattern of lights, just like a fingerprint to a person, every single vehicle has that, that is what he has said. That is a principle that is not based on science. It's never been researched, never been tested, and it's never been peer reviewed.

R. 126, l. 22—R. 127, l. 4. Petitioner asked the court to limit the testimony at trial. R. 127, ll. 18-19. The court indicated its intent to allow the testimony at trial. R. 130, l. 5—R. 131, l. 12.

At trial, Petitioner sought a continuing objection as to Fredericks' testimony. R. 1406, l. 22—R. 1407, l. 5. Petitioner again objected when Fredericks was asked on direct about his determinations. R. 1438, ll. 1-5. The objection was overruled, and Fredericks testified similarly to the 2016 hearing that the vehicle seen on the surveillance videos belonged to Petitioner. R. 1442, ll. 12-15. Despite Petitioner's objections on the record, the Court of Appels determined "[t]his issue is unpreserved for our review." App. 13. Thus, "based on preservation," the Court of Appeals affirmed "the admission of Fredrick's expert testimony." App. 13.

ARGUMENT

I. The Court of Appeals erred in affirming the admission of Grant Fredricks' expert testimony on the basis that it was unpreserved, despite Petitioner's objections made before trial, immediately before testimony, and during his testimony.

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (quoting Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)). "At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge." Id. (citing Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)).

"If an evidentiary ruling is pretrial, a contemporaneous objection must be raised during trial when the evidence is admitted, whereas a party need not renew an objection if the decision is final." State v. Jones, 435 S.C. 138, 144, 866 S.E.2d 558, 561 (2021) citing State v. Wiles, 383 S.C. 151, 156, 679 S.E.2d 172, 175 (2009)). "However, there is a practical exception to this requirement when a judge makes an evidentiary ruling on the record immediately prior to the introduction of evidence." Id. "The rationale supporting this exception is that if no evidence is offered between the initial objection and the admission of the evidence, then there is no basis for the trial court to change its initial ruling." Id.

Moreover, "issue preservation rules should not be applied in a technical manner as if this is some sort of game of 'gotcha' elevating form over substance to trap trial lawyers so as to prevent the appeal of a legitimate issue." State v. Morales, 889 S.C.2d 552, 556 (2023) (citing State v. Jones, 435 S.C. 138, 145, 866 S.E.2d 558, 561 (2021) ("requiring attorneys to continue to object when a ruling is clearly final would not serve the purposes of our rule preservation; it

would merely foster a game of "gotcha," where form is elevated over substance."). Rather, "the ultimate goal behind preservation of error rules is to ensure that an issue raised on appeal has first been addressed to and ruled on by the trial court" State v. Nelson, 331 S.C. 1, 6 n.6, 501 S.E.2d 716, 718 n.6 (1998); see also State v. Neuman, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009). Accordingly, "this Court will not apply the rules of error preservation so rigidly as to bar an otherwise properly presented issue." Chastain v. Hiltabidle, 381 S.C. 508, 516, 673 S.E.2d 826, 830 (Ct. App. 2009).

In the present case, Petitioner preserved the issue for appellate review. Specifically, Petitioner objected at the pretrial hearing not simply to the opinion of Fredricks that the truck in the video was Petitioner's to the exclusion of all others, but that such a conclusion of uniqueness was without any basis or acceptance in science. R. 115, ll. 3-6; R. 116, ln. 1—R. 117, ln. 23; R. 119, ll. 1-24; R. 126, ln. 9—R. 128, ln. 20. This objection was again raised at trial, essentially asking the court to limit Fredricks' opinion testimony to the scope of the qualifications. R. 1406, ln. 22—R. 1407, ln. 128; R. 1437, ll. 3-12; R. 1438, ll. 1-5. At both times, the trial court indicated it would allow Fredricks to testify.

Moreover, at trial, even after purportedly sustaining Petitioner's objection as to whether the truck on video matched his particular vehicle, the court still permitted Fredricks to testify as to his "determination" rather than "whether it was a match." R. 1437, ll. 13-18. Simply stated, the trial court's ruling was a distinction without a difference: Fredricks was permitted to opine as an expert witness that "no vehicle shares the same headlight spread pattern," agreed with the assistant solicitor that "the headlight spread pattern in this case matched on [Petitioner's] to the vehicle on [video]," and then agreed with the State again that he came "to this determination" by going "beyond eyeballing." R. 1441, ln. 19—R. 1443, ln. 1. At each point, Petitioner properly raised the issue

before the court, and at each point the court permitted Fredricks to testify to his expert opinion "determination."

Under such circumstances, Petitioner fulfilled his duty to object to the issue: he did so pretrial, during trial immediately prior to the witness's testimony, and during the testimony as well. The trial court was well aware of the issues before it, as well as counsel's arguments, and made its rulings. Accordingly, the issue was preserved for review, and the Court of Appeals erred in affirming "based on preservation." App. 13. Id. 439 S.C. at 567, 439 S.E.2d at 747. See, e.g., Nelson, 331 S.C. at 6 n.6, 501 S.E.2d at 718 n.6; Chastain, 381 S.C. at 516, 673 S.E.2d 826, 830.

II. The Court of Appeals should have held that the trial court erred in qualifying Fredericks as an expert in forensic video analysis and allowing him to testify regarding his flawed conclusions—later refuted and shown to be unreliable by Petitioner's expert—where he suggested Petitioner's truck was seen driving to and from Peachtree Landing, and where he excluded all other vehicles based on the headlight pattern.

Because the issue was properly preserved, the Court of Appeals should have determined that the trial court erred in qualifying Fredericks as an expert in forensic video analysis and allowing him to testify regarding his flawed conclusions. Fredricks suggested that Petitioner's truck was seen driving to and from Peachtree Landing, and he excluded all other vehicles based on the headlight. However, his findings were refuted by Petitioner's expert and shown to be unreliable. Under such circumstances, Petitioner's case should be reversed, and remanded for new trial.

All expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration. Rule 702 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.

Rule 702, SCRE.

In State v. Phillips, the South Carolina Supreme Court held that the trial court abused its discretion in admitting the state's DNA analyst's expert testimony. 430 S.C. 319, 844 S.E.2d 651 (2020). The state relied on a SLED forensic analyst, Lilly Gallman, who drew comparisons between DNA standards and touch DNA taken from the scene of the crime. Id. at 324, 844 S.E.2d at 653. The Court remarked that "[t]he proponent of scientific evidence has a ... responsibility to provide the trial court the factual and scientific information the court needs to

carry out its gatekeeping duty." Id. at 334, 844 S.E.2d at 659. In that case, as in this one, "the State did not give the trial court the factual and scientific basis the court needed to meaningfully exercise [its] discretion." Id. at 340, 844 S.E.2d at 662.

Similarly, Fredericks based his conclusions on his experience, rather than factual and scientific information. As noted by Koenig both pre-trial and at trial, Fredericks' conclusion as to uniqueness was unsupported by science.

"Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge. Stated differently, expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge." Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010).

"[I]n executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony." Id. at 446, 699 S.E.2d at 175. "First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury." Id. (citing State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009)). "Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Id. (citing Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997)). "Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable." Id. (citing State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999)).

"Expert testimony is not admissible unless it satisfies *all* three requirements with respect to subject matter, expert qualifications, and reliability." Id. (emphasis added). "Thus, only after the trial court has found that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate." Id. at 446-447, 699 S.E.2d at 175 (citing State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009)). Koenig's testimony set forth how Fredericks' findings were not based in scientific principles, meaning the testimony was improper. Fredericks' conclusions were unreliable, and the trial judge erred in denying Petitioner's motion to suppress his testimony regarding uniqueness. Accordingly, rather than affirming the issue "based upon preservation," the Court of Appeals should have held that the trial court reversibly erred. App. 13.

CONCLUSION

For the foregoing reasons, Petitioner Sidney Moorer respectfully requests this Court to grant certiorari and reverse the Court of Appeals' ruling that the issue was unpreserved. Petitioner further requests that this Court rule upon the underlying issue itself; in the alternative, Petitioner requests remand of the issue back to the Court of Appeals to make a full ruling.

Respectfully Submitted,

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of August, 2023.