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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County

Honorable R. Scott Sprouse, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SAMUEL TERRELL RISER,

APPELLANT

APPELLATE CASE NO. 2023-000743

INITIAL BRIEF OF APPELLANT

SARAH E. SHIPE
Appellate Defender

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

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred allowing a law enforcement witness to give opinion testimony and admitting photographs during his testimony which depicted trajectory rods placed at the crime scene where the state failed to lay the Rule 702, SCRE, foundation for the testimony and where the photographs and testimony while potentially relevant were substantially more prejudicial than probative, risked confusion of the issues, or misleading the jury in violation of Rule 403, SCRE?

STATEMENT OF THE CASE

On June 22, 2022, a Spartanburg County grand jury indicted appellant for attempted murder, possession of a weapon during the commission of a violent crime, and malicious injury to personal property. R* (Indictments). On April 24, 2023, appellant's case was called to trial before the Honorable R. Scott Sprouse and a jury. Tr. 1. Appellant was represented by Ricky Harris. The state was represented by assistant solicitors, Candace Clark and Spenser Smith. Tr. 1.

On April 27, 2023, the jury found appellant guilty as indicted. Tr. 438, ll. 11-24. Judge Sprouse sentenced appellant to concurrent terms of life without parole for attempted murder, thirty days for malicious injury to personal property, and five years for possession of a weapon during the commission of a violent crime. Tr. 449, ll. 15-21.

This appeal follows.

STANDARD OF REVIEW

The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” *Id.*; see also *State v. Brockmeyer*, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

ARGUMENT

The trial court erred allowing a law enforcement witness to give opinion testimony and admitting photographs during his testimony which depicted trajectory rods placed at the crime scene where the state failed to lay the Rule 702, SCRE, foundation for the testimony and where the photographs and testimony while potentially relevant were substantially more prejudicial than probative, risked confusion of the issues, or misleading the jury in violation of Rule 403, SCRE.

Relevant facts

Appellant and Shaleayer (Shae) Wilson met in August 2021, and began dating the following month. Tr. 215, ll. 19-25. Early in December 2021, the two mutually decided to end the romantic relationship. Tr. 217, ll. 6-14. On December 21, 2021, the two had been texting throughout the day and appellant came over to Shae's apartment to talk. Tr. 217, ll. 17-21. They argued. Tr. 217, l. 21; 218, l. 11. Shae's next-door neighbors heard the argument and came to check on Shae and her children. Tr. 218, ll. 9-13. Appellant left the apartment. Tr. 218, ll. 15-16; 221, l. 3-16. Shae claimed appellant returned five minutes later and shot her multiple times. Tr. 222, ll. 17-19; 224, l. 1-225, l. 16. Shae sustained gunshot wounds to her right arm, right thigh, right breast, right hand, and a graze wound in her right shoulder. Tr. 328, ll. 1-5.

Shae's next-door neighbors Heaven and Keanna Marks testified they went to check on Shae because they heard arguing. Tr. 160, l. 1-16; 183, ll. 1-25. Heaven testified appellant left Shae's apartment before her. Tr. 160, ll. 17-25. Keanna testified she did not hear any gunshots after she and Heaven returned to their apartment. Tr. 188, ll. 20-22. Keanna claimed that when Shae came over not long after they had checked on her Shae and her two children told her appellant had shot her. Tr. 185, ll. 22-23; 187, ll. 13-23.

Deputy Jeffrey Dail testified on behalf of the state. Tr. 105-52. Dail responded to the apartment complex the evening of the incident. Tr. 107, ll. 20-22. Dail testified he was trained to process a crime scene by his superior Sergeant Sean Nix and stated he took a seven-day class in North Carolina on “crime scenes, photographing, and collecting.” Tr. 107, ll. 16-19.

During Dail’s testimony the solicitor offered state’s exhibits 29-57, photographs of the scene in evidence. Tr. 115, 18-23; 118, ll. 7-16.¹ The solicitor asked Dail to explain the function of a trajectory rod. Tr. 115, l. 24. Dail answered,

I’ve got 2-, 3-, and 5-foot fiberglass rods. We place them in areas that we believe are projectile holes. We - - if it is a - - single hole, we do not put it in because the rod will not sit and show a true trajectory because it has on balance point. If we have a

Tr. 115, l. 25-116, l. 5

Defense counsel objected. He argued Dail’s testimony went beyond explaining that he took the photographs and asserted there had been no foundation laid for expert testimony. Tr. 116, ll. 6-11. The solicitor responded they did not intend to introduce expert testimony. Tr. 116, ll. 12-13. The trial court ruled if the state was eliciting “technical” testimony, more foundation was necessary. Tr. 116, ll. 14-17.

The solicitor asked Dail if he had done “some training on using trajectory rods.” Dail responded he had some training through the sheriff’s office but admitted he was not an expert. Tr. 116, ll. 19-23. The solicitor again asked Dail to explain the function of a trajectory rod, and defense counsel objected again. Tr. 116, l. 24-117, l. 2. Defense counsel contended this was an area of specialized knowledge and that Dail admitted he was not qualified to explain. Counsel asserted Dail’s testimony should be limited to stating he took the photographs. Tr. 117, ll. 1-8.

¹ The contested photographs, state’s exhibits 41; 42; 44-47; 52-57, photographs of the scene are on file with the Court.

The court overruled defense counsel's objection stating, "the witness can testify based on his training of what he used the rods for without getting into areas requiring an expert." Tr. 117, ll. 9-12.

Dail's testimony continued. He told the jury trajectory rods are used to show the believed path of a bullet when it goes through a wall, board, car, or other things of that nature. He stated that it gives law enforcement "an idea" of the "projection" of the bullet. He conceded he did not know exactly where the shooter was standing but said it was an estimation. Tr. 117, ll. 15-25. When the state moved to admit state's exhibits 29-57, photographs into evidence defense counsel objected to the admission of all photographs that included trajectory rods and requested to take up the matter outside the presence of the jury. Tr. 118, ll. 11-16.

Counsel argued the photographs depicting trajectory rods should be excluded because Dail admitted he was not an expert in "bullet trajectory analysis," and that regardless counsel was not aware that any such analysis was done in the case. Tr. 118, l. 22-119, l. 7. Counsel averred the state had thus far failed to lay a proper foundation for Dail's testimony and that the photographs were inadmissible under Rule 403, SCRE. Tr. 119, ll. 8-21. He further posited that while testimony regarding trajectory rods might be relevant the probative value was outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. Counsel maintained that the jury would be forced to speculate because the contested photographs were without context as to what the rods were and how they were used in this case. Tr. 119, l. 17-120, l. 8.

The solicitor insisted they did not intend to have Dail admitted as an expert. Tr. 120, ll. 11-12. They argued they needed the photographs to show there were bullets going in three different rooms and the evidence was not offered to show appellant was in a certain place and the

evidence was a merely a “demonstrative aid.” Tr. 120, ll. 12-22. The solicitor said Dail had some training in to placing the rods, but reiterated Dail would not be offering expert opinion. Tr. 120, ll. 22-25.² The court noted Dail was not an expert but had some training and directed the solicitor to provide more foundation regarding Dail’s training. Tr. 123, ll. 2-6.

Dail’s testimony continued before the jury. Dail testified early in his career he “sided” Sergeant Sean Nix. Dail stated that on his first day trajectory rods were used at a crime scene. Tr. 124, ll. 2-9. He explained Nix showed him how to place the rods to get an “overall idea of the projectile trajectory.” Tr. 124, ll. 9-19. Dail testified he placed trajectory rods in other cases. Tr. 124, ll. 20-22. Dail stated that the purpose of placing the rods is to demonstrate the believed direction of the bullet. Tr. 125, ll. 3-7. He claimed walls were the easiest surface for trajectory rods to be placed in. Dail testified in this case rods were placed in the front door, dining room table, and walls. Tr. 125, ll. 8-23. Dail stated the surfaces in this case were easy to place the trajectory rods in because “the hole is usually pretty clean.” He went on to claim the hole was true to size for the projectile. Tr. 125, l. 24-126, l. 5.

Defense counsel objected again stating the testimony had gone beyond Dail’s training and contended Dail did not have sufficient training for this testimony and asked for the jury to be removed to make further argument. Tr. 126, ll. 6-15. The court overruled the objection permitting no further argument. Tr. 126, l. 18-127, l. 9.

Later in Dail’s testimony he referred to trajectory rods placed in the front door in state’s exhibit 41, photograph. Tr. 131, ll. 14-24. The solicitor asked Dail what was important to note about the door and the trajectory rods. Tr. 131, l. 14-132, l. 1. Defense counsel objected to Dail

² During cross-examination Dail admitted again that he was not an expert in this area and said that he shadowed Sergeant Nix for a few weeks. However, Dail conceded he did not know what type of training Nix had, if any. Tr. 151, ll. 5-24.

being asked to give an opinion and conclusion and the court sustained. Tr. 132, ll. 2-5. However, Dail answered that it was law enforcement's belief that the door was open. Tr. 132, ll. 7-8. Defense counsel objected again, and the court instructed that the solicitor lay a foundation for the question. Tr. 132, ll. 9-13. Dail continued discussing the contested photographs and the trajectory rods depicted in the photographs. Tr. 132-35.

Discussion

The trial court failed to hold a *Daubert/Council*³ hearing and failed to conduct an on-the-record Rule 403 balancing test as required by *State v. Phillips*, 430 SC 319, 844 S.E.2d 651 (2020). As such the trial court failed to exercise its discretion in the admission of Deputy Jeffrey Dail's opinion testimony and the admission of the contested photographs depicting trajectory rods.

“If the witness is not testifying as an expert, the witness' 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' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.” Rule 701, 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.” Rule 702, SCRE. “When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable.” *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518

³ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999).

(1999). “[I]f the evidence is admissible under Rule 702, SCRE, the trial judge should determine if its probative value is outweighed by its prejudicial effect.” *Id.*; Rule 403, SCRE.

Deputy Jeffrey Dail did not possess the requisite qualifications to explain trajectory rods or give an opinion on bullet trajectory paths in this case. The trial court erred allowing Dail’s testimony and the admission of the photographs depicting trajectory rods at the scene.

In *Hamrick v. State*, the Supreme Court of South Carolina held the trial court reversibly erred by characterizing the police officer’s testimony as lay opinion, failing to make necessary findings that the officer was qualified to testify as an expert witness, and admitting officer’s opinion testimony as to whether defendant struck victim within construction zone. 426 SC 638, 828 S.E.2d 596 (2019). In that case the defendant was convicted of felony driving under the influence resulting in great bodily injury. *Id.*

In that case the Court concluded that because the officer gave opinion testimony on the subject of accident reconstruction and the state failed to lay Rule 702, SCRE, foundation the admission of his testimony was error. *Id.* at 650, 828 S.E.2d at 602. First, the Court found the officer’s testimony was incorrectly deemed “lay” opinion where the officer testified as to accident reconstruction which “require[d] expertise.” The Court also found the state sought to establish the officer’s qualifications as an expert and the court erred by characterizing it as lay testimony. *Id.* at 648-49, 828 S.E.2d at 601. Next the Court found the trial court failed to make on the record findings that the state had established the foundation required by Rule 702, SCRE. *Id.* at 649, 828 S.E.2d at 601-02. The Court found the officer “did not possess the necessary qualifications to give an opinion on accident reconstruction.” *Id.* The Court reasoned that accident reconstruction is a “highly technical and specialized field in which experts employ principles of engineering, physics, and other knowledge to formulate opinions as to the

movements and interactions of vehicles and people, under circumstances lay people—even trained officers—simply cannot understand.” *Id.*

In *State v. Phillips*, the Supreme Court of South Carolina held the trial court abused its discretion in admitting state’s DNA analyst expert testimony and the error was not harmless. 430 SC 319, 844 S.E.2d 651 (2020). In that case defendant was convicted of murder and possession of a weapon during the commission of a violent crime. *Id.* In that case the Court found the state failed to lay the foundation so that the trial court could meaningfully exercise its discretion. *Id.* at 340-41, 844 S.E.2d at 662.

In that case the Court found that “because the trial court did not require the state to present the factual and scientific foundation for” the testimony “in a *Daubert/Council* hearing before she testified to the jury” the Court conducted the analysis for the first time on appeal. *Id.* at 341, 844 S.E.2d at 662. The Court held the trial court should also have “conducted an on-the-record” Rule 403, balancing test. The Court found the root of the error was based in “a series of failures by the [s]tate,” the state failed to: (1) present testimony of the expert at a hearing where the court was to consider the admissibility, (2) present a complete factual and scientific basis for the admission of the expert’s opinion, (3) explain to the jury complicated DNA concepts involved in the case, and (4) present correct information regarding DNA evidence. Additionally, the state misstated to both the court and jury that the defendant’s DNA was on the gun and in the jeans pocket. *Id.*

The Court concluded that if an objection is made the trial court must hold a *Daubert/Council* hearing, the proponent of the evidence must present the factual and scientific basis necessary to satisfy the foundational elements of Rule 702, and the trial court must conduct an on-the-record Rule 403 balancing test and make specific findings as to each contested element

or issue. *Id.* at 343, 844 S.E.2d at 663. The Court held that in this case the trial court's failure to do the above was an abuse of discretion. *Id.*

This case is similar to both *Hamrick* and *Phillips*. In both of those cases and here the subject matter of the contested evidence, here bullet trajectory analysis, required expertise. As in *Hamrick*, Dail's testimony was wrongly characterized as lay opinion. As in *Phillips*, here the state failed to: (1) present testimony of the expert at a hearing where the court could consider the admissibility, (2) present a complete factual and scientific basis for the admission of the expert's opinion, (3) explain to the jury bullet trajectory analysis, and (4) present correct information regarding placing trajectory rods and bullet trajectory analysis. As in *Phillips*, the state's failures and the trial court's error in failing to hold a *Daubert/Council* hearing or conduct an on the record Rule 403 balancing test and make specific findings was an abuse of discretion.

In *State v. Wallace* the Supreme Court of South Carolina held that "an 'unfair' ruling on expert testimony may or may not be outside a trial court's discretion," and ruled the witness was properly qualified as an expert in cell site location information. 440 S.C. 537, 892 S.E.2d 310 (2023). Wallace was convicted at trial of murder and kidnapping, and this Court affirmed in an unpublished opinion. *Id.* In that case state's witness, Investigator Dylan Hightower, was called as an expert witness. Hightower used cell sight location information to make a map showing the whereabouts of the defendant's phone during the time of the incident. *Id.* at 541, 892 S.E.2d at 312.

On appeal our Supreme Court considered whether Hightower was properly qualified under Rule 702, SCRE, to testify regarding the analysis of cell sight location information. *Id.* at 543, 892 S.E.2d at 313. The Court found the fact that Hightower was the solicitor's investigator was important, but standing alone, did not render him unqualified and was instead a credibility

matter for the jury to decide. *Id.* at 544, 892 S.E.2d at 314. The Court reasoned that the trial court's analysis should be affected by the "complexity of the 'scientific, technical, or . . . specialized knowledge'" for which the witness is testifying. *Id.* The Court found that the trial court did not abuse its discretion where it held a "robust" examination of Hightower and exercised its responsibility as gatekeeper. *Id.* at 549, 892 S.E.2d at 316.

Unlike *Wallace*, here the trial court did not qualify Dail as an expert under Rule 702, SCRE. Rather it was declared multiple times by the court, the state, and Dail himself, that Dail was in fact not an expert in bullet trajectory analysis. Yet the state continued eliciting questions that required specialized "knowledge, skill, experience, training, or education." *See* Rule 702, SCRE. Moreover, there was inadequate examination of Dail's qualifications to give testimony regarding trajectory rods.

Rather, the trial court overruled defense counsel's numerous objections to the evidence without any analysis merely requesting the state offer more foundation, which the state never did. The foundation offered for this testimony was Dail's assertion that he shadowed a superior, Sergeant Nix, who showed him how to place trajectory rods. Dail admitted he had no idea what Nix's training was regarding trajectory rods.

The failure of the state to lay a proper foundation allowed the state to sneak in opinion testimony without an expert. The testimony offered in conjunction with the photographs were not merely perceptions observed by Dail but rather constituted opinions that require "special knowledge, skill, experience or training" to be properly made. *See* Rule 702, SCRE.

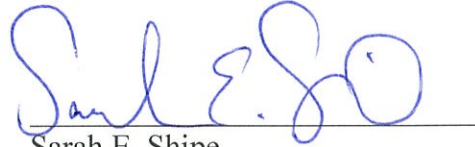
"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative

evidence.” Rule 403, SCRE.

The photographs without any frame of reference by an expert left the jury to speculate and conjecture about what the trajectory rods meant in the context of this crime scene. The photographs depict several trajectory rods placed throughout the apartment. Dail’s inadmissible testimony regarding the rods was confusing and misleading. He told the jury the rods were the believed path of the bullets, he testified regarding his method of placing the rods, and he described what surfaces were easiest for placing the trajectory rods. None of Dail’s testimony regarding trajectory rods was helpful to the jury in deciding any fact at issue. None of Dail’s testimony regarding trajectory rods was relevant to whether appellant shot Shae. Dail’s improper opinion testimony offered deficient and confusing information. While simultaneously the contested photographs depicted an overwhelming scene of information that the jury would have difficulty understanding without more. Even if the Court finds Dail’s testimony was admissible, the contested photographs were inadmissible where the probative value of the photographs was “substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury.” *See* Rule 403, SCRE.

CONCLUSION

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



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of March, 2024.