STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Jan 26 2024

S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Chesterfield County
Honorable D. Craig Brown, Circuit Court Judge

Opinion No. 2023-UP-398 (S.C. Ct. App. Filed Dec. 13, 2023)

Lower Court Case No. 2016-GS-13-00545

THE STATE,

RESPONDENT,

V.

RASHAWN MONTEZ LITTLE,

PETITIONER.

APPELLATE CASE NO. 2021-001385

APPENDIX

KATHRINE H. HUDGINS
Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

INDEX

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Rashawn Montez Little, Appellant.

Appellate Case No. 2021-001385

Appeal From Chesterfield County
D. Craig Brown, Circuit Court Judge

Unpublished Opinion No. 2023-UP-398
Submitted November 1, 2023 – Filed December 13, 2023

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, all of Columbia; and Michael Douglas Ross, of Washington, D.C., all for Respondent.

PER CURIAM: Rashawn Montez Little appeals his convictions for two counts of murder, six counts of attempted murder, and one count of possession of a weapon during a violent crime. On appeal, Little argues the trial court erred in admitting (1) expert testimony and opinion based upon unreliable science, and (2) a hearsay statement under the excited utterance exception. We affirm pursuant to Rule 220(b), SCACR.

1. We hold the trial court did not abuse its discretion in admitting opinion testimony from an expert witness qualified in firearms analysis that a bullet recovered from a shooting victim during autopsy matched a particular firearm. *See State v. Wallace*, 440 S.C. 537, 541, 892 S.E.2d 310, 312 (2023) ("We review a trial court's ruling on the admission or exclusion of evidence—when the ruling is based on the South Carolina Rules of Evidence—under an abuse of discretion standard."); *State v. Jones*, 423 S.C. 631, 636, 817 S.E.2d 268, 270 (2018) ("A trial court's ruling on the admissibility of expert testimony constitutes an abuse of discretion where the ruling is unsupported by the evidence or controlled by an error of law."). Little argues the expert should have been allowed to testify only that the bullet recovered was *consistent* with the firearm, rather than her conclusion that they *matched* because it is unsupported by a reliable method of firearms analysis. *See* 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."); *Wallace*, 440 S.C. at 544, 892 S.E.2d at 313 ("To admit expert testimony under Rule 702, the proponent—in this case the State—must demonstrate, and the trial court must find, the existence of three elements: 'the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable.'" (quoting *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999))); *Council*, 335 S.C. at 19, 515 S.E.2d at 517 (holding a trial court will admit scientific testimony if it meets these reliability factors: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures"). The firearms analyst testified the methodology she used has been widely accepted since the early 1900s and extensively peer reviewed. She also testified her conclusion in this case was subjected to quality control and confirmed by another examiner. Therefore, we find her opinion testimony as to a "match" between the bullet and the firearm was sufficiently reliable for a qualified firearms analyst. *See State v. Hackett*, 215 S.C. 434, 445, 55 S.E.2d 696, 701 (1949) (finding that courts "allow the introduction of expert testimony to show that the bullet which killed the deceased was fired from a

particular pistol or rifle . . . [if] the witness . . . is, by experience and training, qualified to give an expert opinion in the field of [firearms analysis]").

2. We hold the trial court did not abuse its discretion in admitting a non-testifying witness's hearsay statement naming Little as his shooter under the excited utterance exception. *See State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion."); *id.* ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."); Rule 801(c), SCRE ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). The State properly laid a foundation that the statement fell within the excited utterance exception to the prohibition on hearsay with witness testimony that established: (1) the declarant was shot and his statement identified the person who shot and injured him; (2) the witness interviewed the declarant in a hospital, where the declarant was still awaiting treatment, less than twelve hours after the shooting; and (3) the declarant exhibited a frustrated demeanor and agitated attitude about the situation and his condition. *See State v. Stahlnecker*, 386 S.C. 609, 623, 690 S.E.2d 565, 573 (2010) ("Three elements must be met for a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition."); *State v. McHoney*, 344 S.C. 85, 94, 544 S.E.2d 30, 34 (2001) ("In determining whether a statement falls within the excited utterance exception, a court must consider the totality of the circumstances."); *State v. Sims*, 348 S.C. 16, 21, 558 S.E.2d 518, 521 (2002) ("While the passage of time between the startling event and the statement is one factor to consider, it is not the dispositive factor."); *id.* at 22, 558 S.E.2d at 521 ("Other factors useful in determining whether a statement qualifies as an excited utterance include the declarant's demeanor, the declarant's age, and the severity of the startling event."). Further, we hold any potential error by the trial court is harmless because it is cumulative to other testimony identifying Little as the shooter, which was not raised on appeal. *See State v. Collins*, 409 S.C. 524, 537, 763 S.E.2d 22, 29 (2014) ("The harmless error rule generally provides that an error is harmless beyond a reasonable doubt if it did not contribute to the verdict obtained."); *State v. Johnson*, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989) ("The admission of improper evidence is harmless where it is merely cumulative to other evidence.").

AFFIRMED.[1]

WILLIAMS, C.J., and HEWITT, and VERDIN, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chesterfield County

Honorable D. Craig Brown, Circuit Court Judge

Opinion No. 2023-UP-398

THE STATE,

RESPONDENT,

V.

RASHAWN MONTEZ LITTLE,

PETITIONER.

APPELLATE CASE NO. 2021-001385

Petition for Rehearing

Pursuant to Rule 221(a), SCACR, counsel for Petitioner, Rashawn Montez Little, respectfully requests that this Court grant rehearing. On December 13, 2023, this Court affirmed Petitioner's convictions for two counts of murder, six counts of attempted murder and possession of a weapon during the commission of a violent. State v. Rashawn Montez Little , No. 2023-UP-398 (S.C. Ct. App. December 13, 2023). Counsel respectfully submits that this Court overlooked the fact that the reliability factors relied on by the lower court for admission of the expert witness's testimony matching a bullet to a firearm went to firearm identification generally

and not to the specific determination that a bullet was a "match" to a particular firearm. The State, as the proponent of the expert testimony, failed to show that the "match" testimony, as opposed to limited testimony that a bullet was consistent with being fired from a particular firearm, met the reliability requirement for admission.

Argument

Petitioner objected to the testimony of the firearms examiner from SLED, Suzanne Cromer, that a particular bullet was fired by a particular firearm on the ground that the testimony lacked scientific reliability. (R. p. 408, line 25 – p. 409, lines 1-9). The State proffered the testimony of Agent Cromer. (R. pp. 409-425). During the proffer the agent testified, "Actually it kind of dates back to the civil was when Colonel Stonewall Jackson was shot. They could pull that bullet projectile out of him and kind of determined that it was **most consistent** with the ammunition from his own men." (R. p. 416, lines 13-16)(emphasis added).

The judge overruled the objection. (R. p. 422, line 14 – p. 423, 424, 425, lines 1-22). The judge stated, "Therefore based upon that testimony and what I have stated on the record, this Court believes that the reliability factors have been satisfied and therefore the Court will allow such testimony." (R. p. 425, lines 7-10). The reliability factors relied upon by the lower court for admission of the expert witness's testimony matching a bullet to a firearm went to firearm identification and analysis generally and not to the specific determination that a bullet was a "match" to a particular firearm. The State failed to establish that the "match" testimony, as opposed to limited testimony that a bullet was consistent with being fired from a particular firearm, met the reliability requirement for admission.

Before the jury Agent Cromer testified that seven firearms were submitted: 1.) a 40 caliber Glock belonging to Officer Robinson; 2.) a 40 caliber Glock belonging to Officer Cruz; 3.) a 45 caliber H and K submachine gun belonging to Officer Burns; 4.) a Phoenix Arms 25 auto caliber firearm found on the bed in the trailer; 5.) a Highpoint brand 45 auto caliber found in the Caravan vehicle at the scene; 6.) a Ruger Revolver 357 Magnum caliber labeled Marker A, State's exhibit #40; and 7.) a Smith and Wesson 380 semiautomatic M and P Body Guard pistol found under the deceased, State's exhibit #41. (R. p. 438, line 1 – p. 439, lines 1-10).

Agent Cromer testified that multiple cartridge cases or shell casings were collected at the scene and submitted for examination. (R. p. 439, lines 20-21). The agent then testified that certain casings matched certain firearms. She testified that eleven of the 40 S and W caliber cartridge cases were fired by Officer Robinson's firearm. (R. p. 439, lines 21-23). She testified that four of the 40 caliber cartridge cases were fired by Officer Cruz's firearm. (R. p. 440, lines 3-7). She testified that three of the items were fired by Officer Burns' firearm. (R. p. 440, lines 11-15). The agent testified that three items submitted were unsuitable for identification. (R. p. 441, lines 12-22).

Agent Cromer testified that four of the cartridge cases were fired by the same gun but not any of the guns submitted. (R. p. 442, lines 1-23). The agent testified that four of the cartridge cases were fired by the 380 semiautomatic pistol, State's exhibit #41. (R. p. 444, lines 15-17; p. 445, lines 6-10). She told the jury, "I examined the weapon and I compared it to the four fired 380 auto caliber cartridge cases that I received from the scene and the Item A. I determined that in my opinion these four fired cartridge cases were fired by that firearm." (R. p. 445, lines 6-10).

The agent additionally testified that the bullet jacket recovered at the autopsy of Shannon Little was fired by the 380 semiautomatic pistol, State's exhibit #41, Item 48. (R. p. 446, line 19

– p. 447, lines 1-10). She told the jury, "My findings on the bullet jacket is that it met all of those criteria; caliber, types of rifling, number of lands and grooves, direct of twist. And then we go to the actual microscopic exam, and in my opinion there was enough of those individual identifying markers that matched up for me to say that I believe that this was fired by the Item 48, 380 Smith and Wesson Bodyguard pistol." (R. p. 447, lines 4-10). Petitioner renewed his objection to the testimony. (R. p. 446, line 25 – p. 447, line 1). The judge should have limited the agent's testimony to consistencies she observed rather than matches.

While firearm identification testimony has generally been found admissible, the reliability of this kind of expert testimony has come under scrutiny. See David H. Kaye, Firearm-Mark Evidence: Looking Back and Looking Ahead, 68 Case W. Res. L. Rev. 723, 724 (2018). As the United States District Court for the District of Massachusetts wrote:

> Courts have understandably been gun shy about questioning the reliability of firearm identification evidence. *See Santiago*, 199 F.Supp.2d at 111–12 ("The Court ... can only imagine the number of convictions that have been based, in part, on expert testimony regarding the match of a particular bullet to a gun seized from a defendant or his apartment."). *Accord United States v. Foster*, 300 F.Supp.2d 375, 377 n. 1 (D.Md.2004) (noting that "[b]allistics evidence has been accepted in criminal cases for many years"); *United States v. O'Driscoll*, 2003 WL 1402040 at *1, 2003 U.S. Dist. LEXIS 3370 at *4 (M.D.Pa. Feb. 10, 2003). Storm clouds, however, are gathering. *See Sexton v. State*, 93 S.W.3d 96 (Tex.Cr.App.2002) (rejecting matching of cartridge cases based on magazine marks alone without recovery of underlying magazine); *Ramirez v. State*, 810 So.2d 836 (Fla.2001) (rejecting toolmark analysis matching knife to fatal stab wounds).

United States v. Monteiro, 407 F. Supp. 2d 351, 364 (D. Mass. 2006)(n. 1 citing United States v. Green, 405 F. Supp. 2d 104 (D. Mass. 2005) omitted).

In limiting the firearm identification testimony in United States v. Green, 405 F. Supp. 2d 104, 124 (D. Mass. 2005), the United States District Court for the District of Massachusetts wrote:

> Putting together this precedent with the evidence I have heard, suggests admission but with limitations, limitations identical to those I adopted in *Hines*. O'Shea is a seasoned observer of firearms and toolmarks; he may be able to identify marks that a lay observer would not. But while I will allow O'Shea to testify as to his observations, I will not allow him to conclude that the match he found by dint of the specific methodology he used permits "the exclusion of all other guns" as the source of the shell casings. Defense will be permitted full and fair cross-examination.

Agent Cromer's qualification as an expert was not challenged. (R. p. 412, lines 14-15). The agent could testify about her observations. As in Green, however, Agent Cromer should not have been allowed to testify about matches between casings and firearms.

In limiting the firearm identification testimony in Monteiro the Massachusetts District Court explained that, "[b]ecause an examiner's bottom line opinion as to an identification is largely a subjective one, there is no reliable statistical or scientific methodology which will currently permit the expert to testify that it is a 'match' to an absolute certainty, or to an arbitrary degree of statistical certainty[,]" and "[a]llowing the firearms examiner to testify to a reasonable degree of ballistic certainty permits the expert to offer her findings, but does not allow her to say more than is currently justified by the prevailing methodology." 407 F. Supp. 2d at 372. The agent's testimony in the present case should have been limited to a reasonable degree of ballistic certainty.

The Massachusetts courts are not alone in limiting firearm identification testimony. In United States v. Ashburn, 88 F. Supp. 3d 239, 248 (E.D.N.Y. 2015), the United States District Court for Eastern District of New York wrote:

> Based on the court's review of the field of toolmark and firearms identification, including the NAS Report upon which Laurent relies, and on this court's review of *Daubert* proceedings performed in other cases, an instruction limiting LaCova's testimony is appropriate. See, *e.g.*, Willock, 696 F.Supp.2d at 549 (precluding expert from stating opinions and conclusions with any degree of certainty and precluding expert from stating that it was a "practical impossibility" that any other firearm fired the cartridges in question); Taylor, 663 F.Supp.2d at 1179 (limiting

> expert to an opinion that his conclusion was "to a reasonable degree of ballistic certainty"); Glynn, 578 F.Supp.2d at 574 (limiting expert ballistics opinion to statement that match was "more likely than not"); Diaz, 2007 WL 485967, at *14 (precluding experts from testifying that their conclusions were "to the exclusion of all other firearms in the world" and limiting description of certainty to a "reasonable degree of certainty in the ballistics field"); Monteiro, 407 F.Supp.2d at 372 (limiting testimony to a "reasonable degree of ballistic certainty"); Green, 405 F.Supp.2d at 124 (precluding expert from testifying that his methodology permitted "the exclusion of all other guns").

The court in Ashburn cited Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Under both Daubert and State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), Agent Cromer's testimony should have been limited to consistencies she observed. The error was not harmless.

In United States v. Brown, 973 F.3d 667, 703 (7th Cir. 2020), the defendants challenged the reliability of toolmark analysis as a discipline for expert testimony. The United States Court of Appeals for Seventh Circuit admitted the expert testimony but noted reliability concerns with toolmark analysis writing:

> Although it is hard to show abuse of discretion, the defendants urge that it occurred in this instance when the district court found that the toolmark analysis is sufficiently reliable. They assert that the "premise underlying the field of firearms analysis—that no two firearms will produce the same microscopic features on bullets and cartridge cases—[i]s, at best, an unproven hypothesis." They also complain that there are no objective, quantitative standards for determining whether two ammunition components "match."
>
> The defendants' argument has respectable grounding. It is based largely on a report issued by the President's Council of Advisors on Science and Technology (PCAST). The report states that the "foundational validity can *only* be established through multiple independent black box studies," and it identifies only one such study, the Ames Study. According to PCAST, the other available studies could not estimate the reliability of firearms analysis because they employed "artificial designs that differ[ed] in important ways from the problems faced in casework," which "seriously underestimate[d] the false positive [match] rate." Ultimately, the PCAST report found that firearms analysis "[fell] short of the criteria for foundational validity." The defendants also emphasize that even the Ames Study

> had not been published or subject to peer-review at the time of trial. Moreover, they contend, the government's experts misled the jury by testifying about the Ames Study's error rate, because that rate is not representative of the "entire discipline of firearms analysis."

973 F.3d at 703. The present case is distinguished from Brown because the challenge in the present case was not to the reliability of toolmark analysis generally but to the reliability of the methodology used by the agent to the extent that she could testify that there was a match.

In affirming the conviction this Court wrote:

> The firearms analyst testified the methodology she used has been widely accepted since the early 1900s and extensively peer reviewed. She also testified her conclusion in this case was subjected to quality control and confirmed by another examiner. Therefore, we find her opinion testimony as to a "match" between the bullet and the firearm was sufficiently reliable for a qualified firearms analyst. See State v. Hackett, 215 S.C. 434, 445, 55 S.E.2d 696, 701 (1949) (finding that courts "allow the introduction of expert testimony to show that the bullet which killed the deceased was fired from a particular pistol or rifle ... [if] the witness ... is, by experience and training, qualified to give an expert opinion in the field of [firearms analysis]").

State v. Little, No. 2021-001385, 2023 WL 8621086, at *1 (S.C. Ct. App. Dec. 13, 2023). While firearm identification generally has been widely accepted since the 1900s and extensively peer reviewed, the State failed to show that the methodology used by the agent was reliable to the extent that she could testify that there was a match.

In State v. Wallace, 440 S.C. 537, 543–44, 892 S.E.2d 310, 313 (2023), the South Carolina Supreme Court wrote:

> Rule 702 of the South Carolina Rules of Evidence provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." To admit expert testimony under Rule 702, the proponent—in this case the State—must demonstrate, and the trial court must find, the existence of three elements: "the evidence will assist the trier of fact, the

> expert witness is qualified, and the underlying science is reliable." Council, 335 S.C. at 20, 515 S.E.2d at 518.

The only element in question in the present case is the third element – whether the underlying science is reliable. The State submits that Agent Cromer's testimony falls in the non-scientific, or experienced-based category. (Final Brief of Respondent p. 17). Regardless of the type of expert testimony, the State must still prove reliability. The State failed to prove that the "match" testimony was reliable.

In State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 688–89 (2009), the South Carolina Supreme Court addressed non-scientific dog tracking evidence and wrote:

> The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the Council factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony. We have set forth above foundational requirements for Rule 702 expert testimony concerning dog tracking evidence.
>
> We do not pretend to know the myriad of Rule 702 qualification and reliability challenges that could arise with respect to nonscientific expert evidence. Consequently, we offer no formulaic approach that will apply in the generality of cases. Yet the trial court in the discharge of its gatekeeping role in determining admissibility must initially answer the always present threshold questions of qualification and reliability.

The trial judge in the present case abused his discretion by allowing Agent Cromer to testify that a particular firearm fired a bullet rather than limiting the testimony to consistencies. In State v. Jones, 423 S.C. 631, 636, 817 S.E.2d 268, 270 (2018), the South Carolina Supreme Court wrote, "A trial court's ruling on the admissibility of expert testimony constitutes an abuse of discretion where the ruling is unsupported by the evidence or controlled by an error of law. Maybank v. BB&T Corp., 416 S.C. 541, 567, 787 S.E.2d 498, 511 (2016)." The State failed to show that the "match" testimony, as opposed to limited testimony that a bullet was consistent

with being fired from a particular firearm, met the reliability requirement for admission. The trial court's ruling that the "match" testimony was reliable is unsupported by the record. Counsel respectfully seeks rehearing.

Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

This 27th day of December, 2023.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Chesterfield County

Honorable D. Craig Brown, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RASHAWN MONTEZ LITTLE,

PETITIONER.

APPELLATE CASE NO. 2021-001385

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Melody J. Brown, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Rashawn Montez Little, #320601, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 27th day of December, 2023.

Kathrine H. Hudgins
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

The South Carolina Court of Appeals

The State, Respondent,

v.

Rashawn Montez Little, Appellant.

Appellate Case No. 2021-001385

ORDER

After careful consideration of the petition for rehearing, the court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

H. Bruce Williams C.J.

J.

J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Melody Jane Brown, Esquire
Kathrine Haggard Hudgins, Esquire
Michael Douglas Ross, Esquire
Donald J. Zelenka, Esquire
The Honorable D. Craig Brown