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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Maite Murphy, Circuit Court Judge

The State, Respondent,

v.

Kenneth Henry Eastwood, Appellant

Appellate Case No. 2023-001798

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES..... ii

STATEMENT OF ISSUE ON APPEAL..... 1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW3

STATEMENT OF FACTS4

ARGUMENT

The trial judge erred in excluding testimony that Eastwood was given a polygraph after his first interview and then told by law enforcement that he failed because the defense presented an expert witness who explained that such a circumstance may contribute to a false confession thus rendering the testimony admissible under both Rules 702 and 403 of the South Carolina Rules of Evidence8

CONCLUSION.....21

TABLE OF AUTHORITIES

South Carolina Cases

Barrett v. Broad River Power Co., 146 S.C. 85, 143 S.E. 650 (1928)3

In re Manigo, 389 S.C. 96, 697 S.E.2d 629 (Ct. App. 2010).....11

State v. Cope, 405 S.C. 317, 748 S.E.2d 194 (2013) passim

State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) passim

State v. Gray, 408 S.C. 601, 759 S.E.2d 160 (Ct. App. 2014).....16

State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493 (Ct. App. 2003).....3

State v. James, 355 S.C. 25, 583 S.E.2d 745 (2003).....17

State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979)12

State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001).....13

State v. Myers, 359 S.C. 40, 596 S.E.2d 488 (2004).....14, 15, 17

State v. Palmer, 415 S.C. 502, 783 S.E.2d 823 (Ct. App. 2016)11, 13

State v. Phillips, 430 S.C. 319, 844 S.E.2d 651 (2020)19

State v. Samuel, 411 S.C. 602, 769 S.E.2d 662 (2015)9

State v. Samuel, 400 S.C. 593, 735 S.E.2d 541 (Ct. App. 2012).....9

State v. Smith, 276 S.C. 494, 280 S.E.2d 200 (1981)3

State v. Spears, 403 S.C. 247, 742 S.E.2d 878 (Ct. App. 2013).....19

State v. Wallace, 440 S.C. 537, 892 S.E.2d 310 (2023)3

State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991).....3

State v. Wright, 322 S.C. 253, 471 S.E.2d 700 (1996).....9, 13

Todd v. Joyner, 385 S.C. 509, 685 S.E.2d 613 (Ct. App. 2008).....11

Federal Cases

Crane v. Kentucky, 476 U.S. 683 (1986)17

Jackson v. Denno, 378 U.S. 368 (1964).....8, 14, 17

Old Chief v. United States, 519 U.S. 172 (1997).....17

Tyler v. United States, 193 F.2d 24 (D.C. Cir. 1951)19

United States v. Allard, 464 F.3d 529 (5th Cir. 2006)18

United States v. Blake, 571 F.3d 331 (4th Cir. 2009)18

United States v. Kampiles, 609 F.2d 1233 (7th Cir. 1979)18

United States v. Lynn, 856 F.2d 430 (1st Cir. 1988).....18

United States v. Scheffer, 523 U.S. 303 (1998).....9

Other State Cases

Rogers v. Commonwealth, 86 S.W.3d 29 (Ky. 2002).....18

Rules

Rule 403, SCRE passim

Rule 702, SCRE passim

Rule 703, SCRE11

Rule 403, FRE.....16, 18

Rule 702, FRE.....11, 16

Rule 703, FRE.....11, 16

STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in excluding testimony that Eastwood was given a polygraph after his first interview and then told by law enforcement that he failed where the defense presented an expert witness who explained that such a circumstance may contribute to a false confession thus rendering the testimony admissible under both Rules 702 and 403 of the South Carolina Rules of Evidence?

STATEMENT OF THE CASE

This is an appeal from a jury verdict finding Kenneth Eastwood guilty of murder and the trial judge's imposition of a life sentence.

Eastwood was indicted by the Orangeburg County Grand Jury for murder. R. *. His trial was held before the Honorable Maite Murphy and a jury from November 6 – 9, 2023. Eastwood was represented by Ashley Cornwell. The State was represented by Catherine Hunter, Thomas Scott, and Mark Hinds. Tr. 1. The jury found Eastwood guilty as charged and the court sentenced him to life imprisonment. Tr. 663, l. 12 – 669, l. 14.

STANDARD OF REVIEW

Appellate courts “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. Wallace*, 440 S.C. 537, 541, 892 S.E.2d 310, 312 (2023). “Generally, the admission of expert testimony is a matter within the sound discretion of the trial court.” *State v. Whaley*, 305 S.C. 138, 143, 406 S.E.2d 369, 372 (1991). An appellate court “will not reverse the trial court's decision to admit or exclude expert testimony absent a prejudicial abuse of discretion.” *State v. Cope*, 405 S.C. 317, 343-44, 748 S.E.2d 194, 208 (2013).

“[A] trial court acts outside of its discretion when the ruling is not supported by the evidence or is controlled by an error of law.” *Wallace*, 440 S.C. at 542, 892 S.E.2d at 312. “It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.” *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981). “A trial 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).

“[T]he term ‘abuse of discretion’ does not mean any reflection upon the presiding Judge, and it is a strict legal term, to indicate that the appellate Court is simply of the opinion that there was commission of an error of law in the circumstances.” *Barrett v. Broad River Power Co.*, 146 S.C. 85, 96, 143 S.E. 650, 654 (1928).

STATEMENT OF FACTS

On Sunday, December 8, 2019, Kenneth Eastwood met Cara Hodges at a bar called Fishtales in Eutawville, South Carolina. Tr. 208, ll. 1 – 16. Cara’s father was friends with Eastwood and she had arrived in town for a visit a day or two earlier. Tr. 206, l. 22 – 207, l. 18. Even though Cara and Eastwood had just recently met each other, a bartender recalled that “they seemed like they had known each other for a while . . . [t]hey were like playing around the bar, dancing around, you know, drinking.” Tr. 210, ll. 7 – 17. The bartender recalled that Eastwood was drinking wine, Cara was taking shots, and that they both appeared to be intoxicated. Tr. 211, ll. 3 – 15. At one point they even fell on the floor while dancing around the pool table. Tr. 211, ll. 16 – 24.

Cara and Eastwood left the bar together that night around 11:30 p.m. in Eastwood’s car. Tr. 212, ll. 4 – 11. She was reported missing by her father two days later, on December 10. Tr. 220, ll. 12 – 24. Cara’s body was discovered on December 12 by a local man on his deer hunting property. She was naked and had been brutally murdered. Tr. 232, ll. 2 – 22; tr. 370, ll. 1 – 21. There was a deep ligature mark around her neck and contusions and small abrasions all over her body. Tr. 476, ll. 2 – 10. The forensic pathologist who performed the autopsy on Cara determined that her cause of death was “asphyxia due to ligature strangulation.” Tr. 488, ll. 5 – 11.

When law enforcement began investigating Cara’s murder, they first looked for Eastwood. They went to his house and his place of employment but did not find him. They went to Fishtales, the bar where he had been seen dancing with Cara, and located him there. Tr. 239, l. 10 – 242, l. 14. Eastwood agreed to speak with the investigators. Tr. 243, ll. 3 – 7.

During his first interview on December 13, Eastwood told the investigators about how he had met Cara at Fishtales on December 8. Eastwood recalled that Cara was complaining about having difficulties with her father and that she did not want to stay at her father’s house. Cara asked

Eastwood if she could stay at his house that night. State's Ex. 5 at 17:00 – 20:00. Eastwood let Cara spend the night at his house and when he woke up the next morning Cara was gone. State's Ex. 5 at 20:00 – 22:00. Eastwood told the investigators that he did not hurt Cara. State's Ex. 5 at 34:00 – 35:00.

After the first interview, Eastwood agreed to give a sample of his DNA and to allow the investigators to search his house and car. Tr. 249, l. 14 – 250, l. 5; tr. 261, ll. 5 - 12. But before collecting his DNA and searching his house and car, Eastwood was driven to Columbia to be given a polygraph by SLED, after which he was informed that he failed. Tr. 104, ll. 13 – 25; tr. 106, ll. 17 – 24. The jury was not permitted to hear this fact.

After being told he failed the polygraph, investigators returned Eastwood to his home where they began their search. While his house was being searched, an investigator told Eastwood that Cara was “in the morgue,” which Eastwood appeared shocked to hear. Tr. 251, ll. 3 – 17. After the search of Eastwood's house was completed, Eastwood was left there as he was not under arrest. Tr. 252, ll. 15 – 22.

On December 14, law enforcement received a call from Eastwood's manager at his job who told them that Eastwood came to work that morning and confessed to strangling Cara to death because “she wouldn't leave [him] alone.” Tr. 302, l. 1 – 303, l. 23; tr. 305, ll. 7 – 17. Once investigators got this call from Eastwood's manager, they obtained an arrest warrant for murder. Tr. 314, l. 23 – 315, l. 12. With the arrest warrant in hand, investigators arrested Eastwood at his home and took him to the station for a second interview. Tr. 315, l. 13 – 316, l. 7. During the second interview of Eastwood, he claimed to have killed Cara by strangling her. State's Ex. 6.

Defense counsel called Professor Alan Hirsch, a graduate of Yale Law School and professor at Williams College in Massachusetts. Tr. 541, l. 12 – 542, l. 14. Hirsch testified that his principal

focus has been on criminal interrogations and false confessions for twenty years. Tr. 543, ll. 15 – 23. He further explained that his area of expertise was in the interrogation methods that contribute to false confessions. Tr. 543, ll. 13 – 16.

Professor Hirsch noted that there is a voluminous amount of literature, books, and articles about false confessions which he is well acquainted with and that the methods used to evaluate false confessions and interrogation methods are accepted by the scientific community. Tr. 544, l. 2 – 545, l. 1. Hirsch had been qualified as an expert in various courts across the country approximately forty-nine times, including four times in South Carolina, in the field of false confessions and interrogation methods. Tr. 545, l. 25 – 548, l. 7. The trial judge found Professor Hirsch to be qualified as an expert without objection from the State. Tr. 549, ll. 21 – 25.

Hirsch explained to the jury that one type of false confession is known as “coerced compliant,” which involves a suspect who caves under the pressure of interrogation after concluding they will be better off that way. Tr. 553, l. 1 – 554, l. 12. Another type is known as “internalized false confessions.” This is where a suspect, under interrogative pressure by law enforcement in the form of incriminating evidence, begins to believe that they have in fact committed a crime but cannot remember committing it. Tr. 554, l. 13 – 555, l. 3.

Hirsch informed the jury that there are several factors that contribute to a person falsely confessing to a crime. Being under the influence of drugs or alcohol may be particularly relevant in the context of an internalized false confession because the suspect has reason to distrust his memory. Tr. 555, ll. 11 – 17. Sleep deprivation may also contribute because it compromises a person’s ability to make rational decisions. Tr. 556, ll. 4 – 14.

Professor Hirsch also educated the jury on the fact that a suspect being informed that his DNA was found at a crime scene, that there was an eyewitness who identified him as the

perpetrator, or that he failed a polygraph, are all factors that can frighten a person into confessing, even when they are innocent. Tr. 556, l. 25 – 557, l. 8. Specifically as it relates to polygraphs, Hirsch testified that it is common for law enforcement to use a polygraph as a “ruse,” after which they will tell a suspect that he failed the polygraph and that the results of polygraphs are one hundred percent accurate. Tr. 557, l. 9 – 558, l. 1. Hirsch opined that Eastwood’s confession to Cara’s murder was consistent with an internalized false confession. Tr. 561, l. 25 – 562, l. 4.

The State’s DNA expert analyzed several items collected during the investigation and compared DNA samples from those items to known DNA profiles of both Cara and Eastwood. Significantly, the only DNA evidence that connected Cara to Eastwood was Eastwood’s DNA found under Cara’s right fingernails (but not her left) – which was consistent with Eastwood and Cara dancing and touching each other while at the bar together. Tr. 445, l. 23 – 447, l. 22; tr. 463, ll. 13 – 24. Incredibly, the DNA expert lost the fingernail clippings that Eastwood’s DNA was supposedly found on, which she claimed was the first time in her entire career that she had lost evidence. Tr. 448, l. 21 – 449, l. 8. Cara’s DNA was not found anywhere in Eastwood’s car, including the trunk where Eastwood claimed he put her body, or his house, including the electrical cord from the space heater which was supposedly the murder weapon. Tr. 464, ll. 5 – 23.

Eastwood was described as being “very respectful, very calm, [and] laid back.” Tr. 213, ll. 21 – 24. The bartender who had known Eastwood for years and saw him nearly every day said that he had never shown aggression towards anyone and that she had never seen him get angry, lash out, or be violent towards anyone. Tr. 213, l. 24 – 214, l. 9. She further testified that she did not believe Eastwood was the type of person who could kill somebody. Tr. 218, ll. 16 – 19. Eastwood’s manager also testified he knew Eastwood to be non-violent. Tr. 311, ll. 11 – 23.

ARGUMENT

The trial judge erred in excluding testimony that Eastwood was given a polygraph after his first interview and then told by law enforcement that he failed because the defense presented an expert witness who explained that such a circumstance may contribute to a false confession thus rendering the testimony admissible under both Rules 702 and 403 of the South Carolina Rules of Evidence.

Relevant Facts

Pretrial Rulings

During the pretrial *Jackson v. Denno*¹ hearing, Marty Carrigg, an investigator with the Orangeburg County Sheriff's Office, testified that at the conclusion of the first interview of Eastwood, he took Eastwood to SLED in Columbia to take a polygraph. Tr. 104, ll. 13 – 25. Eastwood had told the investigators that he had not harmed Cara and did not know where she was. Court's Ex. 1. At the end of the video recording of the first interview, Eastwood is asked if he is willing to submit to a polygraph and he agreed. Court's Ex. 1 at 43:00. Carrigg admitted that after the polygraph was administered, Eastwood was informed that he failed. Tr. 106, ll. 17 – 24.

At the conclusion of the *Denno* hearing, the State argued that "it would be error to allow in any mention of the polygraph" because it "confuses the jury." Tr. 160, ll. 11 – 21. Defense counsel responded that evidence regarding the administration of the polygraph and Eastwood being informed that he failed the polygraph prior to making any incriminating statements would assist the jury in determining the trustworthiness of his statement and should not be excluded pursuant to Rule 403. Tr. 170, ll. 1 – 8. This evidence was necessary to fully explain why Eastwood subsequently claimed to have murdered Cara to both his manager at work and to law enforcement

¹ 378 U.S. 368 (1964)

at the second interview. Tr. 167 l. 15 – 169, l. 15. Counsel disclosed that she intended to present expert witness testimony that a suspect being informed he has failed a polygraph may contribute to that suspect falsely confessing. Tr. 169, ll. 15 – 25.

Defense counsel cited to *State v. Samuel*, 400 S.C. 593, 735 S.E.2d 541 (Ct. App. 2012) and argued that polygraph evidence is not per se inadmissible, although that decision was later vacated by the Supreme Court which found that the trial court's order was not immediately appealable. *State v. Samuel*, 411 S.C. 602, 769 S.E.2d 662 (2015). Counsel further argued that under Rule 403, the evidence would not prejudice Eastwood but, on the contrary, would bolster his defense that he falsely confessed to the murder of Cara. Tr. 170, l. 9 – 173, l. 8. Counsel cited *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999) and *State v. Wright*, 322 S.C. 253, 471 S.E.2d 700 (1996) which both suggested that polygraph evidence may be admissible under certain circumstances. Tr. 163, l. 17 – 164, l. 3.

The trial judge ruled that testimony about the polygraph was inadmissible pursuant to both Rules 702 and 403 of the South Carolina Rules of Evidence. Tr. 175, l. 14 – 177, l. 9. The court first considered Rule 702 and determined that no testimony had been presented that polygraph examinations were scientifically reliable and that it would not assist the jury because it was not based on sufficient facts and data. Tr. 175, l. 14 – 176, l. 12. The court next considered Rule 403 and determined that testimony regarding the polygraph examination of Eastwood “would be more prejudicial than probative and would confuse the issues before the jury.” Tr. 176, ll. 13 – 17. Relying on *State v. Wright*, 322 S.C. 253, 471 S.E.2d 700 (1996), the trial judge concluded the polygraph testimony was inadmissible because it would bolster the confession of Eastwood. Finally, the trial judge ruled that in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), the South Carolina Supreme Court had cited favorably to *United States v. Scheffer*, 523 U.S. 303 (1998)

which “found that [a] per se rule against admission of polygraph evidence does not violate the Defendant’s right to present relevant evidence in his defense as guaranteed by the United States Constitution.” Tr. 177, ll. 1 – 9.

Trial Rulings

After the State rested its case, the defense presented testimony by Professor Allan Hirsch who was qualified as an expert in false confessions and interrogation methods. Having been qualified as an expert, Professor Hirsch explained to the jury that suspects being informed that they have failed a polygraph is an interrogation technique frequently used by law enforcement to trigger a confession. Tr. 556, l. 25 – 558, l. 1. Hirsch opined that Eastwood’s confession to Cara’s murder was consistent with an internalized false confession. Tr. 561, l. 25 – 562, l. 4.

When Professor Hirsch began to explain his opinion by referencing the fact that Eastwood had agreed to take a polygraph, the State objected. The judge sustained the objection and sent the jury to the jury room. Tr. 562, ll. 7 – 20. The judge told Professor Hirsch that he was not to “mention a polygraph whatsoever or that [Eastwood] took a polygraph.” Tr. 562, l. 23 – 563, l. 2.

After Professor Hirsch finished his testimony but before the defense rested its case, defense counsel asked the trial judge to reconsider her ruling on the polygraph testimony. Tr. 578, ll. 17 – 20. Counsel argued the testimony should be admitted under both Rules 702 and 403. Professor Hirsch had presented expert testimony establishing that certain kinds of interrogation techniques might produce false confessions, specifically including situations where law enforcement officers tell a suspect that he has failed a polygraph. Tr. 578, l. 21 – 579, l. 13. Hirsch testified that there had been numerous studies to corroborate this phenomenon and they have been peer reviewed and accepted in the scientific community. Counsel argued that Hirsch’s testimony satisfied Rule 702 and should be admitted. Tr. 579, l. 14 – 580, l. 17. As to Rule 403, defense counsel argued that

polygraph testimony was probative of Eastwood's state of mind when he confessed to the killing because being confronted with the failure of a polygraph is something Professor Hirsch indicated could trigger a false confession. Tr. 580, l. 18 – 581, l. 15.

The judge denied counsel's request indicating that Hirsch had testified that polygraphs are unreliable and that "it would not assist the trier of fact pursuant to 702 and the probative value is outweighed by the prejudicial effect under the 403 standard." Tr. 582, l. 19 – 583, l. 3. The defense then rested its case. Tr. 583, ll. 18 – 19.

Discussion

Rule 702 of the South Carolina Rules of Evidence provides that "[i]f 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." Furthermore, Rule 703 allows an expert to rely on inadmissible evidence in giving an opinion in court if the inadmissible evidence is reasonably relied upon in the field of expertise. Rule 703, SCRE. Both South Carolina Rules are identical to their federal counterparts. *See* Rules 702 and 703, FRE.

An expert witness is also permitted to give an opinion "based on facts not within his or her firsthand knowledge." *In re Manigo*, 389 S.C. 96, 106, 697 S.E.2d 629, 634 (Ct. App. 2010). "Experts may testify regarding facts or data, not as substantive proof of the facts so stated, but rather as information upon which they have relied in reaching their professional opinions." *Todd v. Joyner*, 385 S.C. 509, 519, 685 S.E.2d 613, 618-619 (Ct. App. 2008).

Before the South Carolina Supreme Court's decision in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), "the law of South Carolina was that evidence of polygraph examinations was generally inadmissible." *State v. Palmer*, 415 S.C. 502, 517, 783 S.E.2d 823, 830 (Ct. App. 2016).

The Supreme Court in *Council* explained that South Carolina does not adhere to a per se rule of inadmissibility of polygraph evidence but rather that the trial judge must evaluate such evidence under Rules 702 and 403 of the South Carolina Rules of Evidence and the Supreme Court's earlier decision in *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979). *Council*, 335 S.C. at 21, 515 S.E.2d at 520.

Under this standard, courts must look at several factors in determining whether to admit scientific evidence "including: (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." *Council*, 335 S.C. at 19, 515 S.E.2d at 517. "[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," and if the evidence is ultimately admitted "the jury may give it such weight as it deems appropriate." *Council*, 335 S.C. at 20-21, 515 S.E.2d at 518.

- A. The trial judge erred in excluding testimony regarding the polygraph pursuant to Rule 702 because Professor Hirsch was qualified as an expert in interrogation methods and false confessions, and he specifically testified that there is voluminous peer-reviewed research on the subject of false confessions which is accepted among the scientific community and which includes the fact that informing suspects they have failed a polygraph may trigger a false confession.

As an initial matter it's important to note that the State did not object to Professor Hirsch being qualified as an expert in the field of false confessions and interrogation methods. The State made no objection to Professor Hirsch explaining to the jury generally that polygraphs are often used as an interrogation tactic by law enforcement to trigger a confession. The State also did not object to Professor Hirsch testifying that suspects being informed that they have failed a polygraph is a contributing factor to false confessions. The issue in this case then is not whether the results of polygraph examinations are reliable or admissible, but whether an expert in the field of false

confessions, who has already testified without objection that a suspect being informed that he has failed a polygraph may contribute to a false confession, may then also testify that the suspect in this case was so informed.

This is significant because many of the South Carolina cases dealing with the admissibility of polygraph evidence have considered the admissibility under the premise that the results of polygraphs are not reliable. Take *State v. Wright*, for example which noted that “[g]enerally, the results of polygraph examinations are inadmissible *because the reliability of the polygraph is questionable.*” 322 S.C. 253, 255, 471 S.E.2d 700, 701 (1996) (emphasis added). The Court reiterated this view in *Council*: “This Court has consistently held the results of polygraph examinations are generally not admissible because the reliability of the tests is questionable.” 335 S.C. 1, 23, 515 S.E.2d 508, 519 (1999). *See also State v. McHoney*, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001) (“McHoney did not meet his burden of proof under Rule 702, SCRE because he did not present any evidence that polygraphs were inherently reliable”).

This Court has likewise relied on the premise that results of polygraphs are unreliable. In *State v. Palmer*, 415 S.C. 502, 783 S.E.2d 823 (Ct. App. 2016), this Court found that a trial judge was correct not to declare a mistrial after the State asked a witness whether he had taken a polygraph. This Court noted that “[b]ecause there was no evidence regarding the results of the witness’ polygraph test, Palmer failed to meet his burden of establishing the prejudicial impact of this evidence.” *Id.* at 518, 783 S.E.2d at 831.

But again, the reliability of the results of a polygraph test are not an issue in this case. Rather it is whether an expert in false confessions may explain to a jury that a suspect being informed he failed a polygraph may contribute to a false confession. Professor Hirsch testified to exactly that without objection from the State. The trial judge erred in not allowing Professor Hirsch

to explain that Eastwood had been informed he failed a polygraph because Hirsch had already established the reliability of the science behind the phenomenon of false confessions.

There was no dispute at trial as to the reliability or admissibility of Hirsch's testimony regarding the phenomenon of false confessions and the fact that suspects being informed they failed a polygraph may contribute to false confessions. The State's contention that results of polygraphs are unreliable and inadmissible missed the point. Professor Hirsch agreed that the results of polygraphs are unreliable. But that is irrelevant because it only matters that a suspect is told that he failed – not whether he actually failed. And it is unclear from the trial record what the results of Eastwood's polygraph were. The State never asserted in argument, and no witness ever testified, that Eastwood "failed" the polygraph. No one ever said the results of Eastwood's polygraph showed signs of deception. The only testimony about the polygraph of Eastwood came in the pretrial *Denno* hearing and the testimony was simply that Eastwood was given a polygraph and *was told* he failed it. We simply do not know what the actual results of the polygraph were.

South Carolina addressed the scope of expert testimony in the field of false confessions in *State v. Myers*, 359 S.C. 40, 596 S.E.2d 488 (2004) and *State v. Cope*, 405 S.C. 317, 748 S.E.2d 194 (2013). In *Myers* and *Cope*, the Supreme Court addressed the admissibility of a false confession expert's testimony regarding specific instances of false confessions that later resulted in suspects being exonerated. The expert who testified in both *Myers* and *Cope* was Dr. Kassin who explained to the jury different types of false confessions and the factors that contribute to them.

In *Myers*, Dr. Kassin was qualified as an expert in social psychology and testified about the psychology of false confessions. *Myers*, 359 S.C. at 50, 596 S.E.2d at 493. Dr. Kassin was not permitted to testify about two specific cases in other states in which suspects had confessed to

crimes and were later exonerated. *Id.* The Supreme Court found that in *Myers*, despite the State's objections, Dr. Kassin was permitted to testify about other specific cases of false confessions, he just did so without mentioning those cases by name. *Id.* at 51, 596 S.E.2d at 494. Thus, the Court concluded that even assuming it was error to limit Dr. Kassin's testimony, any error was harmless considering the rest of his testimony. *Id.*

In *Cope*, Dr. Kassin was not permitted to testify about two specific cases in which suspects had been informed that they failed polygraph tests and then falsely confessed to the crimes but were later exonerated. *Cope*, 405 S.C. at 345, 748 S.E.2d at 208-209. The Supreme Court upheld the trial judge's decision to exclude the testimony of these specific false confessions under Rule 403 because it "would distract the jury's attention from the facts of this case and potentially confuse the issues." *Cope*, 405 S.C. at 347, 748 S.E.2d at 209. The Court further found that *Cope* was not prejudiced by the exclusion of the other specific cases because Dr. Kassin testified extensively about the nature of false confessions and the factors that accompany them. And although Dr. Kassin was not permitted to testify about the two specific cases, it appears that there was significant testimony presented to the jury regarding the polygraph examination of *Cope*, the results of that examination, and the fact that *Cope* was informed he had failed a polygraph prior to ever confessing to the crimes. *Id.* at 332, 748 S.E.2d at 201-02.

Unlike *Cope* and *Myers*, Professor Hirsch was not allowed to testify about factors present in *Eastwood's* case. Far from testifying about some distant false confession case in a different state, Hirsch was prohibited from explaining his opinion about *Eastwood's* confession in the context of the factors present in *Eastwood's* case. Once Professor Hirsch was qualified as an expert in false confessions and interrogation methods, he should have been allowed to fully explain his opinion regarding *Eastwood's* confession, including the fact that *Eastwood* was informed he failed

a polygraph and that such a circumstance may contribute to a false confession. Since the trial judge had already allowed Professor Hirsch to testify generally about this concept, it was an abuse of discretion for the judge to not allow Hirsch to explain how that concept was present in Eastwood's case.

As defense counsel argued, there was ample testimony presented about the peer-reviewed publications regarding false confessions and the circumstances that lead to them – including the alleged failure of a polygraph – and that its reliability is widely accepted in the scientific community. Tr. 579, l. 7 – 580, l. 15. Therefore, the trial judge erred in excluding this testimony under Rule 702 of the South Carolina Rules of Evidence.

B. The trial judge erred in excluding the testimony regarding the polygraph pursuant to Rule 403 because the evidence was highly probative of Eastwood's false confession defense and the probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Under Rule 403 of the South Carolina Rules of Evidence, 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.” This rule, like Rules 702 and 703, is identical to its federal counterpart. *See* Rule 403, FRE. “‘Probative value’ . . . is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues.” *State v. Gray*, 408 S.C. 601, 610, 759 S.E.2d 160, 165 (Ct. App. 2014). In analyzing the probative value of a particular piece of evidence or testimony courts must “consider[] the importance of the evidence and the significance of the issues to which the evidence relates.” *Id.*

“The evaluation of probative value cannot be made in the abstract, but should be made in the practical context of the issues at stake in the trial of each case.” *Id.* “[T]he probative worth of any particular bit of evidence is obviously affected by the scarcity or abundance of other evidence

on the same point.” *State v. James*, 355 S.C. 25, 35, 583 S.E.2d 745, 750 (2003) (quoting *Old Chief v. United States*, 519 U.S. 172, 185 (1997)).

Here, the only evidence of Eastwood’s guilt was his confession. Thus, the entirety of the case was to be decided on whether the jury believed that Eastwood’s statements to his manager and law enforcement were true or false. And the testimony that Eastwood was given a polygraph and told that he failed was highly probative as to the issue of whether he falsely confessed. Especially considering Professor Hirsch’s testimony that this exact circumstance may contribute to a suspect giving a false confession. Furthermore, unlike the evidence sought to be introduced in *Myers* and *Cope*, here the evidence that the judge excluded was evidence about Eastwood’s case – not some unrelated case. And this was the only evidence of its kind. There was no testimony allowed in the entire case about Eastwood having been informed he failed a polygraph prior to making any incriminating statements. Therefore, this evidence had extremely high probative value to the central issue in the case.

The Supreme Court of the United States held in *Crane v. Kentucky*, 476 U.S. 683, 691 (1986) that a criminal defendant has a constitutional right to present evidence about the physical and psychological environment under which a confession was obtained in order to challenge the validity of the confession. The Court in *Crane* found that even where a trial judge has found a confession voluntary under *Jackson v. Denno*, the jury still must decide whether the confession given was true. *Crane*, 476 U.S. at 688-89. The constitutional promise that a defendant has a right to present a complete defense “would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant’s claim of innocence.” *Id.* at 690.

Relying on the Supreme Court’s decision in *Crane*, the Supreme Court of Kentucky considered a case similar to Eastwood’s. In *Rogers v. Commonwealth*, 86 S.W.3d 29 (Ky. 2002), the Court considered whether law enforcement informing a suspect that he had failed a polygraph rendered a subsequent confession involuntary. While the Court in *Rogers* held that the confession was admissible, it found that the trial court committed reversible error in excluding testimony that the defendant was informed he failed a polygraph prior to confessing. *Rogers*, 86 S.W.3d at 37-38. The Court explained that Rogers’ entire defense was that his confession was coerced – i.e. false – through law enforcement’s use of the polygraph. *Id.* at 39. The Court held: “[A]lthough polygraph evidence is not admissible in Kentucky, a defendant – and only the defendant – has the right, as a matter of trial strategy, to bring evidence of a polygraph examination before the jury to inform the jury as to the circumstances in which a confession was made.” *Id.* at 40.

Several federal circuits have also addressed the admissibility of polygraph results under Rule 403 of the Federal Rules of Evidence for the purpose of rebutting a defendant’s claim that his confession was coerced. See *United States v. Blake*, 571 F.3d 331, 346 (4th Cir. 2009) (“testimony concerning a polygraph examination is admissible where it is not offered to prove the truth of the polygraph result, but instead is offered for a limited purpose such as rebutting a defendant’s assertion that his confession was coerced”); *United States v. Allard*, 464 F.3d 529, 535 (5th Cir. 2006) (evidence of polygraph admissible “[w]here a defendant . . . chooses to contest before the jury the voluntariness of her confession”); *United States v. Lynn*, 856 F.2d 430, 433-34 (1st Cir. 1988) (trial court erred in prohibiting cross-examination of a government witness about the fact that a condition of his plea agreement was to pass a polygraph); *United States v. Kampiles*, 609 F.2d 1233, 1244 (7th Cir. 1979) (polygraph evidence was admissible when it was “offered to show the circumstances of a confession rather than its truth and is intended to rebut charges of

coercion”); *Tyler v. United States*, 193 F.2d 24, 31 (D.C. Cir. 1951) (holding that results of defendant’s polygraph were admissible on the question of whether the defendant’s statement was voluntary).

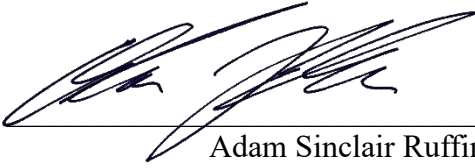
The testimony regarding Eastwood being informed that he had failed a polygraph before he made any incriminating statements had high probative value. The high probative value must then be weighed against the danger of unfair prejudice, confusion of the issues or misleading the jury. “Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis.” *State v. Spears*, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013). Because the central issue that the jury had to decide was whether Eastwood’s confession was true or false, evidence regarding the polygraph would not have tended to suggest a decision on an improper basis. As noted above, Professor Hirsch had already explained to the jury that suspects being informed that they have failed a polygraph test is a circumstance that can lead to a false confession. So, the additional explanation that this circumstance was present in Eastwood’s case would not have suggested a decision on an improper basis but rather would have assisted the jury in evaluating that central question on properly admitted expert testimony.

“[T]he danger of unfair prejudice is a separate analysis from the danger of confusion of the issues or misleading the jury.” *State v. Phillips*, 430 S.C. 319, 329, 844 S.E.2d 651, 656 (2020). Contrary to the State and the trial judge’s position, the evidence surrounding the polygraph of Eastwood would have only helped the jury in understanding the expert testimony regarding false confessions. The testimony about polygraphs would not have confused the jury in any way whatsoever. Professor Hirsch testified that the results of the polygraph are irrelevant to the false confession analysis. What matters is that Eastwood was told that he failed a polygraph and the trial judge erred in preventing the jury from hearing this fact.

The jury could not fully appreciate or understand the defense's theory that Eastwood falsely confessed when they were not allowed to hear that one of the significant factors that contributes to false confessions was present in Eastwood's case. They were allowed to hear testimony in the abstract that informing a suspect he failed a polygraph may contribute to a false confession. But they were not allowed to hear that this contributing factor was present in Eastwood's case. The trial judge erred in excluding this testimony pursuant to Rule 403 of the South Carolina Rules of Evidence.

CONCLUSION

By reason of the foregoing argument, Eastwood's conviction should be reversed, and this case remanded to the Orangeburg County Court of General Sessions for a new trial.



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