

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Thomas A. Russo, Circuit Court Judge

RECEIVED

NOV 12 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

SHAWN WILLIAM SHARPE,

APPELLANT

APPELLATE CASE NO. 2013-001915

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES.....	2
STATEMENT OF ISSUE ON APPEAL	3
STATEMENT OF THE CASE	4
ARGUMENT	5
CONCLUSION	11
PETITION TO BE RELIEVED AS COUNSEL	12

TABLE OF AUTHORITIES

Cases

<u>Daubert v. Merrell Dow Pharmaceuticals, Inc.</u> , 509 U.S. 579 (1993)	9
<u>Gooding v. St. Francis Xavier Hosp.</u> , 326 S.C. 248, 487 S.E.2d 596 (1997)	9
<u>Schmerber v. California</u> , 684 U.S. 757 (1966), ...	4
<u>State v. Council</u> , 335 S.C. 1, 19, 515 S.E.2d 508 (1999)	9
<u>State v. White</u> , 382 S.C. 265, 676 S.E.2d 684 (2009)	9

Rules

Rule 401, SCRE	8
Rule 403, SCRE	8
Rule 702, SCRE	8, 9

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in denying appellant's motion to exclude evidence and expert testimony related to cellular telephone towers?

STATEMENT OF THE CASE

During its May 2013, term, a Lexington County grand jury indicted appellant for murder, first-degree burglary, and armed robbery. R. 761 - 66. On May 8, 2013, a hearing was held pursuant to Schmerber v. California, 384 U.S. 757 (1966), before the Honorable William P. Keesley. R. 723. On August 26, 2013, appellant was tried before the Honorable Thomas A. Russo and a jury. R. 1. Samuel R. Hubbard, III, represented the State. R. 1. Aimee J. Zmroczek represented appellant. R. 1. The jury convicted appellant. R. 707, l. 8 – 708, l. 8. Judge Russo sentenced appellant to concurrent terms of fifteen years' imprisonment for burglary and armed robbery and a consecutive term of thirty years' imprisonment for murder. R. 720, ll. 10 – 22. This appeal follows.

ARGUMENT

The trial court erred in denying appellant's motion to exclude evidence and expert testimony related to cellular telephone towers.

Relevant Facts

On the night of September 21, 2011, two masked men burst into the home of Rose Lucas ("Lucas"). R. 236, ll. 16 – 20. R. 238, ll. 6 – 240, l. 16. Lucas was a crack dealer. R. 235, l. 23 – 236, l. 5. Living with Lucas was Leon Justice ("Justice"). R. 235, ll. 6 – 22. Justice was a crack addict. R. 235, ll. 6 – 236, l. 10.

At approximately 10:30 PM, Lucas heard a knock on the door. R. 236, ll. 16 – 20. R. 238, ll. 6 – 11. Justice opened the door. R. 238, ll. 6 – 11. Lucas testified that as soon as the door was opened there was "a white flash and somebody hollered, he shot – you shot him." R. 238, ll. 6 – 11. A man wearing a mask from the movie "Scream" put a gun to Lucas's head and told her to give them drugs. R. 238, ll. 18 – 23. The other man was also wearing a mask. R. 240, ll. 18 – 16. Lucas led the men to her bedroom and gave them her "crack and the meth money I had." R. 241, ll. 4 – 21. The masked men ran after taking the money and drugs. R. 247, ll. 9 – 20.

Lucas testified that one of her customers was a man named Danny Plumley ("Danny"). R. 242, l. 25 – 243, l. 18. Danny previously brought people he described as his "brothers" who Lucas said were Charlie Plumley ("Charlie") and appellant Shawn Sharpe ("Sharpe"). R. 243, ll. 8 – 13. Lucas testified that Danny had been to her house the previous day and Shawn and Charlie had been to her house on the same day as the shooting. R. 243, ll. 14 – 25.

Charlie testified against Sharpe. He was charged with the same crimes as Sharpe. R. 439, l. 22 – 440, l. 2. He claimed to have “No deals” with the State. R. 440, ll. 3 – 12. Charlie testified that he, Sharpe, and his wife, Angela Plumley (“Angela”) planned the robbery earlier that day. R. 442, l. 23 – 443, l. 24. They obtained jumpsuits to wear. R. 447, ll. 10 – 17. They went to Sharpe’s brother’s house to get clothes and a gun. R. 449, ll. 2 – 5. Charlie testified that he wore the Scream mask and Sharpe wore a bandanna. R. 450, ll. 2 – 16. R. 455, ll. 1 – 8. Sharpe had the gun. R. 454, ll. 24 – 25. When Justice opened the door, Charlie testified that Justice tried to grab Sharpe’s gun and during the struggle, Sharpe attempted to “fire a warning shot and it went off and hit the man’s head. The man grabbed the gun.” R. 455, ll. 1 – 8. Throughout his direct testimony, Charlie testified about calls that he made from his cellular phone and calls that Sharpe made from his phone. R. 441, l. 13 – 469, l. 23. The solicitor had Charlie identified contact information and phone numbers of the various witnesses. R. 466, ll. 3 – 469, l. 23.

Angela was also charged with the same crimes. R. 162, ll. 21 – 24. She testified that she stayed in the truck while Charlie and Sharpe put on masks and went to Lucas’s house. R. 176, l. 19 – 180, l. 14. She saw the flash of the gun. R. 180, ll. 4 – 14. When Charlie and Sharpe returned, Angela claimed Sharpe said, “I think I shot him.” R. 181, ll. 10 – 22. Angela was also asked about telephone conversations that day. R. 184, ll. 16 – 19. R. 190, l. 20 – 191, l. 3.

The police got Sharpe’s number from his mother. R. 300, l. 24 – 301, l. 21. An officer called Sharpe and spoke with him on the phone. R. 301, l. 22 – 302, l. 19. Sharpe denied being with Charlie the night before. R. 302, ll. 17 – 19. During a

subsequent conversation, Sharpe told police he was with his girlfriend "Taco" the night before. R. 314, l. 11 – 315, l. 12. When the police went to Taco's house to speak with her, a friend of Taco's gave the police a gun and a bandanna. R. 318, ll. 4 – 24. Sharpe then arrived at Taco's house. R. 323, ll. 4 – 13. Sharpe was arrested and his cell phone taken from him. R. 323, l. 19 – 324, l. 22.

The State called an AT&T employee named Bob Wetherell ("Wetherell"). R. 495, l. 17 – 496, l. 8. The State used Wetherell as the records custodian from AT&T to admit call records for the cellphones involved in the case from the day of the shooting. R. 496, l. 9 – 497, l. 6. Over objection, the court qualified Wetherell as an expert in radio engineering. R. 498, l. 12 – 500, l. 7. Wetherell then was allowed to testify regarding how cellular telephones connect with a cellular tower and presented maps related to cellular telephone coverage and towers in parts of Lexington County. R. 500, l. 9 – R. 507, l. 18. He also testified regarding the records showing calls made and which towers the cellular telephones used. R. 505, l. 14 – 507, l. 18.

After Wetherell's testimony, the State called Richland County Sheriff's Deputy Scott McDonald ("McDonald") and offered him as an expert "in cell phone investigation." R. 520, l. 4 – 521, l. 9. Over objection, the court allowed McDonald to testify regarding his review of phone records in the case, the cellular towers indicated by the records, and the location of phones as related to those towers. R. 523, ll. 7 – 532, l. 22. The solicitor used the information from the experts regarding the phones' location to place Sharpe with Charlie and near the scene of the shooting. R. 678, l. 16 – 680, l. 23. R. 683, l. 20 – 685, l. 16.

Discussion

Prior to trial, Sharpe filed a motion to preclude the State's evidence regarding cellular telephone locations. R. 724-36. Sharpe argued the evidence was neither relevant nor scientific and was inadmissible under Rules 401, 403, and 702. SCRE 401, 403, 702. R. 724-36. The court heard argument on the motion and in-camera testimony from Wetherell and McDonald. R. 77, l. 22 – 126, l. 15. Sharpe argued that a cell phone's location could not be accurately described by ping data. R. 78, ll. 8 – 22. R. 82, l. 14 – 83, l. 7. The State argued that it would not be using "ping" data, but instead would show which towers processed a call once a call was placed. R. 79, l. 3 – 82, l. 12. The solicitor argued the evidence was being offered to show that a "device is being used on a particular date and it was most likely within this area." R. 82, ll. 10 – 12. Judge Russo then heard testimony from Wetherell and McDonald.

Wetherell had never testified in court before this case. R. 92, l. 23 – 93, l. 3. He testified that the propagation maps used by cell phone companies were used to identify coverage areas and gaps. R. 85, l. 8 – 91, l. 24. He admitted he was unaware of any peer reviewed articles regarding propagation maps. R. 91, l. 25- 92, l. 3. Wetherell also admitted that the maps used "estimates" and he could not testify to any degree of scientific certainty regarding the accuracy of the coverage areas of the towers. R. 93, ll. 2 – 12. He admitted that he was "speculating" regarding the size of a cell site. R. 95, l. 22 – 96, l. 13. Wetherell admitted on re-cross that even if he testified regarding the cell tower a phone used for a particular call, he could not say where the phone was located within that tower's range. R. 98, l. 7 – 99, l. 19. McDonald's testimony depended entirely upon information provided by Wetherell. R. 110, l. 22 – 111, l. 2. Despite the

vagaries of Wetherell's testimony, Judge Russo ruled the testimony would be admitted. R. 125, l. 3 – 126, l. 10.

The trial court failed in its gatekeeping role to exclude this evidence. State v. White, 382 S.C. 265, 272-273, 676 S.E.2d 684, 687-688 (2009). Only reliable evidence may be admitted. See SCRE 702. To determine the reliability of scientific evidence, the court should examine: “(1) the publications and peer review 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. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999). Scientific evidence “is also subject to attack for relevancy and prejudice.” Id.

Other factors to be considered are scientific methodology, peer review, whether a science is generally accepted, and error rate. Id. citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Furthermore, “[t]o be competent to testify as an expert, a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.” Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-54, 487 S.E.2d 596, 598 (1997) (internal quotations omitted).

The State did not satisfy its burden of proving that its evidence regarding cell phone location was reliable or that Wetherell was qualified. Wetherell could only testify regarding what was located in the phone records as to what towers were used by the phones. He admitted he could not state exactly where the phones were located when they made specific calls. He also admitted that the propagation maps were based on estimates

and could not state with any degree of scientific certainty the accuracy of the location ranges shown. Wetherell could point to no peer reviewed studies regarding this subject. His best guess at the lack of error rate for his propagation maps was the lack of problems planning their cell sites and lack of “unhappy customers.” R. 91, ll. 12 – 24.

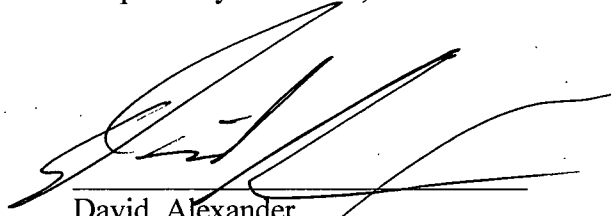
Furthermore, Wetherell had never been qualified as an expert and had never before testified. He had never participated in any specialized training for the type of information contained in his testimony. R. 93, ll. 18 – 21. Wetherell’s graduate education was not in engineering, but in business. R. 84, ll. 15 – 17. The accuracy of the propagation maps was not ensured by Wetherell, but by a third party vendor. R. 92, ll. 10 – 17.

Absent reliability or a qualified expert, it was error to allow this expert testimony. The State’s case hinged on this testimony to place Sharpe at the crime scene. R. 678, l. 16 – 680, l. 23. R. 683, l. 20 – 685, l. 16. The solicitor admitted that Charlie and Angela were murderers who had colluded on their testimony. R. 677, l. 12 – 678, l. 7. But the solicitor told the jury that “Phones don’t lie.” R. 679, ll. 16 – 17. Without this prejudicial evidence, the jury would likely have disbelieved Charlie and Angela and the outcome of this case would have been different. This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's convictions and remand this case for a new trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', is written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of November, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SHAWN WILLIAM SHARPE,

APPELLANT

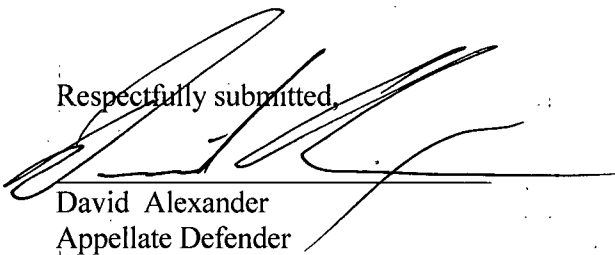
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Shawn William Sharpe states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Thomas A. Russo, which was held on August 26, 2013, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Shawn William Sharpe.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of November, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Thomas A. Russo, Circuit Court Judge

RECEIVED

NOV 12 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

SHAWN WILLIAM SHARPE,

APPELLANT

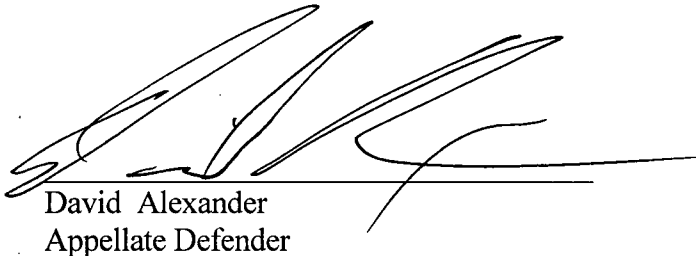
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Trial Transcript;
- (3) May 8, 2013, hearing transcript;
- (4) Court's Ex. 1;
- (5) Court's Ex. 2;
- (6) State's Ex. 1;
- (7) State's Ex. 81;

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

November 12th, 2014



David Alexander
Appellate Defender

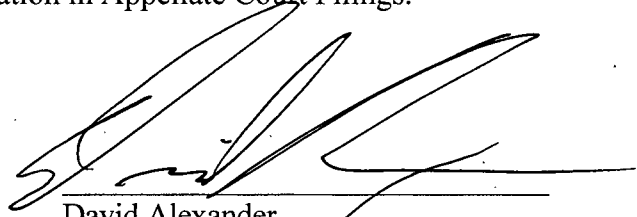
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

November 12th, 2014



David Alexander
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589

RECEIVED

NOV 12 2014

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Thomas A. Russo, Circuit Court Judge

RECEIVED

NOV 12 2014

SC Court of Appeals

THE STATE,

RESPONDENT,

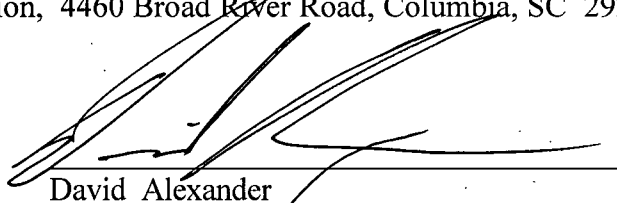
V.

SHAWN WILLIAM SHARPE,

APPELLANT

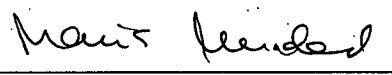
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Shawn William Sharpe, #340383 at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 12th day of November, 2014.


David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of November, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.