STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable William A. McKinnon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TRAVIS LAMONT GATHERS,

APPELLANT

APPELLATE CASE NO. 2022-001053

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

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II. Whether the trial court erred allowing Officer Joe Wallace to provide opinion testimony during trial despite the fact that he was not qualified as an expert?

STATEMENT OF THE CASE

On October 8, 2020, appellant was indicted by a York County grand jury for armed robbery and possession of a weapon during the commission of a violent crime. R. 406. A pretrial *Schmerber*[1] hearing was held February 25, 2021, before the Honorable Daniel Hall. R. 1-21. Adrian Peguese represented appellant and Chris Epting, assistant solicitor, represented the state. R. 1. On February 25, 2021, Judge Hall signed an order granting the state's motion to obtain saliva and hair samples from appellant. R. 405.

Appellant's case was tried July 25-27, 2022, before the Honorable William McKinnon and a jury. R. 1. Benjamin Stitely and Jason Young represented appellant. R. 1. Assistant solicitors Chris Epting, Misty Shelton, and Matthew Hogge represented the state. R. 1.

The jury found appellant guilty of armed robbery and possession of a weapon during the commission of a violent crime. R. 396, l. 21-397, l. 6. Judge McKinnon sentenced appellant to concurrent terms of twenty-five years' imprisonment for armed robbery and five years' imprisonment for possession of a weapon during the commission of a violent crime. R. 400, l. 20-401, l. 7.

This appeal follows.

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1 *Schmerber v. California*, 384 U.S. 757 (1966).

ARGUMENT

I. The trial court erred in the admission of two subsequent, uncharged armed robberies pursuant to Rule 404(b), SCRE, where the evidence did not fall within the identity exception, failed to meet the standard of clear and convincing evidence, and the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.

Standard of review

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. *State v. Whitner*, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); *State v. Clasby*, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Whitner*, 399 S.C. at 557, 732 S.E.2d at 866.

Relevant facts

On June 28, 2020, a Bojangles restaurant located in Lake Wylie, South Carolina was robbed by a black male carrying a black handgun wearing dark clothing and a mask. R. 25, ll. 5-12; 130, ll. 1-5; 132, ll. 1-6; 139, ll. 22-24; 140, l. 3. Three employees were present during the robbery, Douglas Mize, Dontae Gardner, and Eric.[2] R. 130, ll. 15-20. Law enforcement obtained surveillance video of the incident. R. 28, ll. 3-8.[3] No physical evidence was found at the scene linking appellant to the robbery. R. 31, ll.

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[2] Eric did not testify at trial and the transcript does not mention his last name.

[3] State's exhibit 1, DVD recording of Bojangles surveillance video is on file with the Court.

Pretrial hearing

Prior to the start of trial, the state moved to admit *Lyle*[4] evidence of two subsequent robberies of Wendy's restaurants in Tega Cay and Rock Hill occurring on July 12, 2020, and July 16, 2020, respectively. R. 23; 31, ll. 14-16; 40, ll. 1-3. The solicitor claimed appellant was "charged" with "six or seven separate armed robbery incidents," and that he believed evidence from these two subsequent robberies should be admitted at this trial even though the subject of appellant's trial was the armed robbery of a Bojangles restaurant.[5] R. 23-24. In support of their motion the solicitor offered testimony of Officer Joe Wallace, Officer John George, and Emily Campbell-Smith. R. 24-73.

Officer Wallace testified he was involved in the investigation of the June 28, 2020, armed robbery of a Bojangles in Lake Wylie South Carolina. R. 24. The Bojangles surveillance video recording of the incident was played during Wallace's testimony. R. 26-28. Wallace claimed the video showed the robber had a visible scar showing above his mask. R. 29, ll. 3-6. He testified the video showed the robber was wearing a glove on one hand but the hand holding the gun was ungloved. R. 28, ll. 12-16. Wallace also claimed he could identify the make and model of the gun seen in the video as a "Smith and Wesson M[&]P pistol" but he was unsure of the caliber. R. 29, 7-13. As part of his investigation Wallace took screen shots from the surveillance video and created a bulletin, which he sent to multiple law enforcement agencies hoping to discover the identity of the masked robber. R. 29, l. 22-30, l. 5. Wallace testified that, almost immediately after the bulletin was distributed, Allen Cantey, an officer from another agency,

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[4] *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923).

[5] It does not appear appellant was ever charged with any of the other robberies mentioned by the solicitor.

contacted him and identified the person in the surveillance video as appellant. R. 30, ll. 6-21. Wallace acknowledged there was no forensic evidence recovered from Bojangles that implicated any particular person. R. 31, ll. 3-13.

Wallace also testified regarding an armed robbery that occurred two weeks later on July 12, 2020, at a Wendy's located in Tega Cay (Wendy's 1). R. 31, ll. 14-16. During the armed robbery of Wendy's 1 a gun was fired and law enforcement recovered and analyzed a shell casing and projectile. R. 32, ll. 7-25. The shell casing from Wendy's 1 was later matched to a gun found at a third armed robbery, a Wendy's located in Rock Hill, which occurred on July 16, 2020, (Wendy's 2). R. 33, ll. 1-9. The gun found at Wendy's 2 was a Smith and Wesson M&P 9-millimeter pistol. R. 33, l. 10.

Wallace testified that a fingerprint was found on the gun recovered at Wendy's 2 and they interviewed that individual. During the interview the person of interest stated the gun had been brought into the barbershop where appellant worked and passed around for sale. R. 65-66. Wallace also testified regarding a cell phone seized from appellant's residence when he was arrested. R. 34, ll. 8-22; 35-36.

Wallace admitted that the Bojangles armed robbery surveillance video showed the suspect was wearing all dark clothing but in the Wendy's 1 armed robbery the suspect was described as wearing "cargo shorts, turquoise plaid shirt, camo face mask, blue or black hat, and glasses." R. 38, ll. 2-8; 39, ll. 6-7. He acknowledged that during the Bojangles robbery a gun was not fired but that a gun was fired during the Wendy's 1 robbery. R. 39, ll. 18-21.

Officer John George testified he responded to the Wendy's 2 armed robbery where the Smith and Wesson M&P 9-millimeter pistol was recovered. R. 48-49. George swabbed the gun for DNA around the grip, trigger, and the base plate of the magazine. R. 50, ll. 4-15.

Emily Campbell-Smith testified regarding the DNA analysis of the Smith and Wesson M&P 9-millimeter pistol recovered at the Wendy's 2 robbery. R. 54-65. Campbell-Smith testified that there was a mixture of DNA found on the gun including: four contributors found on the trigger, five contributors found on the grip, and four contributors found on the base plate of the magazine. R. 56-60. She said appellant was a major contributor according to the DNA found on the gun. R. 57, ll. 2-5. Campbell-Smith was unable to make any conclusions as to any of the other DNA profiles found on the gun. R. 57, ll. 6-12.

The solicitor argued the two uncharged armed robberies, occurring at separate Wendy's locations weeks after the Bojangles robbery, were relevant to this case as an exception included in Rule 404(b), SCRE, to prove identity which he stated was "the sole issue" for trial. R. 74, ll. 2-4. He contended the Bojangles surveillance video of the robbery reflected that the robber had a scar in the same place as appellant and that appellant's skin tone, hairline, ear position, ridge of nose, and eyes all resembled the robber visible in the surveillance video. R. 74, ll. 14-22. The solicitor was concerned that without the additional evidence of the Wendy's robberies the state would not be able to prove identity beyond a reasonable doubt. R. 74, ll. 23-25.

The solicitor asserted the Smith and Wesson M&P recovered from the Wendy's 2 robbery was "very similar" to the gun carried by the robber in the Bojangles robbery. R. 75, ll. 1-3. The Wendy's 2 gun had appellant's DNA on it. R. 75, ll. 3-9. The solicitor contended there was a "logical connection" between the Bojangles robbery, and the two Wendy's robberies and evidence of the Wendy's robberies should be admitted in appellant's trial. R. 76. He stated that the manager of Wendy's 2, Jaquanda Cunningham, had searched and found a photograph of appellant after his arrest and would testify during the trial that she saw appellant in the drive-thru earlier in the evening before the Wendy's 1 robbery. Cunningham claimed she recognized him

because of his scar. R. 77, l. 18-78, l. 4. The solicitor contended this particular fact supported a finding that the probative value of the evidence was "through the roof" because a "gun matching that description" was found with appellant's DNA on it weeks after he touched the gun at the barbershop. R. 78, ll. 4-14.

Defense counsel countered there was not a sufficient logical connection between the Bojangles robbery and the subsequent Wendy's robberies for evidence from those incidents to be admissible as an identity exception in this case. R. 83, ll. 16-18; 85, ll. 21-25; 86, ll. 8-12; 94, ll. 6-16; 95, ll. 4-21. Defense counsel contended the Bojangles robbery had sufficient evidence to show identity where there were multiple eye witnesses and a surveillance video recording of the Bojangles robbery. R. 82, ll. 1-4; 83, ll. 18-22. Counsel argued the Wendy's robberies were distinct from the Bojangles robbery because the robber wore different clothing, conducted themselves differently, and took items differently in various locations. R. 83, l. 16-86, l. 15; 91. He averred the evidence from the Wendy's 1 and 2 robberies was not probative where there was DNA other than appellant's found on the gun. R. 97, ll. 1-19. Defense counsel also contended that the state bringing in *Lyle* evidence shifted the burden to appellant to defend two uncharged robberies. R. 93, ll. 11-25.

The court granted the state's motion to introduce *Lyle* evidence for the purpose of identity. R. 101, ll. 1-3. The court found there was a logical connection between the incidents because appellant's DNA was found on a black Smith and Wesson pistol used in another robbery two and a half weeks later. R. 94, ll. 17-25; 101, ll. 3-8. The court found that the probative value "strongly outweigh[ed] any unfair prejudice." R. 101, ll. 8-10.

Testimony at trial

At trial the state presented eyewitness testimony from two of the employees working at

Bojangles the night of the robbery. R. 128-144. Douglas Mize was the manager on duty that evening. R. 128, ll. 9-20. Mize described the intruder as a black male wearing a mask covering "most" of his face. R. 130, ll. 1-5. He testified the man demanded money and told him not to look at him while holding a gun on him. R. 129, l. 23-130, l. 9. Mize did not know what type of gun the man had but described it as a "handgun." R. 132, ll. 1-6. He said the other two employees on duty had been instructed to lay down on the floor outside the manager's office. R. 130, ll. 15-24. Mize testified that after he gave the man the money, he and the other two employees were walked by the man to the cooler and stayed there while the robber left. R. 136, ll. 7-22.

Dontae Gardner was also working at Bojangles on the evening of the robbery. R. 139, ll. 4-16. He testified that there were four employees working that evening but said during the robbery Christian was "in the bathroom," which explained why he was not shown in the surveillance video. R. 140, ll. 16-20; 144, ll. 8-15. Gardner testified that a man touched him and told him not to look at him. Gardner saw a gun but could only identify it as a "pistol." R. 139, ll. 19-24. He described the robber as a black man wearing a black mask. Gardner was told by the robber to get on the ground during the robbery. R. 140, ll. 11-15.

Allen Cantey, an officer with the Rock Hill police department testified that prior to this investigation he had seen appellant and was "familiar" with what appellant looked like. R. 273, ll. 9-15. Over defense counsel's objection Cantey testified that he received a bulletin from Officer Wallace of the York County Sheriff's office, and he recognized appellant in the still shot on the bulletin because of appellant's "very distinct scar to the right side of his face."[6] R. 274-275.

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[6] State's 14, still shots from the bulletin are on file with the Court.

Larronchez Chisholm testified that as he was finishing up his food delivery to Wendy's 1, "someone ran up on [him]" and said to go inside and tell the people to give him all their money. R. 176, ll. 1-5. He described the person as a black man as wearing a bandanna and shades. R. 176, ll. 6-18. Chisholm described the gun the man was carrying as "black" and "automatic." R. 178, ll. 5-16. He said the man was "nervous" and said multiple times that he was not playing. Chisholm heard a gun go off during the incident but did not see it. R. 179, ll. 5-19; 182, ll. 2-18.

Sheree Moore, the manager on duty, during the Wendy's 1 robbery testified about the incident. R. 167-174. Moore testified that she saw Chisholm walking with a man behind him. The "African American," man had a gun and was wearing cargo shorts, a bandanna around his face, sunglasses, a hat, and black gloves. R. 168, ll. 5-22; 170, ll. 2-7; 173, ll. 14-23. Moore said the man told them to get down and demanded someone open the safe. R. 168, l. 21-169, l. 4. She testified that the robber fired the gun but she did not see it happen she only heard the shot. R. 170, l. 16-171, l. 1. Moore gave the robber the money from the safe and said that "he left out the back door." R. 172, ll. 1-2.

Lori Kimble collected evidence from Wendy's 1 robbery. R. 183, ll. 15-25. She collected a shell casing from the floor and the projectile found in the wall of the office. R. 184, ll. 3-22.

Two employees, a mother and son, testified regarding the Wendy's 2 robbery. R. 252-272. Jaquanda Cunningham, the manager on duty, testified that she heard a loud boom and then someone ran in the restaurant with a gun. R. 254, ll. 4-118. She said the person was a black man, had on shades, a hat, and a camouflage mask. R. 255, ll. 5-9. Cunningham testified the man demanded she go to the safe to get money. 255, l. 21-256, l. 17. She described the man's demeanor as calm and said he laid the gun down on the counter while she was trying to get

access to the safe maybe in effort to put her at ease because she was afraid. R. 256, ll. 18-25. Her son Jaquan Cunningham testified he was working with his mother that night at Wendy's 2. R. 266, 2-17. Jaquan described the man as wearing a dark striped shirt, face covered, glasses, and blue jeans. R. 271, ll. 1-11. He followed his mother and the man into the manager's office and saw the robber put the gun down. R. 268, ll. 12-21.

Officer John George testified at trial regarding the investigation of the Wendy's 2 robbery. R. 197-218. George testified that there was a gun recovered from the parking lot next door to Wendy's 2. The gun was found alongside cash and cash drawers. R. 199, ll. 3-24. The gun was a Smith and Wesson M&P pistol. R. 201, ll. 2-16. He testified that there was no surveillance video available from Wendy's 2 robbery. R. 210, ll. 8-17. George photographed the items found and swabbed the gun for DNA. [7] R. 202-204. He testified that the Smith and Wesson pistol recovered was "size-wise comparable" to a Glock and that there were "probably numerous" manufacturers that make the same size pistol because "[i]t's the normal size, you know pistol." R. 213, ll. 4-16.

SLED agent, Jana Weaver, testified as an expert in "forensic firearm testing, procession, and comparison." R. 220-238. After testing Weaver concluded that the shell casing found at Wendy's 1 was fired by the gun found at Wendy's 2. R. 225, ll. 8-16. Weaver admitted that she "probably [could] not" tell the difference between different makes of black 9-millimeter pistols if they were held up across the room. R. 235, ll. 10-20.

Officer James Brown testified regarding the Wendy's 2 gun. R. 238-244. After running an "ATF e-trace[]" on the gun it was discovered by Brown that the gun was originally purchased

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[7] During his testimony state's exhibit 5, photographs from Wendy's 2 scene and state's 10, disc of photographs from Wendy's 2 scene were admitted in evidence. R. 206, ll. 4-24. State's exhibit 5 and state's exhibit 10 are on file with the Court.

by an individual name Malcolm Myshawn in Rock Hill, South Carolina. R. 241, ll. 2-242, l. 10. He described Myashawn as a black male born in 1996. R. 242, ll. 11-15. Emily Campbell-Smith was qualified as an expert in forensic biology and DNA analysis and collections. R. 327, l. 19-328, l. 5. Campbell-Smith testified that appellant's DNA was found on the Wendy's 2 gun.[8] R. 336-337; R. 403.

Discussion

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith; however, such evidence may be admissible "to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE. "The evidence admitted 'must logically relate to the crime with which the defendant has been charged.'" *State v. Stokes*, 381 S.C. 390, 404–05, 673 S.E.2d 434, 441 (2009) (citing *State v. Beck*, 342 S.C. 129, 135, 536 S.E.2d 679, 682–83 (2000)).

Where the defendant was not convicted of the prior crime, evidence of the bad act must be clear and convincing. *Id*. Nonetheless, 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. See Rule 403, SCRE (although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice). "Unfair prejudice means an undue tendency to suggest decision on an improper basis." *State v. Dickerson*, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000). Finally, the determination of prejudice must be based on the entire record, and the result will generally turn

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[8] Campbell-Smith testified pretrial and trial that appellant's DNA was found in multiple locations on the gun. R. 57, ll. 2-5; 58, ll. 17-22; 336, l. 25-337, l. 3. However, the report admitted at trial reflected that appellant's DNA was found only on the trigger. States exhibit 17, report.

on the facts of each case. *See State v. Gillian*, 373 S.C. 601, 646 S.E.2d 872 (2007); *State v. Bell*, 302 S.C. 18, 30, 393 S.E.2d 364, 371 (1990).

The evidence related to the Wendy's 1 and Wendy's 2 robberies was not admissible under the identity exception to *Lyle* where it did not meet the standard of clear and convincing. The state put up a law enforcement officer to give testimony that the gun used in the Bojangles incident was of the same make and model as the one found at the Wendy's 2 incident with appellant's DNA. The identification of the gun by Officer Joe Wallace is problematic for multiple reasons. First, a Smith and Wesson M&P pistol is an extremely common gun, as admitted by the officer during cross examination. Second, it is incredulous that anyone, even a firearms expert, could determine that the gun seen in the Bojangles surveillance video was the same as the Smith and Wesson M&P pistol found at Wendy's 2 weeks later. Moreover, the evidence was not clear and convincing where there was an alternate explanation for appellant's DNA being found on the gun. There was testimony presented by Officer Joe Wallace that another person of interest in the case gave a statement which indicated that the Wendy's 2 gun had been passed around at appellant's place of work and multiple individuals, including appellant, handled it. That fact is corroborated by the forensic evidence which showed a mixture of DNA on the gun.

This case is the definition of propensity evidence. Contrary to the solicitor's argument, the state wanted the Wendy's armed robberies admitted to suggest to the jury that appellant had committed armed robberies, so appellant undoubtedly committed this armed robbery. The state's argument that this evidence was probative as to the identity of the person shown in the Bojangles robbery is substantially outweighed by the prejudicial effect of this evidence. What the Wendy's evidence was probative of was that appellant at one time held this gun as did several other people

by the state's own admission. R. 66-67. It was not at all probative regarding the identity of the Bojangles robber who was carrying a black handgun that, despite their best efforts, the state cannot show is the same gun.

In *State v. Ostrowski* this Court held text messages showing Ostrowski's prior drug trafficking were substantially more prejudicial than probative and the error in admitting them was not harmless. 435 S.C. 364, 867 S.E.2d 269 (Ct. App. 2021). In that case Ostrowski was convicted of trafficking methamphetamine and numerous gun charges where after Ostrowski's girlfriend was arrested law enforcement executed a search warrant at their home and found drug paraphernalia in the home, and methamphetamine in the pocket of a pair of men's pants. *Id*. at 374, 867 S.E.2d 274. At trial, the state sought to admit multiple text messages to and from Ostrowski's phone and defense counsel objected on the basis the texts were evidence of other bad acts under Rule 404(b), SCRE. *Id*. at 376, 867 S.E.2d 275. The state contended the messages were relevant to prove "intent to control the disposition" of the drugs as part of their case. The trial court ultimately allowed the admission of the messages finding they were clear and convincing and logically relevant to the issue at hand and that thought they were prejudicial they were substantially probative to the state's case. *Id*.

In its 2021 opinion this Court analogized *Ostrowski* to *State v. Lyle* in analyzing whether the evidence was admissible under the identity exception to Rule 404, SCRE. The well-reasoned analysis laid out by this Court in that case is instructive here. This Court found that while Ostrowski's text messages might prove a drug trafficking scheme, there was no evidence offered at trial that illustrated how the text messages connected Ostrowski to the specific drugs in this case. *Id*. at 392, 867 S.E.2d 283.

This Court found the facts in *Ostrowski* were similar to those at issue in *Lyle* where the defendant was charged with forgery that resembled similar crimes in the same area on the same day and those carried out in nearby cities on earlier dates. *Id*. at 393, 867 S.E.2d 284. This Court looked to *Lyle* for analysis on the connection of time and place and found that in that case "three weeks [was] too long and six weeks [was] certainly too long" for the texts to be permissible evidence at trial. *Id*. at 393-94, 867 S.E.2d 284. The *Lyle* Court reasoned there was a lack of time connection in an incident just 10 days earlier:

> [S]uch evidence strongly tends to induce the jury to believe that, merely because the defendant was guilty of the former crimes, he was also guilty of the latter; but that is the precise inference the general rule was wisely designed to exclude .... The mere fact that the Georgia crimes were similar in nature and parallel as to methods and technique employed in their execution does not serve to identify the defendant as the person who uttered the forged check in Aiken as charged, unless his guilt of the latter crime may be inferred from its similarity to the former. To warrant such inference[,] the similarity must have established such a connection between the crimes as would logically exclude or tend to exclude the possibility that the Aiken crime could have been committed by another person. There is nothing to indicate that the defendant held any monopoly of the methods and means used in passing the forged checks in Georgia, or that they were unique in the annals of crime.

State v. Ostrowski, 435 S.C. 364, 393–94, 867 S.E.2d 269, 284 (Ct. App. 2021) citing *Lyle*, 125 S.C. at 420, 118 S.E. at 808 (citations omitted).

Here, while the evidence of the Wendy's robberies might show a fast-food robbery scheme, the evidence tying appellant to the crime for which he was actually on trial, the Bojangles incident, was shaky at best. Additionally, like *Ostrowski* and *Lyle*, both Wendy's robberies were too far distant in time and in location to be admitted at trial. The physical locations were twenty minutes apart and Wendy's 1 happened two weeks after Bojangles and Wendy's 2 happened days after that. These robberies were too distinct to establish "such a

connection between the crimes as would logically exclude or tend to exclude the possibility" that the Bojangles robbery could have been committed by another person. *Lyle*, 125 S.C. at 420, 118 S.E. at 808.

The admission of this evidence was not harmless where there was equal if not more emphasis on the evidence from the Wendy's 1 and 2 robberies than there was on the evidence of the Bojangles robbery. All the physical evidence presented at appellant's trial was evidence recovered from the inadmissible Wendy's 1 and 2 robberies. That in addition to all the testimony regarding the Wendy's robberies made up a substantial portion of the state's presentation at trial and undoubtedly contributed to the verdict. *See State v. Sherard*, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991) (Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained.)

II. The trial court erred by allowing Officer Joe Wallace to provide opinion testimony during trial despite the fact that he was not qualified as an expert.

Standard of review

"'The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice.'" *State v. Fripp*, 396 S.C. 434, 438, 721 S.E.2d 465, 467 (Ct. App. 2012) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006)).

Relevant facts

Officer Joe Wallace testified he was involved with the investigation of the Bojangles robbery and the Wendy's 1 robbery. R. 279, ll. 3-8. Wallace testified that when he reviewed the surveillance video of the Bojangles robbery he recognized the black handgun visible in the video as a Smith and Wesson M&P pistol. R. 281, ll. 5-20. Defense counsel objected arguing that Wallace had not been qualified as an expert and could not give opinion testimony. R. 281 ll. 21-24. The solicitor argued that the opinion was "not a scientific opinion," and no different than identifying the make and model of a car. R. 281-282. The court overruled defense counsel's objection "for the reason given by the state." R. 282, ll. 3-4.

Discussion

Deciding what type of gun was shown in the surveillance video of the Bojangles robbery was the job of the jury in this case and each piece of evidence should speak for itself. The jury could see and consider the Bojangles surveillance video depicting a gun. Likewise, the Wendy's 2 gun was admitted in evidence for the jury's consideration and comparison to the video. Officer Wallace was not testifying as an expert in this case. He was a fact witness, testifying about his investigation of the Bojangles robbery. Wallace was not qualified as a firearms expert in this

case and should not have been allowed to give his opinion on what the jury saw the surveillance video.

If the witness is not testifying as an expert, the witness'[s] testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness'[s] testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training. Rule 701, SCRE.

"Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge...." *Watson v. Ford Motor Co.*, 389 S.C. 434, 445–46, 699 S.E.2d 169, 175 (2010). "On the other hand, a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training." *Id*. at 446, 699 S.E.2d at 175; *see also State v. Douglas*, 380 S.C. 499, 502, 671 S.E.2d 606, 608 (2009) ("Lay witnesses are permitted to offer testimony in the form of opinions or inferences if the opinions or inferences are rationally based on the witness'[s] perception, and will aid the jury in understanding testimony, and do not require special knowledge."). "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *State v. Fripp*, 396 S.C. 434, 439, 721 S.E.2d 465, 467 (Ct. App. 2012) (quoting Rule 704, SCRE). *State v. Westmoreland*, 421 S.C. 410, 419, 807 S.E.2d 701, 706 (Ct. App. 2017)

Wallace's testimony was not limited, as it should have been, pursuant to Rule 701, SCRE, to an opinion or inference rationally based on his perception, it was not helpful to a clear understanding of his testimony or the determination of a fact in issue. Contrary to the solicitor's

assertion identifying the make and model of a gun is vastly different than identifying the make and model of a vehicle and requires special knowledge, skill, experience, or training.

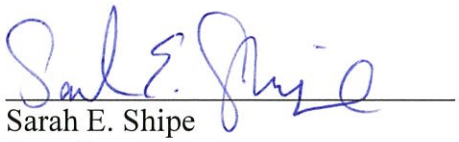
Our Supreme Court considered a related matter in *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001). The Court found reversible error where an officer qualified as an expert in crime scene processing essentially testified as a crime scene reconstruction expert about the position of the victim at the time he was shot. This went to the heart of Ellis's claim of self-defense, and the police officer was not qualified as an expert witness to give an opinion on the ultimate issue before the jury. *See State v. Ellis*, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001), *citing State v. Wilkins*, 305 S.C. 272, 407 S.E.2d 670 (Ct. App. 1991).

Here, the gun was the central piece of evidence that the state used to tie appellant to the Bojangles robbery. Without Wallace's testimony the state had zero physical evidence tying appellant to the crime for which he was on trial. None of the Bojangles eyewitnesses were able to make an identification. The video, while the state claimed you could tell appellant was the person, was not strong evidence tying appellant to the Bojangles robbery. Wallace's improper opinion testimony went directly to the heart of the case. It was the jury's job to determine whether the gun found at Wendy's 2 robbery with appellant's DNA on it was the same gun as the gun seen in the Bojangles surveillance video. Wallace opined that based on his experience as a law enforcement officer he could tell the make and model of the gun. However, testimony revealed that a Smith and Wesson M&P is extremely similar in size and shape to a Glock.

Determining whether the gun in the video was the same as the one entered into evidence was the sole province of the jury and it was reversible error for a lay witness to give opinion testimony. Wallace's opinion testimony regarding the gun was not harmless and appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant requests this Court reverse his convictions and remand his case for a new trial.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of November, 2023.

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SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Sarah E. Shipe
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November 6, 2023

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable William A. McKinnon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TRAVIS LAMONT GATHERS,

APPELLANT

APPELLATE CASE NO. 2022-001053

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon Joshua A. Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 6th day of November, 2023.

Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT