STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions
Honorable Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5987 (S.C. Ct. App. Filed July 5, 2023)

THE STATE,

Respondent,

vs.

TAMMY CAISON MOORER,

Petitioner.

Case No. 2023-001317

RETURN TO PETITION FOR WRIT OF CERTIORARI

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II. Whether the trial court correctly allowed the expert witness in photogrammetry and reverse projection to express his opinion that the suspected vehicle in the surveillance footage was the Moorers' vehicle, and whether the issue is preserved for review.

III. Whether the trial court abused its discretion in disqualifying alleged alibi witnesses from testifying where the witnesses violated the trial court's sequestration order, and whether the trial court correctly found Petitioner violated the notice requirement for Rule 5, SCRCrimP where Petitioner did not timely provide notice within the rule's requirements. (Petitioner's issues III & IV).

IV. Whether the trial court correctly denied the motion for directed verdict for kidnapping and conspiracy. (Petitioner's issue V).

STATEMENT OF THE CASE

Petitioner Tammy Moorer was indicted for kidnapping and conspiracy to kidnap and proceeded to jury trial on October 8, 2018, before the Honorable Benjamin H. Culbertson. Petitioner Moorer's husband, Sidney, had an affair with the victim, Heather Elvis. The State's theory was Victim became pregnant by Sidney, and Sidney and Petitioner carried out a plan to kidnap her by luring her to an isolated boat landing near their house in Socastee in the early morning hours of December 18, 2013. The Moorers bought a pregnancy test and Sidney called Victim from a payphone, then drove to the boat landing, where Victim's car was discovered shortly after. To this day, Victim has never been found. The facts of the case are laid out in detail in the State's brief to the Court of Appeals.

The jury convicted Petitioner of both charges and Judge Culbertson sentenced her to thirty years' imprisonment. Sidney Moorer was tried separately. Petitioner appealed her convictions, and the Court of Appeals affirmed in a published opinion. State v. Moorer, 439 S.C. 525, 888 S.E.2d 725 (Ct.App.2023). Petitioner filed a petition for writ of certiorari and this return follows.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Jenkins, 412 S.C. 643, 650, 773 S.E.2d 906, 909 (2015). For the issue of directed verdict, the operative question is whether evidence exists sufficient for any reasonable juror to reach a guilty verdict. Jackson v. Virginia, 443 U.S. 307, 319 (1979). The second and third issues are evidentiary issues. The admission or exclusion of evidence is a matter addressed to the trial court's sound discretion and will not be reversed absent a manifest abuse of the trial court's discretion and probable prejudice. State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). The abuse of discretion standard also governs the witness exclusion issues, which are addressed together, and go to the

discretion our reviewing courts provide to trial judges, who are best situated to make decisions regarding the conduct of trials. Gavin v. State, 473 So.2d 952, 955 (Miss. 1985) ("even if we wanted to be fact finders, our capacity for such is limited in that we have only a cold, printed record to review. The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire") (cited with approval, Clemmons v. Mississippi, 494 U.S. 738, 766 (1990) (Blackmun, J., dissenting)). "Trial judges in South Carolina, as elsewhere, are allowed a wide discretion in the trial of cases. This is as it should be because a trial judge experiences 'a feel of the case' which oftentimes may not be detected from a cold printed record." State v. Perry, 278 S.C. 490, 494, 299 S.E.2d 324, 326 (1983).

A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. Rule 242, SCACR. Considerations governing review include: (1) Whether there are novel questions of law; (2) Whether there is a dissent in the decision of the Court of Appeals; (3) Whether the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) Whether substantial constitutional issues are directly involved; and (5) Whether a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Id.

ARGUMENT

I. The trial court correctly admitted text messages to show Petitioner's state of mind concerning her husband's affair, to demonstrate her control over the cell phone utilized in abducting Victim, and to counter her assertion that her husband bought a pregnancy test for Petitioner, rather than Victim, because Petitioner thought she was pregnant or trying to get pregnant.

Petitioner alleges the trial court erred in admitting evidence that she used marijuana, visited

"Cougar Life" websites on her phone, and sent sexually oriented texts on Sidney's phone. While this evidence may have incidentally reflected on Petitioner's character, the evidence was admissible because it was relevant (1) to establish her control over Sidney's phone which was used in the kidnapping, (2) to establish that two days before Victim's disappearance, she still bore a grudge over the affair between Sidney and Victim, and (3) to refute her assertions she thought she was pregnant or trying to get pregnant as an alternative innocent explanation to the inculpatory inference that she and Sidney were purchasing the pregnancy test for Victim.

Under Rule 403, SCRE, relevant evidence may still be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice." "Probative" means tending to prove or disprove. State v. Gray, 408 S.C. 601, 609-10, 759 S.E.2d 160, 165 (Ct. App. 2014) (citing Black's Law Dictionary 1323 (9th ed. 2009)). "'Probative value' is the measure of the importance of that tendency to the outcome of a case. It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues." Id. at 610, 759 S.E.2d at 165. The probative value of evidence must, of course, be weighed against the danger of unfair prejudice. "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (citation omitted).

"A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." Id. at 534, 763 S.E.2d at 28 (citation omitted). "We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment." Id. (citation omitted); see also State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 598 (Ct. App.

2001) ("If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.") overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

While marijuana use is still illegal in South Carolina, the marijuana references at trial did not carry a substantial risk of unfair prejudice. Furthermore, the references cited in the petition for writ of certiorari presumably reference marijuana use during the Moorers' vacation in California, where marijuana is legal. Evidence of marijuana use was probative because it tended to refute the assertion Petitioner thought she was pregnant or trying to become pregnant since most expectant mothers would refrain from using alcohol or marijuana. See R. pp. 1301-02. Petitioner claimed she was trying to become pregnant during a trip to California before the kidnapping, she missed her period, and thought she was pregnant at times. R. p. 2000. This was important to the case, as the State theorized it was Victim who was pregnant, which was part of the motive for the crime. When evidence is "logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime." State v. Lyle, 125 S.C. 406, 118 S.E. 803, 807 (1923).

Petitioner also argues evidence she used her phone for internet searches entitled "Cougar Life," and sent sexually explicit texts on Sidney's phone was improper character evidence. The text messages were highly probative to show Petitioner was using her husband Sydney's phone in the weeks leading up to the crime, but used her own cell phone immediately after the crime to attempt to establish an alibi. The messages were also relevant to the core of the State's case: proving Petitioner's motive to kill Victim. The State argued Petitioner was extremely jealous of her husband's infidelity with Victim, as evidenced by her behavior after she discovered the affair. The messages also cast doubt on Petitioner's subsequent claim that she and Sydney had a healthy

open relationship. The prosecutor explained why testimony about the sexually explicit messages was probative:

> The first argument, without a doubt, is to show just two days before [the kidnapping] she's got his phone – there is no doubt there is a strong connection between the fact that she's using his phone to text another man. It shows, A, that she's in control of the phone and, B, it shows basically she's punishing him for having this affair with a 20 year-old. It's look, now I got somebody that is 19, too, and I'm going to rub your nose in it.
>
> It certainly doesn't show this blissful marriage on the heels of two nights later buying a pregnancy test. It shows at this point that, A, she hates him. I mean, the fact that she's using his phone to send these messages shows where that marriage is at that time, and it does not reflect we're taking pregnancy tests because we're back together and things are so wonderful and I'm trying to have a baby. It says, I hate you. I'm using your phone to absolutely punish you for what you have done to me. This affair has come out with [Victim] and now I'm going to rub it in your face that I'm messing around with some 19 year-old.
>
> So I think it absolutely goes to what is going on two days before this girl goes missing, and the relationship between him and her. And it shows – they're charged with conspiracy. It shows that the two of them are so thick in it together that he's okay letting her use his phone to message another man about how much she wants this other man.

R. p. 1349, line 10 – p. 1350, line 14. The prosecutor further explained: "It is to show she's got control of it, to show that she's the dominated [sic] in the relationship and to show that she's absolutely punishing him for what he did. This is retaliation. It is now I got to get you back for what you did to me." R. p. 1350, lines 17-22.

"While the State may not attack a criminal defendant's character unless he has placed it in issue, relevant evidence admissible for other purposes need not be excluded merely because it incidentally reflects upon the defendant's reputation." State v. Faulkner, 274 S.C. 619, 621, 266 S.E.2d 420, 421 (1980). For instance, in State v. Griffin, 277 S.C. 193, 197, 285 S.E.2d 631, 633

(1981), overruled on other grounds by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), the defendant claimed he killed the victim because the victim was having an illicit affair with the defendant's wife. This Court found evidence the defendant engaged in an adulterous affair admissible because it constituted evidence of a lack of affection for his wife that in turn refuted a potentially malice-free motive for killing his wife.

While some of the messages are sexually graphic, the sexual dynamics of Petitioner, Sydney, and Victim were central to this case. Prejudice from the messages was limited because Petitioner claimed at various times, even at trial, to be in an open relationship. Petitioner used sexually graphic language on the witness stand. R. p. 2142, lines 6-11. Because Petitioner offered equally coarse language from the witness stand, the danger of unfair prejudice from the messages was minimal.

Importantly, the texts establish her complete control over the phone, as she is sending sexually explicit texts to another man. However, suddenly in the early morning hours a mere two days later, Sidney had his phone back for the first time in weeks and just in time to have the last phone conversation Victim ever had. There was communication between Petitioner's and Sydney's phones before November 2, but no further communication between the spouses' phones from November 2 until December 18, at about 4:30 a.m., when Petitioner sends a text to Sidney asking him to bring her orange juice and pot-stickers followed by his response. R. pp. 1269-71; pp. 1381-82. Based on the contents of those records, from November 2 to December 18, Petitioner appeared to be using both phones until the early morning hours of December 18, when she made this feeble attempt to establish an alibi. R. pp. 1277-78. Sidney had his phone back thereafter, and there are no more sexually explicit texts to other men.

This evidence is probative of Petitioner's animus towards Sidney, and likewise Victim, for

carrying on the affair. Therefore, the texts are evidence tending to establish motive and intent. Further, it shows her involvement and an agreement to commit kidnapping because Sydney's resumed use of the phone coincides with Victim's kidnapping. The phone Petitioner controlled and used for sending explicit texts to other men is being used by Sidney again within hours, if not minutes, of Victim's unexpected disappearance. Therefore, the sexually explicit nature of the text messages was probative to proving the crimes and the probative value outweighed the limited danger of unfair prejudice. Further, it is unrealistic to believe that a jury would fail to understand the gravity of its judgment and allow reference to marijuana use or sexual language (of which there was plenty throughout trial) to affect its ability to reach a fair and impartial verdict in a kidnapping case where the victim's fate remains unknown. "The erroneous admission of character evidence is harmless beyond a reasonable doubt if its impact is minimal in the context of the entire record." State v. Brown, 344 S.C. 70, 75, 543 S.E.2d 552, 555 (2001). Further, any error was harmless in light of the overwhelming evidence of guilt, which is laid out in more detail in the State's brief to the Court of Appeals. See State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990).

II. The trial court correctly allowed the expert witness in photogrammetry and reverse projection to express his opinion that the suspected vehicle in the surveillance footage was the Moorers' vehicle because the methodology was sound, peer-reviewed, and demonstrated in a detailed exhibit. Further, the issue is not preserved for review.

Petitioner complains the trial court erred in allowing Grant Fredericks to offer his opinion identifying the Moorers' F-150 as the vehicle in surveillance footage captured near the scene of the crime on the early morning hours on December 18. The trial court never made a final ruling on the testimony because Petitioner never objected before the jury. Therefore, the issue is not preserved. Regardless, Fredericks was qualified to offer the opinion tendered to the jury, and the record demonstrates his testimony was reliable. Its weight was for the jury to decide.

How the issue arose.

A hearing was held on April 18, 2016, before the Honorable Dennis R. Markley on Sidney Moorer's motion in limine in which Sidney's attorney ultimately agreed Grant Fredericks was qualified to testify but took issue with part of Fredericks' conclusion. Fredericks was unquestionably qualified. See R. pp. 10-28. Petitioner's attorney moved to join in Sidney Moorer's motion, but did not otherwise participate in the hearing.

Fredericks explained how he reached his opinion that the Moorers' truck was the one depicted in the surveillance footage. Fredericks based his opinion in part on his analysis of the truck's "headlight spread," which he analyzed through a technique called reverse projection, which is essentially visual comparison of images. He 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. Sidney's counsel 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. Fredericks noted many 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 six 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. He explained the process involved calibrating the camera perspective with the

historic camera perspective, under similar lighting conditions and similar environmental conditions. The vehicles being tested were placed into the known position of the historic vehicle for purposes of reverse projection. The process involved moving vehicles inch by inch for 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 with 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 toolbox. 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 observation of identifiers such as bumper stickers. R. p. 58, lines 5-20.

Fredericks' report was peer reviewed by George Reis, who is a certified forensic video examiner with the International Association for Identification. Reis has worked in the forensic

video field since the 1990s. Fredericks testified Reis is one of the leading instructors in his field in the world. Fredericks' detailed report was roughly fifty to sixty pages, detailing each step, plus it had hundreds of images for comparison. Reis sent correspondence to Fredericks in the form of an e-mail summarizing his peer-review of Fredericks' 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. 2383.

Fredericks' opinion was 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.

The defense called an 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 how Fredericks' report was done. 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 position that each vehicle has a unique headlight spread pattern has not been adequately tested. R. pp. 109-10.

At the conclusion of the hearing, Sidney's counsel indicated he did not object to Fredericks' qualifications or his conclusions as to the class of vehicle for the questioned vehicle. However, Sidney's counsel 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 there were aspects of the testimony presenting issues of fact for a jury, but from of the standpoint of being qualified to testify, Judge Dennis found Fredericks was qualified. 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.

The issue is not preserved.

At Petitioner's trial, Fredericks testified about his qualifications and explained his field of expertise before the jury. When the State moved to qualify Fredericks as an expert witness, defense counsel agreed "he has the qualifications to examine the video" and agreed Fredericks was qualified to testify to the make and model of the vehicle, but defense counsel explained to the trial court, "What we object to is him being qualified as an expert to say that he can look at a video – he can look at a video or two videos very brief in time and then come back and say that is a specific truck and it doesn't match any other F-150 in the world. . . . It's like a DNA print or something like that." R. p. 890, lines 2-22.

The trial court ruled Fredericks was an expert in the field of video forensic analysis. The

trial court further advised defense counsel:

> Now, when he goes to render an opinion, if you think it exceeds his scope of expertise, **raise your objection then and I'll make a decision** as to whether or not it exceeds -- . . . . I don't know what his testimony will be. So I'm not going to limit his testimony at this point in time. It is just like any other witness, if he starts to exceed the scope of this expertise, raise your objection and I'll make a decision at that time.

R. p. 890, line 24 – p. 891, line 8 (emphasis added). **Defense counsel agreed with the procedure**: "[A]nd when we think he is getting beyond it, we'll submit the objection." R. p. 891, lines 9-14. Although Petitioner now argues on appeal that Fredericks went beyond the scope of his expertise, defense counsel never objected to Fredericks' testimony, indicating his fears that Fredericks would go too far in his opinion never occurred.

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). In the instant case, the trial court made clear it was not ready to rule on the objection and advised defense counsel to interpose an objection at the appropriate time. Defense counsel never interposed a further objection, so the issue now raised on appeal was not ruled upon by the trial court.

Rule 702/standard of review.

Under Rule 702, SCRE:

> 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.

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 to render an opinion; and (3) the testimony is reliable. State v. Martin, 391 S.C. 508, 514, 706 S.E.2d 40, 42 (Ct. App. 2011). "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). An expert witness may state an opinion based on facts not within his first-hand knowledge, and may base his opinion on information, whether or not admissible, made available to him before the hearing if the information is of the type reasonably relied upon in the field. Rule 703, SCRE; Dawkins v. Fields, 354 S.C. 58, 64, 580 S.E.2d 433, 436 (2003).

Expert testimony in the field on photogrammetry has been approved by appellate courts across the country. See Commonwealth v. Caruso, 4 N.E.3d 1283, 1289 (Mass. Ct. App. 2014); United States v. Quinn, 18 F.3d 1461, 1464-65 (9th Cir. 1994); United States v. Wells, 879 F.3d 900, 933 (9th Cir. 2018). The Texas Court of Appeals found no error in allowing Fredericks to testify as an expert in video analysis. Stevenson v. State, 304 S.W.3d 603 (Tx. Ct. App. 2010). The appellate court noted that even though the jury could see for themselves the sequence of events on videotape, Fredericks helped clarify what they were seeing on a poor quality black and white video, especially in regards to a comparison of the individuals' height. Id. at 623. Fredericks' methodology is logical, even to a lay person, and is capable of close review and scrutiny by other experts, the jury, and even for this Court, as the process has been painstakingly preserved in State's Exhibit No. 41.

Challenge to uniqueness of headlight spread patterns.

Petitioner argues the trial court erred in allowing Fredericks to testify that vehicles produce unique headlight spread patterns that make them uniquely identifiable and opining the Moorers' F-150 was the vehicle in the surveillance videos to the exclusion of all other vehicles. During voir dire at trial, Petitioner's defense counsel questioned whether vehicles are uniquely identifiable from their headlight spread and Fredericks explained, "Yes. Headlight spread analysis is a very specific unique characteristic of a vehicle. There has been lots of publications and testing, and that is one of the very, very unique features of a vehicle." R. p. 883, lines 5-9.

Fredericks further expounded:

> Well, the reasons that headlights are different provides an opportunity for comparisons. So the National Highway Transportation Board looks at a number of different features that cause headlights from a vehicle [of] the same make, model, and year to be different. Dirt and debris on the headlight, a breach of the lens compartment that causes condensation will refract the lights differently. Bulbs begin to wear out, and depending on the number of bulbs in the light, it will have an impact on the diffusion of the light across the roadway. If a bulb comes out just even a fraction of a distance, it will refract within the lens compartment and then project a light differently on the roadway. They do this study because they are trying to minimize glare [for] on-coming traffic. . .
> .

R. p. 883, line 14 – p. 937, line 3.

Fredericks explained further:

> [T]he older a vehicle is, the more likely the headlights will be adjusted and be off because they may hit a pot hole, they may hit a speed bump, and that will cause some changes in the headlight. **So it's very rare to find headlights from the same make, model and year that will overlay each other.**

R. p. 884, line 21 – p. 885, line 2. Fredericks discussed a test performed on a few dozen Crown Victoria vehicles purchased at the same time by a police agency that showed even though the

vehicles were all brand new and were identical models, none of them had the same headlight spread pattern. R. p. 885, lines 2-9. Fredericks referred to this study again during cross-examination, "[W]e did an examination of a number of vehicles right off the assembly line, [and] all their headlights were different." R. p. 970, lines 2-4.

Fredericks later explained he did not base his opinion solely on headlight spread analysis, but explained, "The headlight spread pattern is most easily and uniquely identifiable and can be demonstrated I think more visually than other features, so that is what I focused on." R. p. 949, line 7 – p. 950, line 6. During cross-examination, defense counsel asked Fredericks whether headlight spread pattern analysis is a science by itself. Fredericks answered, "Headlight spread analysis is defined by the International Association for Identification. It is a scientific examination process within photographic video comparison." R. p. 953, lines 4-9; see R. p. 963, line 23 – p. 964, line 9 ("[I]n the International Association for Identification it is trained, taught, and used, and so it is part of forensic video analysis."); see R. pp. 56-57 (noting terms used in the headlight analysis are defined by the IAI).

The trial court did not err in allowing Fredericks to opine the Moorers' vehicle matched the vehicle in the videos as he demonstrated during voir dire that his methodology was sound. Additionally, his report was peer-reviewed with particularized approbation from the peer about the headlight spread analysis. Importantly, the similarities and differences in the headlight spread between the tested vehicles and the questioned vehicle was on full display within Fredericks' report, State's Exhibit 41. The testimony, method, and results, were readily understandable for the jury so it could give Fredericks' testimony whatever weight they felt appropriate. See generally State v. Morgan, 326 S.C. 503, 485 S.E.2d 112 (Ct. App. 1997) (noting standard for admissibility of scientific expert evidence is designed to prevent jurors from being misled by an aura of

infallibility surrounding unproven scientific methods), overruled on other grounds by State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009); see generally State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979) (admissibility of scientific evidence depends on whether the experts relied on scientifically and professionally established techniques); State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991) (not all expert testimony is subject to a Jones challenge). The question of whether the questioned vehicle was a one-of-a-kind of match with the Moorers' vehicle was a quintessential jury issue. Accordingly, the trial court did not abuse its discretion in allowing the testimony even if counsel had objected to the testimony.

Further, any error was harmless. If restricting the opinion as suggested by Sidney Moorer's attorney at the pretrial hearing, the opinion evidence still established a 2013 F-150 of the same make and specifications at the Moorers' truck, including HID headlights and a toolbox, travelled towards the landing in time to meet and abduct Victim. In tandem with phone records, tower tracking records, the Moorers' admissions, and the records of the Moorers' movements, this provides ample evidence of their guilt. State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) (Error is harmless when it could not reasonably have affected the result of the trial). Combined with the compelling evidence of motive, evidence of Petitioner's guilt was overwhelming.

III. The trial court did not abuse its discretion in disqualifying alleged alibi witnesses from testifying because the witnesses violated the trial court's sequestration order. Further, the trial court correctly found Petitioner violated the notice requirement for Rule 5, SCRCrimP because Petitioner did not timely provide notice within the rule's requirements. (Petitioner's issues III & IV).

Petitioner complains the trial court erred in excluding Petitioner's alleged alibi witnesses. This issue is mooted by those witnesses' willful violation of the sequestration order. However,

defense counsel admitted failing to follow the Rule 5, SCRCrimP procedure, so the trial court did not err. Petitioner also complains the trial court erred in disallowing the same witnesses from testifying based on a violation of the sequestration order. However, the violation was willful and the trial court did not abuse its discretion.

Prior to trial, the State made a motion to disqualify several alibi witnesses. The State noted in 2014, it moved under Rule 5 for the defense to provide notice of the intent to provide alibi witnesses. Exactly ten days prior to trial, on September 28, 2018, defense counsel provided notice for the first time that it intended to call two alibi witnesses, Nikki Moorer and the youngest child, but failed to provide their addresses. Seven days prior to trial, defense counsel provided a PO Box instead of a physical address for these witnesses and named two more witnesses, Alice Caison and Christian Moorer. See R. pp. 2354-61. The State noted it was prejudiced by the violation because the purpose of the rule is to provide the prosecution ample time to interview the witnesses. Defense counsel's explanation was that the ten-day deadline just crept up on him and claimed the timeframe he was provided was September 17 to December 20, 2013. R. pp. 13-14. However, the prosecutor advised the trial court that the time frame in the reciprocal Rule 5 motion was December 17 to December 20, 2013. R. p. 17, lines 8-13. Defense counsel admitted he did not provide the contact information until seven days prior to trial and the trial court granted the State's motion since defense counsel did not comply with the rules. R. p. 20, lines 7-23.

The conduct of a criminal trial is left largely to the sound discretion of the trial judge. State v. Barton, 325 S.C. 522, 529, 481 S.E.2d 439, 443 (Ct. App. 1997) (citing State v. Sinclair, 275 S.C. 608, 614, 274 S.E.2d 411, 414 (1981)). In the instant case, the trial court did not abuse its discretion because defense counsel, despite having been provided reciprocal discovery in 2014, waited until the eleventh hour in 2018 to serve the notice of potential alibi witnesses and then

failed to meet the straightforward requirements for such notice under Rule 5, SCRCrimP. Defense counsel certainly was aware that the children and Petitioner's mother could provide alibi testimony much sooner than ten days before trial and should have provided adequate notice, including the required contact information, much sooner. Counsel's rule violation prejudiced the State.

Further, Petitioner testified the children, except for Christian, were asleep, and Ashley did not claim to see Petitioner after she sent the children home at 3:10 a.m. Petitioner did not claim to see her mother than night. Therefore, Petitioner was not prejudiced by the alleged error. In any event, that issue was rendered moot by the blatant violation of the trial court's sequestration order.

The trial court issued a sequestration order allowing only the solicitor's investigator to remain in the court room. R. pp. 166-68. When defense counsel prepared to call Petitioner's oldest son, Christian Moorer, as a witness, the prosecution made the trial court aware of a problem with the sequester of witnesses. The prosecutor explained:

> We have been in contact with the Sheriff's Department. They have informed us that every time they went to the room that they are being sequestered in, pursuant to your order, they were already stepping out of the room as they approached that room every time so as it appeared to them of keeping the Sheriff's Office from coming in that room. They knew when the Sheriff's Office was coming to that room.

R. p. 1606, lines 14-22.

The trial court decided to take evidence on the matter and the State called Jade Pike to the stand. R. p. 1610. Pike explained what happened:

> I was escorting [Petitioner] out of the courtroom. The witnesses were sequestered in one of our side rooms. When she opened the door, the children were in there, Ms. Polly was in there, her mother, and they had a laptop computer sitting on top of the table in the middle, and it had the live stream on it. I confiscated – I took the computer out of the room and gave it to the gentleman that was also in there, Richard McGowan, that claimed it was his computer, had

> him put the computer up, told them that they knew they weren't allowed to be watching it, **because we already had spoken to them about it**, and then went back like 20 minutes later, and they still had their cell phones.

R. p. 1700, lines 12-24. The violations Pike testified about occurred on Monday, during the second week of trial. R. p. 1701, lines 3-5. Christian denied watching the trial. R. pp. 1710-12.

The trial court found there was a violation of the sequestration order and excluded any testimony from Christian Moorer, Nikki Moorer, youngest child, and Polly Caison. R. p. 1720, lines 8-11. The trial court also disqualified the testimony of another witness who had been present in the courtroom, which is not challenged on appeal. R. p. 1720, lines 12-19. Defense counsel asked for clarification on the trial court's factual findings on the sequestration order, and the trial court explained "I find the officer's testimony was credible, that she walked in on Monday and she saw them watching this live stream." R. p. 1722, lines 2-4; see also p. 1724, lines 4-7. Once the discussion concluded, the trial court expressed its understanding that, "I have just cut maybe five possible witnesses. Are you ready to go forward with your defense, or do you need time to regroup." R. p. 1725, lines 22-25. There were also issues with the sequestration order during the prior week of trial. R. p. 1723, lines 6-9; R. p. 2164-65.

The decision to sequester witnesses is left to the sound discretion of the trial judge and will not be disturbed absent an abuse of discretion. State v. Tisdale, 338 S.C. 607, 616, 527 S.E.2d 389, 394 (Ct. App. 2000). The purpose of the exclusion rule is to prevent the possibility that one witness will shape his testimony to match another witness's testimony. State v. Huckabee, 388 S.C. 232, 241, 694 S.E.2d 781, 785 (Ct. App. 2010). If a witness violates the order, he may be disciplined by the court. Id. The question of whether to exclude testimony by the offending witness depends upon the particular circumstances and "lies within the sound discretion of the trial

court." Id. (quoting United States v. Leggett, 326 F.2d 613, 613–14 (4th Cir.1964)).

In the instant case, there was clear evidence that defense witnesses willfully violated the sequestration order. The trial court acted within its discretion and did not err in disqualifying the witnesses from testifying. See also State v. Stewart, 283 S.C. 104, 110, 320 S.E.2d 447, 450 (1984) ("It would do well for defense counsel to remember that the people of the State as well as the defendant are entitled to a fair trial.").

IV. Because evidence shows Victim suddenly and unexpectedly disappeared after Petitioner and her husband lured her to a remote boat landing near their house, the trial court correctly denied the motion for directed verdict for kidnapping and conspiracy.

Petitioner claims the trial court should have granted a directed verdict for both the kidnapping and the conspiracy to kidnap charges. The trial court correctly denied the motion because the evidence established Petitioner and Sidney lured Victim to a remote boat landing. The motive could not be clearer – Petitioner despised Victim. Victim disappeared from this boat landing, and since her sudden and unexpected disappearance, has never been heard from again.

When considering a motion for directed verdict, the trial court is concerned with the existence of evidence, not its weight and the evidence should be reviewed in the light most favorable to the State. State v. Walker, 349 S.C. 49, 53, 562 S.E.2d 313, 315 (2002). Ultimately, the question is whether, in view of the evidence in the light most favorable to the State, a rational trier of fact could find all the elements beyond a reasonable doubt. State v. Robinson, 310 S.C. 535, 539, 426 S.E.2d 317, 318 (1992) (finding any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt in affirming the denial of a motion for directed verdict and citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

Kidnapping requires proof of an unlawful act that may take the form of seizure,

confinement, inveiglement, decoy, kidnapping, abduction, or carrying away another person without authority of law. State v. East, 353 S.C. 634, 578 S.E.2d 748 (Ct. App. 2003). Kidnapping is a continuous offense commencing when the victim is wrongly deprived of freedom and continuing until freedom is restored. State v. Tucker, 334 S.C. 1, 13, 512 S.E.2d 99, 105 (1999). A "conspiracy" is "a combination or agreement between two or more persons for the purpose of accomplishing an unlawful object or a lawful object by unlawful means." S.C. Code Ann. § 16-17-410.

Moorer argues the State failed to prove the corpus delicti of kidnapping. When applied to a particular offense, corpus delicti means the specific crime has been committed. State v. Dodd, 354 S.C. 13, 17, 579 S.E.2d 331, 333 (Ct. App. 2003). In the present case, Victim has remained missing for many years, the remaining question is if her disappearance resulted from criminal agency. See State v. Williams, 321 S.C. 381, 384, 468 S.E.2d 656, 658 (1996); State v. Blocker, 205 S.C. 303, 306, 31 S.E.2d 908, 909 (1944); State v Hummell, 266 P.3d 269, 280-81 (Wash. Ct. App. 2012); Government of the Virgin Islands v. Harris, 938 F.2d 401, 415 (3d Cir. 1991) (collecting cases). In State v. Owens, 291 S.C. 116, 118, 352 S.E.2d 474, 476 (1987), like the present case, the alleged kidnapping victim disappeared and was not found. The Supreme Court found corpus delicti was established because the victim remained missing at the time of trial, there were signs of a struggle at the victim's home, and a ransom note was received. Petitioner argues the evidence is not as strong as in Owens. Of course, the facts and motives in the present case and Owens are different, but far more evidence establishes motive and a relationship between Victim and the Moorers. Owens, 293 S.C. at 166-68, 359 S.E.2d at 277-78; see also State v. Weston, 367 S.C. 279, 293, 625 S.E.2d 641, 648-49 (2006).

There is sufficient evidence that Victim's disappearance was the result of criminal agency.

Victim was described by several employees at Titled Kilt as a reliable worker who did not miss scheduled shifts without notice. She left her belongings at her apartment. She always kept her phone with her and her phone was no longer functioning after she arrived, and subsequently disappeared from, Peachtree Landing in early morning hours of December 18. Her vehicle was abandoned and irregularly parked. From the landing, she made multiple calls to Sidney's phone. Sidney showed a picture of Victim after her disappearance became well known, and the picture appears to show her in distress. Donald Demarino testified that based on the picture, he did not expect Victim to be seen again. The prosecution offered significant evidence showing Petitioner's motive to commit the crime. Petitioner admitted to being with Sidney in the F-150 during the early morning hours on December 18. Cell phone data reflects Sidney and Petitioner's phones moving in tandem through the early morning hours. Petitioner was aware Sidney was purchasing a pregnancy test at Wal-Mart, and she was with him for the payphone call to Victim – forensic evidence established Petitioner and Sidney's phones were in the proximity of the payphone at the time of the call. Sidney told the police he made the phone call. Victim drove out to the remote, isolated landing only minutes away from the Moorers' residence, calling Sidney's phone for the first time since November. There is no record of Victim visiting this landing before. According to Petitioner, they were home by 3:10 a.m., so they were close to the landing that was only minutes away. Importantly, forensic evidence proved the Moorers' 2013 Ford F-150 went to this remote landing at the early morning hour where Victim waited. Petitioner's motive was crystal clear. Certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, the judgment and convictions of the lower court should be affirmed.

Respectfully submitted,

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Assistant Attorney General

JIMMY A. RICHARDSON
Solicitor, Fifteenth Judicial Circuit

BY: _____
JOSHUA A. EDWARDS

October 26, 2023

ATTORNEYS FOR RESPONDENT

RECEIVED
Oct 26 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of General Sessions
Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2023-001317

THE STATE, Respondent,

vs.

TAMMY CAISON MOORER, Petitioner.

PROOF OF SERVICE

I, Anne Mueller, certify that I have served one copy of the within Return to Petition for Writ of Certiorari on Robert M. Dudek, Esquire, and Lara M. Caudy, Esquire, counsel of record for the Petitioner by electronic mail to the address listed for each counsel in AIS.

I further certify that all parties required by Rule to be served have been served.
This 26th day of October 2023.

Anne Mueller

Anne A. Mueller
Legal Assistant

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From:	Anne Mueller
To:	RDudek@sccid.sc.gov; "lcaudy@sccid.sc.gov"
Cc:	Pollard, Shelby; hbryant@sccid.sc.gov; Josh Edwards; Anne Mueller
Bcc:	Victim Services
Subject:	The State v. Tammy Caison Moorer, 2023-001317
Date:	Thursday, October 26, 2023 3:09:00 PM
Attachments:	Moorer Tammy - 2023-001317 - Return To Petition For Writ Of Certiorari (03422098xD2C78).PDF image001.png

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Good afternoon, Mr. Dudek and Ms. Caudy.

Attached to this email is the State's Return To Petition For Writ Of Certiorari in the above matter. We will be filing this return electronically with the Supreme Court using the Court's AIS One Drive system.

If you would, we would very much appreciate your acknowledgement of receipt of our return by return email.

Sincerely,

Anne Mueller, Legal Assistant for Assistant Attorney General Joshua A. Edwards

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