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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions
The Honorable William A. McKinnon, Circuit Court Judge

Appellate Case No. 2022-001053

THE STATE,

Respondent,

v.

TRAVIS LAMONT GATHERS,

Appellant.

INITIAL BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF THE ISSUES ON APPEAL

- I. Evidence of other bad acts is admissible to prove identity if a logical connection is established between the other acts and question of identity. Gathers committed two subsequent robberies in the same geographical area within 18 days of the charged robbery using the same type of gun, targeting the same type of businesses, at the same time of day, and in a similar manner. Was evidence of the other robberies admissible?

- II. Lay witnesses may not give opinions requiring technical, scientific, or specialized knowledge, but may give non-specialized testimony in the form of opinions or inferences based on their perceptions and which are helpful to the jury. The lead investigator testified that, after comparing surveillance video with stock images of firearms, he believed the gun used in this robbery was a Smith & Wesson MMP. Was this testimony admissible, and was Gathers prejudiced by its admission?

STATEMENT OF THE CASE

A York County grand jury indicted Appellant Travis Gathers for armed robbery and possession of a weapon during the commission of a violent crime. (Indictments). He proceeded to jury trial on July 25–27, 2022, before the Honorable William A. McKinnon, Circuit Court Judge. Gathers was convicted as charged and sentenced to 25 years' and 5 years' incarceration, respectively, with the sentences to be served concurrently. (Sentencing sheets). This direct appeal follows.

STATEMENT OF FACTS

Around 11:00 on the night of June 28, 2020, a black male robbed a Bojangles restaurant in the Lake Wylie area of Rock Hill. (Tr.p.23). The perpetrator used a rock to smash a glass door into the restaurant, the lobby of which was closed at the time. (Tr.p.286). The man's face was partially covered with a bandana-style face covering which did not cover the top of his face. (Tr.p.24–25, p.136). He demanded money from the store manager while wielding a black pistol. (Tr.p.136). A high-quality surveillance video depicted the robbery. (State's Exhibit #1). An officer with the Rock Hill police department identified Gathers as the person in the video from a bulletin circulated within his department. (Tr.p.281). He noted Gathers's distinct facial scar. (Tr.p.281). Another officer studied the firearm in the video, compared it with images of various models of pistols, and concluded it was a Smith & Wesson MMP. (Tr.p.287).

Another robbery occurred at a Wendy's restaurant on Highway 160 in Fort Mill on July 12. A black male with a face covering entered through an open door at around 11:30 pm. (Tr.p.173; p.183, lines 5–6; p.290). He presented a pistol and demanded money from the store manager. (Tr.p.174). The perpetrator fired a shot, leaving behind a shell casing and projectile. (Tr.p.176, 190). The manager gave him money in a white paper Wendy's bag. (Tr.p.177).

Another robbery occurred at a Wendy's in Rock Hill on July 16 just after midnight. (Tr.p.204). A black male entered the store by smashing through a glass door and demanded money. (Tr.p.206, p.212, p.272). Police arrived just as the perpetrator fled. (Tr.p.265). Officers discovered a Smith & Wesson 9mm MMP

pistol and cash drawers in an adjacent parking lot, located up an embankment from the Wendy's. (Tr.p.205, p.213). The gun was analyzed for DNA. Gathers's DNA was found on several areas of the pistol. (Tr.p.350, lines 17—19). While there were other minor contributors who left DNA on the gun, these samples were not sufficient to develop a profile. (Tr.p.338—40). Gathers was the major DNA contributor on each area of the gun, indicating he had extended physical contact with the weapon. (Tr.p.342—43, p.350, lines 1—2). The probability of randomly selecting an unrelated individual from the same DNA profile was one in greater than 7 trillion. (Tr.p.342, lines 11—16).

A SLED scientist test-fired a round from the pistol used in the July 16 robbery and compared it to the shell collected from the scene of the July 12 robbery. She determined the shell casing collected from the July 12 robbery was fired from the same weapon used in the July 16 robbery. (Tr.p.31—32, p.39, p.231).

A worker at the Rock Hill Wendy's testified Gathers had come through the drive-through line earlier on the night on the 16th. (Tr.p.266). She recognized him due to the distinctive scar on his face. (Tr.p.266).

Police secured a search warrant and searched Gathers's home. They recovered a cell phone and extracted the contents. State's Exhibit #13 is a photograph recovered from the phone. The photograph was created on July 16, the day of the robbery of the Rock Hill Wendy's. The photograph shows a Wendy's bag full of cash. (State's Exhibit #13; Tr.p.71). The solicitor argued the presence of a

Wendy's bag corroborated a witness's testimony that Gathers went through the Wendy's drive-through earlier that day. (Tr.p.389).

ARGUMENT

- I. **The trial court correctly admitted evidence that Gathers committed two additional burglaries in the same geographical area within 18 days of the charged crime because the evidence supported a finding that the same type of weapon was used in each robbery, Gathers's DNA was found on the gun recovered at the scene of the last robbery, the same gun was used in the July 16 and July 12 robberies, and the robberies were committed in similar fashion, all of which tended to prove Gathers committed the Bojangles robbery.**

The trial court correctly admitted evidence that Gathers committed two subsequent burglaries of fast food restaurants in the Rock Hill area within 18 days of the Bojangles robbery for which he was being tried because the subsequent robberies were relevant to the issue of identity. The State presented evidence that all of the robberies were committed late at night at fast food restaurants in a similar manner and with the same type of gun, establishing a logical connection between the robberies. This Court should affirm.

A. Standard of Review.

In criminal cases, the appellate court sits to review errors of law only. State v. Barksdale, 433 S.C. 324, 330, 857 S.E.2d 557, 560 (Ct. App. 2021). The decision to admit or exclude evidence is within the sound discretion of the trial court. Id.

B. Discussion.

Evidence of other crimes is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual. State v. Gillian, 360 S.C. 433, 443, 602 S.E.2d 62, 67 (Ct. App. 2004), aff'd as modified, 373 S.C. 601, 646 S.E.2d 872 (2007). However, evidence of other crimes is admissible to prove identity. Rule 404(b),

SCRE. The question for a trial court is whether the evidence serves some legitimate purpose that is not prohibited by Rule 404(b). State v. Perry, 430 S.C. 24, 30, 842 S.E.2d 654, 657 (2020). There must be "a logical relevancy or connection between the other crime and some disputed fact or element of the crime charged." Id.

Where the defendant was not convicted of the other crime, evidence of the bad act must be clear and convincing. State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009). "Clear and convincing" evidence is an intermediate degree of proof which will produce in the mind of the trier of facts a firm belief as to the allegations sought to be established. Id. at n.14. Even if bad act evidence is clear and convincing and falls within the Rule 404(b) exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Id.; Rule 403, SCRE. Unfair prejudice means an undue tendency to suggest decision on an improper basis. Id.

The evidence was clear and convincing that Gathers committed the July 16 robbery, and by extension the July 12 robbery. Gathers's DNA was found on the gun recovered from the scene of the July 16 robbery. While there were insubstantial amounts of other human DNA recovered from the gun, they were not significant enough to develop a profile because they were of "poor quality and quantity." (Tr.p.338–40). Gathers was the major contributor. (Tr.p.342). A major contribution results from "how much somebody has touched the item, how much DNA they leave behind." (Tr.p.343, lines 6–8). In addition to the DNA evidence, Gathers matched the description of the perpetrator. Finally, police recovered a

photograph from Gathers's phone, taken on the day of the robbery, showing a Wendy's bag full of cash. (Tr.p.359; State's Exhibit #13). Evidence that Gathers committed the July 16 robbery was clear and convincing. By extension, the evidence was clear and convincing Gathers committed the July 12 robbery. The same gun was used in both robberies and, again, the description of the perpetrator matched Gathers. The similar method of operation further shows Gathers committed both the July 12 and July 16 Wendy's robberies.

Evidence of the subsequent robberies was admissible on the issue of identity. The State presented evidence that the same type of gun was used in each robbery. Along with the other similarities between the robberies, this supports an inference that the same person committed the three robberies.

The State was not required to prove Gathers used the same exact weapon in the subsequent robberies to establish logical relevance. In State v. Southerland, the Supreme Court explained the trial court properly admitted evidence that Southerland stole a shotgun two weeks before the murder for which he was being tried because Southerland "possessed a shotgun at the time of the murder, [and] that the shotgun was **the type** used to kill" the victim. State v. Southerland, 316 S.C. 377, 383, 447 S.E.2d 862, 866 (1994), overruled on other grounds by State v. Chapman, 317 S.C. 302, 454 S.E.2d 317 (1995) (emphasis added).

Similarly, in State v. Gillian, the State introduced evidence that Gillian committed a prior burglary in which a .38 caliber pistol was stolen. State v. Gillian, 360 S.C. 433, 439–40, 602 S.E.2d 62, 65–66 (Ct. App. 2004), aff'd as modified, 373

S.C. 601, 646 S.E.2d 872 (2007). Gillian was on trial for a murder which occurred the following evening, in which the same caliber handgun was used. This Court held evidence of the burglary was properly admitted because the stolen gun was "consistent with **the type of weapon** that fired the bullets recovered from [the victim's] body." Id. at 445, 602 S.E.2d at 69 (emphasis added). This Court explained "Gillian's lake house burglary was properly admitted as it had a clear 'logical relevance' to Gillian's possession of a firearm linked, if only circumstantially, to the murder." Id. at 446, 602 S.E.2d at 69. On certiorari, the Supreme Court reiterated the probative value of the evidence, noting the same "type of weapon" was used in the charged crime and explaining that "[a]llowing the State to present evidence of the burglary in an effort to show the alleged murder weapon was in petitioner's hands immediately prior to the murder was highly probative." State v. Gillian, 373 S.C. 601, 611, 646 S.E.2d 872, 877 (2007). See also United States v. Moore, 709 F.3d 287, 295 (4th Cir. 2013) (explaining defendant's prior possession of a revolver was relevant because it was "the same type of gun" used in the charged crime).

It was similarly probative to show Gathers was in possession of the same type of weapon used to commit the Bojangles robbery during the subsequent burglaries at Wendy's 14 and 18 days later, respectively. While this is not a conclusive connection between the robberies, it is a logical one. That is all that is required for admission under Rule 404(b).

The logical connection between the crimes was enhanced by the similar mode of operation used to commit each robbery. These robberies occurred over an 18-day period, in the same geographical area. The physical description of the perpetrator of each robbery was consistent: the perpetrator in each case was a black male. In each robbery, he covered his face with a wrap-type face covering. Significantly, the target in each case was a fast food restaurant. The robberies occurred at the same time of day: late at night after the restaurants had closed. On each occasion the perpetrator fled to a nearby vehicle. All of these common factors suggest the person who robbed the Wendy's restaurants in July was the same person who robbed the Bojangles because in each case the perpetrator used a similar mode of operation. Cf. Tariq-Madyun v. State, 361 Ga. App. 219, 220, 863 S.E.2d 703, 708 (2021) (in appeal of conviction for armed robbery of fast food restaurant, affirming admission of distant prior robberies of fast food restaurants as proof of identity and noting relevance arising from similarities such as robberies occurring "at a time that was not very busy " and that robber "possessed the same type of gun").

In the landmark case of State v. Lyle, 125 S.C. 406 (1923), the Supreme Court explained the proper use of other act evidence to prove identity. There, Lyle was charged with a forgery that occurred in Aiken. Lyle asserted an alibi defense. To prove he was the person who committed the forgery, the State presented evidence of five other forgeries allegedly committed by Lyle. Two occurred in Aiken on the same day, three occurred in various parts of Georgia in the weeks before the Aiken forgery.

The Lyle court affirmed admission of the Aiken forgeries to prove identity. The court explained "the person seen by [witnesses to other forgeries] was engaged in a similar transaction . . . the same R.F.D. address was used in one instance, the marked similarity in technique of operation, etc., all logically tended to establish that the man seen by [witnesses to other forgeries] was the same person who passed the forged check" in the charged case. Id. at 807–08. Significantly, the other two forgeries both occurred in Aiken on the same day as the charged crime.

The court reached the opposite conclusion as to the Georgia forgeries. The court treated the three Georgia forgeries as a group, even though one occurred 9 days earlier, one occurred 14 days earlier, and another occurred a full 7 weeks earlier. Id. at 808. However, all three occurred far from Aiken, and from each other, in Griffin, Athens, and La Grange. Id. The court explained the general similarity in the crimes did not tend to prove Lyle committed the Aiken forgeries, as the methods were not unique enough to logically "exclude the possibility that the Aiken crime could have been committed by another person." Id. The court further explained that the proof that Lyle committed the Georgia crimes was not as strong as the proof of the Aiken crimes, as the witness identifications were not as reliable. Id. at 809.

This is not the case here, where DNA evidence strongly linked Gathers to the gun used in the July 12 and 16 robberies, and a photograph taken on the date of the July 16 robbery and later extracted from Gathers's phone showed a Wendy's bag full of money. The evidence of Gathers's guilt of the July 16 robbery, and by

extension the July 12 robbery, was clear and convincing. This case is further distinguished from the Georgia forgeries in Lyle by the fact that the robberies occurred in the same geographical area, rather than spread far across the state of Georgia, in one case 7 weeks prior to the charged crimes. Furthermore, the use of the same type of gun is comparable to Lyle's use of the same false mailing address in each of the Aiken forgeries. Id. at 807–08. Evidence of the Wendy's robberies meets the logical connection standard explained in Lyle.

The Wendy's robberies were not admitted to attack Gathers's character, or to suggest he had a propensity to rob people. The State specifically argued to the jury that the prior incidents were only relevant to show identity. The State focused on Gathers's mode of operation, repeatedly using the "MO" when discussing the carrying out of the robberies. (Tr.p.388, lines 11–23). Likewise, defense counsel used the phrase "MO" when discussing the dissimilarities between the robberies, arguing the distinctions showed the same person did not commit each robbery. (Tr.p.396, line 25).

These were fact-based connections legitimately tending to show the person who robbed the Wendy's restaurants was the same person who robbed the Bojangles. As the solicitor explained, there were weaknesses in each case, but when presented together Gathers's guilt became clear. (Tr.p 79). The strongest evidence in the Bojangles case was the surveillance video, which depicted the robbery with such clarity that the State could argue based on the video alone that Gathers was the person depicted. (Tr.p.382, 385). However, the case became much stronger

when viewed in context of Gathers committing two similar robberies within the next 18 days using the same type of weapon. While there was not high quality video depicting Gathers committing these robberies, there was compelling physical evidence linking Gathers to the crimes: the pistol used in both robberies. The physical evidence from the subsequent robberies tended to prove Gathers was the person in the surveillance video carrying out the Bojangles robbery. Thus the "other act" evidence was not used to show propensity, but to establish a logical connection between each crime, strengthening the evidence in the Bojangles case.

While there is always the danger that evidence of other crimes will incidentally implicate a defendant's character, the danger of unfair prejudice did not substantially outweigh the high probative value of the evidence in this case. See Rule 403, SCRE. The trial court properly gave a limiting instruction that evidence of the other robberies was only admissible to prove identity. (Tr.p.379, lines 7–15). Attorneys for the State and defense likewise reminded the jury in closing that the Wendy's robberies could only be considered on the issue of identity. (Tr.p.386, lines 8–13; p.394–95). This mitigated the danger of unfair prejudice. This Court should affirm.

II. The trial court correctly allowed the lead investigator to testify he believed the gun depicted in surveillance footage of the Bojangles robbery was a Smith & Wesson MMP based on his visual observation, and Gathers was not prejudiced because the ultimate determination was left to the jury

The trial correctly allowed Officer Joey Wallace to testify that, in the course of his investigation, he reviewed the footage of the Bojangles robbery, observed the gun used, compared the gun to various models of pistols, and came to the conclusion that the gun was a Smith & Wesson MMP. Even if this was an "opinion," it was not an opinion which required the officer to be qualified as an expert pursuant to Rule 702, SCRE. The officer's testimony was rationally based on his own perception, did not require scientific, technical, or specialized knowledge, and was helpful to the jury. Even if the testimony was improper, any error was harmless because the ultimate determination whether the gun was in fact a Smith & Wesson MMP was appropriately left to the jury. This Court should affirm.

A. Standard of review.

In criminal cases, the appellate court sits to review errors of law only. State v. Barksdale, 433 S.C. 324, 330, 857 S.E.2d 557, 560 (Ct. App. 2021). The decision to admit or exclude evidence is within the sound discretion of the trial court. Id.

B. Discussion.

The testimony in question came as Officer Joey Wallace was explaining the course of his investigation into the Bojangles robbery. Wallace was the case agent for both the June 28 Bojangles robbery and July 12 Wendy's robbery. Wallace explained he examined the high-quality Bojangles surveillance video and attempted

to identify the gun used in the robbery. (Tr.p.285–87). He "compared it to numerous other firearms, different manufacturers; Smith & Wesson, Glock, Taurus, Beretta, you know, different one that are out there, looking at stock photos, and also looking at actual guns to see, you know, if we thought we could figure out what it was. Looking at that we determined that we believed it to be a Smith & Wesson MMP pistol." (Tr.p.287). The officer responded affirmatively when the solicitor asked whether, after viewing the surveillance videos and stock images, he had "an idea what gun might be used in this case." (Tr.p.288, lines 23–24).

This is not the type of opinion contemplated by Rule 702, SCRE. The officer did not purport to know with any degree of certainty that the gun in the video was in fact a Smith & Wesson MMP. Nor did he give an opinion based on hypotheticals or matters outside his personal knowledge. See United States v. Perkins, 470 F.3d 150, 156 (4th Cir. 2006) (noting "fine line" between 701 and 702 opinion testimony and finding no error in admission of officer testimony "framed in terms of their eyewitness observations and particularized experience as police officers" as opposed the "hypothetical questions based on second-hand accounts"). He was merely testifying to his belief that the gun was an MMP based on his visual observation when explaining the course of his investigation.

Even if the officer's testimony was an opinion, it was proper under Rule 701, SCRE. The officer's testimony was based on a visual observation of the firearm in the surveillance video and comparison with stock photographs of other guns. (Tr.p.287). This did not require special knowledge. Cf. Hamrick v. State, 426 S.C.

638, 648, 828 S.E.2d 596, 601 (2019) (explaining accident reconstruction requires expertise because it relies on an understanding of physics, engineering, and other sciences). The officer was essentially testifying to his visual perception of the gun as seen on the surveillance video and stock images, meaning his belief was rationally based on his perception. See Rule 701, SCRE. The terms “fact” and “opinion” denote merely a difference of degree of concreteness of description. State v. Williams, 321 S.C. 455, 463–64, 469 S.E.2d 49, 54 (1996).

To the extent the officer relied on his experience and knowledge to help identify the gun, this was allowable. 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." State v. McClinton, 265 S.C. 171, 176–77, 217 S.E.2d 584, 586 (1975). Law enforcement officers may "draw on their experiences while testifying" and may "provide lay opinions based on their observations, experience and training, but may not provide lay opinions on such matters if they did not either observe the events in question or actively participate in the investigation." State v. Ostrowski, 435 S.C. 364, 384–85, 867 S.E.2d 269, 279 (Ct. App. 2021) (reversing conviction on other grounds). Officer Wallace was the lead investigator on both the Bojangles robbery and the July 12 Wendy's robbery. He had been a police officer with York's violent crime unit for 17 years and had "experience with firearms . . . personally and professionally." (Tr.p.286–87). It was proper for the officer to draw on prior personal and professional knowledge of firearms when examining the characteristics of the gun in the surveillance video. (Tr.p.287, line 4). His

testimony was helpful to jurors who may not have been familiar with firearms. See State v. Fripp, 396 S.C. 434, 441, 721 S.E.2d 465, 468 (Ct. App. 2012) ("While the jury, having observed Fripp for a relatively brief period of time in the courtroom setting, may have believed Fripp was the person on the videotape, Brown's and Young's testimonies, based on their perceptions of him over time, aided the jury in making an ultimate determination as to the burglar's identity."). Even though officer Wallace would likely have qualified as an expert in firearms had he been offered, his qualification was not required to give the testimony at issue. See Hon. D. Garrison Hill, Lay Witness Opinions, SC Lawyer Sept. 2007, at 34, 39 ("Simply because a witness could be qualified as an expert does not mean that he must.").

Even if this Court finds the testimony was improper, its admission was harmless. See Cent. R. Co. of New Jersey v. Monahan, 11 F.2d 212, 214 (2d Cir. 1926) (Hand, J.) (explaining it is "hardly ever reversible error" to admit lay opinion testimony, noting "its foundation may generally be as conveniently left to cross-examination"). Defense counsel ably cross-examined the officer on the reliability of his conclusion, noting the similarities between Smith & Wesson MMPs and Glocks. (Tr.p.299–300). The State did not rely on Wallace's testimony alone to establish the gun used in the Bojangles robbery was the same type used in the Wendy's robberies. The jury was able to view the surveillance video and compare the image with the actual gun used in the Wendy's robberies to determine whether they believed the gun used in the Bojangles robbery was in fact a Smith & Wesson MMP. The officer merely testified about the course of his investigation, and explained he personally

"believed [the pistol] to be a Smith & Wesson MMP pistol." (Tr.p.287). Qualifying the officer as an expert would have been more prejudicial to Gathers because it may have given improper "imprimatur" to the officer's testimony. See State v. Chavis, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015).

The solicitor did refer to the officer's testimony in closing. (Tr.p.384, lines 17–19). However, he did not argue the officer's identification of the pistol was conclusive. Rather, he referred to the actual gun and surveillance video and argued directly to the jury that the gun in the video was the same Smith & Wesson MMP introduced as an exhibit at trial. He argued: "Well, let's go back to the gun, the gun that is in evidence right now. You see him holding it. You see a still from when he's in the manager's office in the middle, and the gun on the right is the one that was recovered on July 16 outside of Wendy's, because his DNA is on multiple parts of the gun as a major contributor. More shots of the gun. Side profile. Same slide, same guard, same grip on the back, same everything with his DNA on the trigger, and on the grip, and on the bottom of the magazine as the major contributor." (Tr.p.386, lines 13–23). Thus, the jury made the ultimate determination whether they believed the gun in the Bojangles surveillance video was a Smith & Wesson MMP. Accordingly, Gathers was not prejudiced by the officer's testimony. This Court should affirm.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

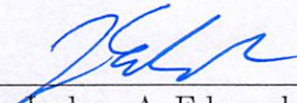
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