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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Maite Murphy, Circuit Court Judge

The State, Respondent,

v.

Kenneth Henry Eastwood, Appellant

Appellate Case No. 2023-001798

INITIAL REPLY BRIEF OF APPELLANT

Adam Sinclair Ruffin
SC Bar No. 101350
1320 Main Street, Suite 300
Columbia, SC 29201
(803) 470-5629
adam@ruffinappeals.com
Attorney for Appellant

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ARGUMENT IN REPLY

The reliability of polygraph results is irrelevant to the issue before this Court, the jury would not have been confused by the distinction between the reliability of polygraphs and various circumstances that may lead a suspect to give a false confession, and the exclusion of Hirsch's testimony was not harmless beyond a reasonable doubt.

Rule 702

The State focuses its Rule 702 analysis on whether polygraph results are reliable. It points out that “[Eastwood] failed to provide any testimony that the polygraph is reliable,” and that “[Eastwood’s] own expert testified that polygraphs are generally unreliable.” IBOR 13. But whether the results of polygraph tests are reliable is not an issue in this case. And whatever the results of Eastwood’s polygraph test were, they were irrelevant to the point Eastwood was making through his expert, Professor Hirsch.

The testimony excluded by the trial court was that Eastwood was informed by law enforcement that he failed a polygraph prior to confessing. Whether he actually failed didn’t matter to Hirsch’s testimony. What mattered is that Eastwood was told that he failed. Tr. 557, ll. 9 – 18. Because of this, both the State and the trial judge are mistaken in their view that the polygraph testimony was inadmissible under Rule 702.

In reality, there is no reliability question under Rule 702 presented in this case. Since Professor Hirsch was qualified in the field of false confessions and interrogation methods, any Rule 702 reliability analysis would have been centered around the reliability of those disciplines. But the State did not challenge the reliability of false confession expert testimony. And even if the State had objected to the reliability of false confession expert testimony, Hirsch easily satisfied Rule 702 in this regard through his knowledge, training, expertise, and methodology. Tr. 541, l. 12

– 549, l. 25. Additionally, the admission of false confession expert testimony has been tacitly endorsed by our Supreme Court in both *State v. Cope*, 405 S.C. 317, 748 S.E.2d 194 (2013) and *State v. Myers*, 359 S.C. 40, 596 S.E.2d 488 (2004).

The trial judge erred in excluding any mention of the fact that Eastwood was given a polygraph and told that he failed prior to confessing. This fact was relied on by Professor Hirsch in forming his opinion and he should have been permitted to fully explain his opinion to the jury. Since the results of Eastwood’s polygraph were irrelevant to Hirsch’s opinion, the unreliability of polygraph results was not a proper basis to exclude this testimony.

Rule 403

The State argues that the jury would have been confused if they were informed that Eastwood was told by law enforcement that he failed a polygraph prior to confessing. IBOR 17. It’s unclear how the jury would be confused by this testimony when they had already been informed by Hirsch that these circumstances may contribute to a false confession. Testimony that these circumstances were present in Eastwood’s case would not have confused the jury but instead would have clarified Hirsch’s opinion.

The State relies heavily on *State v. Wright*, 322 S.C. 253, 471 S.E.2d 700 (1996) in support of its argument that any mention of a polygraph would have been improper. IBOR 16-17. *Wright* is distinguishable from this case because the issue in *Wright* was whether the defendant’s confession was involuntary. The polygraph examiner in *Wright* had informed the defendant that the results of the polygraph were admissible in court and that he failed. *Wright*, 322 S.C. at 255, 471 S.E.2d at 701. The *Wright* Court found that “the only inference the jury could reasonably have drawn from learning appellant’s confession followed closely after a deceptive polygraph was that the confession was truthful and the answers given to the polygraph exam were untruthful [which]

would serve to bolster the confession rather than persuade the jury to believe the alleged coercion.” *Id.* at 256, 471 S.E.2d at 702. However, in this case Hirsch explained to the jury that a suspect being informed that he failed a polygraph test may contribute to a false confession, not a true one. Therefore, the assumption that the jury would infer that a confession given after a failed polygraph was true was directly contradicted by Hirsch’s testimony.

The jury would not have been confused by learning that circumstances which Hirsch had already explained to them could lead to false confessions were present in Eastwood’s case. It would have indeed had the opposite effect on them. They would have more clearly understood why Hirsch reached the opinion he did regarding Eastwood’s confession.

Harmless Error

Appellate courts will not reverse trial errors if the error was harmless beyond a reasonable doubt. *State v. Burdette*, 427 S.C. 490, 496, 832 S.E.2d 575, 578 (2019). “Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained.” *State v. Fletcher*, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). If the defendant’s guilt is conclusively proven by competent evidence such that no other rational conclusion could be reached, then any trial error which does not affect the result of the trial is harmless. *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989). The exclusion of cumulative evidence may also be harmless. *See State v. Myers*, 359 S.C. 40, 596 S.E.2d 488 (2004).

The State argues that “[Eastwood’s] expert testified extensively about the false confession theory, including the use of polygraphs as a ruse to convince a defendant to confess” and that “the only thing [Eastwood’s] expert was not allowed to do was say the word ‘polygraph’ in connection with [Eastwood’s] interviews.” IBOR 14. But that is not the only thing Hirsch wasn’t allowed to say. The jury wasn’t allowed to hear any testimony that Eastwood agreed to take a polygraph, was

given a polygraph, and then was told by law enforcement that he failed. It is this series of circumstances that may contribute to a false confession. And while Hirsch was allowed to explain that these circumstances may contribute to a false confession, the jury was not informed that each of these circumstances was present in Eastwood's case.

The State also argues that there is no difference between the jury hearing testimony that law enforcement told Eastwood they knew he was lying, and Eastwood being told that he failed a polygraph. The State claims that Hirsch testified that "it is being confronted with the suggestion that he is lying that can lead to a false confession." IBOR 15-16. This is not what Hirsch said. Hirsch testified that law enforcement will use "the polygraph as a ruse to convince the person to confess" and that "often the polygrapher will tell the suspect, this is one hundred percent accurate. This never fails. This is science. And the average person may believe it." Tr. 557, l. 16 – 558, l. 1.

It's not merely being confronted with lying that was underpinning Hirsch's testimony in this case. It is being confronted with the failure of a polygraph in particular that may lead to a false confession. Hirsch's testimony as limited by the trial judge did not adequately convey to the jury the basis for Hirsch's opinion regarding Eastwood's confession. And while the State is correct that "the central issue before the jury was whether [Eastwood] murdered [Cara]," the jury could only answer this question by determining whether Eastwood's confession was true or false. And the jury could not adequately answer that question without hearing the excluded testimony regarding Eastwood being informed he failed a polygraph prior to confessing.

CONCLUSION

For the reasons argued in Eastwood’s opening brief, and this reply brief, this Court should reverse his conviction and remand this case for a new trial.



Adam Sinclair Ruffin
SC Bar No. 101350
1320 Main Street, Suite 300
Columbia, SC 29201
(803) 470-5629
adam@ruffinappeals.com
Attorney for Appellant

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PROOF OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, undersigned counsel hereby certifies that a true copy of the initial brief of appellant in the above referenced case has been served upon Deborah Shupe, at the primary e-mail address listed in the Attorney Information System (AIS), this 2nd day of December 2024.



Adam Sinclair Ruffin
SC Bar No. 101350
1320 Main Street, Suite 300
Columbia, SC 29201
(803) 470-5629
adam@ruffinappeals.com
Attorney for Appellant