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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Marlboro County

Honorable Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JEJAUNCEY FERNANDO HARRINGTON,

APPELLANT

APPELLATE CASE NO. 2023-000305

FINAL BRIEF OF APPELLANT

LARA M. CAUDY
Senior 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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2.

Did the trial judge abuse his discretion by admitting expert testimony on footwear impression analysis from Melinda Worley pursuant to Rule 702, SCRE, since the subject matter of her testimony was unreliable, and Rule 403, SCRE since any probative value of the evidence was outweighed by the danger of unfair prejudice given its unreliability?

3.

Did the trial judge err by sentencing Appellant to five years for possession of a weapon during the commission of a violent crime when he was sentenced to life without parole for murder in violation of S.C. Code Ann. § 16-23-490(A)?

STATEMENT OF THE CASE

A Marlboro County grand jury indicted Appellant on September 12, 2017 for two counts of murder, kidnapping, armed robbery, use of a motor vehicle without owner's consent, and possession of a weapon during the commission of a violent crime. R. 1398 – 1409. In April 2019, the state served notice of its intent to seek the death penalty. The Honorable Michael G. Nettles was assigned the case and held numerous pretrial hearings. Notable for this appeal were hearings held on December 20, 2021 regarding Appellant's motion to suppress blood sample and on January 13, 2023 regarding Appellant's motion to exclude expert footwear impression testimony from Melinda Worley.

Less than a month before Appellant's case was scheduled for trial, the state agreed to withdraw its notice of intent to seek the death penalty in exchange for Appellant's waiver of his right to a jury trial. Appellant's case was ultimately called to trial on February 9, 2023 before Judge Nettles. Kernard Redmond, Heather Weiss, and Elizabeth Munnerlyn represented the state. S. Boyd Young, Emily Crayton, Robert Bank, and Hannah Freedman represented Appellant. R. 150.

On February 24, 2023, Judge Nettles found Appellant guilty as indicted. R. 1378, l. 19 – 1379, l. 4. Appellant was sentenced to life without parole for each count of murder, thirty years for kidnapping, thirty years for armed robbery, five years for use of a motor vehicle without owner's consent, and five years for the weapons offense. All sentences were ordered to be served concurrently. R. 1380, l. 12 – 1382, l. 12.

This appeal follows.

STATEMENT OF FACTS

In May 2017, Ella Lowery lived with her mother, Delores Lowery, and her children, Tyreon and Iyana, in a three bedroom home on Craig Circle in Bennettsville. Tyreon, who is autistic, was ten years old and Iyana was eight years old. Ella had a "risky lifestyle." She was a "party girl" who "liked to have sex." She "had a lot of men in her life" and "would see different men at the same time." Ella had three Facebook accounts that contained sexually graphic videos and photographs. She also engaged in video and phone "sex chats." R. 508, l. 17 – 509, l. 19; R. 1241, ll. 1-15.

Ella's mother, Delores, was a weaver at BGF Industries in Cheraw. She worked third shift from midnight until 8:00 am. Delores usually left their home in Bennettsville around 11:30 pm before her shift and would return home sometime between 8:15 and 8:30 in the morning after Ella had already taken the children to school. R. 321, l. 19 – 322, l. 19; R. 342, l. 7 – 343, l. 3.

On the night of May 4, 2017, Delores left her house around 11:30 pm like usual. When she left, Ella, Tyreon, and Iyana were all home. Delores returned home from work the following morning, May 5, 2017, shortly before 8:30 am. She entered the home through the side door under the carport as she typically did. When Delores reached the steps leading to the door, she noticed a cigarette butt on the top step. She was "stunned" because no one in her home smoked and she did not allow smoking in or around the house. R. 323, l. 1 – 324, l. 9. As soon as Delores entered the kitchen, she saw Ella lying face down on the floor of the den in a "puddle of blood." R. 324, l. 12 – 325, l. 8.

Delores "started hollering and screaming." She ran down the hallway where the bedrooms were located and began looking for Tyreon and Iyana. Tyreon ran out of his bedroom. Delores asked him where Iyana was and he said she had "gone to school." Delores searched the

house for Iyana, but did not find her. R. 334, ll. 3-19. During her search, she noticed the contents of Ella's purse were dumped out on Ella's bed where Ella and Iyana usually slept. R. 334, l. 23 – 335, l. 12. Delores immediately called 911. Deputies with the Marlboro County Sheriff's Office responded.

After confirming Iyana was not at school and did not ride the school bus that day, a search began for Iyana. R. 368, l. 12 – 369, l. 2. The Marlboro County Sheriff's Office requested assistance from the South Carolina Law Enforcement Division (SLED) and the Federal Bureau of Investigation (FBI). R. 705, ll. 1-13. Agents with SLED's Crime Scene Unit processed the scene. They collected the cigarette butt Delores noticed on the steps of the carport, along with other evidence, and submitted it to SLED for DNA analysis. There were also several footwear impressions on the linoleum floor in the kitchen and one on the concrete ground under the carport made in suspected blood. Cuttings from the linoleum floor containing these footwear impressions were collected and the impression in the carport was specially photographed.

In the months leading up to her death, Ella was dating Dwayne Bright. Delores told investigators that "this was a bad relationship" and that Bright called Ella "all kinds of bad names." Delores also told investigators that Ella dated Clifton Benjamin and that in the days before her death, Benjamin repeatedly called Ella but she would not answer his calls. R. 343, l. 13 – 346, l. 16.

Jamie Campbell, who had been friends with Ella since the tenth grade, called the Marlboro County Sheriff's Office upon finding out about Ella's death. R. 485, ll. 13-20. She told investigators that Ella considered obtaining a restraining order against Dwyane Bright in March 2017 and that he was verbally abusive toward her. Campbell also sent investigators screenshots of text messages Bright had sent Ella. R. 492, l. 3 – 494, l. 3.

Investigators interviewed Dwayne Bright on May 6, 2017 and simultaneously executed a search warrant at his house. Bright admitted to being at Ella's house. He said Ella had texted him "to come over for sex." Initially there was confusion concerning whether Bright was at Ella's house during the early morning hours of May 4, 2017 or May 5, 2017, the morning Ella died. After Bright was given a polygraph, he was further interrogated by Sergeant Jamie Seales. Seales confronted Bright with the "threatening" text messages Bright had sent Ella in March 2017 that law enforcement had received from Jamie Campbell. Seales also told Bright that Ella's blood was found on Bright's shoes and that the "wear patterns" on Bright's Nike Air Force 1 shoes would match the bloody footprints found at Ella's house. R. 782, l. 9 – 793, l. 22.

After being confronted with this evidence, Bright admitted to getting into an altercation with Ella that morning. He told Seales that Ella said, "fuck you, fuck you, just get the fuck out of my house" and then hit him. Bright tried to block Ella from hitting him. He admitted to hitting Ella at least three times. Seales then questioned Bright about a knife.[1] Bright told Seales that Ella had threatened to cut him before. That morning, Ella "had something. It was probably a knife." Bright said he tried to take the knife from Ella and she fell. Seales questioned Bright about the blood found on his shoes.[2] However, Bright "kept saying there was no blood." Bright exclaimed, "oh, my God, I don't know what I did." R. 782, l. 9 – 793, l. 22.

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[1] Law enforcement knew based on the autopsy that Ella had multiple stab wounds: two on her neck, one on her abdomen, two on her back, and one on her left hand. The two wounds to her neck were fatal as one injured the carotid artery and the other the left vertebral artery, which caused extensive bleeding. R. 248, l. 21 – 250, l. 16. Given the depth of the wounds to the neck, Ella's injuries were likely caused by a sharp instrument or knife with a blade about five inches long. R. 284, l. 21 – 288, l. 7.

[2] The DNA profile developed from swabs of suspected blood on the outside of Bright's shoes matched the DNA profile of Bright. R. 1191, l. 23 – 1194, l. 14. However, the DNA profile developed from swabs of the inside of Bright's shoes was a mixture of two individuals. Dwayne

Seales told Bright they had to find the knife. Bright said he threw the knife as he was walking down Ella's driveway. Investigators took Bright to Ella's house immediately after this confession in an effort to locate the knife. When they arrived, Bright "walked around the yard. He just kept walking around and saying I don't know where it is, I don't know where it went, I don't know where it's at." R. 793, l. 10 – 794, l. 15. Shortly thereafter, during the early morning hours of May 7, 2017, Bright was arrested and charged with Ella's murder. R. 794, ll. 16-25.

Investigators obtained a search warrant for Bright's phone records. R. 560, l. 19 – 562, l. 20. The records showed Ella and Bright exchanged several text messages during the late hours of May 3, 2017 into the early morning hours of May 4, 2017. The last text message Bright sent Ella was at 2:17 am on May 4, 2017, the day before Ella died. R. 565, l. 7 – 567, l. 22. Sergeant Seales admitted there was initially "confusion about the phone records" because investigators mistakenly believed Ella and Bright exchanged text messages during the late hours of May 4, 2017 into the early morning hours of May 5, 2017, the morning Ella died. R. 734, ll. 14-24. Investigators also obtained surveillance footage from a Bojangles restaurant based on Bright's statement that he walked home from Ella's house after the altercation and passed by Bojangles. R. 538, l. 22 – 540, l. 6; R. 694, l. 16 – 695, l. 8. The footage showed a person matching Bright's description walking past the restaurant at 1:20 am on May 4, 2017, the morning before Ella died. Bright allegedly did not drive because he had a seizure condition. "He walked everywhere he went." R. 601, ll. 7-19. This evidence suggested the altercation between Bright and Ella occurred the day before her death.

After Bright was arrested, special agents with the FBI interviewed Jamie Campbell on May 7, 2017 at her house in Grayson, Georgia. The agents questioned her about the information

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Bright and Ella Lowery were included as possible contributors to the major component of this mixture. R. 1189, l. 14 – 1191, l. 12.

she had previously shared concerning Dwayne Bright. They also questioned her about a number that appeared on Ella's phone records: 843-535-3480. Ella texted this number at 1:08:30 am on the morning of her death. It was the last outgoing activity on her phone.[3] This number texted Ella back at 1:08:55 am. Campbell identified this number as belonging to Appellant, Campbell's "off and on" boyfriend. This was the first time Appellant's name was mentioned during the investigation. R. 494, l. 18 – 497, l. 2.

Campbell and Appellant had lived together from 2010 until July 2016 at 603 Grace Street in Bennettsville, a Section 8 residence in Campbell's name. After Campbell moved to Georgia in July 2016, she allowed Appellant to continue living in the home, and the two talked every day. R. 486, l. 5 – 487, l. 14. Campbell was surprised Ella and Appellant had texted each other as she was unaware the two communicated. R. 494, l. 18 – 497, l. 2. After the FBI left her house on May 7, 2017, she called Appellant and told him she had just been questioned by the FBI, that agents were coming to talk to Appellant, and that he would have to explain why he was talking to Ella. Campbell also demanded that Appellant tell her why he had been talking to Ella. Appellant allegedly hung up the phone and Campbell was unable to reach him again. R. 497, l. 3 – 498, l. 18.

The cigarette butt collected from the carport steps was analyzed by Adrienne Hefney, a DNA analyst at SLED. Hefney was able to develop a DNA profile from the cigarette, but was initially unable to identify the profile. Hefney contacted Roxanne Love, a lieutenant in the investigative unit at SLED, who was supervising the investigation. Hefney told Love to notify her if law enforcement developed any other suspects or persons of interest and Hefney would "look at their databases" to see if the profile developed from the cigarette butt could be

[3] Ella continued to be active on Facebook until 1:38 am. R. 1241, l. 1 – 1246, l. 23.

identified. On May 8, 2017, when she became aware that Appellant's name "had come into play," Love contacted Hefney and gave her Appellant's name. Hefney told Love the DNA profile developed from the cigarette "matched the profile" SLED had in its database for Appellant. Hefney told Love she would need a known DNA standard for Appellant to compare to the DNA profile developed from the cigarette. Hefney told Love where she could obtain the known standard needed. R. 665, l. 3 – 667, l. 9.

Based on the information Love received from Hefney, Love contacted Sandy Wilkes, the evidence custodian for the Marlboro County Sheriff's Office, and requested Wilkes obtain the evidence box related to a 2005 murder investigation from storage. Appellant was charged with this unrelated murder in 2005, but was acquitted by a jury in 2007. Love obtained Appellant's known blood standard from this evidence box, and it was transported to SLED in Columbia. R. 667, l. 7 – 671, l. 4. Hefney later developed Appellant's known DNA profile from this blood standard and determined it matched the DNA profile developed from the cigarette butt.

Meanwhile, law enforcement obtained surveillance footage from cameras located at 602 Grace Street, a daycare located across the street from Appellant's residence in Bennettsville. The footage showed Appellant's vehicle coming and going during the late hours of May 4, 2017 and the early morning hours of May 5, 2017, the morning Ella died. Specifically, the footage showed Appellant's vehicle leaving at 10:50 pm, returning at 11:35 pm, leaving at 12:25 am, returning at 1:41 am, leaving at 1:46 am, and returning at 5:16 am. R. 815, l. 18 – 828, l. 21.

On May 9, 2017, FBI agents again interviewed Jamie Campbell at her home in Georgia. Campbell told the agents that Appellant drove a 1998 Mitsubishi Eclipse. Appellant bought this car in September 2016 "from an old lady" after Campbell had moved to Georgia. Campbell allowed Appellant to register the car in her name. Campbell also assisted Appellant in obtaining

insurance for the vehicle. Campbell added the Eclipse to her insurance policy because she already had insurance for her own vehicle. Appellant and Campbell shared responsibility for making the insurance payments even though the insurance was solely in her name. R. 515, l. 4 – 518, l. 7. Campbell was fine with this arrangement until Appellant got into a car accident in December 2016. "The insurance people and police were calling" Campbell. Because Campbell was "the one who [was] getting in trouble," she told Appellant to park the car in Rockingham, North Carolina where Appellant was staying and working at the time or "get somebody with a license to drive you in the car" since Appellant had a suspended license. R. 500, ll. 10-24. However, in the months that followed, Campbell was aware Appellant continued to drive the car as needed. R. 520, l. 23 – 521, l. 12.

After Campbell talked to the FBI on May 9, 2017, someone with law enforcement called Campbell and asked her if she had specifically given Appellant permission to drive the Mitsubishi Eclipse to Charlotte. Campbell told the person no because she had not spoken to Appellant in days. R. 501, ll. 7-24; R. 520, ll. 15-22. Based on Campbell's statement, investigators with the Marlboro County Sheriff's Office obtained an arrest warrant for Appellant for use of a vehicle without owner's consent. The warrant was entered into NCIC to assist in locating Appellant. R. 624, ll. 10-24.

Appellant was arrested without incident on May 11, 2017 at a convenience store in Charlotte after a license plate reader utilized by the Charlotte-Mecklenburg Police Department alerted police to the whereabouts of his vehicle. R. 871, l. 24 – 876, l. 19. Appellant's Mitsubishi Eclipse was towed to a "secured crime scene bay" at the Charlotte-Mecklenburg Police Department headquarters in Uptown Charlotte. R. 881, ll. 5-19. After a search warrant was obtained, the vehicle was processed by crime scene investigators with SLED. R. 892, l. 2 –

899, l. 1. While processing the vehicle, investigators used a chemical called Blue Star, which reacts to the hemoglobin in blood, to search for latent blood. R. 898, ll. 7-18. There was a reaction on the lock mechanism on the interior latch of the trunk, the bottom of the trunk, and the metal floorboard of the passenger seat. Swabs were collected from these areas. These swabs, along with other evidence collected from the vehicle, were analyzed for DNA by Adrienne Hefney at the SLED laboratory in Columbia. R. 909, l. 2 – 910, l. 21; R. 921, l. 25 – 922, l. 19.

Hefney developed a DNA profile from the swabs of the lock mechanism on the interior latch of the trunk. The DNA profile was a mixture of at least two individuals. The profile of the major contributor matched the DNA profile of Iyana. Hefney maintained that the "probability of randomly selecting an unrelated individual having a DNA profile matching the major contributor to this mixture was approximately one in 520 septillion." R. 1219, ll. 2-25. However, Hefney admitted she did not know how the DNA got there, how long it had been there, or whether it was from blood, salvia, skin cells, or some other bodily fluid. No serology testing was done on any of the evidence collected from the Eclipse. R. 1227, l. 1 – 1229, l. 8.

On May 12, 2017, Appellant was charged with Ella's murder.[4] However, Iyana had not been found yet. Richard LaBean, who lived on New Bridge Road in McColl, was familiar with Appellant. Appellant's family owned property next to LaBean on New Bridge Road and Appellant had lived there when he was younger. After Appellant moved away, LaBean saw Appellant near the abandoned house across the road from LaBean's property "a couple of times." R. 1095, l. 12 – 1100, l. 22.

Late on May 13, 2017, after LaBean learned Appellant had been arrested, he checked the footage from his home surveillance cameras. The footage allegedly showed a vehicle turning

[4] Around this time, Dwyane Bright was released from jail and the charge against him was dismissed.

into the property across the street from LaBean's residence and driving around to the back of the abandoned house during the early morning hours of May 5, 2017. About two to three hours later, the footage showed the vehicle leaving the abandoned house with its headlights off. Once the car reached New Bridge Road, the headlights turned on. The car turned left onto New Bridge Road in the direction of the bridge over Gum Swamp Creek. R. 1100, l. 23 – 1101, l. 15; R. 1109, l. 3 – 1110, l. 2.

LaBean immediately reported his findings to the police. Investigators with the Marlboro County Sheriff's Office responded to LaBean's house and watched the footage. They confirmed what the footage showed.[5] R. 626, l. 15 – 629, l. 22; R. 736, l. 16 – 737, l. 15. Based on this footage, the police secured the property, obtained a search warrant, and commenced a search at daybreak on May 14, 2017. R. 738, ll. 1-22. On the ground near the abandoned house, investigators found Ella Lowery's debit card and a receipt with Ella's name on it. Shortly thereafter, investigators found Iyana's body in Gum Swamp Creek, about one hundred to three hundred yards from the abandoned house. R. 422, l. 15 – 426, l. 18; R. 672, l. 19 – 675, l. 25. Her body was severely decomposed, and the pathologist could not determine a cause of death. R. 256, ll. 3-11. However, the pathologist concluded Iyana did not die from a stab wound or a gunshot wound because she would have seen evidence of such during her internal exam. R. 256,

[5] While several witnesses claimed the footage showed a vehicle entering the property and leaving several hours later, the footage downloaded by law enforcement did not show the vehicle arriving at the property. It only showed a vehicle leaving with its headlights off and turning onto New Bridge Road. If the footage of the vehicle arriving ever existed, investigators did not download or save it. R. 627, l. 19 – 629, l. 22; R. 645, ll. 8-23; R. 736, l. 16 – 737, l. 15; R. 740, ll. 11-23.

ll. 6-19. The only injuries Iyana had were fractures to several of her upper front teeth and a recently absent tooth.[6] R. 256, ll. 20-24.

Appellant was subsequently charged with murder related to Iyana's death among other charges.

[6] Investigators noticed Appellant's hand was injured upon his arrest. On May 31, 2017, Appellant's hand was x-rayed pursuant to a court order. The x-ray showed a "subacute fracture of the distal right fifth metacarpal." Subacute means the injury was at least two weeks to two to three months old. R. 1121, l. 5 – 1124, l. 9. The radiologist who later reviewed the x-ray maintained the injury was at least four to ten weeks old. R. 173, l. 17 – 176, l. 23. The state theorized that Appellant injured his hand by striking Iyana.

ARGUMENT

1.

The trial judge erred by denying Appellant's motion to suppress his DNA profile developed from Appellant's known blood standard, which was obtained during an unrelated murder investigation in 2005 in which Appellant was charged but subsequently acquitted by a jury in 2007, pursuant to S.C. Code § 17-1-40 since the blood standard was unlawfully retained by law enforcement and should have been destroyed after Appellant's acquittal.

Relevant Facts

Appellant moved pretrial to suppress his DNA. This motion was heard on December 20, 2021. Defense counsel explained that Appellant was charged with murder in 2005 by the Marlboro County Sheriff's Office. Appellant proceeded to trial and was acquitted by a jury on February 9, 2007. During the 2005 investigation, law enforcement obtained Appellant's known blood standard, which was analyzed by SLED. The Marlboro County Sheriff's Office retained Appellant's known blood standard even though Appellant was acquitted at trial. In 2017, when Appellant became a person of interest in this case, law enforcement located the known blood standard from the old case and used it to develop Appellant's DNA profile.

Defense counsel argued Appellant's known blood standard obtained in 2005 should have been destroyed upon Appellant's acquittal pursuant to S.C. Code § 17-1-40, which requires an individual's mug shots and fingerprints to be destroyed if the person is found not guilty of the underlying charge. Counsel acknowledged that the state is entitled to retain "crime scene evidence and continue to investigate the case." However, he argued a known blood standard is equivalent to a mugshot or fingerprint card and "is not crime scene evidence." R. 2, l. 12 – 3, l. 19.

Counsel further asserted, "Now, the value of that is that known blood standard, which should not have been in the State's possession, is what the State used to compare to a cigarette butt at the Lowery residence to say that it was their opinion that Mr. Harrington's DNA was on a cigarette butt, and that led to the probable cause for further investigation and actions. And we think that . . . since they had blood that they shouldn't have had, that would negate probable cause and taint future events." R. 3, l. 20 – 4, l. 5.

The prosecutor emphasized that the statute, § 17-1-40, "existed in one form prior to 2016 and in a separate form after 2016." She argued that prior to 2016, the statute required arrest and booking records, mugshots, and fingerprints be destroyed after a person charged with a criminal offense is found innocent of the charge. She maintained the statute was "interpreted by the courts" to apply to arrest records, fingerprints, and booking information taken from an individual arrested on a charge. She further claimed, "[C]ourts have also said that that [the destruction] is triggered by an expungement request and an expungement order by the Court." The prosecutor emphasized that Appellant did not request an expungement order until December 8, 2020, so the statute did not apply to Appellant's case. She further argued that even if it did apply to Appellant's case, the statute did not require the known blood standard be destroyed. R. 4, l. 17 – 7, l. 12.

Additionally, the prosecutor argued that after the statute was amended in 2016, it now specifically states that the enumerated items must be destroyed only after a person's record is expunged. R. 7, l. 13 – 8, l. 17.

The trial judge requested proposed orders on the motion, but subsequently denied Appellant's motion to suppress. R. 29, ll. 9-14. During trial, Appellant contemporaneously objected to any testimony and evidence concerning the known blood standard and Appellant's

DNA profile developed therefrom along with any related evidence derived therefrom. R. 666, ll. 11-15; R. 671, ll. 5-11; R. 672, ll. 2-9; R. 1145, ll. 14-17.

Standard of Review

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) (citing State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002)). "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. (citing State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)).

Discussion

The trial judge erred by denying Appellant's motion to suppress his DNA profile developed from Appellant's known blood standard, which was obtained in 2005 during an unrelated murder investigation in which Appellant was charged but subsequently acquitted by a jury in 2007, pursuant to S.C. Code § 17-1-40 since the blood standard was unlawfully retained by law enforcement and should have been destroyed after Appellant was found not guilty.

In 2007, when Appellant was acquitted of murder, Section 17-1-40 stated: "Any person who after being charged with a criminal offense and such charge is discharged or proceedings against such person dismissed or *is found to be innocent of such charge* the arrest and booking record, files, mug shots, and fingerprints of such person *shall be destroyed* and no evidence of such record pertaining to such charge shall be retained by any municipal, county, or State law enforcement agency." (emphasis added). This version of the statute was effective until June 11, 2007.[7]

[7] Appellant was found not guilty by a jury on February 9, 2007. See R. 39.

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." Bryant v. State, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009) (quoting Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996)) (internal quotation marks omitted). "As such, a court must abide by the plain meaning of the words of a statute." State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) (citing Hodge v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). Also, penal statutes must be strictly construed against the state and in favor of the defendant. Hair v. State, 305 S.C. 77, 79, 406 S.E.2d 332, 334 (1991) (citing State v. Cutler, 274 S.C. 376, 378, 264 S.E.2d 420, 420-421 (1980)); State v. Muldrow, 348 S.C. 264, 268, 559 S.E.2d 847, 849 (2002).

Under the plain language of the statute in effect at the time of Appellant's acquittal, all of Appellant's arrest and bookings records, files, mug shots, and fingerprints related to his 2005 murder charge should have been destroyed after he was found not guilty by a jury on February 9, 2007. As defense counsel argued pretrial, Appellant's known blood standard is the equivalent to his fingerprints and other arrest records and is not considered "crime scene evidence." Accordingly, the known blood standard likewise should have been destroyed and was unlawfully retained by law enforcement. Because Appellant's known blood standard was unlawfully retained, it and any evidence derived from its unlawful retention should have been suppressed by the trial judge.

Moreover, to address the prosecutor's argument pretrial, the version of the statute in effect in 2016 did not apply to Appellant's case as it did not come into effect until nearly ten years after Appellant's known blood standard should have been destroyed.

Respectfully, this Court should hold the trial judge erred by denying Appellant's motion to suppress, reverse Appellant's convictions, and remand for a new trial.

2.

The trial judge abused his discretion by admitting expert testimony on footwear impression analysis from Melinda Worley pursuant to Rule 702, SCRE, since the subject matter of her testimony was unreliable, and Rule 403, SCRE since any probative value of the evidence was outweighed by the danger of unfair prejudice given its unreliability.

Relevant Facts

Appellant moved pretrial to exclude expert footwear impression testimony from Melinda Worley pursuant to Rule 702, SCRE, and Rule 403, SCRE. The judge held a pretrial hearing on the motion on January 13, 2023, in which the state proffered Worley's qualifications. The judge decided to wait until a later date to hear the substance of Worley's testimony because he wanted to "give a great deal of thought" about whether Worley was qualified. R. 99, l. 7 – 120, l. 10.

Before Worley testified at trial, defense counsel argued Worley was not qualified as an expert in the analysis of footwear impressions and that her testimony was unreliable because she did not follow standard scientific procedures followed by experts in the field. R. 981, ll. 5-18. The prosecutor maintained Worley "is an expert in the field" and that she followed proper procedures "step by step." She also argued Worley's conclusions were reviewed by her supervisor. Because Worley followed "SLED's process" and her analysis was peer reviewed, the prosecutor asserted Worley's testimony was reliable and should be admitted. R. 981, l. 5 – 982, l. 11.

The judge stated that since it was a bench trial, he would have to hear Worley's testimony and then make a ruling on whether it was admissible. R. 982, l. 22 – 983, l. 2. Because the judge had previously found Worley qualified as an expert in the field, the prosecutor did not have Worley repeat her qualifications. R. 984, ll. 11-20.

Worley explained that she received Dwayne Bright's shoes seized from his residence on May 6, 2017, during the execution of a search warrant, and the shoes Appellant was wearing when he was arrested in Charlotte on May 11, 2017. Bright's shoes were size 12 Nike Air Force 1s, which were marked as SLED's Item 52 and State's Exhibit No. 109. Appellant's shoes were size 13 Nike Air Force 1s, which were marked as SLED's Item 100 and State's Exhibit No. 153. R. 990, l. 1 – 991, l. 22; R. 1008, l. 23 – 1009, l. 6. Worley also received five cuttings from the linoleum floor bearing footwear impressions. She sent these to the "photography studio" to be photographed and printed to scale. R. 991, l. 23 – 992, l. 22. She also requested the photography lab print photographs of the impression found on the ground of the carport. These photographs were also printed to scale. R. 992, l. 23 – 994, l. 16.

Worley created "inked test impressions of the known shoes" to compare to photographs of the unknown impressions collected from Ella's house. In order to create the test impressions, Worley had someone who wears a similar size shoe wear the known shoes. She then applied ink to the shoes and had the person step directly onto "the transparency." Worley admitted that she no longer uses this method to create test impressions. She now creates test impressions on thick card stock paper and reprints the impressions on the transparencies because "stepping directly onto the transparency" is "slippery with the ink." R. 985, l. 13 – 986, l. 7. The test impressions of Bright's shoes were marked as State's Exhibit No. 115 while the test impressions of Appellant's shoes were marked as State's Exhibit No. 154. R. 1001, ll. 7-10.

After Worley created the test impressions, she overlayed the transparencies onto the printed photographs of the unknown impressions to compare. R. 995, ll. 13-16. Before doing so, Worley concluded the quality and clarity of the unknown impressions was suitable for comparison. R. 1002, l. 4 – 1003, l. 11.

During her comparisons, Worley first looks for class characteristics, such as size, shape, and outsole design. If the class characteristics are consistent, Worley then looks for wear and any random characteristics in the impression. R. 1004, ll. 5-16. Worley testified that the size 12 and size 13 test impressions were "very close together in size." She determined that there was "not a lot of difference in the toe end" of the size 12 and the size 13 shoes and the heel of the shoes "were basically the same." R. 1004, l. 17 – 1005, l. 23. However, she concluded that the "length of the parallel lines in the middle" were "slightly longer" in the size 13 shoes than in the size 12 shoes. R. 1006, ll. 4-9. The arcs of the different size shoes were slightly different as well. R. 1006, ll. 13-20.

Worley concluded that three of the unknown footwear impressions found on the kitchen floor could have been made by both Bright's and Appellant's shoes because they displayed the same class characteristics. She further concluded that two additional impressions found on the kitchen floor as well as the impression found in the carport could have been made by Appellant's shoes, but not by Bright's shoes. It was her opinion that these unknown impressions were "more consistent with the size 13 than the size 12." R. 1007, l. 13 – 1013, l. 8. Worley summarized, "Some of them I couldn't tell a difference between the [size] 12 and the 13. I couldn't rule one out; so I included both of them. And others I determined that they were corresponding in combined class characteristics of the size 13 shoe more so than the size 12." R. 1017, ll. 13-20. However, there was no "wear that was visible in any of the impressions" so Worley's results were that they corresponded in "combined class characteristics only." R. 1017, ll. 6-12.

Worley testified that she followed "the same procedure" she was taught when she was trained on how to conduct footwear comparisons "from start to finish" and that she uses the same procedure for every case she analyzes. She explained that all of her work is peer reviewed by

one of two qualified examiners at SLED. The peer reviewer receives Worley's "examination worksheet and table of contents, all of the photographs of the unknown impressions, [and] the test impressions that [she] created. The peer reviewer then overlays the test impressions onto the photographs of the unknown impressions and determines whether he agrees with her results or does not agree with her results. If the peer reviewer notices a "discrepancy" with her conclusions, then he will "send it back" to Worley and ask her to take a closer look. After Worley corrects "whatever needs to be fixed," she sends it back to the peer reviewer, and if he is then satisfied, he will approve her report. R. 987, l. 15 – 988, l. 19.

When questioned by the judge, Worley maintained that footwear impression analysis has achieved widespread acceptance in the scientific and law enforcement community. She testified that there are scientific publications on the subject and that the technique has been tested. However, she was unaware of the error rate or whether an error rate had been calculated. Lastly, she maintained that there are guidelines or standards set forth and that she follows these guidelines. R. 1018, l. 7 – 1019, l. 12.

On cross-examination, Worley admitted that her laboratory does not have *Forensic Footwear Evidence* by Will Bodziak and does not follow the protocol outlined in the book. However, she recognized that the techniques described in the book are considered the "gold standard practices" for forensic footwear analysis. While she does not follow the practices outlined in *Forensic Footwear Evidence*, Worley maintained that she follows the accepted protocols utilized by her lab. R. 1020, l. 10 – 1021, l. 11.

Worley acknowledged that it is important to create numerous test impressions of each shoe because no two footwear impressions even from the same shoe are identical given various factors, such as whether the individual touches the floor with his toes first or his heel. However,

in Appellant's case, Worley only created two test impressions of each shoe. She also admitted that her test impressions in this case "weren't the best" but they were "what [she] ended up with." She acknowledged that she could have redone the test impressions, but did not.

Worley also agreed that it is "notoriously hard" to determine size differences in Nike Air Force 1s. Bodziak reports that the "standard deviations in sizes for Air Force 1s range from approximately 2.6 millimeters for a size 10 shoe and 1.6 millimeters for a size 12 shoe." This means that a size 12 Air Force 1 could vary from another size 12 Air Force 1 by as much as 1.6 millimeters. Given this, Worley admitted it is difficult to detect differences between sizes on an Air Force 1 shoe. However, she maintained that she spent a lot of time "going back and forth between" the test impressions and the unknown impressions "until [she] was comfortable with [her] result." R. 1027, l. 18 – 1028, l. 17.

Worley testified that she had to rely on size differences in this case because she did not have a "specific wear pattern." She admitted that she measured from heel to toe on the test impressions with a ruler. However, that is "not something [she would] normally do" because it is "not best practice." She only measured the test impressions with a ruler in this case because she had "to do something to try to determine what the difference is between them [Bright's size 12 shoes and Appellant's size 13 shoes]." R. 1029, l. 5 – 1030, l. 2.

Lastly, Worley admitted that her analysis only consisted of overlaying the test impression on top of the unknown impression to see "if it agrees or does not agree and where it agrees or doesn't agree." This is the way her lab has "always done it" even if this method is not endorsed by Bodziak. R. 1031, l. 18 – 1032, l. 12.

After Worley testified, the judge found "footwear analysis and the discipline is something that's not within the ordinary knowledge of an ordinary layperson" and is the type testimony that

would "aid the factfinder in understanding the evidence." He further found Worley is qualified and that her testimony is admissible. R. 1035, l. 16 – 1036, l. 2.

Standard of Review

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) (citing State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002)). "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. (citing State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)).

Discussion

The trial judge abused his discretion by admitting expert footwear impression testimony from Melinda Worley pursuant to Rule 702, SCRE, because evidence was unreliable, and pursuant to Rule 403, SCRE, since any probative value of the evidence was outweighed by the danger of unfair prejudice given its unreliability.

The admission of expert testimony is governed by Rule 702, SCRE, which provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." "When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999); See Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010). "Reliability is a central feature of Rule 702 admissibility." State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009) (citing State v.

Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001) (finding error in the trial court's decision to admit "unreliable" expert evidence).

"The trial judge should apply the Jones[8] factors to determine reliability. Council, 335 S.C. at 20, 515 S.E.2d at 518. "The Jones reliability factors take into consideration: (1) the publications and peer reviews 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, 573, 541 S.E.2d 813, 819 (2001). "Further, if the evidence is admissible under Rule 702, SCRE, the trial judge should determine if its probative value is outweighed by its prejudicial effect." Council, 335 S.C. at 20, 515 S.E.2d at 518 (citing Rule 403, SCRE).

Worley admitted that she did not follow "best practices" during her analysis in this case. While she recognized that the techniques described in *Forensic Footwear Evidence* by Will Bodziak are considered the "gold standard practices" for forensic footwear analysis, she does not (and did not in this case) follow the practices outlined in the book. R. 1020, l. 10 – 1021, l. 11.

Worley acknowledged that it is important to create numerous test impressions of each shoe because no two footwear impressions even from the same shoe are identical given various factors, such as whether the individual touches the floor with his toes first or his heel. However, in Appellant's case, Worley only created two test impressions of each shoe. She also admitted that her test impressions in this case "weren't the best" but they were "what [she] ended up with." She acknowledged that she could have redone the test impressions, but did not.

Worley testified that she had to rely on size differences in this case because she did not have a "specific wear pattern." She admitted that she measured from heel to toe on the test

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

impressions with a ruler. However, that is "not something [she would] normally do" because it is "not best practice." She only measured the test impressions with a ruler in this case because she had "to do something to try to determine what the difference is between them [Bright's size 12 shoes and Appellant's size 13 shoes]." R. 1029, l. 5 – 1030, l. 2.

Worley also agreed that it is "notoriously hard" to determine size differences in Nike Air Force 1s. Bodziak reports that the "standard deviations in sizes for Air Force 1s range from approximately 2.6 millimeters for a size 10 shoe and 1.6 millimeters for a size 12 shoe." This means that a size 12 Air Force 1 could vary from another size 12 Air Force 1 by as much as 1.6 millimeters. Given this, Worley admitted it is difficult to detect differences between sizes on an Air Force 1 shoe. However, her conclusions in this case were based exclusively on the size differences between Bright's and Appellant's shoes. R. 1027, l. 18 – 1028, l. 17.

Finally, Worley admitted that her analysis only consisted of overlaying the test impression on top of the unknown impression to see "if it agrees or does not agree and where it agrees or doesn't agree." This is the way her lab has "always done it" even if this method is not endorsed by Bodziak. R. 1031, l. 18 – 1032, l. 12.

Based on Worley's admission that she did not follow best practices during her analysis in this case, her testimony and conclusions were unreliable and should have been excluded by the trial judge pursuant to Rule 702, SCRE. Additionally, because her conclusions were unreliable, her testimony had no probative value. Even if her testimony did have probative value, it was substantially outweighed by the danger of unfair prejudice given the unreliability of the evidence.

Respectfully, this Court should hold the trial judge abused his discretion by admitting Worley's expert testimony pursuant to Rule 702 and Rule 403, reverse Appellant's convictions, and remand for a new trial.

3.

The trial judge erred by sentencing Appellant to five years for possession of a weapon during the commission of a violent crime when he was sentenced to life without parole for murder in violation of S.C. Code Ann. § 16-23-490(A).

Relevant Facts

The judge sentenced Appellant to life without parole for murder, thirty years for kidnapping, thirty years for armed robbery, five years for use of a motor vehicle without owner's consent, and five years for possession of a weapon during the commission of a violent crime. He ordered all sentences be served concurrently. R. 1380, l. 12 – 1382, l. 12. Immediately after the judge imposed the sentence, defense counsel stated, "You Honor, with regard to the - - and I've seen this done a couple of different ways. I didn't know if you gave - - I know you don't give a consecutive sentence when you give a life sentence on the use of a weapon during the commission of a violent crime. *I thought that the way that it was interpreted was that you didn't get sentenced on it if you were also sentenced to life*. I don't know the correct answer on that. R. 1381, ll. 17-24 (emphasis added).

The judge responded, "A lot of people think that it's mandatory consecutive, but it's not. You can sentence concurrent, and that's what I did. There's - - certainly [there] are avenues. If I've sentenced him incorrectly, I'm certain y'all will know how to address that, but all of the sentences are to run concurrent." R. 1382, ll. 5-12. The proceedings then concluded.

Standard of Review

"A sentence will not be overturned absent an abuse of discretion when the ruling is based on an error of law or a factual conclusion without evidentiary support." In re M.B.H., 387 S.C.

323, 326, 692 S.E.2d 541, 542 (2010) (citing State v. Rice, 375 S.C. 302, 315, 652 S.E.2d 409, 415 (Ct. App. 2007)).

Discussion

The trial judge erred by sentencing Appellant to five years for possession of a weapon during the commission of a violent crime when he was sentenced to life without parole for murder in violation of S.C. Code Ann. § 16-23-490(A).

The plain language of S.C. Code Ann. § 16-23-490(A) is unambiguous. The five year sentence for possession of a weapon during the commission of a violent crime does not apply where the defendant is sentenced to life without parole for the violent crime. Section 16-23-490(A) states:

> If a person is in possession of a firearm or visibly displays what appears to be a firearm or visibly displays a knife during the commission of a violent crime and is convicted of committing or attempting to commit a violent crime as defined in Section 16-1-60, he must be imprisoned five years, in addition to the punishment provided for the principal crime. *This five-year sentence **does not apply** in cases where the death penalty or a life sentence without parole is imposed for the violent crime.*

(emphasis added).

In State v. Owens, the appellant, who was sentenced to death for murder, argued the trial judge erred in sentencing him for possession of a firearm during the commission of a violent crime because § 16-23-490(A) prohibits such a sentence where the death penalty is imposed. Our Supreme Court agreed. State v. Owens, 346 S.C. 637, 666-667, 552 S.E.2d 745, 760 (2001), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). The Court wrote:

> Section 16-23-490(A) (Supp. 2000) states:
>
> If a person is in possession of a firearm or visibly displays what appears to be a firearm ... during the commission of a violent crime and is convicted of

> committing ... a violent crime ..., he must be imprisoned five years, in addition to the punishment for the principal crime. *This five-year sentence does not apply in cases where the death penalty* or a life sentence without parole *is imposed for the violent crime.*
>
> Section 16-23-490(A) expressly provides the mandatory five year sentence for possession of a firearm during the commission of a violent crime shall not be imposed when the defendant is sentenced to death or to life without parole for the violent crime. Appellant was sentenced to death. Accordingly, we vacate the five year sentence for possession of a firearm during the commission of a violent crime.

Id. (emphasis in original).

Subsequently, in State v. Palmer, 415 S.C. 502, 525, 783 S.E.2d 823, 835 (Ct. App. 2016), this Court stated:

> Palmer was found guilty of murder and possession of a weapon during the commission of a violent crime. The court sentenced Palmer to five years' imprisonment on the possession of a weapon during the commission of a violent crime after sentencing him to life without parole on the murder. Palmer objected to the sentence. Palmer argues this was in error because S.C. Code Ann. § 16-23-490(A) (2015) provides the five-year sentence is inapplicable when a court imposes a life without parole sentence.
>
> The State concedes this was in error, and we agree. Therefore, Palmer's sentence for possession of a weapon during the commission of a violent crime should be vacated.

(internal citations omitted).

While defense counsel correctly informed the judge that the five year sentence for possession of a weapon during the commission of a violent crime does not apply if the defendant is sentenced to life without parole for the underlying violent crime, counsel ultimately did not object to the sentence imposed. Consequently, there is an argument this sentencing error is not preserved for appellate review. However, in the interest of judicial economy, this Court should hold the trial judge erred in sentencing Appellant to five years for possession of a weapon during the commission of a violent crime and vacate Appellant's five year sentence. See State v. Johnston, 333 S.C. 459, 510 S.E.2d 423 (1999) (remanding for resentencing where the sentence

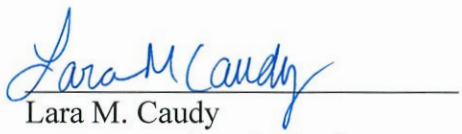
imposed was excessive even though no challenge was made to the sentence at trial); State v. Vick 384 S.C. 189, 682 S.E.2d 275 (Ct. App. 2009) (vacating a sentence for kidnapping in the interest of judicial economy where such sentence was precluded by S.C. Code Ann. § 16-3-910 because the defendant received a concurrent sentence under the murder statute even though no challenge was made to the sentence at trial); State v. Bonner, 400 S.C. 561, 735 S.E.2d 525 (Ct. App. 2012) (vacating the defendant's sentence of life without parole for first degree burglary pursuant to Graham v. Florida, 560 U.S. 48 (2010), which forbids the imposition of a LWOP sentence for a nonhomicide crime committed by a juvenile, even though no challenge was made to the sentence at trial).

Appellant was convicted of murder, a violent crime as defined in S.C. Code Ann. § 16-1-60, and sentenced to life without parole. Consequently, the trial judge erred in sentencing Appellant to five years for possession of a weapon during the commission of a violent crime. His five year sentence should be vacated.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial. In the alternative, Appellant requests this Court vacate his sentence for possession of a weapon during the commission of a violent crime.

Respectfully submitted,



Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of November, 2024.

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SC Court of Appeals

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."

November 26, 2024.

Lara M. Caudy
Senior 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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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Marlboro County

Honorable Michael G. Nettles, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

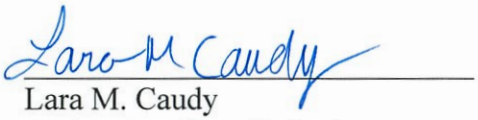
JEJAUNCEY FERNANDO HARRINGTON,

APPELLANT.

APPELLATE CASE NO. 2023-000305

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above referenced case has been served upon J. Anthony Mabry, Esquire, at the primary email address listed in the Attorney Information System (AIS), this 26th day of November, 2024.



Lara M. Caudy
Senior Appellate Defender

ATTORNEY FOR APPELLANT