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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

TRAVIS LAMONT GATHERS,

APPELLANT

APPELLATE CASE NO. 2022-001053

Appeal from York County

Honorable William A. McKinnon, Circuit Court Judge

Opinion No. 2025-UP-277

PETITION FOR REHEARING

On August 6, 2025, this Court affirmed appellant's convictions and sentences where appellant argued the trial court erred (1) in the admission of two subsequent, uncharged armed robberies pursuant to Rule 404(b), SCRE, where the evidence did not fall within the identity exception, failed to meet the standard of clear and convincing evidence, and the probative value of the evidence was substantially outweighed by the danger of unfair prejudice and (2) by allowing Officer Joe Wallace to give opinion testimony during the trial despite the fact that he was not qualified as an expert. *State v. Gathers*, Op. No. 2025-UP-277 (S.C. Ct. App. Filed Aug. 6, 2025). Appellant respectfully requests rehearing pursuant to Rule 221(a), SCACR,

considering the significant points overlooked and/or misapprehended by this Court discussed below.

1. Admission of the Wendy's Robberies

In its opinion this Court held "the evidence of both Wendy's robberies establishe[d] a connection with the Bojangles robbery that logically exclude[d] the possibility that the Bojangles robbery could have been committed by another person." *State v. Gathers*, Op. No. 2025-UP-277 (S.C. Ct. App. Filed Aug. 6, 2025). This Court analogized this case to *State v. Gillian*,[1] finding as there "the evidence of a man with a similar scar, robbing a fast-food restaurant in the evening, carrying the same weapon, all within close proximity and time to the Bojangles robbery created a logically relevant connection between the crimes and was probative as to the identity of the Bojangles robber." *Id.* at 7.

Initially, the logical relevancy as to all but the "man with a similar scar" is thin. Neither the location (a fast-food restaurant), time of day (evening), or weapon (a Smith and Wesson M&P--an extremely common handgun), are at all unique such that they established such a connection between the crimes as would logically exclude or tend to exclude the possibility that the Bojangles robbery could have been committed by another person. *See State v. Lyle*, 125 S.C. 406, 420, 118 S.E. 803, 808 (1923).

Additionally, *Gillian* is distinct from this case. Notably, there were witnesses that testified to Gillian's involvement in the burglaries. The evidence that Mr. Gathers committed the Wendy's robberies is not nearly so strong. Instead, there is inference upon inference that *maybe* Mr. Gathers committed the Wendy's robberies which occurred within three weeks of the Bojangles robbery in neighboring towns. In *Gillian*, the court reasoned that "other competent

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[1] 373 S.C. 601, 646 S.E.2d 872 (2007).

evidence established petitioner's guilt beyond a reasonable doubt." *State v. Gillian*, 373 S.C. 601, 610, 646 S.E.2d 872, 877 (2007). Here, there was no competent evidence suggesting Mr. Gathers' guilt without the evidence of the Wendy's robberies. Without the testimony of the uncharged Wendy's robberies the state had zero physical evidence that tied Mr. Gathers to the charged Bojangles robbery.

The state wanted evidence of the Wendy's robberies admitted at trial to show propensity. The purpose was to suggest to the jury that appellant committed other armed robberies, so he surely committed this robbery. The state's argument that this evidence was probative as to the identity of the person shown in the Bojangles robbery is substantially outweighed by the prejudicial effect of this evidence. What the Wendy's evidence was probative of was that appellant at one time held the gun found at the Wendy's 2 robbery as did several other people by the state's own admission. R. 66-67. It was not at all probative regarding the identity of the Bojangles robber who was carrying a black handgun that, despite their best efforts, the state could not show was the same gun.

In *State v. Ostrowski* this Court held text messages showing Ostrowski's prior drug trafficking were substantially more prejudicial than probative and the error in admitting them was not harmless. 435 S.C. 364, 867 S.E.2d 269 (Ct. App. 2021). In that case, Ostrowski was convicted of trafficking methamphetamine and numerous gun charges where, after Ostrowski's girlfriend was arrested, law enforcement executed a search warrant at their home and found drug paraphernalia in the home, and methamphetamine in the pocket of a pair of men's pants. *Id.* at 374, 867 S.E.2d 274. At trial, the state sought to admit multiple text messages to and from Ostrowski's phone and defense counsel objected on the basis the texts were evidence of other bad acts under Rule 404(b), SCRE. *Id.* at 376, 867 S.E.2d 275. The state contended the

messages were relevant to prove "intent to control the disposition" of the drugs as part of their case. The trial court ultimately allowed the admission of the messages, finding they were clear and convincing and logically relevant to the issue at hand and that though they were prejudicial, they were substantially probative to the state's case. *Id.*

In its 2021 opinion, this Court analogized *Ostrowski* to *State v. Lyle* in analyzing whether the evidence was admissible under the identity exception to Rule 404, SCRE. The well-reasoned analysis laid out by this Court in that case is instructive here. This Court found that while Ostrowski's text messages might prove a drug trafficking scheme, there was no evidence offered at trial that illustrated how the text messages connected Ostrowski to the specific drugs in this case. *Id.* at 392, 867 S.E.2d 283.

This Court found the facts in *Ostrowski* were similar to those at issue in *Lyle* where the defendant was charged with forgery that resembled similar crimes in the same area on the same day and those carried out in nearby cities on earlier dates. *Id.* at 393, 867 S.E.2d 284. This Court looked to *Lyle* for analysis on the connection of time and place and found that in that case "three weeks [was] too long and six weeks [was] certainly too long" for the texts to be permissible evidence at trial. *Id.* at 393-94, 867 S.E.2d 284. The *Lyle* Court reasoned there was a lack of time connection in an incident just 10 days earlier:

> [S]uch evidence strongly tends to induce the jury to believe that, merely because the defendant was guilty of the former crimes, he was also guilty of the latter; but that is the precise inference the general rule was wisely designed to exclude .... The mere fact that the Georgia crimes were similar in nature and parallel as to methods and technique employed in their execution does not serve to identify the defendant as the person who uttered the forged check in Aiken as charged, unless his guilt of the latter crime may be inferred from its similarity to the former. To warrant such inference[,] the similarity must have established such a connection between the crimes as would logically exclude or tend to exclude the possibility that the Aiken crime could have been committed by

> another person. There is nothing to indicate that the defendant held any monopoly of the methods and means used in passing the forged checks in Georgia, or that they were unique in the annals of crime.

State v. Ostrowski, 435 S.C. 364, 393–94, 867 S.E.2d 269, 284 (Ct. App. 2021) citing *Lyle*, 125 S.C. at 420, 118 S.E. at 808 (citations omitted).

Here, while the evidence of the Wendy's robberies might show a fast-food robbery scheme, the evidence tying appellant to the crime for which he was actually on trial, the Bojangles incident, is shaky at best. Additionally, like *Ostrowski* and *Lyle*, both Wendy's robberies were too far distant in time and in location to be admitted at trial. The physical locations were twenty minutes apart and Wendy's 1 happened two weeks after Bojangles and Wendy's 2 happened days after that. These robberies were too distinct to establish "such a connection between the crimes as would logically exclude or tend to exclude the possibility" that the Bojangles robbery could have been committed by another person. *Lyle*, 125 S.C. at 420, 118 S.E. at 808.

Citing *State v. Stokes*, 381 S.C. 390, 404–05, 673 S.E.2d 434, 441 (2009), this Court further found evidence of the Wendy's robberies was clear and convincing. *State v. Gathers*, Op. No. 2025-UP-277 (S.C. Ct. App. Filed Aug. 6, 2025). The evidence related to the Wendy's robberies was not admissible under the identity exception to *Lyle* where it did not meet the standard of clear and convincing. The state put up a law enforcement officer to give testimony that the gun used in the Bojangles incident was of the same make and model as the one found at the Wendy's 2 robbery with appellant's DNA.

The identification of the gun by Officer Joe Wallace is problematic for multiple reasons. First, a Smith and Wesson M&P pistol is an extremely common gun, as admitted by the officer during cross examination. Second, it is incredulous that anyone, even a firearms expert, could

determine that the gun seen in the Bojangles surveillance video was the same as the Smith and Wesson M&P pistol found at Wendy's 2 weeks later. Moreover, the evidence was not clear and convincing where there was an alternate explanation for appellant's DNA being found on the gun. There was testimony presented by Officer Joe Wallace that another person of interest in the case gave a statement which indicated that the Wendy's 2 gun had been passed around at appellant's place of work and multiple individuals, including appellant, handled it. That fact is corroborated by the forensic evidence which showed a mixture of DNA on the gun.

Lastly, the admission of this evidence was not harmless where there was equal if not more emphasis on the evidence from the uncharged Wendy's robberies than there was on the evidence of the charged Bojangles robbery. *All* the physical evidence presented at appellant's trial was evidence recovered from the inadmissible Wendy's robberies. That, in addition to all the testimony regarding the Wendy's robberies, made up a substantial portion of the state's presentation at trial and undoubtedly contributed to the verdict. *See State v. Sherard*, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991) (Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained.)

2. Officer Wallace's Testimony

In its opinion this Court held the trial court did not err in admitting Officer Wallace's testimony regarding the gun. *State v. Gathers*, Op. No. 2025-UP-277 (S.C. Ct. App. Filed Aug. 6, 2025). This Court specifically found Wallace's testimony was rationally based on his perceptions, was helpful to determine a fact at issue, and did not require special knowledge, skill experience, or training. *Id.*

However, Wallace's identification of the gun went beyond his perception. He testified as to how he came to his ultimate conclusion regarding the gun, and it included research and

comparison. This Court found that experience with firearms "might have been helpful, but certainly wasn't required." *Id.* However, another state's witness, a SLED firearm expert, testified she was not able to distinguish the difference in a black nine-millimeter gun even from a short distance. R. 235.

Deciding what type of gun was shown in the surveillance video of the Bojangles robbery was the job of the jury in this case and each piece of evidence should speak for itself. The jury could see and consider the Bojangles surveillance video depicting a gun. Likewise, the Wendy's 2 gun was admitted in evidence for the jury's consideration and comparison to the video.

Officer Wallace was not testifying as an expert in this case. He was a fact witness, testifying about his investigation of the Bojangles robbery. Wallace was not qualified as a firearms expert in this case and should not have been allowed to give his opinion on what the jury saw in the surveillance video.

If the witness is not testifying as an expert, the witness'[s] testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness'[s] testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training. Rule 701, SCRE.

"Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge...." *Watson v. Ford Motor Co.*, 389 S.C. 434, 445–46, 699 S.E.2d 169, 175 (2010). "On the other hand, a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training." *Id.* at 446, 699 S.E.2d at 175; *see also State v. Douglas*, 380 S.C. 499, 502, 671 S.E.2d 606, 608 (2009) ("Lay witnesses are permitted

to offer testimony in the form of opinions or inferences if the opinions or inferences are rationally based on the witness'[s] perception, and will aid the jury in understanding testimony, and do not require special knowledge."). "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *State v. Fripp*, 396 S.C. 434, 439, 721 S.E.2d 465, 467 (Ct. App. 2012) (quoting Rule 704, SCRE). *State v. Westmoreland*, 421 S.C. 410, 419, 807 S.E.2d 701, 706 (Ct. App. 2017)

Wallace's testimony was not limited, as it should have been, pursuant to Rule 701, SCRE, to an opinion or inference rationally based on his perception. It was not helpful to a clear understanding of his testimony or to the determination of a fact in issue. Contrary to the solicitor's assertion, identifying the make and model of a gun is vastly different than identifying the make and model of a vehicle and requires special knowledge, skill, experience, or training.

Our Supreme Court considered a related matter in *State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001). The Court found reversible error where an officer qualified as an expert in crime scene processing essentially testified as a crime scene reconstruction expert about the position of the victim at the time he was shot. This went to the heart of Ellis's claim of self-defense, and the police officer was not qualified as an expert witness to give an opinion on the ultimate issue before the jury. *See State v. Ellis*, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001), *citing State v. Wilkins*, 305 S.C. 272, 407 S.E.2d 670 (Ct. App. 1991).

Here, the gun was the central piece of evidence that the state used to tie appellant to the Bojangles robbery. Without Wallace's testimony the state had zero physical evidence tying appellant to the crime for which he was on trial. None of the Bojangles eyewitnesses were able

to make an identification. The video, while the state claimed you could tell appellant was the person, was not strong evidence tying appellant to the Bojangles robbery.

Wallace's improper opinion testimony went directly to the heart of the case. It was the jury's job to determine whether the gun found at Wendy's 2 robbery with appellant's DNA on it was the same gun as the gun seen in the Bojangles surveillance video. Wallace opined that based on his experience as a law enforcement officer he could tell the make and model of the gun. However, testimony revealed that a Smith and Wesson M&P is extremely similar in size and shape to a Glock.

Determining whether the gun in the video was the same as the one entered into evidence was the sole province of the jury and it was reversible error for a lay witness to give opinion testimony. Wallace's opinion testimony regarding the gun could not have been harmless and appellant should be granted a new trial.

Respectfully Submitted,

SARAH E. SHIPE
Appellate Defender

This 21st day of August, 2025.

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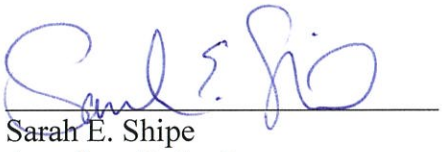
TRAVIS LAMONT GATHERS,

APPELLANT

APPELLATE CASE NO. 2022-001053

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-entitled case has been served upon Joshua A. Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Travis Lamont Gathers, #377502, at Allendale Correctional Institution, 1057 Revolutionary Trail, Fairfax, SC 29827, this 21st day of August, 2025.



Sarah E. Shipe
Appellate Defender

ATTORNEY FOR APPELLANT

Leverett, Scott

From: Leverett, Scott
Sent: Thursday, August 21, 2025 4:42 PM
To: Josh Edwards
Cc: Susan Spencer; Shipe, Sarah
Subject: 2022-001053 - State v. Travis L. Gathers - Petition for Rehearing
Attachments: 2022-001053 - State v. Travis L. Gathers - Petition for Rehearing.pdf; AG Coverletter.pdf

Dear Mr. Edwards,

Attached please find a copy of the Petition for Rehearing in the above referenced case that is being filed today with the Court of Appeals.

-Scott Leverett
Admin. Asst. for Sarah Shipe
Appellate Defense