STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable Patrick Cleburne Fant, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARCUS CHRISTOPHER WHITE,

APPELLANT.

APPELLATE CASE NO. 2024-001106

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by permitting a forensic toxicologist to opine Appellant's blood alcohol levels reflected material and appreciable impairment, where the witness based his conclusions on "key assumptions"—that Appellant had stopped drinking two hours before the crash and had little to no food—which did not apply, since the testimony was unreliable under Rule 702, SCRE and this testimony was highly prejudicial given the disputed evidence of impairment?

STATEMENT OF THE CASE

During the January term of 2023, a Greenville County Grand Jury indicted Marcus White, Appellant, for two counts of felony driving under the influence (DUI) resulting in death, and two counts of felony DUI resulting in great bodily injury. R. 377 – 384. Appellant was tried before the Honorable Patrick Fant, III, and a jury, from June 17 – 19, 2024. Randy Chambers represented Appellant. Elizabeth Gary and Haley Kernell prosecuted the case. R. 1.

Appellant was convicted as indicted. R. 241, l. 8 – 242, l. 7. Appellant was sentenced to serve concurrent terms of imprisonment of twenty-five years for each count of felony DUI resulting in death, and fifteen years for each count of felony DUI resulting in great bodily injury. He was also fined $10,100 for each count of felony DUI resulting in death, and $5,100 for each count of felony DUI resulting in great bodily injury. R. 250, l. 8 – 251, l. 13.

This appeal follows.

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. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "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.*; *see also State v. Brockmeyer*, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013). The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted). The circuit court's decision to admit expert testimony will not be reversed on appeal absent "a manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006) (citations omitted).

ARGUMENT

The court erred by permitting a forensic toxicologist to opine Appellant's blood alcohol level reflected material and appreciable impairment, where the witness based his conclusions on "key assumptions"—that Appellant had stopped drinking two hours before the crash and had little to no food—which did not apply, since the testimony was unreliable under Rule 702, SCRE and this testimony was highly prejudicial given the disputed evidence of impairment.

Relevant facts

At approximately 9:30 or 9:45 p.m. on October 21, 2021, a tragic car accident occurred at the intersection of Brown Road and Piedmont Highway in Greenville County. Appellant was driving down the highway. The Trimmier family's car was at the stop sign on Brown Road and pulled out to turn left onto the highway when it was struck by Appellant's car. R. 190, l. 3 – 192, l. 16; R. 191, l. 1 – 196, l. 1; R. 30, l. 23 – 33, l. 15; R. 43, ll. 1-15; R. 59, ll. 5-12; R. 156, ll. 7-9. Appellant was speeding when the wreck occurred. R. 113, l. 13 – 115, l. 25. Appellant was injured. R. 193, l. 12 – 195, l. 10.

The Trimmiers had children in the car. Five-year-old Minor 1 was killed. Five-year-old Minor 2 was injured. Tasj-Hamiel Trimmier was injured. Tonyaldo Trimmier died a month later from injuries sustained in the wreck. R. 66, l. 6 – 67, l. 6; R. 87, l. 24 – 95, l. 7. An accident reconstruction expert testified that if Appellant had been driving the speed limit, the Trimmier's car would have had time to clear the turn and the wreck would not have occurred. R. 133, l. 19 – 134, l. 8; R. 139, l. 2 – 140, l. 13.

Appellant was a postal worker. R. 180, ll. 17-18; R. 188, ll. 21-25. He and his wife and family members had been at a dinner hosted by their friend, a chef. R. 181, l. 21 – 183, l. 2; R. 186, ll. 3-16. Appellant was at the dinner for about two hours and he had a mixed drink and one

or two beers, along with plenty of food. R. 189, l. 12 – 190, l. 9; R. 186, ll. 11-12; R. 182, ll. 11-13. Appellant's wife and his brother-in-law both stated they saw Appellant drink a mixed drink and a beer during the evening, he did not appear impaired, and if he had appeared impaired, he would have ridden home with his wife in her car or remained at his brother-in-law's home. Neither Appellant's wife nor his brother-in-law had concerns about Appellant driving home. R. 183, l. 6 – 184, l. 19; R. 186, l. 19 – 187, l. 20. Appellant testified he did not feel impaired. R. 190, ll. 7-17.

Highway patrol officers saw Appellant at the hospital and alleged he had glassy, bloodshot eyes and smelled like alcohol. R. 62, ll. 13-24; R. 74, l. 18 – 75, l. 4. However, Appellant's airbags had deployed, which may cause eye irritation. R. 80, l. 21 – 81, l. 14. Officer Campbell claimed Appellant showed four out of six "clues" of impairment when he was administered the "Horizontal Gaze Nystagmus test," a field sobriety test. R. 75, l. 12 – 78, l. 10.

Kevin Selinsky of SLED was qualified as an expert in forensic toxicology. R. 149, l. 17 – 151, l. 19. Appellant's medical records showed the "medical blood," which was drawn at the hospital the night of the accident, reflected "177 mg/dL" of alcohol. (Medical records showed that blood was drawn at "2246" or 10:46 p.m.) Selinsky testified the 0.177 Ethanol level equated to a blood alcohol level of 0.15. R. 158, l. 11 – 159, l. 11; R. 361 – 362; R. 363 – 368. The blood drawn at the behest of law enforcement was taken later, at 3:00 a.m. the following day. R. 158, l. 11 – 159, l. 11; R. 147, l. 5 – 148, l. 22; R. 154, l. 6 – 156, l. 15; R. 146, l. 22 – 148, l. 22; R. 64, ll. 18-25. Selinsky's report showed an Ethanol level of .084 percent grams per deciliter. R. 155, ll. 4-22; R. 358 – 360. Selinsky's .084 result was based on the 3:00 a.m. blood draw. R. 368.

The two samples were both taken well after the crash; thus they did not indicate what Appellant's blood alcohol level was while driving. Therefore, Selinsky needed to extrapolate to determine Appellant's blood alcohol level at the time of the crash, and to determine whether Appellant was impaired at the time of the crash rather than when his blood was drawn at the hospital.[1]

According to Selinksy, "back extrapolation" was "kind of an educated hypothesis way to kind of see with certain stipulations what that blood level could have possibly been around the time of the accident." R. 156, ll. 11-15. Selinsky stated that "back extrapolation" required "key assumptions," the "most important" of which was "to assume the subject was in the elimination phase of alcohol. Meaning that they had not ingested any alcohol for, roughly, two hours before the time that you are back extrapolating to [i.e., the time of the accident]. And this time looking for around the time of the accident, about 9:45, 10:00." R. 156, ll. 16-25. Another key assumption was that: "Little to no food was consumed." R. 361 – 362. Finally, the extrapolations assumed Appellant had a healthy liver. R. 361 – 362.

No basis was offered by the State for why Selinsky's "key assumption" that Appellant stopped drinking at least two hours before the crash applied in this case. There was no evidence that Appellant's last drink was two hours before the accident. Appellant was only at the dinner for a about two hours total, and he consumed alcohol during that time. There was also no basis for another critical assumption by Selinsky—that Appellant had eaten little to no food.

[1] Because Appellant consumed alcohol with food, and did so during the two hours preceding the crash, his blood alcohol level may have been higher at the hospital (when the samples were drawn) than it was while he was driving, since alcohol that was not yet absorbed into the blood at the time of the crash may have been absorbed during the time that passed in the aftermath of the crash. *See McLean v. Moran*, 963 F.2d 1306, 1309–10 (9th Cir. 1992) ("Most experts agree that it ordinarily takes forty-five to ninety minutes to attain a peak BAC level on an empty stomach, and two to three hours if alcohol is consumed with or after a meal, while a few contend that the time lag between alcohol consumption and absorption into the blood stream is even longer.").

Appellant had just left the dinner, where he ate tacos while consuming alcohol, when the wreck occurred.

Selinksy testified about the effects of alcohol consumption on people generally. He stated alcohol "generally affects people in the same manner. People take it at lower levels to drink socially, relax, have a good time." R. 161, ll. 18-23. "And then it goes from there. You can start to get some decreased inhibitions. Your reaction time will increase, your memory, your balance, things along that line. It kind of gets worse as the levels tend to increase." R. 161, l. 23 – 162, l. 2. The solicitor asked if there were differences in how alcohol affects a heavy drinker, more casual drinker, or light drinker. Selinsky stated,

> with somebody that's a heavy drinker to get to a certain level versus somebody that's not a heavy drinker, once they're at that level, for a heavy drinker, it's likely going to take them a lot more alcohol ingested to get to that point because they're breaking it down a lot faster. And then along that same line is if they're repeatedly heavy drinkers, they have, as we call it, learned behaviors. So if you're talking to somebody, you might not know that they're impaired.

R. 204, ll. 3-15.

Selinksy testified that assuming Appellant's last drink was more than two hours prior to the accident, using back extrapolation, his blood alcohol level would have been 0.126 to 0.215 at the time of the crash. R. 160, l. 10 – 161, l. 11. The solicitor asked Selinsky: "And in your opinion, looking at those ranges, those numbers, those values, was The Defendant materially and appreciably impaired at the time of the collision?" R. 163, ll. 8-10. Appellant objected to the reliability of the testimony: "I don't believe he can make that determination just based on his calculations. I mean, he wasn't at the scene. He didn't see Mr. White. He can't say." R. 163, ll. 11-14. Counsel argued:

> I don't think that he can speak, specifically, to The Defendant in this case, Marcus White. He may be able to speak generally, but as he's already testified himself, **he said that there are a number of variables that go into it**. He doesn't know how much alcohol was consumed. He doesn't know the frequency with which Mr. White drinks. **There are a number of things that he doesn't know**. And he is giving a range rather than precise numbers as far as what the BA level even was. I think he can certainly testify to what he's already testified to. **I don't think he can speak, specifically, whether or not Mr. White was under the influence or impaired at the time of the accident**.
> . . .
>
> [T]he inference level is only one of many factors that the jury can consider in determining whether somebody is materially and appreciably impaired.

R. 163, l. 25 – 165, l. 5 (emphasis added).

The court overruled the objection. R. 165, ll. 10-16. Selinsky testified: "What, ultimately, I can testify to is the number on the report, which is .084. So at that time, he was materially and appreciably impaired. I can't say for certain whether or not he was or wasn't using back extrapolation, but I can say if he was anywhere in that range of .136 and .215, then yes, he was materially and appreciably impaired." R. 166, ll. 11-17.

At the conclusion of the case, the jury was instructed that: "The State must prove beyond a reasonable doubt that The Defendant was sufficiently under the influence to impair his ability to drive with reasonable care with due regard for others and himself as a reasonably prudent person would drive." R. 227, ll. 21-25.

Discussion

"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." Rule 702, SCRE. "All expert testimony must satisfy the Rule 702 criteria, and

that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009). "Reliability is a central feature of Rule 702 admissibility, and our jurisprudence is in complete accord. *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); *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999) (noting that before expert evidence is admitted the trial court must determine it is reliable)." *White*, 382 S.C. at 270, 676 S.E.2d at 686-87.

Scientific evidence is admissible under Rule 702, SCRE, if the proponent demonstrates and the trial judge determines: "(1) the evidence will assist the trier of fact; (2) the expert witness is qualified; (3) the underlying science is reliable, applying the factors found in *State v. Jones,* 273 S.C. 723, 259 S.E.2d 120 (1979); and (4) the probative value of the evidence outweighs its prejudicial effect." *State v. Jones*, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001) (citing *State v. Council,* 335 S.C. at 19, 515 S.E.2d at 517). The 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. at 573, 541 S.E.2d at 819.

The State did not demonstrate Selinsky's testimony, that Appellant's blood alcohol levels reflected material and appreciable impairment, was reliable. Selinsky's numbers were based on tests from blood draws taken well after the collision, and Selinsky made "key assumptions" that were inapplicable: that Appellant had stopped drinking two hours before the crash and that Appellant had ingested little to no food. As counsel correctly argued, there were "a number of

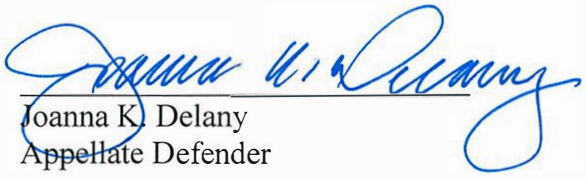
things" that Selinsky "d[id]n't know." Selinsky's testimony was conjecture. The evidence failed the reliability prong of Rule 702. Moreover, because the evidence was unreliable it did not assist the trier of fact. The court erred in permitting the testimony. Rule 702, SCRE.

"Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. Thus, an insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) (cleaned up). "A harmless error analysis is contextual and specific to the circumstances of the case: No definite rule of law governs a finding of harmless error; 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." *State v. Byers*, 392 S.C. 438, 447–48, 710 S.E.2d 55, 60 (2011) (cleaned up).

Appellant's defense was that he was not impaired. Two witnesses testified on his behalf that he did not appear to be impaired. R. 207, l. 12 – 209, l. 18. Selinsky was qualified as an expert witness. *See State v. Kromah*, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013) ("although an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts"). *Cf. State v. Ellis*, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001) (improper expert opinion which went to the heart of the case was not harmless). This error could have affected the result of the trial. *See Jamison v. Morris*, 385 S.C. 215, 229, 684 S.E.2d 168, 175 (2009) (evidence of intoxication, other than erroneously admitted expert testimony on intoxication, was not so overwhelming that the admission was harmless error).

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.



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This 19th of February, 2026.

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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."

This 19th of February, 2026.

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