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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Steven H. John, Circuit Court Judge

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NOV 26 2013

Case No. 2013-445

SC COURT OF APPEALS

THE STATE,.....Respondent,

v.

LEXIE JAMES TURNER, JR.....Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

- I. THE TRIAL COURT ERRED IN ADMITTING NON-RELIABLE, EXPERT TESTIMONY TO IMPROPERLY BOLSTER THE STATE'S CASE.

STATEMENT OF THE CASE

Lexie James Turner, Jr. was indicted by the York County grand jury of possession with intent to distribute crack cocaine and distribution of crack cocaine. He was tried before the Honorable Steven H. John and jury on February 26th and 27th, 2013. He was represented by Melissa Inzerillo, Esquire of the York County Public Defender's Office. He was found not guilty on the distribution count and guilty on the possession with intent to distribute count, and sentenced to 11 years incarceration.

This appeal timely follows.

STATEMENT OF THE FACTS

On May 18, 2012, the York County Multi-Jurisdictional Drug Enforcement Unit employed a confidential informant, Ben Quick, to attempt to purchase crack cocaine while wearing a video camera. After police observed what they believed was a drug transaction, they seized the Appellant and located 2.5 grams of crack cocaine in the console of Appellant's vehicle. Appellant was arrested for possession with intent to distribute crack cocaine and actual distribution of crack cocaine.

ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING NON-RELIABLE, EXPERT TESTIMONY TO IMPROPERLY BOLSTER THE STATE'S CASE.

The qualification of a witness as an expert is a matter within the discretion of the trial court. *State v. Schumpert*, 312 S.C. 502 (1993). An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions. *State v. Douglas*, 369 S.C. 424, 429–30 (2006).

Witnesses are generally not allowed to give their opinions; however “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” *S.C. R. Evid. 702*. “In determining whether to admit expert testimony, the court must make three inquiries. First, the court must determine whether the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. Second, the expert must have acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter, although he need not be a specialist in the particular branch of the field. Finally, the substance of the testimony must be reliable. It is this final requirement of reliability which is the central feature of the inquiry.” *Graves v. CAS Med. Sys., Inc.*, 401 S.C. 63, 74 (2012), reh'g denied (Dec. 12, 2012) (internal citations omitted).

To show that Appellant possessed crack cocaine with the intent to distribute, the State sought to introduce Commander Marvin Brown as an expert “in how crack cocaine is packaged, how it’s sold, the going price, the typical intoxicating dose, and the different habits between the typical addict and the typical drug dealer.” (Transcript p.112 lines 6-

9). The trial court qualified Commander Brown as an expert, over defense counsel's objection, in the fields of "packaging, price, dose, habits, and sale." (Transcript p. 112 line 18).

Appellant conceded at trial that Commander Brown had extensive expertise in the field of law enforcement based on his years of police work and his training. However, counsel went on to argue that the determination should go further than just Commander Brown's experience and that "the person as an expert to be a little more qualified than just someone who has a lot of experience in a particular field." (Transcript p. 106 lines 13-15). Defense counsel essentially argued that while Commander Brown might satisfy the second prong of the Court's required inquiry in determining the admissibility of expert testimony, namely that Commander Brown had the skill and experience, he lacked the essential third prong, reliability.

At one time nonscientific expert testimony was not subject to the reliability standards required of scientific expert testimony. However, the South Carolina Supreme Court, in *State v. White*, expressly held "[n]onscientific expert testimony must satisfy Rule 702, both in terms of expert qualifications and reliability of the subject matter." 382 S.C. 265, 273 (2009). Reliability of the expert's testimony must be established by the trial court before it is submitted to the jury. The Court in *White* declined to offer a "formulaic approach that will apply in the generality of cases," but went on to state the "trial court in the discharge of its gatekeeping role in determining admissibility must initially answer the always present threshold questions of qualification and reliability." *Id.* at 688-89.

Reliability is the essential problem with allowing expert testimony like Commander Brown's statements regarding to the different habits of drug users and drug

dealers. As a qualified expert, Commander Brown was permitted to have the following exchange, over trial counsel's objection:

Q: Based on your training and experience, your street experience particularly, how many doses would you expect a recreational user to have, typically?

A: Recreational users usually have one to three rocks, up to maybe six max, because they buy them like going to the store and buying it....

A: A dealer when – we are talking two and a half grams, is five hundred dollars worth of crack cocaine. A user would not be walking around with five hundred dollars of crack cocaine in his pocket.

(Transcript p.114 lines 22-25, p. 115 lines 1-2, 11-14).

The trial court abused its discretion in allowing this testimony by failing to determine the reliability of Commander Brown's proffered expert opinion. Just as trial counsel suspected, this testimony "hit more of speculation than any sort of expertise..." (Transcript p. 107 lines 8-9). There was no vetting by the trial court to determine if there were any underlying studies or data upon which Commander Brown relied or if it was simply his opinion. It is no coincidence that the amount of crack cocaine Commander Brown referenced is the exact amount found in Appellant's vehicle. This is not expert testimony, this is the arresting officer stating his opinion that goes to the ultimate issue the jury is supposed to determine. This is the reason expert testimony is required to be vetted for reliability, in order to prevent this kind of untested testimony to be submitted to the jury from a court-qualified expert and is exactly why Rule 702 is so crucial.

In *State v. Trapp*, the South Carolina Supreme Court had another opportunity to examine the reliability requirement of nonscientific expert testimony. The State attempted to introduce a witness as an expert in crime scene analysis and victimology.

The Court found the witness was qualified an expert based solely on his expertise, while leaving this issue of reliability up the jury. Under the reasoning in *White*, the Court found the admission of the expert testimony “before vetting it for its reliability was error.” *State v. Tapp*, 398 S.C. 376, 389 (2012), reh'g denied (July 27, 2012).

It appears from the record, the trial court was persuaded by *State v. Robinson*, 396 S.C. 577 (Ct. App. 2012), where the Court of Appeals had recently affirmed Commander Brown as an expert. Yet this opinion also fails to examine any question of reliability. The trial court should have questioned the reliability of Commander Brown’s testimony as to the difference between the habits of drug dealers and those of drug users, and the court should have excluded it under Rule 702.

Harmless Error

The key factor for determining whether a trial error constitutes reversible error is “whether it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’ ” *State v. Charping*, 313 S.C. 147, 157 (1993). “Whether an error is harmless depends on the circumstances of the particular case.” *State v. Mitchell*, 378 S.C. 305, 316 (2008). “No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it ‘could not reasonably have affected the result of the trial.’ ” *Id.*

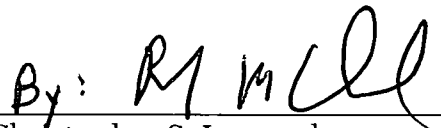
“Improper ‘expert’ evidence which goes to the heart of the case is not harmless. *State v. Tapp*, 398 S.C. 376, 393 (Pleicones, J., dissenting) (citing *State v. Ellis*, 345 S.C. 175 (2001)). There is not overwhelming evidence of Appellant’s guilt, there are none of the other indicia of drug dealing recognized by the courts. Appellant was not found with a large amount of money, there were not multiple baggies of the crack cocaine, weapons,

or any scales. *See State v. Cherry*, 361 S.C. 588, 593 (2004). Combined with the fact the jury found Appellant not guilty of a distribution which was alleged to occur moments before the arrest; this case was clearly a close call for the jury. And the only evidence that could be used to prove Appellant's intent to distribute is the quantity of the substance. As the State argued in their closing. "Do you remember Marvin Brown's testimony?... He would expect the average user to have between three and six intoxicating doses and no more." (Transcript p. 246, lines 11, 20-22). This is the exact evidence which Commander Brown's inadmissible "expert" testimony improperly bolstered. This is why reliability is an essential foundation requirement of expert testimony. This is why it was not harmless error to allow this "expert" testimony to go to the heart of the case. Respectfully, Appellant asks this Court to reverse his conviction.

CONCLUSION

Respectfully, Appellant asks this Court to reverse his conviction.

Respectfully submitted,

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ATTORNEYS FOR THE RESPONDENT

November 26th, 2013
Columbia, South Carolina

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In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of General Sessions

Steven H. John, Circuit Court Judge

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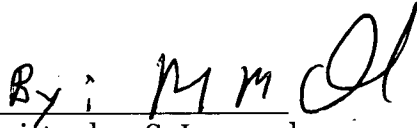
Appellant.

APPELLANT'S DESIGNATION OF MATTER TO BE INCLUDED IN
RECORD ON APPEAL

The Appellant Lexie James Turner, Jr. proposes that the following be included in the Records on Appeal:

- 1) Trial Transcript, February 26-27, 2013
pp. 63-68, 100-137, 231-273

I certify that this designation contains no matter which is irrelevant to this appeal

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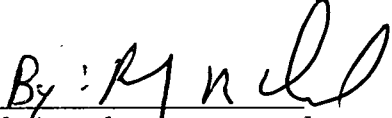
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PROOF OF SERVICE

I certify that I have served the **APPELLANT'S INITIAL BRIEF** on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on November 26th of 2013, addressed to the attorney of record, Salley Elliott, Esq., South Carolina Attorney General's Office, P.O. Box 11549, Columbia, SC 29211.

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