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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
The Honorable Alex Kinlaw, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

JASMINE LIZ MARIE ROBINSON,

APPELLANT.

Appellate Case No. 2023-000830

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

R. BRANDON LARRABEE
Assistant Attorney General
S.C. Bar No. 104865

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-6305

HON. W. WALTER WILKINS
Solicitor, Thirteenth Judicial Circuit
305 East North Street, Ste. 325
Greenville, South Carolina 29601-2185
(864) 467-8647

ATTORNEYS FOR RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by allowing an expert witness, a forensic pathologist, to testify regarding the findings of the decedent's autopsy, including the manner and cause of death, when the witness did not perform the autopsy but merely peer reviewed the findings of the pathologist who actually performed the autopsy in violation of Appellant's Sixth Amendment right to confront the witnesses against her?

RESPONDENT'S COUNTER-STATEMENT OF ISSUE ON APPEAL

Where the evidence at trial showed that the Appellant's gun went off, the victim died from a gunshot wound to the head, and Appellant's theory of the case rested primarily on disputing the presence of malice, was any alleged error in the admission of expert testimony that did not violate Appellant's Confrontation Clause rights harmless?

STATEMENT OF THE CASE

Appellant was indicted on charges of murder, attempted murder, and possession of a weapon during a violent crime. (R. pp. 773-776) Appellant proceeded to trial in front of the Honorable Alex Kinlaw Jr. (R. p. 1). The trial was conducted May 8, 9, 11, and 12, 2023. *Id.* Appellant was represented by Ernest Hamilton, Esq. *Id.* The State was represented by Assistant Solicitors Meghan A. Gasser and Brittany D. Scott. *Id.*

A pre-trial motion in limine concerned the testimony of Dr. Grace Dukes. (R. p. 75, l. 9–p. 83, l. 14). The trial court did not immediately rule on the issue. The trial court later decided to admit the testimony. (R. p. 344, ll. 17–20). At the conclusion of the trial, Appellant was found guilty on all counts. (R. p. 764, ll. 3–11). She was sentenced to 45 years for murder, 20 years for attempted murder, and five years for possession of a weapon during a violent crime. (R. p. 770, l. 22–p. 771, l. 8). This appeal follows.

STATEMENT OF FACTS

Appellant Jasmine Liz Marie Robinson killed the man with whom she had shared a tempestuous relationship after finding him in his car with another woman. The evidence in the record cannot reasonably lead to any other conclusion.

Sometime around midnight between November 5 and 6, 2020, [1] Patience Parks (Patience) went to meet her boyfriend, Desmond Parks (Desmond),[2] at his mother's house. (R. p. 196, l. 21–p. 197, l. 12). After conversation and a carryout meal from Waffle House, Desmond said he needed to go to the store. (R. p. 198, ll. 4–24). Patience and Desmond drove in his silver Acura to a nearby Spinx. (R. p. 199, ll. 9–25).

While they were at the Spinx, a "young lady pulled in." (R. p. 202, ll. 21–24). It was Appellant. (R. p. 203, ll. 16–21).

According to Patience's testimony, Appellant tried to use her vehicle to block the two from leaving by pulling up on the passenger side. (R. p. 204, ll. 10–14). Patience urged Desmond to drive around Appellant. (R. p. 204, ll. 15–16).[3] Desmond did so, but Appellant began to pursue them in her vehicle. (R. p. 207, ll. 6–7).

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[1] Counsel uses this phraseology to avoid confusion. It was one minute after 11:59 p.m. on November 5.

[2] While they shared a last name, Patience and Desmond were neither married nor related. (R. p. 201, l. 21–R. p. 202, l. 3). "We made sure of that," Patience said of the latter. (R. p. 202, l. 1).

[3] At a separate point, Patience is quoted in the transcript as saying: "I told [Desmond] not to go around her because we did not have time for any type of conflict." (R. p. 207, ll. 5–7). Based on the context and a full view of Patience's testimony, counsel believes that Patience testified accurately in saying that she *did* advise Desmond to drive around Appellant's car. In either case, whether Patience asked him to drive around Appellant or not, he did so, and it is not material to the issues before this Court.

During Appellant's pursuit, she and Desmond had a phone call; Patience could tell that Appellant was yelling. (R. p. 207, l. 21–p. 208, l. 1). Desmond asked Appellant not to follow his car back to his mother's house. (R. p. 208, ll. 5–10). He also told Appellant, according to Patience, that "I told you what it was already. You already know what it is." *Id.*

Shortly after that was when Patience felt the shards of glass hit her in the neck. (R. p. 208, ll. 24–25). Desmond "was slumped at that point." (R. p. 208, l. 25–p. 209, l. 1). The car came to a stop. (R. p. 209, ll. 4–19).

Appellant soon appeared at the driver's side door and opened it. (R. p. 210, ll. 2–4). She pointed the gun at Patience and pulled the trigger. (R. p. 210, ll. 5–6). But the gun had jammed, and while Appellant attempted to "unjam" it, Patience begged for her life. (R. p. 210, ll. 7–12; p. 211, ll. 3–12). Apparently unable to get the gun to operate, Appellant backed away from Desmond's car, back to her own vehicle. (R. p. 212, ll. 12–25). Patience, unable to compose her thoughts enough to unlock her own door, crawled across Desmond and asked Appellant "why did you do that?" (R. p. 213, ll. 3–12). Back in her vehicle, Appellant then "pulled off like she was leaving the store." (R. p. 213, ll. 17–18).

Patience called 9-1-1. (R. p. 214, ll. 2–10). She went to a nearby house to try to get help, in part because she was not able to remember what street she was on. (R. p. 215, ll. 3–6). She also tried, at first unsuccessfully, to get other cars to stop and help them; one eventually did. (R. p. 215, ll. 7–9). She would periodically return to the car, because "I didn't want Desmond to feel like I was leaving him." (R. p. 216, ll. 4–10).

Testifying on her own behalf, Appellant told a slightly different story. She produced photographs during her testimony to show that she and Desmond were still together as recently as

May 31, 2020. (R. p. 570, ll. 17–20).[4] They had lived together since 2013, and purportedly held themselves out as husband and wife. (R. p. 583, ll. 4–21). Their relationship was troubled because Desmond was having children with other women, but Appellant denied that he was in a "physical relationship" with the other women. (R. p. 584, ll. 9–12; p. 608, ll. 2–9).[5] Appellant conceded that she had discussed moving out on Desmond, but she said she was not serious. (R. p. 600, ll. 3–19). She said they were still in a relationship as of September 2020. (R. 626, l. 22–p. 627, l. 3).

In the early moments of November 6, Appellant got off early from her overnight work shift. (R. p. 586, ll. 13–21). She eventually headed to Spinx, where she claimed that Desmond called her and asked why she was off early. (R. p. 586, l. 25–p. 587, l. 3). She then realized that Desmond was also at the Spinx. (R. p. 587, ll. 4–7). Appellant testified that she noticed someone else was in the car with Desmond, though he at first denied anyone was with him and then said it was "his homeboy." (R. p. 589, ll. 2–8). Appellant does not deny that she followed the couple as they left the Spinx. (R. p. 590, ll. 17–18). According to Appellant, she was in the right lane as they left the Spinx, and Desmond was in the entrance lane. (R. p. 592, ll. 3–9).

In Appellant's telling, the shooting was accidental. During her pursuit of Desmond and Patience, she said, Desmond slowed down and stopped his car in the middle of the road. (R. p. 592, ll. 16–19). Appellant stopped as well, retrieved her gun from the glove compartment, and began moving towards Desmond's car. (R. p. 592, ll. 20–24). Appellant then swung her gun into what she thought was the driver's side window in order to scare Desmond. (R. p. 592, l. 25–p. 593, l. 12). Based on what police told her, Appellant later surmised that she actually hit the rear

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[4] Patience said she had been told that Desmond and Appellant were no longer together. (R. p. 231, ll. 11-14).

[5] The State asked Appellant at one point, "So these children just happened?" Appellant responded: "Yes." (R. p. 608, ll. 8–9).

driver's side window. (R. p. 592, l. 25–p. 593, l. 4). Despite the fact that Appellant said she had the gun's safety on that night, the gun accidentally went off as the window shattered. (R. p. 594, l. 1; p. 597, ll. 1–3).[6] Appellant turned herself in, and recalled telling law enforcement that she did not know exactly what happened. (R. p. 598, ll. 9–12). She maintained that she did not tell law enforcement that she had pointed her gun at anyone or fired the weapon. (R. p. 598, ll. 13–16).

At trial, a Greenville County employee who photographed Desmond's autopsy testified about an X-ray picture of the victim's head, which was admitted at trial. (R. p. 315, ll. 22–24; p. 316, l. 18–p. 317, l. 17). According to the testimony, the bullet was still visible in the victim's head. (R. p. 317, ll. 16–17).

Then, the State presented the testimony of Dr. Grace Dukes. Dr. Dukes did not perform the autopsy, but later peer-reviewed it as a routine quality-control measure. (R. p. 346, l. 24-p. 347, l. 15). Appellant objected to the testimony of Dr. Dukes on the grounds that "she [doesn't] have the knowledge to testify to the findings" of the examiner who performed the autopsy. (R. p. 329, l. 24–p. 330, l. 1). The trial court found that Dukes' testimony about her own conclusions about the cause of Desmond's death was admissible. (R. p. 344, ll. 17–20).

When the jury returned to the courtroom, Dr. Dukes discussed the peer-review process, saying that it involves looking over the autopsy report, photographs, investigative report, and other information and determining whether to "sign off" on the autopsy. (R. p. 347, ll. 15–18). The heart of Dr. Dukes' testimony included the following:

> Q So you just said sign off and agree. So you're, actually, forming your own opinion when you're reviewing all of these documents?

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[6] Appellant later said during her testimony that she was not sure if her gun created the hole in the window. (R. p. 603, ll. 19–22). Appellant also said that she "didn't know if anything shot out of [the gun]." (R. p. 637, ll. 17–20).

A Yes.

Q Okay. And after doing everything -- did you review everything in this case?

A Yes, those things mentioned.

Q And after reviewing the autopsy report, did you agree with Dr. Ward's findings?

A Yes.

Q And what injuries, if any, did Desmond Parks have?

A He had a gunshot wound to the head.

Q And where was that located?

A It was -- the entrance wound was on the left side of the head on the parietal scalp.

Q And you just did an indication. Just for the record to be clear, you indicated with your finger to your head. Is that where the left parietal scalp is located?

A Yes.

Q And was there an exit wound located?

A No.

Q Was a projectile located in Desmond Parks' skull?

A Yes, it was.

. . . .

Q And in this case, what was the cause of Desmond Parks' death?

A Gunshot wound of the head.

Q And was that your opinion -- is that your opinion after review of all the documents in this case?

A Yes.

(R. p. 348, l. 16–p. 350, l. 7).

At the conclusion of the trial, the jury found Appellant guilty of murder, attempted murder, and possession of a weapon during a violent crime. (R. p. 764, ll. 5–11). The trial court sentenced her to 45 years imprisonment on the murder charge, 20 years on attempted murder, and five years on the weapons charge. (R. p. 770, l. 22–p. 771, l. 8). This appeal follows.

STANDARD OF REVIEW

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the [circuit] court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. McCray*, 413 S.C. 76, 90, 773 S.E.2d 914, 921 (Ct. App. 2015) (alteration in original) (quoting *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006) (citation omitted)).

ARGUMENT

Any error in the admission of the expert witness' testimony was harmless, and there was no error because the expert was not selected for the proceeding, there was probative and admissible evidence supporting the expert's opinion, and the expert could have reached an independent conclusion.

Appellant argues that the trial court's decision to admit Dr. Dukes' testimony is reversible error, because it amounted to the admission of testimonial hearsay of Dr. Ward's autopsy. But appellant is wrong. If error occurred—and the State does not concede that it did—it was without a doubt harmless. Alternatively, the admission of Dr. Dukes' testimony was not error because her testimony did not violate Appellant's rights under the Confrontation Clause.

As an initial matter, any error from the admission of Dr. Dukes' testimony was without a doubt harmless in the context of the trial as a whole.

"A violation of [a] defendant's Sixth Amendment right to confront [a] witness is not *per se* reversible error if the error was harmless beyond a reasonable doubt." *State v. McCray*, 413 S.C. 76, 91, 773 S.E.2d 914, 922 (Ct. App. 2015) (alteration in original) (quoting *State v. Pradubsri*, 403 S.C. 270, 280, 743 S.E.2d 98, 104 (Ct. App. 2013)). In assessing harmless error, the court should consider "whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Id.* (quoting *State v. Gracely,* 399 S.C. 363, 375, 731 S.E.2d 880, 886 (2012)).

Here, there is no reason to believe that Dr. Dukes' testimony tipped the balance in an otherwise unpersuasive case. Instead, even under the Appellant's version of the truth, she had her hand on the weapon when it went off. The victim was struck by a bullet. The victim died. Photographs showed a bullet lodged in the victim's brain.

As a result, there was no reasonable doubt that Appellant killed the victim. Appellant's strategy at trial was largely focused on convincing the jury of her implausible story that she did not intend to kill the victim and did not have the required malice for murder. The jury could make its decision about the Appellant's state of mind regardless of the intricacies of forensic science, based instead on its role assessing the credibility of witnesses. *See Tappeiner v. State*, 416 S.C. 239, 250, 785 S.E.2d 471, 476 (2016) ("Generally, '[t]he assessment of witness credibility is within the exclusive province of the jury.'" (alteration in original) (quoting *State v. McKerley*, 397 S.C. 461, 464, 725 S.E.2d 139, 141 (Ct. App. 2012))).

If the jury believed Appellant's testimony that after she pursued Desmond and Patience on foot, she attempted only to scare Desmond, but tragically ended his life by accident, nothing in Dr. Dukes' testimony would have changed that belief. If the jury believed that Appellant instead chased down Desmond and Patience, and in the aftermath of the pursuit murdered Desmond and threatened to do the same to Patience, nothing in Dr. Dukes' testimony would have provided any additional heft to that belief.

Setting that aside, however, there is no error in the admission of Dr. Dukes' testimony, because she is the rare expert witness whose testimony about the autopsy did not deprive Appellant of her rights under the Confrontation Clause.

The heart of a defendant's Confrontation Clause is the ability to ensure that the defendant can challenge the evidence put before the jury. *See Crawford v. Washington*, 541 U.S. 36, 61, 124 S. Ct. 1354, 1370, 158 L. Ed. 2d 177 (2004) ("To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.").

As a result, courts have found that expert testimony denies a defendant the right of cross-examination when the expert's testimony provides no way to actually test the evidence. For that reason, courts have rejected such testimony when the testimony's effectiveness cannot be subjected to an effective cross-examination, either because the expert was a substitute selected solely to push otherwise inadmissible evidence into the courtroom; or because the opinion cannot be supported by otherwise admissible evidence that can be challenged; or because the expert is simply regurgitating the opinions of another and has no real possibility of coming to an independent conclusion. *See infra.* Those factors are not present here.

Since the U.S. Supreme Court's ruling in *Crawford*, courts have grappled with the instruction that they must exclude "testimonial hearsay" because it violates a defendant's Sixth Amendment right to confront his or her accusers.[7] *See generally Crawford*, 541 U.S. 36, 124 S. Ct. 1354, 158 L3d.2d 177 (2004); *see also Smith v. Arizona*, 602 U.S. 779, 783–89, 144 S. Ct. 1785, 1791–94, 219 L. Ed. 2d 420 (2024) (recounting recent jurisprudence).

It is undisputed that forensic evidence is subject to the Confrontation Clause, at least in some cases. *See id.* For example, the U.S. Supreme Court in *Melendez-Diaz v. Massachusetts* ruled that "certificates of analysis" containing the results of drug tests could not be admitted without the testimony of the witnesses who performed the tests because "the certificates were offered to prove the truth of what they asserted: that the seized powder was in fact cocaine." *Id.* at 784–786, 144 S. Ct. at 1792; *see generally Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L.Ed.2d. 314 (2009). Particularly relevant to the issue at hand, the Supreme Court later ruled "that a State could not introduce one lab analyst's written findings through the testimony

[7] *See* U.S. Const. amend. VI (ensuring defendant's right "to be confronted with the witnesses against him").

of another." *See Smith*, 602 U.S. at 786, 144 S. Ct. at 1792–93 (discussing *Bullcoming v. New Mexico*, 564 U.S. 647, 651–652, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011)). In its most recent statement on the matter, the high court found that a "substitute" expert could not testify about the drug-test results generated by another analyst. *See Smith*, 602 U.S. at 796–800, 144 S. Ct. at 1799–1801. In that case, the expert had not been involved in the case before preparing for his testimony. *See id.* at 790–791, 144 S. Ct. at 1795–96.

This Court has also considered the limits of expert opinions, and admission of the underlying facts. *See State v. McCray*, 413 S.C. 76, 773 S.E.2d 914 (Ct. App. 2015). In *McCray*, a SLED forensic analyst who had peer reviewed another forensic scientist's DNA analysis could not testify because she "merely served as a conduit to introduce the results of [the other scientist's] DNA tests." See id. at 90–91, 773 S.E.2d at 922. The Court explained:

> After a thorough review of the record, we find [the reviewer] did not offer any independent opinions regarding the results of the tests or produce an original product that could be tested through cross-examination. Specifically, during cross-examination, [the testifying analyst] stated, 'I did not perform DNA analysis in this case.... My job was as a peer reviewer.' Additionally, [the reviewer] stated she was not present when the tests were conducted. [Her] statement that the DNA swabs from the scene matched Porcher's DNA appears to be based solely on [the original scientist's] tests; therefore, we find [the testifying analyst] merely served as a conduit to introduce the results of [the original scientist's] DNA tests.

McCray, 413 S.C. at 90–91, 773 S.E.2d at 922. More recently, our supreme court rejected the testimony of a pathologist who relied on tests by a private laboratory to help conclude that a child had died from "acute oxycodone toxicity." *State v. Brewer*, 438 S.C. 37, 42, 52–54, 882 S.E.2d 156, 158, 164–65 (2022), *cert. denied,* 143 S. Ct. 2649, 216 L. Ed. 2d 1231 (2023). Significantly, in that case, "defense counsel argued [the pathologist] could not testify as to the amount of

oxycodone in the child because the only support for that conclusion was the lab report." *Id.* at 42–43, 882 S.E.2d at 159.

Because Dr. Dukes' involvement in the case was not driven solely by trial preparation, because she formed her own opinion about the meaning of the autopsy evidence, and because her statements could be exposed to a meaningful cross-examination, the admission of that testimony did not violate Appellant's rights under the Confrontation Clause. In other words, Dr. Dukes is situated differently than the experts whose testimony has been rejected by courts.

First, Dr. Dukes was not a helicopter expert like the one disapproved of in *Smith*. *See* 602 U.S. at 796, 144 S. Ct. at 1799 ("[A]s his testimony makes clear, what [the substitute expert] knew on that score came only from reviewing [the original expert's] records."). Her testimony was based on work done separate from trial preparations; she was not selected for trial without any previous connection to the case.

Second, at least some of the evidence that could support Dr. Dukes' findings was independently admissible. For example, the X-ray photograph of Desmond's head was admitted during the testimony of a witness who attended the autopsy and took photographs. Appellant does not separately challenge the admission of that photograph in this appeal. Therefore, there was evidence on the record that could have been used to challenge Dr. Dukes' conclusions through cross-examination.

Finally, Dr. Dukes did not rely solely on Dr. Ward's findings, but independently came to the conclusion that his assessment was correct. She testified at trial that she reviewed several records to come to her independent conclusion on the cause of Desmond's death; while those records almost certainly formed the basis of Dr. Ward's findings, Dr. Dukes was free to interpret them as she wished before deciding to "sign off" on the autopsy. In fact, she stated that her

conclusion needed to be based on "an understanding of all of the circumstances and areas of documentation." (R. p. 348, ll. 12–15). Her peer review did not consist entirely of reporting that a test conducted by another person said what it said. *See McCray*, 413 S.C. at 90, 773 S.E.2d at 921–22 ("The touchstone for determining whether an expert is giving an independent judgment or merely acting as a transmitter for testimonial hearsay is whether an expert is applying his training and expertise to the sources before him, thereby producing an original product that can be tested through cross-examination." (quoting *United States v. Palacios*, 677 F.3d 234, 243 (4th Cir. 2012)); *id.* at 90–91, 773 S.E.2d at 922 (finding error in admission of an expert's testimony when the expert "did not offer any independent opinions regarding the results of the tests or produce an original product that could be tested through cross-examination"); *see Brewer*, 438 S.C. at 42–43, 882 S.E.2d at 159 (noting defense's argument that the expert "could not testify as to the amount of oxycodone in the child because *the only support for that conclusion was the lab report*" (emphasis added)). Because she offered her own conclusions, could provide the rationale for those conclusions and could thus be challenged by meaningful cross-examination, Dr. Dukes' testimony was subject to a confrontation from Appellant as envisioned by the Constitution. Her testimony did not violate the Confrontation Clause.

CONCLUSION

Because the pivotal issue at trial was not the cause of the victim's death, but why Appellant caused the victim's death, Dr. Dukes' testimony about what killed the victim would have been harmless even if it was in error. However, because Dr. Dukes was not solely involved in the case to testify for trial, because her assessment could be tested through otherwise admissible evidence,

and because her conclusions were her own there was no error to warrant reversal in any event. This court should affirm Appellant's conviction.

Respectfully Submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
S.C. Bar No. 14244

R. BRANDON LARRABEE
Assistant Attorney General
S.C. Bar No. 104865

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305

By: s/*R. Brandon Larrabee*
R. BRANDON LARRABEE
ATTORNEYS FOR RESPONDENT

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PROOF OF SERVICE

I, **R. Brandon Larrabee**, of counsel for the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Final Brief of Respondent has been forwarded to Appellant's counsel, Lara M. Caudy, Esq., via email today, January 30, 2025 to lcaudy@sccid.sc.gov, and to her assistant at smcinnis@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 30th day of January, 2025.

s/ R. Brandon Larrabee
R. Brandon Larrabee
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305