STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

Honorable R. Ferrell Cothran, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES L. GINTHER,

APPELLANT

APPELLATE CASE NO. 2019-000672

FINAL BRIEF OF APPELLANT

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 APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial judge err in refusing to limit the opinion testimony of the expert witness in forensic firearms examination to consistencies in the comparison of the firearm and the shell casing?

2. Did the trial judge err in admitting irrelevant, confusing, and misleading photographs of a vehicle from a traffic camera?

STATEMENT OF THE CASE

In March of 2018, the Sumer County Grand Jury indicted Appellant, James Lee Ginther, for murder and kidnapping, indictment #2018-GS-43-0206. On April 8, 2019, Appellant proceeded to jury trial before the Honorable R. Ferrell Cothran. Jason E. Bridges and Allen J. Barnes represented Appellant at trial. Solicitor Ernest A. Finney, III prosecuted the case. The jury returned verdicts of guilty. Judge Cothran sentenced Appellant to life imprisonment without parole. A timely notice of intent to appeal was served on April 16, 2019.

On May 12, 2020, counsel for Appellant moved for an order to remand the case for a hearing to attempt to reconstruct the record as to missing witness testimony. (Supp. R. p. 1). The trial transcript reflects that a portion of the first cross examination of State's witness Investigator Randall Stewart, the entire direct and cross-examination of State's witnesses Investigator Randall Hilliard and Agent Kristina Gainey and the direct examination of State's witness Rachael Salak are not included in the record due to an equipment malfunction. (R. p. 325, lines 20-21; p. 326, lines 1-9; p. 327, lines 2-3). On June 4, 2020, this Court granted the motion to remand for reconstruction of the record. (Supp. R. p. 52). On May 4, 2022, the parties submitted to the Court a proposed stipulation as to the content of the missing testimony to take the place of the missing testimony without the need for a reconstruction hearing. (R. p. 677). In a letter dated May 11, 2022, this Court advised the parties that the case was no longer held in abeyance and directed the parties to file the initial brief of appellant and designation of matter within thirty (30) days. (Supp. R. p. 53). The initial brief of appellant and designation of matter follow.

STANDARDS OF REVIEW

1. The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted). The circuit court's decision to admit expert testimony will not be reversed on appeal absent "a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006) (citations omitted). An abuse of discretion occurs when the circuit court's conclusions "either lack evidentiary support or are controlled by an error of law." State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013) (quoting Douglas, 369 S.C. at 429–30, 632 S.E.2d at 848) (internal quotation marks omitted). "A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." State v. Grubbs, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing Means v. Gates, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct.App.2001)). To show prejudice, the appellant must prove "that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citing Means, 348 S.C. at 166, 558 S.E.2d at 924).

2. 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). 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).

FACTS

On Thursday, November 16, 2017, the body of Suzette Ginther, Appellant's former wife and mother of their two young children, was found by a hunter in the woods in the Wedgefield area of Sumter County after Ms. Ginther did not arrive at her job that morning at Pet Smart in Columbia. (R. pp. 268-269; p. 148, lines 18-23). The forensic pathologist testified that she died from a single gunshot wound to the head. (R. p. 370, lines 1-8). At the time of her death Suzette Ginther was living in Cherryvale in Sumter County with her boyfriend, William Parker, and the two children. (R. p. 61, lines 13-15; p. 64, lines 3-6). Parker testified that Suzette Ginther left for work on the morning of November 16, 2017, at 4:00 AM. (R. p. 73, lines 19-25). The van Suzette Ginther drove was found abandoned on a rural road in Cherryvale. (R. p. 111, lines 6-11). The van was still registered to Appellant. (R. p. 113, lines 2-7).

At the time of Suzette Ginther's death Appellant was living in Columbia with his fiancé, Rachael Salak, and their infant son. (R. p. 305, lines 6-12). On Saturday, November 18, 2017, Investigator Randall Stewart, Investigator Randall Hilliard, both of the Sumter County Sheriff's Office and Agent Kristina Gainey with the South Carolina Law Enforcement Division [SLED] met with Appellant at his home in Columbia. (R. p. 27, lines 4-14). The meeting was recorded on the investigator's body camera and introduced in evidence, over objection, as State's exhibit #62. (R. p. 302, line 10 – p. 303, lines 1-25). The fiancé, Rachael Salak, was present for most of the meeting but at one point she and Agent Gainey stepped outside. (See State's #62). Appellant told the officers that he owned several firearms, including a Glock, and showed the officers the firearms. (See State's #62). Appellant provided the officer with a DNA sample by a buccal swab. (R. p. 314, line 6 – p. 315, lines 1-21). Investigator Stewart testified that he also collected DNA samples from Rachael Salak and an individual named Warren Dundero. (R. p. 316, lines 3-5).

Dundero lived across the street from where the van was found abandoned. (R. p. 321, line 24 – p. 322, 323, lines 1-10). Investigator Stewart admitted that Dundero had been a suspect in the murder of Suzette Ginther. (R. p. 322, line 13 – p. 323, lines 1-10).

According to Rachael Salak, Appellant was agitated the Saturday night after the investigators left. (R. p. 681). Rachael Salak claimed that she confronted Appellant the next day on Sunday and he suggested that Rachael tell the police she murdered Suzette Ginther as the police would be easy on her because she was a woman with bipolar disease. (R. p. 681). According to Rachael Salak, she became afraid of Appellant and told him to leave. (R. p. 681).

Investigator Stewart testified that on Sunday, November 18, 2017, 2:10 PM, he received a phone call from Rachael Salak. (R. p.397, lines 2-5). As a result, Agent Gainey met with Rachael Salak in Columbia. Based on the interview with Salak, Investigator Stewart obtained an arrest warrant for Appellant and entered his name, the make and model of his vehicle and the serial number of his gun into the NCIC system. (R. p. 398, lines 1-24). Appellant was taken into custody in Louisville, Kentucky after the car he was driving, a Nissan Cube, drifted off the road. (R. p. 517, lines 12-14; p. 543, lines 4-6). Appellant was brought back to South Carolina, along with his personal belongings. (R. p. 399, line 6 – p. 400, lines 1-3). Included with the personal belongings was the Glock firearm Appellant showed the officers on Saturday.

ARGUMENTS

1. **The trial judge erred in refusing to limit the opinion testimony of the expert witness in forensic firearms examination to consistencies in the comparison of the firearm and the shell casing.**

One shell casing was found in the woods near the body of Suzette Ginther. (R. p. 177, line 23 – p. 178, lines 1-13). The shell casing was submitted to Agent Chad Smith of SLED's Forensic Services Laboratory. (R. p. 411, line 8 – p. 412, lines 1-2; p. 413, lines 1-7). The shell casing was admitted in evidence, without objection, as State's exhibit #72. (R. p. 413, lines 14-19). The nine-millimeter Luger Glock firearm found when the officers took Appellant into custody in Kentucky was also submitted to Agent Smith. (R. p. 412, lines 5-8). The firearm was admitted in evidence, over objection, as State's exhibit #68. (R. p. 410, lines 6-13). Agent Smith was offered as an expert in the field of forensic firearms examination without objection. (R. p. 421, lines 8-11).

Prior to Agent Smith's testimony Appellant made the following objection:

> The other report where Item One - - where basically the forensic examiner tested the cartridge case. He claims that matching an individual identifying characteristic were found and it was concluded that Item One was fired by Item 19.
>
> My objection would be that - - I've consulted with an expert, my own, Richard Earnest. Through my consultation with him and through my - - now, this is not South Carolina precedent, but there is a case; United States v. Green Federal Case. That kind of language that that firearm fired that cartridge case to the exclusion of other firearms in the world I think - - I don't know if he can actually make that claim.
>
> I think that's beyond the scope of what he can say. He can say that there are things that match up. There are things that are consistent, but I don't think he can say that conclusory language. If that report comes into evidence I will object at that point.

(R. p. 392, line 23 – p. 393, lines 1-15). The State responded telling the judge, "Your Honor I don't think I intend to put in his report, the written report. But I do plan on asking him whether the cartridge found near the body was examined and compared to the gun taken from the

Defendant. And my anticipation is he's going to say it was examined microscopically and determined to be fired by that gun." (R. p. 393, lines 17-23). The judge ruled, "I understand. Whatever he says you can cross-examine him on it. I mean based on what information you have. I mean assuming the question is proper and you can object to the question or form of the question, but it's his opinion if he's qualified to give one you can obviously cross examine him on that. Whether it's accurate or not or whatever." (R. p. 394, lines 1-7). The trial judge erred.

During the direct examination of Agent Smith the State asked, "All right. Did you come up with a conclusion as to whether that fired casing was fired by that Luger?" (R. p. 422, lines 4-5). Agent Smith testified that he had made a conclusion and when asked about his conclusion, Appellant objected. (R. p. 422, lines 6-9). The judge overruled the objection. (R. p. 422, line 10). Agent Smith then testified, "Yes, sir I was able to conclude that the fired cartridge case submitted as State's Exhibit 72 was fired by this particular firearm, State's Exhibit 68." (R. p. 422, lines 11-13).

On re-direct examination the State asked, "Agent Smith, just to be clear cause that was a lot of technical information. Your expert opinion is that that Glock firearm fired the casing and made the impressions on the back of the casing?" (R. p. 433, lines 11-14). Appellant again objected and the objection was overruled. (R. p. 433, lines 15-16). Agent Smith answered, "Correct. That would be my conclusion that State's Exhibit 72, that would be the fired cartridge case I received was fired by this particular gun." (R. p. 433, lines 17-19). The Solicitor then referenced the match in closing argument. (R. p. 623, line 25 – p. 624, lines 1-8). The trial judge should have precluded the agent from testifying that the Glock fired the shell casing found near the body. Agent Smith's testimony should have been limited to the consistencies in the comparison of the firearm and the shell casing.

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 Smith's qualification as an expert was not challenged. The agent could testify about his observations. As in Green, however, Agent Smith should not have been allowed to testify, as he did, that the match was to the exclusion of all other guns.

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 Smith's testimony should have been limited to consistencies he observed.

While Appellant did not specifically challenge the methodology used to make the comparison, the request to limit the testimony and the citation to United States v. Green triggered the trial judge's duty as gatekeeper pursuant to Rule 702, SCRE, and Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010), to determine if the methodology was reliable. The trial judge abused his discretion in refusing to limit the testimony. The error is not harmless.

2. The trial judge erred in admitting irrelevant, confusing, and misleading photographs of a vehicle from a traffic camera in Columbia.

Prior to trial Appellant objected to two photographs of a vehicle that State sought to introduce. (R. p. 47, line 23 – p. 48-50, lines 1-22). The prosecutor told the judge:

> The reason we want these photographs is because they appear to be the type of vehicle that the Defendant was driving at the time this crime was committed. We are not saying that it was the vehicle of the Defendant. We're just saying that a search of the Columbia - - City of Columbia traffic cameras have produced that imagine [sic]. And the S.L.E.D. agent who was examining the video on Highway 378 as a major artery out of Columbia on the way to Sumter captured the video on the date and time we think the Defendant was on his way to Sumter.

(R. p. 48, lines 1-10). Appellant argued:

> Our objection is that it's not relevant and that can also be confusing to the jury. There is no identifying marking on that vehicle or license plate about driver. The remote distance and timeframe, I mean it's not like it's in Sumter next to any crime scene location. I think it's too remote in time to be relevant, and there is also not enough identification of any vehicle to be relevant." So I would just object to that on relevance ground and also could be prejudicial to my client by confusing the jury about what is exactly shown in that video. Or in the stills.

The judge withheld ruling. (R. p. 50, lines 14-20).

The State moved to admit the photos during the direct examination of SLED Agent Gainey. (R. p. 326, lines 12-13; R. p. 679). Appellant objected telling the judge, "Any post objections about relevance and prejudice." (R. p. 326, lines 14-15). The judge overruled the objections and

the photos were admitted in evidence as State's exhibits #66 and #67. In closing argument the Solicitor told the jury:

> And we know he had to get in the car in the middle of the night because we have a picture of a Cube leaving Columbia at about one o'clock in the morning heading for Sumter. Look at State's Exhibit 67. No, I don't have the driver's license, the plate on that. No, it's not in color. But thank Gods [sic] Christina Gainey, Investigator, stayed up and worked this case. And she looked at all the traffic cam she could and she found this picture. Heading to Sumter at one o'clock in the morning on Wednesday night. And there is the car that was stopped in Kentucky a week later.

(R. p. 606, line 23 – p. 607, lines 1-8). The State was unable to prove that the box like vehicle depicted in the traffic still photo was a Cube. The blurry unidentifiable photos of some type of boxy vehicle in Columbia on November 16, 2017, at 12;56 AM were irrelevant and prejudicial as confusing to the jury. The photos were inadmissible pursuant to Rules 401 and 403, SCRE. The judge abused his discretion in admitting the photos.

In State v. Lyles, 379 S.C. 328, 337, 665 S.E.2d 201, 206 (Ct. App. 2008), the South Carolina Court of Appeals wrote:

> "Under Rule 401, evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy." Preslar, 364 S.C. at 476, 613 S.E.2d at 386 (citing In re Care and Treatment of Corley, 353 S.C. 202, 205, 577 S.E.2d 451, 453 (2003); Adams, 354 S.C. at 378, 580 S.E.2d at 794); accord State v. Cheeseboro, 346 S.C. 526, 548, 552 S.E.2d 300, 311 (2001); State v. King, 349 S.C. 142, 153, 561 S.E.2d 640, 645 (Ct.App.2002). "Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986) (citing Toole v. Salter, 249 S.C. 354, 361, 154 S.E.2d 434, 437 (1967)). Evidence is incompetent if it could create dangers such as prejudice, undue delay, confusion of the issues, tendency to mislead the jury, waste of time, or cumulative presentation. See State v. Pipkin, 359 S.C. 322, 326, 597 S.E.2d 831, 833 (Ct.App.2004); see also Rule 403, SCRE.

The blurry photos of an unidentifiable box like vehicle in Columbia do not establish or make more or less probable the matter in controversy involving the shooting death of Suzette Ginther in Sumter. The State was unable to prove that the box like vehicle was a Nissan Cube.

The State was unable to link the blurry photo of the vehicle to Appellant or show that the mystery vehicle traveled to Sumter. The photo was not relevant pursuant to Rule 401, SCRE.

Alternatively, if the blurry unidentifiable photos of some box like vehicle are deemed minimally relevant, the sheer speculative nature of the photos combined with the Solicitor's closing argument stating that the State had a picture of a Cube leaving Columbia heading to Sumter render the photos inadmissible pursuant to Rule 403, SCRE. The speculative blurry unidentifiable photos of a box like vehicle in Columbia were confusing and misleading to the jury. Any possible minimal probative value is substantially outweighed by the danger of confusion of the issues and misleading the jury. The trial judge abused his discretion in admitting the photos. The error is not harmless.

CONCLUSION

Based on the above arguments, this Court should reverse the convictions and remand for a new trial.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 22nd day of February, 2023.

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."

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 APPELLANT

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