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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. SUPREME COURT

Appeal from Horry County
The Honorable R. Markley Dennis, Circuit Court Judge

Appellate Case No. 2023-001240
Opinion No. 5988 (S.C. Ct. App. Filed June 7, 2023)

THE STATE,

RESPONDENT,

V.

SIDNEY S. MOORER,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON CERTIORARI

I.

Whether Petitioner's arguments related to the trial court's admission of expert testimony are preserved for review where the trial court sustained both of Appellant's objections to the expert's conclusion and Appellant did not object once the expert established the requisite foundation for his opinion.

II.

If the issue is preserved, whether the trial court correctly admitted expert testimony where the expert's testimony established that his process and his testimony were reliable and within the scope of his expertise.

STATEMENT OF THE CASE

Petitioner Sidney Moorer was indicted for kidnapping and conspiracy to kidnap. His first trial ended in mistrial on June 20, 2016. His wife and alleged co-conspirator, Tammy Moorer, was tried and convicted for the same charges in October 2018. Her convictions were affirmed by the Court of Appeals on June 7, 2023, withdrawn and refiled July 5, 2023. State v. Moorer, 439 S.C. 525, 888 S.E.2d 725 (Ct. App. 2023). Petitioner was tried and convicted for obstruction of justice in August 2017, before the Honorable R. Markley Dennis, Jr. The charge arose, generally speaking, from the same set of facts as in the present case. See State v. Sidney Moorer, 2020-UP-198 (S.C. Ct. App. filed July 1, 2020); sentencing sheet: 2017-GS-23-1320. Petitioner was then tried before Judge Dennis the second time for kidnapping and conspiracy on September 9-18, 2019. The jury found him guilty as charged. Judge Dennis imposed concurrent sentences of thirty years' imprisonment for each charge. Petitioner's convictions were affirmed by the Court of Appeals on June 7, 2023. State v. Moorer, 439 S.C. 550, 888 S.E.2d 738 (Ct. App. 2023). His petition for rehearing was denied on July 5, 2023. A petition for writ of certiorari was filed on August 18, 2023. This return follows.

ARGUMENT

I. The Court of Appeals correctly found Petitioner's argument regarding the trial court's admission of expert testimony is not preserved for review.

Petitioner argues the trial court erred in allowing Grant Fredericks to testify each vehicle has a unique headlight spread pattern and the suspect vehicle in the surveillance footage matched Petitioner's F-150. While Petitioner claims his objection was overruled, in actuality, both times Petitioner objected, the objection was sustained for want of further foundation. Once the foundation was established, Petitioner never interposed an objection. The Court of Appeals correctly found this issue is not preserved. Certiorari should be denied.

How the issue arose.

A hearing was held on April 18, 2016, three years before trial, before Judge Dennis on Petitioner's motion in limine in which Petitioner ultimately agreed Grant Fredericks was qualified to testify but took issue with part of Fredericks' conclusion.

Fredericks testified he has performed forensic video analysis for over thirty-two years. Fredericks formerly was the head of the Vancouver, British Columbia, police department's forensic video unit. Since 1994, Fredericks has been a lead instructor for the Law Enforcement and Emergency Services Video Association (LEVA), teaching throughout North America, the United Kingdom, and Asia. Fredericks is a contract instructor for the FBI, and is a certified forensic video analyst and member of the International Association for Identification (IAI). Fredericks has testified regularly since 1994 and testified over 150 times in the last 10-12 years in courts in the United States and internationally. R. pp. 10-11.

As a lead instructor for LEVA – the preeminent organization for training forensic video analysts – Fredericks personally instructed between two and three thousand video analysts. His coursework includes teaching principles of reverse projection photogrammetry for video

analysis. R. pp. 11-12. Fredericks published in various industry publications and co-authored a best practices guideline for the use of compression in digital video environments. Fredericks co-authored a Best Practices and Standards for LEVA and its members. His work on these publications was peer-reviewed. Fredericks explained certification as a forensic video analyst requires 188 hours of coursework with recertification every three years. The final part of certification requires submission and defense of a case report before a committee of peers. R. pp. 14-17.

Fredericks explained forensic video analysis encompasses a number of subdisciplines including photographic video comparison and reverse projection photogrammetry. Other subdisciplines include macroblock analysis, speed estimation, and color correction. Fredericks has utilized reverse projection since 1984. Photographic video comparison is a primary area of his work since around 1997-98. R. pp. 22-23. Fredericks won the Vollmer award, which is an IAI award for excellence in forensic techniques. R. p. 28.

Fredericks described reverse projection 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. p. 31, line 25 – p. 32, line 11. Petitioner asked Fredericks whether reverse projection was different than headlight spread pattern analysis and Fredericks answered:

No, it’s exactly the same. It’s – headlight spread pattern analysis is just the examination of the reflection of light off of the object. In this case, it’s – we’re just looking at one feature of reverse projection. So, the vehicle is – reflects light back into the camera. The forward facing illumination of the light pattern from the headlights, fog lamps, whatever it is, reflect light to the camera. That’s just one feature. . . . [I]f I were examining dents, then I would describe a depth comparison. If I were examining mud spatter . . . on the side of the vehicle, I would describe mud spatter. It’s all part of reverse projection, photographic video comparison. In this case, there was an illumination of light in front of the car that could be contrast[ed] and compared, so I described that as headlight spread pattern because it’s compartmentalizing all of the features of reverse projection and photographic comparison.

R. p. 33, line 12 – p. 34, line 2. Fredericks noted thousands of different types of headlights exist that distribute different beams. Even consecutive model years of the same make will distribute different beams because the headlight component changes. “So it’s part of the process, okay, that people in my industry consider very importantly in doing comparison work.” R. p. 36, lines 2-20. Fredericks noted a large number of publications analyze changing headlight spread pattern from vehicle to vehicle, including the Highway Transportation Safety Authority Administration. R. pp. 36-37. Kineticorp published a peer-reviewed magazine in the traffic accident reconstruction field that discusses changes in headlight spread pattern and the measurement of that change. R. p. 38, lines 11-18. Fredericks has provided expert testimony on the comparison of headlight spread pattern analysis at least half a dozen times. R. p. 39, lines 22-24. At this juncture, Judge Dennis found the topic was beyond the ordinary knowledge of jurors, and Fredericks was qualified by his training, background, and experience to offer an opinion, leaving the remaining issue of the breadth of Frederick’s opinion that would be allowed. R. p. 41, lines 7-19.

Fredericks explained some of the methodology in examining the surveillance video:

I went back to the scene. I employed images from the original camera, recorded through the original digital video recording system, under the same lighting conditions, the same environmental conditions. And then I used a forensic tool that’s commonly used in my field to overlay the images to compare and contrast to the light. I also conducted a number of tests on reflective areas of the vehicle by covering over those areas and uncovering them so I could properly identify where reflection was coming from. . . . [F]or instance, a tool box in the vehicle, place the tool box, remove the tool box, study the reflection differences. I also used over a dozen other vehicles of different makes and models but similar in appearance and vehicles of the same class, both in manufacturer and make to compare the reflections. . . .

R. p. 43, lines 9-23. Fredericks conducted an analysis to determine the class and characteristics of the questioned vehicle. The process involved calibrating the camera perspective with the

historic camera perspective, under similar lighting conditions and similar environmental conditions. The vehicles tested were placed into the known position of the historic vehicle for purposes of reverse projection, with inch by inch precise placement. R. pp. 45-46.

The known truck – the Moorers’ truck – was a Ford F-150 Limited. Fredericks tested twelve other king-cab type trucks of varying makes and models for the purpose of comparing and contrasting from the questioned vehicle. Based on the brightness or luminance, some colors were eliminated, and Fredericks determined the questioned vehicle was dark in color. Fredericks also determined, through comparison and contrast, that the questioned vehicle was a four-door truck with a tool box. Additionally, using photographic video comparison and reverse projection, including analysis of the headlight spread pattern, Frederick determined the questioned vehicle had HID headlights. Fredericks agreed with the prosecutor he used the same technique or science to compare the headlights as he did to determine the questioned vehicle had a toolbox and was a four-door vehicle. He used this science to determine the class and characteristics of the questioned truck and made his determination it was the Moorers’ vehicle through the totality of his analysis and not just the headlight spread. R. pp. 47-52.

Fredericks utilizes the ACE-VR methodology, which stands for analyze, compare, evaluate, verify, and report. It has been the standard in the field for decades. R. p. 54. Fredericks explained headlight analysis is just one component of reverse projection and photographic video comparison. Other examples include an analysis of a vehicle’s bumper, mud spatter analysis, and analysis of bumper stickers. R. p. 58, lines 5-20. Fredericks explained the quality control procedures he utilized included the use of multiple kinds of vehicles for analysis, having his work peer reviewed, and following the ACE-VR methodology. R. p. 63, lines 17-22. Fredericks’ report was peer reviewed by George Reis, a certified forensic video examiner with

the International Association for Identification. Reis has worked in the forensic video field since the 1990s and is one of the leading instructors in his field in the world. Fredericks' detailed report was roughly fifty to sixty pages in text, detailing each step, plus had hundreds of images for comparison. The entire process was capable of being peer-reviewed. Reis sent correspondence to Fredericks in the form of an e-mail summarizing his peer-review of Frederick's report and indicating he agreed with the methodology and the results. Reis found the headlight pattern analysis was an appropriate analysis. R. pp. 64-67; p. 1948.

Specifically, Reis advised:

I have reviewed your report of June 4, 2015 on "State vs Sydney Moorer and Tammy Moorer." The report is very thorough and written in a manner that explains your methodology, the foundations for headlight spread pattern comparison as a part of vehicle comparison, and the justification for your conclusion. The concept of any forensic comparison – from natural objects such as fingerprints and footprints to manmade objects from bullets, tires and tool marks are all based on these same criteria. I agree with your methodology and find your illustrations show the similarities and differences from different vehicles quite well. It does appear that some of the frames show quite a bit of resolution for this type of comparison. **The premise of the uniqueness of headlight spread patterns is well stated and illustrated.**

Supp. R. 1 (emphasis added). Fredericks concluded the questioned vehicle in the video surveillance taken on 814 and at D&S Siteworks was the Moorers' vehicle. R. p. 75. He advised he has provided this opinion in other cases and been allowed to testify to that in all the cases where that was the opinion he had to render. R. pp. 78-79.

Petitioner called their expert witness, Bruce Koenig, who admitted when he was with the FBI, they did video comparisons matching questioned vehicles to known vehicles through reverse projection and photographic video comparison, and it has been done for a long time. R. p. 105, lines 15-25. Koenig attested Fredericks does excellent work. R. p. 108, lines 10-17. For the most part, Koenig did not have any issues with Fredericks' report. He felt Fredericks did a

thorough job in the rear projection analysis and his comparisons. R. p. 108, lines 18-24. Koenig agreed with Fredericks' conclusion as to the class of vehicle for the questioned vehicle. Koenig only disagreed that a conclusion could be made that the known vehicle could be an absolute match with the questioned vehicle, arguing the view that each vehicle has a unique headlight spread pattern has not been adequately tested. R. pp. 109-10.

At the conclusion of the hearing, Petitioner indicated he did not object to Fredericks' qualifications or his conclusions as to the class of vehicle for the questioned vehicle. However, Petitioner objected to the conclusion that no two vehicles projected the same headlight pattern. R. pp. 126-28. Responding to the Moorers' argument that Fredericks should not be allowed to say each vehicle has a unique headlight spread pattern, Judge Dennis noted: "He's saying in his experience, and . . . that to me is the distinction here. He's testifying from his personal experience in analyzing, he's never encountered that." R. p. 129, lines 15-24. Judge Dennis ruled:

At the time of trial, we will have heard his testimony in full and then from the standpoint, if the solicitor asks that question, we can excuse the jury and we can go into it and have further hearing concerning Mr. Fredericks' testimony in that vein. But from the standpoint of his testifying to the methodology, it's clearly – and I find nothing either from anybody's testimony, nothing that I've done on my independent research that says this is not a recognized standard for identification and he's gone through it methodically.

R. p. 130, lines 5-14. Judge Dennis noted aspects of the testimony presented issues of fact for a jury, but Fredericks was qualified to testify. R. p. 130, lines 14-24. Judge Dennis further cautioned while he was inclined to allow the full extent of Fredericks' opinion, the scope of the opinion still needed to be addressed at the time of trial. R. p. 130, line 24 – p. 131, line 7.

At trial: Judge Dennis does not allow a running objection/sustains Petitioner's objections.

At trial, while the jury was out of the courtroom, defense counsel advised Judge Dennis that the defense did not anticipate objecting to Grant Fredericks' qualifications but wanted to make a running objection to some of Fredericks' conclusions and opinions. Judge Dennis did not allow a running objection, explaining, "The qualifications, when we render an opinion, when you qualify him, he's entitled to render an opinion. The extent and the breadth of that opinion is limited to his qualifications, and therein lies where it will be challenged." Judge Dennis advised defense counsel he would need to interpose an objection, then he would hear the challenge outside the jury's presence. R. p. 1407, lines 6-19.

Judge Dennis explained further:

I think my statement was at that time – and you made it in your opening statement, and I remember that, my reaction was similar to yours – is that they are the same as fingerprints, I don't think that's scientific. . . . [W]hen I read his report, he said in my experience I've never seen lights that differ. That's totally different. . . . [H]e's not saying categorically there is no such thing . . . he's saying from his personal experiences, which he's entitled to do that. There is a distinction there, as far as I'm concerned.

R. p. 1408, lines 6-21. Judge Dennis reiterated defense counsel would need to interpose a specific objection. R. p. 1409, line 23 – p. 1410, line 1.

Fredericks testified before the jury as to his qualifications and defense counsel did not conduct voir dire or object to Fredericks' qualifications. Fredericks runs Forensic Video Solutions and teaches forensic video analysis in various parts of North America and the world. Fredericks has examined video for thirty years and has been qualified to testify hundreds of times throughout North America, Britain, and New Zealand. He has taught at the FBI National Academy and is a lead instructor for LEVA. He taught a course that included video comparison and reverse projection of historic images to compare objects such as vehicles. R. pp. 1426-30.

Fredericks agreed with defense counsel during cross-examination that he adhered to the scientific method. R. p. 1498, lines 9-12.

Fredericks described forensic video analysis as the examination, comparison, and evaluation of video, which now chiefly concerns digital media rather than analog media which was the primary form until around 2001. Comparison work is accomplished through the use of reverse projection and may include, in addition to headlight analysis, the identification of vehicles or clothing. R. pp. 1431-32. Fredericks compared the Moorers' F-150, the known vehicle, to the questioned vehicle depicted in the surveillance taken from 814 and from Mill Pond Road. Fredericks explained he has undertaken this kind of analysis many times. Fredericks explained the methodology is the same whether making the analysis for vehicles, individuals, or other items. R. p. 1434.

Fredericks was asked what he did to analyze the known vehicle and the suspect vehicle.

He testified:

At that time, I did an examination of video images that were provided to me of a questioned vehicle. There were two sets of locations where the vehicle was depicted, and I made observations about the vehicle, **including the headlight spread pattern. That is one thing that is quite unique to a vehicle,** and if there is enough resolution, if there is enough reliability in the edge pattern, that an examination and an evaluation of the headlight spread pattern can be made, then I may proceed to say this is fit for the purpose of doing that comparison.

R. p. 1436, lines 7-17 (emphasis added). There was no objection to the testimony. Fredericks answered the prosecution's next three questions and then the prosecution asked, with the intent for Fredericks to afterwards explain his conclusion, whether Petitioner's F-150 matched the questioned vehicle in the 814 surveillance footage. Judge Dennis promptly instructed the witness to not answer the question, which allowed defense counsel to lodge an objection "that this completely goes outside the expertise of the witness." R. p. 1437, lines 3-12. Judge Dennis

explicitly sustained the objection and made the prosecution rephrase the question as to whether a “determination” was made rather than a “match.” With the rephrased question posed, Fredericks confirmed he was able to make a determination and confirmed the follow up question as to whether he was prepared to show how he came to the determination. R. p. 1437, lines 18-25.

The prosecution asked what the determination Fredericks came to but defense counsel objected and Judge Dennis sustained the objection, requiring foundation as to whether the opinion “meets the test first, before he renders an opinion.” R. p. 1438, lines 1-8.

Fredericks explained:

The methodology is to compare and contrast all of the features of a questioned object, in this case a vehicle to a known vehicle. That evaluation and comparison is normally done through what is called “reverse projection.” It is where we go back to the scene, we project the historic images of the object car driving by each of the areas, over on top of a contemporary view.

R. p. 1438, lines 12-19. This involved reposition of the known object in precisely the same position on the roadway under the same lighting conditions. Then Fredericks analyzes the reflection of the vehicles, comparing the reflection from the bumper, headlights or taillights, and other reflective features. This includes the disbursement of the headlight pattern over the roadway. R. pp. 1438-39. Fredericks explained:

[T]here is significant research, studies and publications establishing that Headlight spread pattern is unique from vehicle to vehicle. Vehicles of the same class, make, model, year, there are a lot of reasons why – which we’ll probably get into – that establishes that the diffusion of the light, the angle of the headlight on the ground, the reflection off of the highway can be compared to establish the uniqueness of a vehicle. That is part of the reverse projection, all of which is just evaluating the reflection of light. And so that is the methodology. That would establish that a vehicle could be the same or cannot be eliminated; it might be the same.

R. p. 1439, lines 11-24 (emphasis added). Even vehicles of the same class, make, model, and year may have some difference, and if there is no difference, could emit a different headlight

pattern. Fredericks noted vehicles from different classes offer different headlight spread patterns because of differences in structure. R. p. 1440.

Without objection, Fredericks explained, "So that examination was done, and they were both identical in physical characteristics in reflection off of the vehicle, including unique features that were visible in the back of the vehicle, to the headlight spread pattern. They were all identical." R. p. 1441, lines 6-15. Fredericks was asked if in his experience, whether vehicles of the same make, model, and year exhibit different headlight spread patterns. Fredericks answered, "In all of the examinations I've done, all of the tests that I've written – the tests I've read, the studies and publications that I've read and tests from peers, my peers, with enough resolution, no vehicle shares the same headlight spread pattern." R. p. 1441, lines 19-23. Fredericks again confirmed in his experience and his studies in his field, every vehicle has a unique headlight spread analysis. He then confirmed the headlight spread pattern of the Moorers' F-150 matched the suspect vehicle. R. pp. 1441-42. This testimony was all provided without objection. Fredericks continued to provide testimony explaining the process which he utilized, all without objection. R. pp. 1443-78.

On cross-examination, Fredericks confirmed that use of headlight spread analysis to "identify one individual vehicle to the exclusion of all others is generally accepted in the field." R. p. 1500, lines 5-14. The term is defined by LEVA in its glossary. R. p. 1500, lines 21-25. Defense counsel asked if the discipline is published in any textbooks "or things of that nature." Fredericks answered that the U.S. Department of Transportation published a document entitled Sensitivity Analysis of Headlight Perimeters Affecting Visibility and Glare in 2008 that offered a series of explanations and testing to show "why headlight spread pattern was different from vehicle to vehicle." R. p. 1516, lines 2-14. Fredericks explained another article defining

headlight spread pattern analysis that discussed “a number of observations, including a description of high intensity discharge” or HID lights, and “how they are different from one another and the circumstances by which they would be different.” The article further explains, “[W]hy one headlight from one vehicle of the same make and model would be different from another, because of humidity inside the lens, because of wear and tear on the roadway and because of the canting of the light for traffic.” R. p. 1516, line 20 – p. 1517, line 14. A sheriff’s deputy conducted a study with 60 brand new Crown Vics, that all had different headlight spreads right off the assembly line. R. p. 1517, lines 15-21. Fredericks offered to detail further studies, but beaten, defense counsel declined. R. p. 1518, lines 4-6.

The Court of Appeals correctly found this issue is not preserved. Both Petitioner’s objections were sustained, and he never raised the objection that the opinion was not reliable, and failed to provide further objection once the prosecution provided foundation for Fredericks’ opinion and then asked him to offer his ultimate opinion. See State v. George, 323 S.C. 496, 510-11, 476 S.E.2d 903, 911-12 (1996) (Finding an issue is not preserved for appellate review if the objecting party accepts the trial court’s ruling and does not contemporaneously make an additional objection to the sufficiency of the relief provided); State v. McLaughlin, 307 S.C. 19, 413 S.E.2d 819 (1992) (An appellant’s “failure to request a more explicit ruling constitutes a waiver to any objection to the judge’s general ruling.”). Certiorari should be denied.

II. The trial court correctly admitted expert testimony regarding the unique headlight spread pattern of the suspect vehicle.

Before admitting expert testimony, the trial judge must find: (1) the expert’s testimony will assist the trier of fact; (2) the expert has the required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. State v. Martin, 391 S.C. 508, 514, 706 S.E.2d 40, 42 (Ct. App. 2011); Rule 702 SCRE. “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.” Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). “A trial court’s decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion.” State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009).

In United States v. Quinn, 18 F.3d 1461, 1464-65 (9th Cir. 1994), the Ninth Circuit Court of Appeals found the district court did not err in allowing an expert in photogrammetry to testify to the approximate height of the bank robber shown on surveillance video without holding a Daubert hearing. The Court of Appeals found no error and observed the district court “concluded that the process used by [the expert] was nothing more than a series of computer assisted calculations that did not involve any novel or questionable scientific techniques.” Id. at 1465.

In United States v. Wells, 879 F.3d 900, 933 (9th Cir. 2018), an expert in Honda vehicles was allowed to testify he was 70 percent certain a vehicle depicted in a blurry video was a Honda CR-V after his initial analysis determined a CR-V was one of three possible models depicted in the video and photogrammetric analysis eliminated the other two Honda models.

Sagely stated in an unpublished opinion by the North Dakota District Court, United States v. Rodriguez, 2006 WL 8438025 (D. N.D. s/July 26, 2006), the district court addressed a challenge to the video analyst’s methods of reverse projection measurement. The expert staged three poles of varying height, videotaped the placement of the poles, and overlay an image of the perpetrator shown in the original video overtop the videos with the three poles to determine the perpetrator was approximately 5’6” tall. The district court found the expert testimony admissible, noting, “Even to the lay person, this methodology is logical.” Id. at 2.

In the present case, Fredericks' methodology was likewise logical, and as in Quinn, did not involve any novel or questionable scientific techniques. It relied on the familiar ACE-VR method and Fredericks' work was presented to the jury for its own evaluation. Further, he explained the uniqueness of headlight spreads between vehicles of the same make and model based on information he gained from experience, literature, and study.

A comparison to the facts found in Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010) demonstrates the soundness of Fredericks' testimony. In that case, the Supreme Court found a witness qualified as an expert failed to meet the reliability requirements of Rule 702 to testify as to causation by a cruise control design and also offer an alternative design for the cruise control system. The Supreme Court observed it was questionable whether the witness was qualified and further: (1) he never tested his theory, (2) it was never peer reviewed, (3) he never published his theory, and (4) while noting general acceptance of a scientific principle in the community was not required for admissibility, the Supreme Court noted that the expert's theory was rejected in the community. Id. at 451-52, 699 S.E.2d at 178.

In contrast to Watson, Fredericks' theory of uniqueness was tested, his work on the instant case was peer reviewed, Fredericks cited and discussed publications that supported his theory, and the theory was not rejected, but accepted based on Fredericks' testimony at trial. Therefore, the trial court did not abuse its discretion in allowing the testimony. Certiorari should be denied.

CONCLUSION

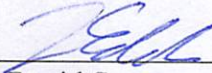

For all the foregoing reasons, it is respectfully submitted that certiorari should be denied.

Respectfully submitted,

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