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**Oct 21 2024**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Lancaster County

Honorable Brian M. Gibbons, Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

ARKEVUS JIMON CAUTHEN,

APPELLANT

APPELLATE CASE NO. 2022-001268

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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 REVIEW .....3

ARGUMENTS

1.

The trial court abused its discretion in admitting into evidence a gun recovered from the curtilage of Appellant’s home because the State exceeded the scope of its search warrant when it dug into the ground searching for a murder weapon. ....4

2.

The trial court erred in allowing multiple witnesses to testify that an injury on appellant’s arm was a “bite mark,” which constituted improper expert opinions .....6

CONCLUSION.....9

**TABLE OF AUTHORITIES**

**Cases**

Arizona v. Hicks, 480 U.S. 321 (1987) ..... 5

Franks v. Delaware, 438 U.S. 154 (1978) ..... 4

Hamrick v. State, 426 S.C. 638, 828 S.E.2d 596 (2019) ..... 3

State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999)..... 3

State v. Counts, 413 S.C. 153, 776 S.E.2d 59 (2015)..... 5

State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001)..... 5

State v. McClinton, 265 S.C. 171, 217 S.E.2d 584 (1975)..... 7, 8

State v. Warner, 430 S.C. 76, 842 S.E.2d 361 (Ct. App. 2020), *aff'd in part and remanded in part on other grounds*, 436 S.C. 395, 407, 872 S.E.2d 638, 644 (2022)..... 3

**Rules**

Rule 701, SCRE..... 7

Rule 702, SCRE..... 3

**STATEMENT OF ISSUES ON APPEAL**

1.

Whether the trial court abused its discretion in admitting into evidence a gun recovered from the curtilage of Appellant's home because the State exceeded the scope of its search warrant when it dug into the ground searching for a murder weapon?

2.

Did the trial court err in allowing multiple witnesses to testify that an injury on appellant's arm was a "bite mark," which constituted improper expert opinions?

## STATEMENT OF THE CASE

A Lancaster County grand jury indicted appellant for murder, armed robbery, and a weapons charge and on September 6, 2022, appellant was tried before the Honorable Brian M. Gibbons and a jury. R. 1. Lisa Collins and Nichole Wine represented the State. R. 1. William Frick represented appellant. R. 1. The jury convicted appellant. R. 647. Judge Gibbons sentenced appellant to life imprisonment for murder, five years' imprisonment for the weapons charge, and thirty years' imprisonment for armed robbery, all running consecutive. R. 653. This appeal follows.

## STANDARD OF REVIEW

As to Issue One, the standard of review is abuse of discretion.

As for Issue Two, the trial court is required to make a finding of an expert witness's qualification under Rule 702, SCRE. State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999). "We review evidentiary rulings for abuse of discretion, meaning we will only disturb them if they have caused prejudice and are the result of legal error or have inadequate factual support." State v. Warner, 430 S.C. 76, 83, 842 S.E.2d 361, 364 (Ct. App. 2020), *aff'd in part and remanded in part on other grounds*, 436 S.C. 395, 407, 872 S.E.2d 638, 644 (2022). Error is found where expert testimony is offered absent a finding of expert qualification under Rule 702. Hamrick v. State, 426 S.C. 638, 650, 828 S.E.2d 596, 602 (2019).

## ARGUMENT

1.

The trial court abused its discretion in admitting into evidence a gun recovered from the curtilage of Appellant's home because the State exceeded the scope of its search warrant when it dug into the ground searching for a murder weapon.

At the pretrial hearings, the parties agreed to use the transcripts from a previous trial that resulted in a hung jury instead of live testimony. R. 657-58. Defense counsel abandoned the strategy from the previous trial in attacking the search warrant under Franks v. Delaware, 438 U.S. 154 (1978) and stated that he would be attacking the search and seizure of a gun from appellant's backyard because the police exceeded the scope of the search warrant. R. 671.

Defense counsel argued the search warrant did not say anything about looking for a gun or digging up appellant's yard. R. 687. He also argued the pistol found was not in plain sight. R. 687. He argued the backyard was not a locked container. R. 691. Appellant argued that even if the search could be valid under the Fourth Amendment, it did not satisfy the South Carolina Constitution's greater privacy rights. R. 691-92. The trial court ruled the search was not beyond the scope of the warrant. R. 706.

The trial court erred because the warrant did not expressly authorize the police to dig into appellant's backyard. Supp. R. 4. The warrant gives the address as the "property to be searched." Supp. R. 4. The warrant lists the places to be searched: "attics, basements, locked or unlocked containers, outbuildings, storage sheds, trash areas and trash containers, attached or unattached." Supp. R. 4. Despite this comprehensive list, the warrant does not mention the curtilage. Supp. R. 4. It does not mention the yard. Supp. R. 4. It certainly says nothing about digging. Supp. R. 4. The photographs of the yard where the pistol was recovered demonstrate

that it was not in plain view and the police had to use a shovel to uncover it. State's Ex. 52, 53, 55, 57, 58.

The plain view exception did not apply because the police had to move the dirt covering the gun. In Arizona v. Hicks, 480 U.S. 321 (1987), the Court held that moving stereo equipment even a few inches constituted a search. "A search is a search, even if it happens to disclose nothing but the bottom of a turntable. Hicks, 480 U.S. at 325. Here, moving the dirt was a search.

Because the gun was not in plain view, an additional warrant was required. While the warrant authorized a search into locked containers, its language shows this only applied to containers in the house. This left the State in the position of arguing that the portion of the warrant authorizing a search of trash containers made the search valid because "there are people that bury their trash in the yard." R. 698.

Even if the warrant covered digging in the yard under the Fourth Amendment, South Carolina's express right of privacy gives greater protections to its citizens. State v. Forrester, 343 S.C. 637, 645, 541 S.E.2d 837, 841 (2001); State v. Counts, 413 S.C. 153, 172, 776 S.E.2d 59, 69-70 (2015). This Court should find under our constitution that the earth is not a container and if the police contemplate digging up someone's property, they must get express permission from a magistrate to do so. The warrant should be strictly construed against the police under the state constitution. Failure to get an additional warrant invalidates this search and this Court should reverse.

The trial court erred in allowing multiple witnesses to testify that an injury on appellant's arm was a "bite mark," which constituted improper expert opinions.

The case against appellant for the murder of John Duncan ("Duncan") was entirely circumstantial. Duncan was found dead in his apartment by his brother. R. 174. Duncan died from multiple stab wounds. R. 265. The State relied primarily on DNA evidence supposedly consistent with appellant's culled from Duncan's fingernails and finding a gun that belonged to Duncan buried in appellant's backyard that should have been suppressed as argued in Issue One.. R. 456-67.

Appellant testified and vehemently denied killing Duncan. R. 572. Appellant explained the DNA on Duncan because appellant shook Duncan's hand and got a hug from him several days before Duncan's murder. R. 576-77. Appellant also explained the gun. R. 574-75. He bought the gun from the "errand boy" in the neighborhood for fifty dollars. R. 574-75. Appellant buried the gun in the yard because he had a felony conviction and did not want the police to find it. R. 574-75.

Because of their weak case against appellant, the State repeatedly emphasized wounds found on appellant when he was arrested, contending they were suffered during an altercation with Duncan. Appellant had multiple scratches on his body, but he got these from a briar patch when he went fishing. R. 572.

On the back of appellant's arm was a wound that the State claimed was a bite mark. (State's Ex. 15). At a pretrial hearing, appellant moved to suppress any reference to the wound as a bite mark. R. 684. Appellant argued the State had no expert testimony that the wound was a bite mark. R. 707. The State asked a forensic odontologist to do a bite mark comparison, but the

odontologist refused. R. 707. Appellant argued that whether the wound was a bite mark was not the proper subject of lay opinion. R. 177.

The State argued that whether a wound was a bite did not require expert opinion. R. 711. The trial judge ruled witnesses could testify they thought the wound was a bite mark. R. 712. The judge said, “as a three time parent of toddlers, to me, it looks like a bite mark. I hate to—I’ve seen many bite marks in my life as a parent either received or given.” R. 712.

The trial judge erred in allowing non-experts testify about the cause of the wound. Judge Gibbons improperly substituted his own opinion that the wound was a bite mark instead of conducting a proper analysis under the rules of evidence. Had the trial court conducted such an analysis, it would have determined that lay opinions were inadmissible.

“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. Lay witnesses could not offer an opinion on the source of appellant’s wound because it required special knowledge, skill, experience, and training under Rule 701(c). The fact that a forensic odontologist refused to conduct any analysis demonstrates that the source of the wound was properly the subject of expert testimony, but that no expert could make any conclusion. Without a real expert witness, the State attempted to back-door these opinions through lay witnesses.

In a case before the adoption of the rules of evidence, the Supreme Court found that a police officer could testify that a cut looked like it was caused by a bite. State v. McClinton, 265 S.C. 171, 217 S.E.2d 584 (1975). But the officers did not conclusively state the injury was

caused by a bite. Id. McClinton recounts the officers describing the injury in terms of its indentations and “as though it had been bitten” or “similar to a tooth.” Id.

Unlike McClinton, the State had nearly every witness testify that the injury on appellant’s arm was a bite mark. R. 131, 145, 146, 148, 284, 307, 309, 320, 345, 346, 360. Whether the injury was caused by a bite was important in this circumstantial case. After SLED released the crime scene to Duncan’s family, his daughter found a tooth belonging to Duncan in the kitchen. R. 100, 471. Duncan was missing a tooth. R. 269. The solicitor argued that Duncan lost the tooth when he bit appellant during a struggle. R. 616. Appellant testified the wound was not caused by a bite and he likely got it from lifting weights. R. 578-79. In this entirely circumstantial case, the court erred in letting lay witnesses make a conclusion about the wound when that conclusion rested solely in the province of the jury. This Court should reverse.

**CONCLUSION**

For the foregoing reasons, this Court should reverse Appellant's convictions and remand for a new trial.



David Alexander  
Deputy Chief Attorney for Capital Appeals

ATTORNEY FOR APPELLANT

This 21st day of October, 2024.

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CERTIFICATE OF SERVICE  
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Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Brief of Appellant 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), this 21<sup>st</sup> day of October, 2024.



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