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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County
The Honorable Maite Murphy, Circuit Court Judge
Appellate Case No. 2023-001798

THE STATE,

Respondent,

v.

KENNETH HENRY EASTWOOD,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Judge Murphy properly excluded evidence regarding Appellant's polygraph test because Appellant failed to lay a proper foundation for polygraph reliability, Appellant's expert was able to testify about the basis for his false confession opinion without mentioning the polygraph, and the polygraph evidence would serve to confuse the jury

STATEMENT OF THE CASE

The State concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On April 5, 2023, the Orangeburg County Grand Jury indicted Appellant Kenneth Henry Eastwood on one count of murder arising from the December 2021 strangulation death of Cara Hodges (Victim). The matter was called for a jury trial in November 2023 before the Honorable Maite Murphy, Circuit Court Judge.

Pre-Trial Hearing

Prior to trial, Judge Murphy conducted a hearing to determine the voluntariness of statements Appellant gave to investigators. Investigator Marty Carrigg of the Orangeburg County Sheriff's Office testified he was involved in the investigation regarding the Victim's murder. The Victim's body was discovered on December 12th and investigators attempted to locate Appellant on December 13th. Appellant was not at his home, and the investigators then went to Fishtales, a club they were told Appellant frequented. While the investigators were talking to a waitress in the club, Appellant drove up outside. The investigators went outside to speak with Appellant, who said he expected law enforcement would want to talk to him, and he agreed to go to the Sheriff's Office for an interview. Appellant was not put in handcuffs or detained. (Trial Transcript [TT], pp. 84-113 Record on Appeal [R.], pp. _____)

Investigator Carrigg testified he drove Appellant to the Sheriff's Office and did not attempt to interview him. At some point, Appellant asked him if this was about the Victim, and Investigator Carrigg told him it was, which was the extent of their conversation during the drive. (TT, pp. 90-91; R., pp. _____)

After they arrived at the Sheriff's Office, Investigator Carrigg advised Appellant of his Miranda¹ rights. Appellant indicated he understood his rights and waived them. Investigator Carrigg testified they interviewed Appellant for just under an hour, and Appellant did not appear incapacitated in any way, he was not forced or threatened to speak with the investigators, he was not denied food, water or bathroom breaks during the interview, and he was not placed under arrest. (TT, pp. 93-96; R., pp. _____)

At the conclusion of the interview, Appellant agreed to take a polygraph and Investigator Carrigg drove him the State Law Enforcement Division (SLED) in Columbia for the polygraph. At the conclusion of the polygraph, Appellant was told he had failed it. Investigator Carrigg then drove Appellant back to the Sheriff's Department where Appellant agreed to give investigators a buccal swab for DNA analysis, and he consented to a search of his home and car. Investigator Carrigg testified he did not discuss the investigation with Appellant during the ride to Columbia and back, and Appellant was not in custody at that time. (TT, pp. 97-99; R., pp. _____)

After obtaining the buccal swab, Investigator Carrigg drove Appellant to Appellant's home and they sat in the Investigator's car while officers conducted a search of the home. While they sat in the car, Investigator Carrigg asked Appellant where the Victim was, and Appellant said he did not know. Investigator Carrigg then told Appellant he knew where the Victim was because she was in the morgue. He testified Appellant acted like it shocked him, and kept saying "oh, my Lord." When the search concluded, Appellant was left at his home. (TT, pp. 99; R., pp. _____)

Investigator William McCormack of the Orangeburg County Sheriff's Office testified he was a crime scene investigator and assisted in the search of Appellant's home.

¹Miranda v. Arizona, 384 U.S. 436 (1966).₂

He testified Appellant was initially outside the home with Investigator Carrigg, but he did come into the home to secure his dog and unlock two gun safes. Appellant was not in handcuffs, and he agreed to remove his shirt so investigators to see if he had any injuries. Investigator McCormack observed some scratches on the right side of Appellant's chest, which Appellant stated were caused by a cat. (TT, pp. 114-117; R., pp.____)

Lt. Shumpert testified he arrested Appellant at Appellant's home on December 14, 2019, and advised him of his Miranda rights, but he did not question Appellant at the residence. Appellant was transported to the Sheriff's Office by another deputy, and Lt. Shumpert participated in an interview of Appellant at the Sheriff's Office. Another investigator again advised Appellant of his Miranda rights, and Appellant agreed to speak with the investigators. Lt. Shumpert testified he did not threaten or coerce Appellant into speaking with them, and Appellant did not appear to be under the influence of any substance or have any cognitive impairments. (TT, pp. 133-137; R., pp.____)

Lt. Shumpert interviewed Appellant again on December 15, 2019, as a follow-up to the interview the previous day. He again advised Appellant of his Miranda rights, and Appellant again agreed to speak with Lt. Shumpert. During the interview, Appellant stated he threw the Victim's clothes into a dumpster, but he wasn't sure which dumpster. After the interview, Lt. Shumpert attempted to locate the clothes, but was unable to find them. (TT, pp. 137-143; R., pp.____)

On cross-examination, Lt. Shumpert stated that during the interview on the 14th, he told Appellant they had talked to his manager, and they knew what had happened to the Victim. He recalled Appellant stating he did not want to give a statement, and Lt. Shumpert told Appellant "he needed to get it off his chest." During the interview, Lt. Shumpert brought Appellant an extra bottle of water, and at the end of the interview he

asked Appellant if he needed anything else. Appellant responded that “he needed sleep.” (TT, pp. 125-130; R., pp. _____)

Lieutenant Dujan Council of the Orangeburg County Sheriff’s Office testified he was present with Lieutenant James Schumpert during Appellant’s interview after Appellant was arrested and brought to the Sheriff’s Office. Lt. Council advised Appellant of his Miranda rights at the beginning of the interview, and Appellant waived his rights and agreed to speak with the investigators. Lt. Council testified Appellant was not forced, threatened or denied food, water or bathroom breaks during the interview, which lasted approximately twenty to twenty-five minutes. (TT, pp. 119-125; R., pp. _____)

On cross-examination, Lt. Council testified he was the officer who got the arrest warrant, and he was present when Appellant was arrested at his residence. The warrant stated that Appellant gave a statement to an independent witness, identified as the manager at Appellant’s job, indicating he had to resign because law enforcement knew “he did it.” Lt. Council stated that Lt. Shumpert conducted the interview, and he encouraged Appellant to “get it off your chest.” (TT, pp. 125-130; R., pp. _____)

After hearing arguments, Judge Murphy stated she had reviewed the videotaped interviews and after considering all the evidence presented, she found that the statements were voluntary and admissible. She stated Appellant did not appear sleepy or intoxicated during the videotaped interviews, he was provided several Miranda warnings, and agreed to talk to law enforcement. (TT, pp. 158-160; R., pp. _____)

Judge Murphy then stated that after reviewing the videotapes, she was concerned about evidence regarding polygraph testing. The State informed Judge Murphy it did not intend to introduce the portion of the December 13th interview mentioning Appellant taking a polygraph, and argued that allowing mention of the polygraph should not be

permitted under the court rules and because it would confuse the jury. (TT, p. 160; R., pp.____)

Appellant argued that polygraph evidence is not *per se* inadmissible, and evidence that he voluntarily took the polygraph and was told he failed it went to the reliability and trustworthiness of his subsequent confession to both his manager and law enforcement. He further argued the evidence was relevant to explain to the jury what happened during the hours he was with law enforcement on the 13th and the “interrogation tactics” used by law enforcement during that time, and how everything prompted his confession. (TT, pp. 160-173; R., pp.____)

In response, the State argued the confession did not occur immediately after the polygraph or anything that was said to him about the results. Rather, Appellant confessed the next morning to his manager, who then told law enforcement about the confession. (TT, pp. 173-175; R., pp.____)

Judge Murphy found the trustworthiness of Appellant’s confessions was established by the evidence corroborating the specifics of his statements. As to admission of the polygraph evidence, Judge Murphy found that no evidence had been presented to establish the reliability of the polygraph is supported by facts and data as required by Rule 702, SCRE. She further found that the polygraph evidence would be more prejudicial than probative and confuse the issues before the jury. She noted that the evidence “would possibly bolster the confession of the Defendant.” (TT, pp. 175-177; R., pp.____)

Trial Testimony

Before the jury, the State presented evidence that Appellant was the last person seen with the Victim before she was reported missing. He and the Victim met at Fishtales on December 8th, and left together at 11:30 p.m. that night. The Victim’s father reported her

missing on December 10th, and told the responding officer that the Victim had been with Appellant on the 8th. The Victim's body was discovered on December 12th in a wooded area in Orangeburg County. (TT, pp. 189-195; R., pp.____)

Investigator Carrigg testified about his involvement in the investigation and his interaction with Appellant on December 13th. Investigator Andrew Hayes of the Orangeburg County Sheriff's Office testified that he was with Investigator Carrigg when he met with Appellant at Fishtales, and he obtained the buccal swab from Appellant that day. He was also present during Appellant's first interview at the Sheriff's Department and testified Appellant was cooperative and there was no force or coercion used to get his cooperation. (TT, pp. 281-284; R., pp.____)

On cross-examination, Investigator Hayes testified Appellant agreed to go to SLED in Columbia to be interviewed by a SLED Agent, and at some point after that interview, Appellant was told they did not believe he was being truthful. He further testified he was in the car with Investigator Carrigg and Appellant when they drove Appellant home that evening, but he did not hear any discussion between them about the investigation. (TT, pp. 284-299; R., pp.____)

Brian Lauder testified he was a manager at the local grocery store where Appellant worked. Appellant was scheduled to work on December 14th, but he came in and told Lauder that he would not be in that day and probably would not be back. When Lauder asked him why, Appellant said that Sheriff's Department was investigating him, and he then stated, "I did it." Lauder then asked Appellant what he did, and Appellant stated, "I killed her, I strangled her," and told Lauder he did it "because she wouldn't leave me alone," and he "put her in the car and dumped her on the side of the road." When Lauder advised Appellant to turn himself in to law enforcement, Appellant said that when law

enforcement got the DNA results back, “they’ll know and I’ll confess then.” After Appellant left, Lauder called the Sheriff’s Office and reported Appellant’s statements. (TT, pp. 300-306; R., pp._____))

Lt. Council testified about his involvement in the investigation into Victim’s death, including obtaining the warrant for Appellant’s arrest after Lauder reported what Appellant told him because the details Appellant provided to Lauder about the murder had not been released to the public. He also participated in the interview of Appellant after Appellant was arrested and brought to the Sheriff’s Department, and testified about reading the Miranda rights to Appellant at the beginning of the interview. Lt. Council stated Appellant did not appear to be under the influence of drugs or alcohol, and he had no concerns about Appellant’s competency to understand that was taking place. (TT, pp. 315-320; R., pp._____))

Investigator Shumpert testified about his involvement in Appellant’s arrest on December 14th, and the interview of Appellant after he was arrested. He stated Appellant was advised of his Miranda rights when he was arrested and prior to being interviewed at the Sheriff’s Office, and he had no concerns about Appellant’s ability to understand his rights. He also testified about reading the Miranda rights to Appellant prior to his interview of Appellant on December 15th, during which Appellant told him he had thrown Victim’s clothes in a dumpster. Lt. Shumpert checked the dumpsters that Appellant might be where he threw the clothes, but was unable to locate them. (TT, pp. 338-346; R., pp._____))

Investigator William McCormick of the Orangeburg County Sheriff’s Office testified he was a crime scene investigator at the scene where Victim’s body was found and participated in the search of Appellant’s residence. He took photographs of the crime

scene, the residence, and of scratches on Appellant's body. He also attended the Victim's autopsy and retrieved swabs and fingernail clippings from the pathologist for analysis. (TT, pp. 365-404; R., pp._____))

Amanda Webb, a DNA analyst with the Orangeburg County of Public Safety, was qualified as an expert in DNA analysis, and testified she developed DNA profiles for Victim and Appellant from items seized during the investigation and delivered to her lab. After the profiles were developed, she analyzed nail clippings and touch DNA swabs related to the case. From Victim's right fingernail clippings, she extracted DNA from two people, and determined the DNA was Victim's and Appellant's. Under Victim's left fingernail clippings, she found Victim was the major DNA contributor, but was unable to determine the minor contributor and could not exclude Appellant as the contributor. (TT. pp. 437-455; R., pp._____))

A forensic pathologist, Kelly Rose, testified she performed Victim's autopsy and determined the manner of death was homicide caused by asphyxiation due to ligature strangulation. There was a deep ligature mark around the Victim's neck, abrasions on her knees, and scattered contusions on all areas of her body. There were also numerous scratches and fingernail marks indicating the Victim struggled to get the ligature off her neck, her larynx was fractured, and she had petechiae and areas of hemorrhage in her eyes. (TT, pp. 469-488; R., pp._____))

Appellant called Alan Hirsch, who was qualified as an expert in false confessions and interrogation techniques, who testified about different categories of false confessions: voluntary false confessions; coerced compliant false confessions; and internalized false confessions. He stated that internalized false confessions involve interrogative pressure when confronted with evidence proving guilt, and a suspect who mistrusts his memory

because of alcoholic blackouts or other reasons starts to believe he might have committed the crime. (TT, pp. 541-550; R., pp. _____)

Hirsch further testified that the types of evidence showing guilt law enforcement may use include telling the suspect he failed a polygraph test as a way to “frighten” the suspect into confessing. He stated that polygraphs are considered unreliable and inadmissible, and there might not even be a polygraph test, but law enforcement use the polygraph as a ruse to convince the suspect to confess, and might tell the suspect the polygraph is 100% accurate and never fails, which the average person might believe. Another thing that might convince a suspect to confess is telling the suspect his DNA is at the crime scene. (TT, pp. 551-558; R., pp. _____)

Hirsch testified he reviewed Appellant’s case and determined Appellant’s confessions were “consistent with an internalized false confession.” He stated Appellant was interviewed on two occasions, and on the first occasion, Appellant was cooperative, maintained his innocence, and wanted to take a polygraph, but he had already confessed by the second interview. (TT, pp. 560-562; R., pp. _____)

After Judge Murphy reiterated her ruling excluding testimony regarding Appellant’s polygraph test, Hirsch testified that after Appellant talked with an officer in Columbia, he was told they knew he was lying, and that Appellant mistrusted his own memory due to alcohol abuse. He further testified that the combination of those factors led Appellant to confess because he could have been influenced to think he killed the Victim. He stated that even though Appellant’s initial confession was not to law enforcement during an interrogation, it was still consistent with an internalized false confession. (TT, pp. 563-570; R., pp. _____)

On cross-examination, Hirsch testified he did not talk to Appellant or any of the law enforcement officers involved in the case. He also agreed that the tactics law enforcement used in this case were legal and could be good methods to produce a reliable confession. (TT, pp. 570-576; R., pp.____)

After Hirsch testified, Appellant moved for Judge Murphy to reconsider her pretrial ruling regarding testimony about the polygraph on the ground that Hirsch's testimony established the scientific validity of studies indicating that the technique of confrontation regarding a failed polygraph test leads to internalized false confession, and the testimony sought did not go to the reliability of the polygraph test, just the state of mind arising from being told the suspect failed the polygraph. Judge Murphy denied the motion, again finding that testimony regarding Appellant's polygraph would not assist the trier of fact and the prejudicial effect substantially outweighed the probative value. (TT, pp. 578-583)

During closing argument, Appellant stressed the false confession narrative, and specifically referenced the testimony that law enforcement took him to Columbia to be interviewed, and then told him they had proof he was lying. Appellant argued the "case is consistent with what we know with false confessions," from the use of alcohol, the distrusted memory, sleep deprivation, and being "confronted with objective evidence leading to his guilt," which caused him to "momentarily likely believe what law enforcement was telling him." (TT, pp. 604-639; R., pp.____)

The jury found Appellant guilty of murder, and Judge Murphy sentenced him to life imprisonment. This appeal followed. (TT, pp. 663-667; R., pp.____)

STANDARD OF REVIEW

“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 [a] 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).

ARGUMENT

Judge Murphy properly excluded evidence regarding Appellant's polygraph test because Appellant failed to lay a proper foundation for polygraph reliability, Appellant's expert was able to testify about the basis for his false confession opinion without mentioning the polygraph, and the polygraph evidence would serve to confuse the jury

Appellant contends Judge Murphy erred in excluding testimony regarding Appellant's polygraph results and law enforcement's subsequent statement to him that he failed the polygraph because the testimony was directly relevant to the false confession testimony Appellant presented at trial. Judge Murphy's ruling was amply supported by well-established case law regarding the admissibility of polygraph evidence, Appellant failed to lay any foundation for the admission of polygraph evidence, and allowing that testimony would confuse the jury regarding the issues before it.

"The results of polygraph examinations are generally not admissible because the reliability of the tests is questioned;" however, "in light of the adoption of the SCRE, admissibility of [polygraph evidence] should be analyzed under Rules 702 and 403, SCRE and the Jones factors." State v. Council, 335, S.C. 1, 515 S.E.2d 508, 519 (1999); State v. Samuel, 400 S.C. 593, 601, 735 S.E.2d 541, 546 (2012), *vacated*, State v. Samuel, 411 S.C. 602, 769 S.E.2d 662 (2015); In re Robert R., 340 S.C. 242, 531 S.E.2d 301, 304 (Ct. App. 2000). The general rule is that no mention of a polygraph test should be made before the jury in a criminal case, and if such a reference is made, the trial judge must ensure the jury draws no improper inference from it. State v. Johnson, 376 S.C. 8, 654 S.E.2d 835, 836 (2007); State v. Palmer, 415 S.C. 502, 783 S.E.2d 823, 831 (Ct. App. 2016).

A. Rule 702

Appellant contends that Judge Murphy erred in excluding testimony regarding the polygraph pursuant to Rule 702 because Professor Alan Hirsch was qualified as an expert in interrogation methods and false confessions, and he specifically testified there is voluminous peer-reviewed research on the subject of false confessions. He stated the false confession analysis is accepted among the scientific community, including the fact that informing suspects they have failed a polygraph may trigger a false confession. Under a 702 analysis, the trial court must consider the evidence that was presented to the court. Here, Appellant failed to provide any testimony that the polygraph is reliable, that it is based upon and supported by scientific, technical, or other reliable specialized knowledge, or that it would assist the trier of fact to determine the issue in fact. Indeed, Appellant's own expert testified that polygraphs are generally unreliable.

Rule 702 of the South Carolina Rules of Evidence states 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.” Rule 702, SCRE. In considering the admissibility of scientific evidence, the court looks at several factors, 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. State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 819 (2001).

Appellant attempts to dodge his failure to provide Judge Murphy with any foundational basis for admitting evidence regarding Appellant's polygraph test results by pivoting to the

argument that the issue was not the admissibility of the polygraph test itself. Rather, he argues that the issue before Judge Murphy was whether a false confession expert can testify that a defendant's confession was coerced by law enforcement advising the defendant he failed a polygraph. This pivot does not alter the analysis or conclusion in this case.

Ultimately, Appellant's Rule 702 analysis is irrelevant. Appellant's expert was qualified without objection as an expert on the theory of false confessions and he was able to describe the analysis that supported his ultimate opinion. Since Appellant was able to present his expert without objection, the only issue before Judge Murphy was the admissibility of polygraph evidence, and she was not asked to conduct a Rule 702 analysis of the underlying false confession theory.

Appellant's expert testified extensively about the false confession theory, including the use of polygraphs as a ruse to convince a defendant to confess. He then testified about the facts specific to this case that he found were relevant to his ultimate opinion, including the fact that Appellant wanted to take a polygraph and after Appellant spoke with a SLED agent, law enforcement told Appellant they knew he was lying. The expert then opined that Appellant's confessions were "false" confessions as a result of use of alcohol, lack of sleep, and law enforcement telling him they knew he was lying.² (TT, pp. 562-570; R., pp. ____). As discussed further below, the only thing Appellant's expert was not allowed to do was say the word "polygraph" in connection with Appellant's interviews.

²In the face of the expert's false confession theory, the jury was aware that law enforcement left Appellant at home alone for the night after telling him they knew he was lying about his involvement in Victim's disappearance, and he initially confessed to his manager the next morning with no law enforcement present. The jury also had the videos of both law enforcement interviews of Appellant, and could judge for itself whether law enforcement engaged in extensive coercion to get Appellant's confession. (State's Exhibit 5 [Thumb Drive], State's Exhibit 6 [Thumb Drive]).

B. Rule 403

Appellant further contends Judge Murphy erred in excluding testimony regarding the polygraph pursuant to Rule 403. He asserts the evidence was highly probative of Appellant'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.

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. "[A] court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates." State v. Gray, 408 S.C. 601, 759 S.E.2d 160, 165 (Ct. App. 2014).

All probative testimony relating to Appellant's expert's false confession opinion was admitted into evidence. As stated above, the only thing the expert could not do was say the word "polygraph" specifically in connection with this case, even though he did talk about the law enforcement "ruse" of using polygraph results, even if untrue, to evoke a confession. Appellant's expert was able to testify about various types of "false" confessions, the circumstances leading to purported false confessions, and the circumstances surrounding Appellant's confessions. Significantly, the expert was able to testify that Appellant agreed to take a polygraph and law enforcement told him they knew he was lying after he spoke to a SLED agent. Then, the expert was able to give his opinion that Appellant gave an "internalized false confession."

For purposes of explaining the basis for the expert's opinion that Appellant's confessions were false, there is little real distinction between law enforcement telling a defendant they know he is lying after he speaks to a particular officer versus telling him he

failed a polygraph examination. As explained by the expert, it is being confronted with the suggestion that he is lying that can lead to a false confession, and the expert was able to testify that law enforcement told Appellant they “knew” he was lying after he spoke with the SLED agent. Appellant fails to explain how use of the word “polygraph” would have made any difference in the expert’s opinion or the jury’s consideration of it.

In State v. Wright, 322 S.C. 253, 471 S.E.2d 700 (1996), the Supreme Court affirmed the trial court’s exclusion of any mention of the polygraph, finding no abuse of discretion “considering the authority against admitting evidence of polygraph examinations and the potential prejudice to appellant.” The defendant in Wright sought to use misinformation from the polygraph examiner to show the defendant’s confession was not voluntary. The court held the defendant failed to show what limitation could be placed on the polygraph disclosure to limit prejudice to the defendant, and without some limitation, the jury could have reasonably inferred that the defendant’s confession following closely after a deceptive polygraph was that the confession was truthful and the polygraph answers were untruthful, which “would serve to bolster the confession rather than persuade the jury to believe the alleged coercion.”³ *Id.* at 702.

Similar to the circumstances in Wright, Judge Murphy found that mention of the polygraph in this case would confuse the issues before the jury and had the potential to bolster the Appellant’s confession rather than attack its credibility, which demonstrates that she performed the discretionary balancing of evidence required under Rule 403. Contrary to Appellant’s assertion that the “central” issue for the jury was whether Appellant’s confession was true or false, the central issue before the jury was whether Appellant murdered Victim.

³It is difficult to envision a limitation on polygraph evidence that would avoid the reasonable inference the court found had to be avoided.

Allowing Appellant to present further evidence regarding the alleged “coerced” confessions, specifically the impact of the polygraph information, would have done nothing but confuse the issues and divert the jury’s attention to the polygraph rather than on the actual issue at hand.⁴

Appellant’s claim that his expert was “prohibited from explaining his opinion about [Appellant’s] confession in the context of the factors present in [Appellant’s] case” is simply inaccurate and ignores the testimony the expert was able to give as the basis for his opinion. Judge Murphy acted well within her discretion to properly balance the evidence under 403 and correctly concluded this evidence was more prejudicial than probative and was inadmissible, especially in the face of what the expert was able to testify about in connection with his opinion.

C. Harmless Error

Finally, even assuming error, failure to admit express testimony regarding the polygraph was harmless in light of other evidence in the record supporting the jury’s verdict.⁵ Error is harmless where it could not reasonably have affected the result of the trial. In re Harvey, 355 S.C. 53, 584 S.E.2d 893, 897 (2003). “A harmless error analysis is contextual and specific to the circumstances of the case,” and “the materiality and prejudicial character of the error must be determined from its relationship to the entire case.” State v. Heller, 399 S.C. 157, 731 S.E.2d 312, 320 (Ct. App. 2012) (emphasis added).

⁴Appellant asserts that the actual results of Appellant’s polygraph examination are unknown because there was no evidence presented about the results of Appellant’s polygraph examination. (Brief of Appellant, p. 14). That assertion is irrelevant to the issue presented. Even if somehow relevant, however, Appellant’s counsel apparently did know the actual polygraph results as indicated by her representation to Judge Murphy that Appellant only failed on two questions - do you know where Cara is, and do you know for sure where Cara is now. (TT, p. 164; R., pp. ____).

⁵ The State does not concede error in the exclusion of the polygraph evidence.

Contrary to Appellant's assertion that his confessions were the only evidence of his guilt, Appellant's confessions, as given initially to his manager and subsequently to law enforcement, were not the only evidence from which the jury could have found beyond a reasonable doubt that Appellant murdered the Victim. There was direct evidence that Appellant was the last person anyone saw with Victim, Appellant had scratches on his body, and his DNA was found under Victim's fingernails. In addition, there was circumstantial evidence further corroborating Appellant's confessions.

For instance, Appellant stated he strangled Victim with an electric cord for a heater and he threw the cord away when he disposed of Victim's clothes. A subsequent search of Appellant's house revealed a space heater in the bedroom that was located a distance from the electric socket such that it required an extension cord to be plugged in – an extension cord that has never been found. Appellant also told law enforcement he threw Victim's clothes in a dumpster, and he was not sure which dumpster. Law enforcement searched two dumpsters but could not find the clothes.

There was direct and circumstantial evidence linking Appellant to Victim's murder that served to corroborate details of Appellant's confessions. When the record is viewed as a whole, any potential error in excluding testimony specifically mentioning the polygraph was harmless beyond a reasonable doubt.

CONCLUSION

For all the foregoing reasons, the State respectfully submits Judge Murphy's rulings and Appellant's conviction.

Respectfully submitted,

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