STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Marlboro County

J. Michael Baxley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ALEXANDER CARMICHAEL HUCKABEE, III,

APPELLANT.

APPELLATE CASE NO. 2013-001409

INITIAL BRIEF OF APPELLANT

JOHN H. STROM
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

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III. Whether the trial court committed reversible error by allowing SLED "criminal profiler" Paul LaRosa to give expert testimony applying concepts on "offender behavior" in crafting a "criminal profile" when the State failed to demonstrate that LaRosa had the necessary education, expertise, and experience to give opinion testimony?

IV. Whether the trial court committed reversible error by allowing SLED "criminal profiler" Paul LaRosa to give expert testimony applying concepts on "offender behavior" in crafting a "criminal profile" when the probative value of the expert "offender behavior" evidence, offered as definitive proof of Appellant's guilt, was substantially outweighed by the danger of unfair prejudice as the evidence is not probative of whether the Appellant committed the specific acts he for which he was standing trial and provided no information helpful to the jury's understanding of the evidence properly before it?

V. Whether the trial court committed reversible error by admitting Appellant's videotaped interrogation after law enforcement testified that they failed to fully re-*Mirandize* Appellant, including failing to advise him of his right to have an attorney present and his right to have an attorney appointed if he could not afford one, when three days had elapsed since his previous custodial interrogation and the interrogation was given under coercive conditions which overcame Appellant's will?

STATEMENT OF THE CASE

On January 31, 2012, the Marlboro County Grand Jury indicted Appellant for inflicting great bodily injury upon a child, criminal sexual conduct with a minor first degree, and homicide by child abuse. R. * On October 5, 2012, Appellant was re-indicted on all charges to accurately reflect Appellant's name. R. * (Indictments).

Appellant's co-defendant, Atelia Hunt, was indicted for great bodily injury upon a child and homicide by child abuse. On March 1, 2013, Hunt pled guilty to homicide by child abuse and was sentenced to twenty years.

On May 14, 2013, Appellant proceeded to trial before the Honorable J. Michael Baxley and a jury. Tr. 1. Brandon Steen and Richard Jones represented Appellant, and Deputy Solicitor Kernard E. Redmond and Assistant Solicitors Mary-Thomas Lee and Mia B. David represented the State. The jury found Appellant guilty of all charges.

The trial court sentenced Appellant to concurrent terms of life imprisonment on homicide by child abuse and criminal sexual conduct with a minor first degree and a concurrent term of 20 years imprisonment on inflicting great bodily injury upon a child.

This appeal follows.

ARGUMENT

I.

The trial court committed reversible error by allowing SLED "criminal profiler" Paul LaRosa to give expert testimony applying concepts on "offender behavior" in crafting a "criminal profile" when the only inference from such profile testimony, that a defendant who matches the profile must be guilty, is improper as it usurps the jury's role and was offered for the sole purpose of advancing expert opinion concerning the ultimate question of guilt or innocence.

Relevant Facts

On October 6, 2011, Appellant and his girlfriend, Atelia Hunt, took Hunt's minor child to the emergency room after she suffered a series of seizures. Tr.113, ll. 22-23. Minor child was not breathing. *Id.* Attempts to revive her were unsuccessful. Tr. 115, ll. 1-21. Linda Hooper, the supervising nurse on duty that night, testified at trial that minor child had multiple bruises and burn marks. Tr. 115, ll. 22 – Tr. 116, ll. 3. Hooper also noticed that the minor child's head was shaved. Tr. 113, ll. 17-23.

An autopsy revealed that the minor child died from an untreated urinary tract infection which eventually spread to her kidneys causing a blood infection. Tr. 156, ll. 5 – Tr. 157, ll. 22. The bacteria in her blood caused irregular clotting; progressing to a series of small strokes when the infected blood clots reached her brain. *Id.* Dr. Cynthia Schandl, who performed the autopsy, believed that the symptoms from the infection, particularly as it progressed to the brain would have been noticeable, such as: unsteady walking, lethargy, loss of appetite, and possibly seizures. Tr. 160, ll. 18 – Tr. 161, ll. 11.

Proffer Testimony of "Criminal Profiler" Paul LaRosa

At trial, the State sought to have Lieutenant Paul LaRosa of SLED to testify as an expert in in "offender behavior" or "criminal profiling." Tr. 533, ll. 10-11. A proffer was held to determine

whether the "science" of criminal profiling is sufficiently reliable and whether LaRosa had the necessary qualifications. *Id.* at 18-23.[1]

LaRosa had worked at SLED for eighteen years, and had a bachelor's degree in art and political science. Tr. 534, ll. 24 – Tr. 538, ll. 5. He began his career in the Latent Print Crime Scene Unit and was certified in crime scene reconstruction. Tr. 535, ll. 3-12. From 2000 to 2005, he was a member of the Blood Hound Tracking Team, followed by a period as an investigator. *Id.* at 12-19. In 2010, he entered an understudy program to become a criminal profiler. *Id.* at 20-23. During this program his mentor was Mike Prodan, the subject of the opinion in *State v. Tapp*, 398 S.C. 376, 728 S.E.2d 468 (2012); Tr. 536, ll. 5-10. It is unclear if LaRosa was still an understudy at the time of this investigation. *Id.* at 11-16.

LaRosa's formal instruction on criminal profiling and psychology, specifically sex offense profiling, came from two programs: (1) an eight week FBI course and (2) a one month internship with the Department of Mental Health. Tr. 536, ll. 19 – Tr. 538, ll. 1. LaRosa claimed his usual role is to help police identify the characteristics of a potential offender before the police have arrested or identified a suspect. Tr.536, ll. 19-22. LaRosa admitted Appellant's trial was the first time he testified as an expert criminal profiler in any court regarding sex offender profiles, but added hopefully, "we've got hundreds in the chute ready to go." Tr. 557, ll. 6-13. LaRosa further admitted that Appellant's case was only his second time testifying as a criminal profiler in any court. Tr. 544, ll. 7-9.

[1] Criminal profiling is also referred to as "victimology"; "behavioral analysis"; and "criminal behavioralist." Tr. 536, ll. 8-10; Tr. 549, ll. 11-20; Tr. 588, ll. 14-15.

On the scientific reliability of "criminal profiling" and its methods, LaRosa claimed repeatedly that his work was peer reviewed. Tr. 544, ll. 15-18; Tr. 549, ll. 6-7; Tr. 549, ll. 25 – Tr. 550, ll.7; Tr. 550, ll. 6-7; Tr. 554, ll. 9-13; T r. 589, ll. 23-25. He never identified or elaborated on what peer in the field of "criminal profiling" reviewed his work on this case, but simply that he had sent his results to others and they had approved of his profile. Tr. 549, ll. 2-7. No other criminal profilers, psychiatrists, or psychologists were called by the State to verify the accuracy of LaRosa's profile. LaRosa averred:

> Within our field, because we have the access of others that we bounce things off of. We talk. We have case reviews and that kind of stuff. We do have some fellow behavioral investigators with the FBI. There are several in Virginia that we will share with each other this information, and make sure that we're tracking correctly. But this case was peer reviewed in the --- in the testimony that I was going to testify to, about it being a Situational Child Molester with sadist overtones. And we know that a Situational Child Molester is going to be a male, and that he gets sexual gratification from inflicting pain on others.

Tr. 549, ll. 18 – Tr. 550, ll. 5. LaRosa explained that his conclusions on the sexual nature of the abuse as well as the gender, age, and relationship of the victim to the perpetrator were drawn in part on an FBI criminal profile database. Tr. 545, ll. 13-21. He did not name this database. LaRosa never referenced any scientific, psychological, or psychiatric treatises relied on when designing his criminal profile, and he did not reference any authorities in the criminal profiling field whose generally reliable or accepted methods he followed.

With respect to the amount of information about the case he used, LaRosa claimed he examined the autopsy report, and was told the "bases of the case," including the background of the Appellant and co-defendant by Bass. Tr. 539, ll. 16-21; Tr. 542, ll.16-19. LaRosa stated that he concluded the offender behavior fit the profile situational child molester:

> The accuracy rate. ***We have learned from our past mistakes as Criminal Profilers and Behaviorists, in a case like this we're not specifically saying that Mikey is the***

> ***one who inflicted those*** --- those scars and the sexual abuse on this victim. I can not say that he did it. ***I can just say that it would've been somebody, a male, who would have had direct influence over this child. We have the ability to be alone over a period of time, to inflict over a period of time,*** these –these burns and this abuse to this three year who would have had direct influence over this child.

Tr. 554, ll. 14-23 (***emphasis added***). Interestingly, LaRosa admitted that **the description of the possible offender was intentionally vague so as to improve the accuracy of his profile**. Tr. 555, ll. 5-7. LaRosa confessed that, "in the past [criminal profilers] would say that it would be a white male, twenty-four years old, driving a red truck, [or] he was twenty six years old driving a green truck, so we've pattern this a little different," in an effort to increase the chances that the person charged with the crime matches the criminal profile. Tr. 554, ll. 25 – Tr. 555, ll. 4.

LaRosa did not submit his findings in a written report and the content of his testimony was not revealed to defense counsel until the day before he was to testify. LaRosa only became involved in the case after Appellant and co-defendant were arrested. LaRosa had no investigative function helping law enforcement generate leads or narrow down a large group of suspects. Tr. 539, ll. 16-21.

Trial Court's Ruling on Admissibility of LaRosa's Testimony

The trial court qualified LaRosa as an expert in the science of criminal profiling and ruled that all aspects of his testimony was admissible. Tr.564, ll. 5-18. The trial court stated its opinion that the requirements for reliability were met:

> I find that, you know, ***there are numerous publications. There is peer review*** of this technic [*sic*] which he testified to yesterday. He also testified that he has ***previously been admitted as an expert in crime scene analysis, and also other behavior issues***. He's never--- he candidly admitted he has not been admitted as an expert in a CSC case allegedly with this type of evidence. But the Court does not find that the fact that this would be first impression on this specific set of facts would disqualify him to testify today.

> I do find that because there is, he has an opportunity to work with the colleagues. He has worked with the behavioral group with the FBI, that thus there is --- there are quality control procedures, and there also are consistency --- are consistency in the methods that he applies.

Tr. 564, ll. 9-24 (*emphasis added*). The trial court also concluded that criminal profiling was a sufficiently reliable scientific field to be admitted as evidence at trial:

> Basically, looking at this from **some sort of *Dauber[t]* Analysis** as well, that I find that this area of law is a cross roads of psychology, and human behavior, and crime scene analysis. As I said earlier, it is peer reviewed.

Tr. 564, ll. 25 – Tr. 565, ll. 3 (*emphasis added*). Curiously, the trial judge buttressed his finding, by noting criminal profiling's alleged general acceptance in popular culture somehow confirmed the scientific reliability of LaRosa's expert testimony and made it proper for the jury to hear:

> The Court finds that there is ***general acceptance now for this type of testimony, not only in the public domain, who may have even come to expect from television shows such as Criminal Minds and other media*** that involve this type of science that has a definite impact on jury expectations. Although we're not here necessarily to play to jury expectations, ***it just tells me that this is a generally accepted area of science. And I was impressed yesterday that Agent LaRosa testified that, because he will not identify the [Appellant] as the perpetrator, he has at least his position was, he would have a zero rate of error. But the Court has some comfort that he's not here today to necessarily target by name a specific defendant***, he is simply is going to give some annualizes [verbatim] of the crime scene, which actually is the body of the child.

Tr. 565, ll. 9 – Tr. 566, ll.20 (*emphasis added*). The trial court then determined that the probative value of LaRosa's testimony substantially outweighed any prejudice. Tr. 565, ll. 21 – Tr. 566, ll. 7. Specifically the trial court found that:

> [t]he jury here is confronted with basic questions. ***How could anyone do this to a child?*** Clearly if these wounds are not self-inflicted, these are cigarette burns, and that is the, I guess, the real evidence here, is ***the State's attempt to prove that the Defendant did it. That's what brings us here. But the jury has to be wondering how could such a thing occur.***

> And the Court finds that this is a core concern. It's really something we haven't discussed yet. ***I'm sure it will come out in closing about how anyone could do this. How could this type of crime be committed?*** Clearly the crime was committed here. I'm not saying that the Defendant did it, **but someone did**, because again these wounds cannot self-inflicted.
>
> And so, the Court finds that ***this type of behavioral analysis to assist the jury in bringing an understanding to what really is a core issue,*** so I find it highly probative.

Tr. 566, ll. 8-24 (*emphasis added*). The trial reasoned that the testimony was not prejudicial because the defense should have prepared for the State to put up evidence that Appellant committed the crime. Tr. 567, ll. 1-4. The trial court did caution that if the testimony "***attempts to exclude the other adult in the house, which of course, is the mother***....when he attempts to exculpate her, the court believes that goes beyond what would be expected in the case by defense counsel." Tr. 567, ll. 10-16 (*emphasis added*).

LaRosa's Trial Testimony Before the Jury

Immediately upon being qualified as an expert witness and having his reliability sanctioned by the trial judge, LaRosa summarized what "criminal profilers" do in a typical investigation. Tr. 588, ll. 7 – Tr. 591, ll. 6. LaRosa asserted, "**it's what televisions show, shows the majority of the time, is you have a victim and we don't know who did it**.... We get into all kinds of victimology. Who was the victim. What was she like..." Tr. 588, ll. 10-16 (*emphasis added*). He testified that the majority of the work concerns looking at how the crime was done, **the victim's lifestyle** (minor child was four at the time of her death), and the background and lifestyle of the potential suspects. T r. 588, ll. 17 – Tr. 589, ll. 11.

LaRosa stressed that criminal profiling is a collaborative effort and that he "consulted with other 'criminal profilers' and make sure that everything that I'm seeing in a peer review system...are correct." Tr. 589, ll.21 –Tr. 590, ll. 10. In concluding what a "criminal profiler" does,

LaRosa concluded, "we were asked why would somebody do this. What are the most likely characteristic of a person that would do this and harm this child this way." Tr. 590, ll. 23 – Tr. 591, ll. 1.

His methods and goals explained, LaRosa then recounted his role in Appellant's case. Tr. 591, ll. 11 – Tr. 596, ll. 12. LaRosa stated that he drew on his crime reconstruction background in addition to his profiling expertise in determining the perpetrator was an adult male because he believed the burns on the minor child demonstrated that she was held down while they were inflicted. Tr. 593, ll. 4-24. LaRosa proffered that since the burns were inflicted around her genital area and that ninety-nine percent of all violent sexual assaults on children are done by males; the perpetrator was a male. Tr. 594, ll.7-2. LaRosa assuaged any skeptical jurors, professing:

> it is right there in my research, and the research was done as late as this past week, and it was doubled checked last night. ***There were no cases*** that I could find from ***the Forensic Psychiatrist that I consulted*** with and also ***the other Profilers in our unit***, where we have ran into a case where a sole offender would be a female.

Tr. 594, ll. 21-25 (*emphasis added*). None of the individuals alluded to by LaRosa testified at trial or were identified by name.

Having asserted his infallibility and outlined his methodology, LaRosa revealed the criminal profile he constructed, prefaced with explicit assurance that the fact Appellant was already in custody had no impact on his conclusion:

> If this case came to us as a traditional profile and we had this victim on the side, say on the side of the road, ***we didn't know who she belonged to or what the history was***. I would be telling the local authorities that ***you would be looking for an adult male, approximately the age of twenty five to forty***, who would have --- who would --- once we would identify her and know who she is, ***that this individual would have direct access over this child where they were able to have complete control over a period of time***.

Tr. 595, ll. 9-18. On cross-examination, LaRosa conceded that Appellant's trial was the first time he had testified in a CSC trial as a criminal profiler. Tr. 596, ll. 20-24. LaRosa also freely admitted that he had no direct evidence that Appellant was the perpetrator, "I have no evidence of anybody, except to meet that profile that I just explained to you." Tr. 597, ll. 2-3. On recross, LaRosa, over the objection of defense counsel, testified that he had consulted on hundreds of CSC cases with all kinds of perpetrators, victims, and facts, but that in these cases his testimony was not requested. Tr. 597, ll. 17 – Tr. 598, ll. 21.

State's Closing Argument

LaRosa's testimony featured prominently in the State's closing argument; the expert that confirmed Appellant's guilt by linking the minor child's injuries to the Appellant:

> Paul Larosa testified, and I think Jones referred to it as whoie. **I mean it's -- he trained with the Federal Bureau of Investigation, the chief law enforcement agency in the United States of America in this particular field**. And here is the more important thing. **Did he really tell you anything that didn't make sense**. You know before you say, oh, and dismiss it as whoie what he tell you? Well, it's a male. **Looking at it as a crime scene situation we would be looking for an adult male.**[2]

Tr. Vol. II. 48, ll. 3-11. Having vouched for the credibility and skill of LaRosa, the State summarized LaRosa's testimony:

> **Agent LaRosa testified that based on that and based on his review of that and review of the record that would indicate an adult**. . . .
>
> You know, why do that[?] **That's sadistic. Well, that leads into the sexual gratification aspect** of this because it is centered around her genitalia. It's sick. It's sadistic, but there is a sexual basis for why someone would do that. Sick. I can't fathom it, but unfortunately, as we heard it happens, and it happened to [Minor Child].

[2] Volume II of the trial transcript which contains the closing arguments and charge to the jury took on June 21, 2013 and is cited as Transcript Volume II (Tr. Vol. II). This transcript does not continue with the same pagination as the trial transcript.

> And then he also, Agent LaRosa, talked about the fact that **it would have been a male** because in the research and he outlined the research that had been done, the nature of what it is he does, and what not. These situations involve men. **Men are the perpetrators. . . . [LaRosa] [d]id not point and say the Defendant did it. This is where your common sense comes in. Who had the most access to that child during 16 that time? That was an adult male. The defendant.**

Tr. Vol. II. 48, ll. 17 – Tr. Vol. II 49, ll. 16. The State then highlighted statements made by Appellant during his third interrogation by law enforcement, where Appellant conceded that he saw some indications of abuse and that he should have called DSS. Tr. Vol. II. 53, ll. 8 – Tr. Vol. II. 54, ll. 2.

The State also invited the jurors to compare their hypothetical actions to Appellant's actions: "[h]ow many of us would look and see that much going on with a three year old and not say or do something unless we had something to hide? Unless we were the perpetrators." *Id.* at 3-6. The State concluded with a slide show of pictures of the minor child from the autopsy interspersed with pictures of the minor child while she was alive. Tr. Vol. II. 57, ll. 10 – Tr. Vol. II. 59, ll. 23.

Discussion

Criminal profiling testimony has the sole purpose of presenting expert opinion concerning the question of guilt or innocence; as such it usurps the jury's role as the sole judge of the facts and it does not aid the jury in objectively evaluating evidence put forward at trial. This Court should now take the opportunity to hold such testimony *per se* inadmissible.

South Carolina Courts have addressed the issue of criminal profiling testimony, but have not ruled on the admissibility of such evidence. *State v. Tapp*, 398 S.C. at 389, 728 S.E.2d at 475 (trial court's failure to make a determination on the underlying reliability of profiler's method was a

harmless error)[3]. South Carolina courts have addressed the admissibility of a similar area of expert testimony in forensic interviewing of child abuse victims. *State v. Kromah*, 401 S.C. 340, 360, 737 S.E.2d 490, 500 (2013). In *Kromah*, the Court held that testimony by a forensic interviewer that she made a "compelling finding" of abuse based on her interview of the minor child was inadmissible as it bolstered the credibility of the victim. *Id.* at 356, 737 S.E.2d at 498.

As the Court noted, forensic interviewing may be a helpful investigative tool, but it is not an area of scientific study, it does not turn its practitioners into "human truth-detectors", and that court sanctioned expertise is improper because the interviewer's testimony must be limited to personal observations. *Id.* n. 4. Further, the Court concluded that the propriety of forensic interviewer testimony is questionable:

> An interviewer's statement that there is a "compelling finding" of physical abuse relies not just on objective evidence such as the presence of injuries, but on the statements of the victim and ***the interviewer's subjective belief as to the victim's believability***. However, an interviewer's expectations or bias, the suggestiveness of the interviewer's questions, and the interviewer's examination of possible alternative explanations for any concerns, are all factors that can influence the interviewer's conclusions in this regard. ***Such subjects, while undoubtedly important in the investigative process, are not appropriate in a court of law when they run afoul of evidentiary rules and a defendant's constitutional rights***.

Id. at 357, 737 S.E.2d at 499 n. 5 (*emphasis added*). Criminal profile or offender behavior testimony has been held inadmissible in over twenty states. In the Fourth Circuit Court of Appeals as well as the Eighth, Ninth, Tenth, and Eleventh Circuits criminal profiling testimony is also inadmissible. When courts address offender behavior or criminal profile testimony, it has been near universally excluded whether presented by the State or by the defense. *People v. Robbie*, 92

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[3]*See Id.* at 391, 728 S.E.2d at 476 (Pleicones, J., dissenting) (Prodan's testimony not harmless error as served to identify defendant as likely perpetrator in light of his statement to police that he had been in victim's apartment, as well as the testimony of the victim's roommate and another witness that the victim was familiar with respondent).

Cal.App.4th 1075, 112 Cal.Rptr.2d 479 (2001) (***testimony of criminal profiler was offered to establish a stereotype and then condemn defendant for fitting it***; testimony did not help the jury objectively evaluate evidence, but instead pushed them to conclude defendant was guilty because he fit the profile, not because of evidence presented at trial) (*emphasis added*).

In holding criminal profiling testimony inadmissible courts emphasize its irrelevance to the specific facts of the case before the jury, "evidence which only describes the characteristics of the typical offender has no relevance to whether the defendant committed the crime in question." *State v. Clements,* 770 P.2d 447, 454 (Kan. 1989); *see also: Sloan v. State,* 522 A.2d. 1364 (Md. Ct. App. 1987); *State v. Petrich,* 683 P.2d. 173 (Wash. 1984); *People v. Bradley,* 526 N.E.2d 916 (Ill. Ct. App. 3rd 1988); *Sanders v State*, 303 S.E.2d 13 (Ga. 1983); *Douglas v U. S.,* 386 A2d 289 (D.C. Ct. App. 1978); *U.S. v. Gillespie,* 852 F.2d 475 (9th Cir. 1988); *see, State v Hansen,* 743 P2d 157 (Ore. 1987); *see also, U.S. v Quigley,* 890 F.2d 1019 (8th Cir 1989), *cert denied* 493 US 1091 (1990); *U.S. v. Jones,* 913 F.2d 174 (4th Cir. 1990); *U.S. v. Miller*, 874 F.2d 1255 (9th Cir. 1989); *U.S. v Hernandez-Cuartas,* 717 F.2d 552 (11th Cir. 1983).

Second, courts stress that the inference drawn from criminal profiling evidence is an impermissible usurpation of the jury's role as sole fact finder, "the essence of the testimony would have been that **the expert had determined that the defendant was not a sex abuser and, therefore, was not guilty**. That question is for the jury." *State v. Gallup,* 779 P.2d 169, 172 (Ore. Ct. App. 1989)(*emphasis added*); *see, State v. Person,* 564 A.2d. 626 (Conn. Ct. App.1989); *State v. Fitzgerald,*382 N.W.2d 892 (Minn. Ct. App. 1986); *State v. Tucker,* 798 P.2d 1349 (Az. Ct. App. 1990); *People v. Watkins,* 440 N.W.2d 36 (Mich. Ct. App.1989); *Pendleton v. Commonwealth,* 685 S.W.2d 549 (Ky. 1985); *Williams v. State,* 649 S.W.2d 693 (Tex. Ct. App. 1983); *Kanaras v. State,*

460 A.2d 61 (Md. Ct. App. 1983); *U.S. v St. Pierre,* 812 F.2d 417 (8th Cir. 1987); *see also, State v. Cavallo,* 443 A.2d 1020 (NJ 1982).

As with forensic interviewing and polygraph examinations, criminal profiling may be an effective investigative tool. As expert testimony, it runs afoul of evidentiary rules and defendant's constitutional right to have a jury of his peers decide guilt or innocence by objectively weighing the evidence properly before them. From a practical standpoint, it allows the party offering the expert to present highly prejudicial testimony, perhaps proper in a closing argument where the state is not presenting evidence and is allowed to make reasonable inferences from the record, during the case in chief with the weight and authority given by jurors to court sanctioned experts. *Wastson v. Ford Motor Co.*, 389 S.C. 434, 449, 699 S.E.2d 169, 176 (2010)(courts should be cautious in conferring an expert label upon a witness as juries may accord excessive, undue weight to "expert" testimony).

LaRosa's testimony is exactly the kind of criminal profile testimony that has been ruled inadmissible in so many other jurisdictions. His testimony was put forward by the state to establish the profile of a child molester and then to condemn the Appellant because he fit their tailor-made profile. The court's ruling also illustrates the powerful, human appeal of profile testimony, as it alleges to answer, "How could anyone do this to a child . . . . the jury has to be wondering how could such a thing occur." Tr. 566, ll. 8-21.

How something could happen is not the proper focus of the jury's deliberations; the jury must objectively decide if the State proved beyond a reasonable doubt that the defendant did the crime. How someone could bring themselves to commit these acts is irrelevant to the determination of whether the State proved beyond a reasonable doubt that Appellant was the perpetrator. LaRosa's testimony did not help the jury objectively evaluate evidence, but instead demanded the jury conclude the defendant was guilty because he fit the profile.

Accordingly this Court should take the opportunity to definitively rule that expert "criminal profile" or "offender behavior" testimony is *per se* inadmissible in South Carolina courts.

II.

The trial court committed reversible error by allowing SLED "criminal profiler" Paul LaRosa to give expert testimony applying concepts on "offender behavior" in crafting a "criminal profile" when the State failed to establish that the methodology of "criminal profiling" was scientifically reliable under *State v. Jones.*

Discussion

All expert testimony must satisfy the Rule 702, SCRE, criteria. *State v. White*, 382, S.C. 265, 270, 676 S.E.2d 684, 686 (2009). Under this rule, the trial court exercises gatekeeping function to insure the proposed expert testimony meets a reliability threshold for the jury's consideration. *Id.* This inquiry requires that the proposed expert testimony meets a threshold level of reliability, regardless of whether it is scientific or unscientific. *Id.* Accordingly, trial courts are required to establish whether: (1) the expert has the requisite qualifications, experience, and/or credentials; (2) the methodology by which the evidence is obtained is reliable; and (3) the evidence will assist the trier of fact. *Id.* Evaluating the reliability of the proposed expert testimony is the central concern of Rule 702 admissibility. *State v. Jones,* 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001); *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 147, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999).

With respect to reliability of scientific expert testimony and evidence, the trial court must examine the following factors: (1) publications and peer reviews of the technique used by the expert; (2) prior application of the method to the type of evidence involved in the case; (3) quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. *State v. Jones,* 273 S.C.723, 731-732, 259 S.E.2d 120, 124-125 (1979). When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable. *State v. Council*, 335 S.C. 1, 21, 515 S.E.2d 508, 518 (1999). On appeal, the trial judge's

decision to admit or exclude evidence is reviewed under an abuse of discretion standard. *Id.* at 20, 515 S.E.2d at 518.

Whether criminal profiling is a proper field for scientific expert testimony is an open question in South Carolina. *Tapp*, 398 S.C. at 389 728 S.E.2d at 475. However, the South Carolina Supreme Court's decisions regarding "barefoot sole impressions" in *State v. Jones*, and mitochondrial DNA (mtDNA) analysis in *State v. Council* are instructive and, at a minimum, provide guideposts for determining the level of scientific reliability required by courts when evaluating the admissibility of testimony from an obscure or relatively new field of study.

In *Jones*, the State sought to introduce "barefoot insole impression evidence," which theorizes that the regular wearer of a pair of shoes imparts the impression of his foot into the insole of the shoes. 343 S.C. 562, 572, 541 S.E.2d 813, 819. Barefoot insole impression evidence consists of "inked impressions of the suspected wearer's feet, photos of the suspected wearer's known insoles, and a standing cast of the suspected wearer's foot [which] are compared to the impressions in the boots, both visually and by using calipers to compare distances between toes and other features among the various exhibits." *Id.* The State's expert testified that there were several methods used in making "barefoot insole impression" comparisons and that his work was published and subject to peer review. The expert specifically named three texts that he relied on, and several professional discussions he had with named experts as the basis for reaching his conclusion in the present case. *Id.*

The Supreme Court held that "barefoot insole impression" evidence is not scientifically reliable under the *Jones* test and thus inadmissible. *Id.* at 573, 541 S.E.2d at 819. The Court noted that while the expert was peer reviewed, much of his earlier work was discredited. *Id.* Moreover, SLED had no experience conducting this kind of work and had no written protocol to insure

accuracy and repeatability. *Id.* at 574, 541 S.E.2d at 819. Further, the Court concluded that there was no existing recognized scientific laws or proceedings regarding the field of "barefoot insole impression." *Id.*

By comparison, in *State v. Council* the Court affirmed the trial court's determination that mtDNA analysis evidence was admissible. 335 S.C. 1, 515 S.E.2d. 508 (1999). At trial, the State's expert testified on proffer that he conducted the analysis using a widely recognized and accepted methodology within the scientific community. *Id.* at 17, 515 S.E.2d at 517. Further the expert testified that he confirmed the mtDNA evidence "based on a scientific objective standard" that was capable of repetition and replication by any qualified scientist. *Id.* at 18, 515 S.E.2d. at 516-517.

Looking to the *Jones* test, the Court concluded: "[mtDNA] analysis has been subjected to peer review and many articles have been published about this technology. The F.B.I. validated the process and determined its [statistical] rate of error. Its underlying science has been generally accepted in the scientific community. Further, while forensic application of mtDNA analysis is fairly new, the technology has been used in other contexts for several years." *Id.* On appeal, the trial court's ruling was upheld, mtDNA analysis evidence was admissible under *Jones* and Rule 702 SCRE. *Id.* at 21, 515 S.E.2d at 518.

In the present case the trial court abused its discretion in holding that the science and methodology utilized in the field of "criminal profiling" was sufficiently reliable under the *Jones* standard. Tr. 564, ll. 9-24. First, LaRosa's never named an authoritative "criminal profiling" text that he relied on in making his determination and never named other criminal profilers that he sent his profile to for peer review. Instead, LaRosa vaguely references an F.B.I. run database of past offenders and that he sent his profile to other anonymous behaviorists for review. Tr. 548, ll. 5 – Tr. 549, ll. 25. As LaRosa never submitted a written report, the trial court had no other way of knowing

what information LaRosa used or supplied to his peer reviewers when generating and seeking confirmation of his offender profile.

Second, LaRosa's testimony regarding prior application of his methods in past criminal cases was vague and provided no guidance to the trial court regarding the reliability of his testimony. LaRosa admitted that he had never testified as a profiler in a criminal sexual conduct case before and had only testified once before as a criminal profiler. Tr. 596, ll. 20-25. Third, as to error rate and quality control, LaRosa testified that he had a zero rate of error in making predictions. Tr. 554, ll. 7 – Tr. 555, ll. 10. This astonishing accuracy was reached by creating vague profiles. *Id.* However, LaRosa never testified as to specific quality control measures taken to insure reliability, beyond simply crafting a broad profile capable of encapsulating at least one of the incarcerated suspects.

Fourth, unlike the method for analyzing mtDNA sanctioned in *Council*, there is no consistent scientific method or procedure in criminal profiling. As LaRosa explained, the methodology of "criminal profilers" consists of looking at all of the evidence law enforcement has in a particular case and trying to extrapolate a sketch of the characteristics a possible perpetrator based on past cases. Thus, there is no minimum amount of evidence necessary before a criminal profile can be created. Moreover, the importance of any particular piece of evidence is left completely to the subjective determination of the individual profiler. LaRosa's methods cannot be tested for consistency and there are no scientific laws applicable to "criminal profiling."

Ultimately, creating a known potential error rate to insure the accuracy of criminal profiling is impossible because there are too many variables in technique: there are no standards for evaluating the weight and relevance of certain evidence; no set standards for how specific a profile must be before it can be declared a success; and no defined method of crafting a profiling that

capable of replication by others to insure accuracy. Additionally, the trial court erred in applying a *Daubert* analysis, which the Supreme Court had expressly rejected in *Jones*; which along with the trial court's stated reasoning revealed a deeply flawed exercise of discretion. 383 S.C. at 538, 681 S.E.2d at 581.

Any assertion of harmless error by the State would be untenable; LaRosa's offender profile testimony could not be harmless because it was the only evidence the State presented linking the injuries of the minor child and the resulting criminal sexual conduct charge to the Appellant. During all three of Appellant's interrogations, including the final interrogation spanning three hours, and at trial Appellant adamantly denied any knowledge of the cigarette burns to the minor child's genitals. Nor was there DNA evidence indicating Appellant's involvement or eye witnesses to the alleged conduct.

Testimony by his co-defendant, Hunt, was entirely self-serving and uncreditable. She had taken a plea deal which resulted in her changing her story and "remembering" incidents involving Appellant and minor child. Tr. 503, ll. 15 – Tr. 504, ll. 25. Even then none the incidents remembered explained the pattern of cigarette burns. Tr. 496, ll. 19-25. The pornography found on Hunt's computer, but attributed to Appellant, consisted almost exclusively of visits to a single website with videos involving older women.[4] Tr. 659, ll. 11-23. Finally, prior to taking the plea deal she wrote a letter to Appellant's mother assuring her of Appellant's innocence and her love for him; while simultaneously carrying on an affair with a correctional officer.[5] Tr. 457, ll. 8 – Tr. 459, ll. 22.

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[4] The computer and computer crime report were entered into the record as State's Ex. No. 85 and 99, respectively. R.* (Computer Report).

[5] The letters from Hunt to Appellant's mother and to the correctional officer were entered into the record as Defense Exhibit No. 1 and 2, respectively. R.* (Hunt Letters).

Therefore, the trial court's error in admitting LaRosa's testimony was not harmless because it was critical to the Appellant being found guilty of criminal sexual conduct with a minor in the first degree. *State v. Mitchell,* 378 S.C. 305, 316, 662 S.E.2d 493, 499 (2008). Accordingly the trial court committed reversible error in holding that criminal profiling was a proper field for expert testimony as the State failed to establish that the methodology of "criminal profiling" was scientifically reliable under *State v. Jones*.

III.

Whether the trial court committed reversible error by allowing SLED "criminal profiler" Paul LaRosa to give expert testimony applying concepts on "offender behavior" in crafting a "criminal profile" when the State failed to demonstrate that LaRosa had the necessary education, expertise, and experience to give opinion testimony?

Discussion

Trial courts have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, SCRE, whether the evidence is scientific or nonscientific. *White*, 382 S.C. at 274, 676 S.E.2d at 688. In the discharge of its gatekeeping role, a trial court must assess an expert's qualifications before determining if the expert's proposed testimony is sufficiently reliable. *Tapp*, 398 S.C. at 389, 728 S.E.2d at 475 (trial court committed reversible error in permitting testimony from criminal profiler without first assessing his qualifications as an expert).[6] Rule 702, SCRE, imposes on the trial courts an affirmative and meaningful gatekeeping duty. *White*, 382 S.C. at 270, 676 S.E.2d at 686. However, a trial court's decision to admit or to exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. *State v. Price,* 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006).

Competency to testify as an expert requires a witness to "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, 252-53, 487 S.E.2d 596, 598 (1997). An expert's testimony may not exceed the scope of his expertise. *State v. Ellis,* 345 S.C. 175, 547 S.E.2d 490 (2001) (finding police officer, qualified as an expert in crime scene processing and fingerprint identification,

[6] The South Carolina Supreme Court has declined to make a determination as to the reliability and expertise of criminal profiler, Adam Prodan. *Tapp*, 398 S.C. at 388, 767 S.E.2d at 474 n. 11; *State v. Sessions*, 2013–UP–063 (S.C. Ct. App. Filed January 30, 20130; and *State v. Stephens*, 2013–UP–062 (S.C. Ct. App. Filed January 30, 2013).

exceeded the scope of his expertise when he testified to conclusions drawn from the location and position of the victim's body at the time of the shooting).

In order to testify as to an accused's state of mind, a prospective expert must state what training or experience enabled the expert to comment as to the accused's state of mind at the time of the incident. *State v. Harris*, 318 S.C. 178, 181, 456 S.E.2d 433, 435 (Ct. App. 1995) (licensed clinical psychologist with ***four years of mental health experience and six months of counseling with defendant was not qualified*** to render an opinion as to defendant's state of mind at the time of the incident) (*emphasis added*). While an expert witness is not necessary to testify to the existence of prior injuries; only a properly qualified expert may offer a conclusion that a child has been a victim of abuse. *State v. Lopez*, 306 S.C. 362, 366, 412 S.E.2d 390, 393 (1991) (diagnosis of a victim's injuries and determination of the cause of those injuries based on the symptoms is beyond the ability of the average trier of fact and a qualified expert opinion is essential for the trier of fact to connect those injuries to a physical cause). Therefore, qualifications for expert witnesses in child abuse cases focus on whether the proffered expert possessed the requisite skill, training, experience, learning, and knowledge to render a psychiatric or psychological diagnosis of the victim and the abuser.

Moreover, since the Appellant and Hunt were already incarcerated when LaRosa became involved in the case, LaRosa's testimony was focused on explaining why someone would abuse the minor child and which of the two defendants was most likely responsible. Tr. 590, ll. 15-24. His formal psychological training and education consisted of an eight week F.B.I. course and a one month internship with the department of mental health. His profiling experience consisted of assisting in investigations in an advisory capacity with an undisclosed rate of success and profiling

accuracy. Tr. 597, ll. 25 – Tr. 598, ll. 7. He had never testified as a criminal profiler in a criminal sexual conduct with a minor case. Tr. 596, ll. 20-24.

While not identifying the Appellant by name, LaRosa, considering he was brought in when the suspects were limited to two people, strongly inferred Appellant was the perpetrator. Tr. 595, ll. 3-25. He speculated to the jury in graphic detail that the perpetrator, whoever he might be, was "a situational abuser.... from sex sadistic qualities like this," and was almost certainly "an adult male, approximately the age of twenty five to forty, who would have . . . direct access over this child where they were able to have complete control over a period of time." Tr. 595, ll. 13 – Tr. 598; ll. 7. Further, LaRosa speculated that Hunt was too self-absorbed to have sexually abused the minor child. Tr. 552, ll. 6-20. He also claimed that Hunt's journal was likely an accurate and true reflection of her feelings since it was "an open ended flowing document."[7] Tr. 551, ll. 9-21.

LaRosa pontificated on the Appellant's state of mind at the time of incident and hypothesized that he was a sadistic pedophile. Tr. 595, ll. 13 – Tr. 598; ll. 7. He also speculated on the co-defendant's state of mind and speculated on her possible psychological condition. Tr. 551, ll. 9-21. Further, he diagnosed the minor child's injuries, determined of the cause of those injuries, and connected the physical findings to a cause with an alleged perpetrator. *Lopez*, 306 S.C. at 366, 412 S.E.2d at 393. Nothing in LaRosa's experience, training, and education suggests he has the necessary mental health background or professional qualifications to reliably make these assessments and testify as an expert at trial.

[7] In addition to his profiling expertise, LaRosa also apparently is credentialed as a human truth detector. *Kromah,* 401 S.C. at 357, 737 S.E.2d at 499 n. 4.

IV.

The trial court committed reversible error by allowing SLED "criminal profiler" Paul LaRosa to give expert testimony applying concepts on "offender behavior" in crafting a "criminal profile" when the probative value of the expert "offender behavior" evidence, offered as definitive proof of Appellant's guilt, was substantially outweighed by the danger of unfair prejudice as the evidence is not probative of whether the Appellant committed the specific acts he for which he was standing trial and provided no information helpful to the jury's understanding of the evidence properly before it.

Discussion

Rule 403, SCRE, states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." A trial court has wide discretion in ruling on Rule 403 objections. *See State v. Adams,* 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003). ("A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. We ... are obligated to give great deference to the trial court's judgment [regarding Rule 403]." (internal citation omitted)). However, evidence "calculated to arouse the sympathy or prejudice of the jury should be excluded if they are ... not necessary to substantiate material facts or conditions." *State v. Torres,* 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010). "[A] court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates." *State v. Collins*, 398 S.C. 197, 203, 727 S.E.2d 751, 754 (Ct. App. 2012).

"Prejudice that is 'unfair' is distinguished from the legitimate impact all evidence has on the outcome of a case." *Id.* " 'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.' " *Id.* (quoting *State v. Gilchrist*, 329 S.C.

621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998)). " 'All evidence is meant to be prejudicial; it is only unfair prejudice which must be [scrutinized under Rule 403].' " *Id.* (quoting *Gilchrist*, 329 S.C. at 630, 496 S.E.2d at 429). Like probative value, unfair prejudice should be evaluated in the practical context of the issues at stake in the trial of the case." *Id.*; *See State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) ("The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case.").

In the present case, LaRosa's testimony had no relevance to whether the Appellant committed the specific acts he on which he was indicted. However, his testimony was extremely prejudicial. LaRosa's testimony should have been excluded under Rule 403, SCRE because it served only to introduce to the jury an unfavorable comparison between the hypothetical profile of someone who might have sexually abused the minor child and Appellant. It did not make any specific factual issue of guilt or innocence of the Appellant any more or less probable.

Moreover, for LaRosa's testimony to have any value to the State it necessarily exceeded the limitations placed on it by the trial court. Tr. 567, ll. 10-16. LaRosa was instructed to avoid eliminating Hunt as a suspect. *Id.* Nevertheless his testimony immediately eliminated Hunt as a suspect: "**you would be looking for an adult male.**" Tr.595, ll. 9-18 (*emphasis added*). Therefore, even under the trial court's unworkable standard, LaRosa's testimony should have been disallowed. In all respects his testimony was both highly prejudicial and of almost no relevance.

Accordingly, the trial court committed a reversible error and abused its discretion in permitting SLED "criminal profiler" Paul LaRosa to testify about the characteristics of "offender behavior" where the probative value of such expert "offender behavior" testimony, which was offered as definitive proof of Appellant's guilt, was substantially outweighed by the danger of

unfair prejudice as the evidence has no relevance to whether the Appellant committed the specific acts for which he was being tried and provided no information helpful to the jury's understanding of the evidence properly before it.

V.

The trial court committed reversible error by admitting Appellant's videotaped interrogation after law enforcement testified that they failed to fully re-*Mirandize* Appellant, including failing to advise him of his right to have an attorney present and his right to have an attorney appointed if he could not afford one, when three days had elapsed since his previous custodial interrogation and the interrogation was given under coercive conditions which overcame Appellant's will.

Relevant Facts

Appellant never admitted to maliciously harming the minor child and adamantly denied molesting the minor child. As detailed below, Appellant was interrogated three times by law enforcement. 3d. Supp. Tr. 33, ll. 9-22. Of those three interrogations, only the third interrogation, done without fully re-*Mirandizing* Appellant, yielded any incriminating statements. Tr. 757, ll. 11-24. The statements Appellant made during his third interrogation are incriminatory only in the sense that Appellant reflected introspectively on how he failed to seek medical attention for the minor child and that he may have too roughly disciplined minor child. *Id.*

First Interrogation of Appellant

Appellant was first questioned by law enforcement at his residence on the night of minor child's death.[8] 1st. Supp. Tr. 20, ll. 9-14. That night, Appellant was transported by law

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[8] There are three transcripts relevant to Appellant's Argument V:

(1) Volume I of the *Jackson v. Denno* hearing transcript on October 5, 2012 is cited as First Supplemental Transcript (1st. Supp. Tr.).

(2) Volume II of the *Jackson v. Denno* hearing transcript which contains the trial court's ruling on October 18, 2012 is cited as Second Supplemental Transcript (2d. Supp. Tr.). These transcripts do not continue with the same pagination.

(3) The transcript of law enforcement's third interrogation of Appellant on October 13, 2011 is cited as Third Supplemental Transcript (3d. Supp. Tr.); this transcript was entered into the record as Court's Ex. No. 2 and is on file with the Court. The videotaped interrogation was also entered into the record as State's Exhibit No. 81-83 and is on file with this Court.

enforcement to the Bennettsville Police Department for further questioning. 1st. Supp. Tr. 21, ll. 13-20. Appellant was not interrogated immediately, but held at the station while police spoke with medical personnel and neighbors. 1st. Supp. Tr. 41, ll. 8-11. Appellant's son was taken into SCDSS custody at this time. *Id.* at ll. 21-23. This interrogation lasted about forty-five minutes and Appellant appeared to law enforcement to be alert, sober, and to understand the questions. 1st. Supp. Tr. 31, ll. 24 – 1st. Supp. Tr. 32, ll. 14. Appellant did not request breaks or drinks during the interview. *Id.* at ll. 12-17. Further, Appellant was not made any promises, shackled, threatened, and was not under arrest. 1st. Supp. Tr. 32, ll. 18 – 1st. Supp. Tr. 33, ll. 8. Appellant was apparently free to leave during this interview if he wanted to. *Id.*

Appellant signed the law enforcement provided form acknowledging his *Miranda*[9] rights at 12:45 A.M. on October 7, 2011. 1st. Supp. Tr. 35, ll. 4-16. During the interrogation, Appellant admitted to being at home with the minor child on the night of her death and that he believed she had a seizure. 1st. Supp. Tr. 37, ll. 21-24. Appellant denied involvement in the child's death and was allowed to return home. 1st. Supp. Tr. 38, ll. 4. Later that night Atelia Hunt was *Mirandized* and interviewed, starting at 1:47 A.M. The following morning, October 8, 2011, Appellant was arrested. 1st. Supp. Tr. 39, ll. 15-20.

Second Interrogation of Appellant

Three days later, on October 10, 2011, Appellant was interrogated for a second time. 1st. Supp. Tr. 92, ll. 22-25. This interrogation took place at the Bennettsville Detention Center and was conducted by Lt. Kathy Bass of SLED and Lt. Larry Turner of the Bennettsville Police Department. 1st. Supp. Tr. 87, ll. 21 – 1st. Supp. Tr. 88, ll. 13. Appellant remained under arrest, incarcerated, likely shackled, but not handcuffed. 1st. Supp. Tr. 104, ll. 11-20. Appellant was *Mirandized.* He

[9] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

initialed and signed a second *Miranda* waiver.[10] 1st. Supp. Tr. 90, ll. 4-21. This interrogation was not videotaped. 1st. Supp. Tr. 116, ll. 2-6. At the end of the interrogation and at the behest of law enforcement, Appellant started to write a statement. 1st. Supp. Tr. 116, ll. 10- 17. Shortly after beginning his statement, Bass stopped Appellant and recalled:

> [Appellant] attempted to write a statement. He wrote about three or four sentences. He told me he was not a good writer or speller. He requested I write it for him, and I told him I couldn't do that. So, he wrote what he felt like he could write at that point and just said, I can't --- I'm not good with this.

1st. Supp. Tr. 94, ll. 4-10. Bass and Turner terminated the interrogation after learning that Appellant was only semiliterate. *Id.* at ll. 11-24.

Third Interrogation of Appellant

On October 13, 2011, Appellant was transported back to the Bennettsville Police Station in order to be videotaped for a third interrogation by Bass and Turner. 1st. Supp. Tr. 116, ll. 2-9. Unlike his prior interrogations, Appellant was not provided with a *Miranda* waiver form and was not fully *Mirandized.* 1st. Supp. Tr. 116, ll. 19 – Tr. 117, ll. 19. Bass would explain at the *Denno* hearing:

> ***I abbreviated [the Miranda warnings]. But, I virtually told him that he was still under arrest.*** I had read him his rights when I was at the jail, and that everything was still intact from his Miranda warnings, so I went over it in my terms. I don't think I actually read a form to him.

Id. at ll. 6-11 (emphasis added). **Bass did not advise Appellant he had the right to have an attorney present or that one would be appointed if he could not afford an attorney**. 3d. Supp. Tr. 6, ll. 1-7. Before starting the interview, Bass told Appellant:

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[10] The *Miranda* rights waiver form signed and initialed by Appellant on October 10, 2011 was entered into the record as State's Exhibit No. 79. R.* (Oct. 10, 2011 *Miranda* Waiver).

> You know me and my house keeping rules. I got to make sure you understand that. I read you your rights the last time we were here, so you understand that you have the right to remain silent.

Appellant: on everything.

> Bass: And anything you say can be held against you. And you realize if you at any point, say [Bass], I don't want to talk to you anymore, that's all you got to tell me and we're done.

3d. Supp. Tr. 3, ll. 13-23. At the pre-trial *Denno* hearing, Bass stated that avoiding the full *Miranda* warnings in later interrogations was her "standard practice." 1st. Supp. Tr. 116, ll. 12-14. Bass would also later testify that while she did not threaten or make promises to Appellant, she did tell him that she, "wanted to help him . . . . That he needed to tell me that he needed help. If there was something going on at home with Minor child or at home, that this was the time for him to tell me." 1st. Supp. Tr. 117, ll. 20 – 1st. Supp. Tr. 118, ll. 4. Bass also implied to Appellant that she would help Appellant find out about his upcoming bond hearing and told Appellant was not a flight risk. 1st. Supp. Tr. 118, ll. 18-25.

Over the course of the interrogation Appellant conceded that he occasionally hit the minor child when disciplining her. He consistently denied ever molesting the child or inflicting burns on her. 3d. Supp. Tr. 33, ll. 9-22. Appellant catalogued for law enforcement his significant health problems: hyperactivity, epilepsy, narcolepsy, and a learning disability resulting in near illiteracy. 3d. Supp. Tr. 10, ll. 4 – 3d. Supp. Tr. 13, ll. 24. When interrogating Appellant, Bass regularly told Petitioner that if he did not cooperate he would be blamed for the minor child's death and that the only way to avoid this was by giving more information. 3d. Supp. Tr. 113, ll. 18-23. At the end of the interrogation, Lt. Turner asked Appellant if he believed in God and informed Appellant that "Christ is going to deal with you . . . . Well I can promise you, as long you been sitting across that table, you've not been truthful with us. God will deal with you." 3d. Supp. Tr. 201, ll. 1-17.

Jackson v. Denno Hearing

On October 5, 2012, the trial court conducted a *Jackson v. Denno* hearing. 1st. Supp. Tr. 1. After reviewing the evidence and testimony summarized above, the trial court concluded that all of Appellant and co-defendant's statements, written or oral, were admissible. This included the videotaped statements made by Applicant during the October 13, 2011 interrogation. 2d. Supp. Tr. 7, ll. 9 – 2d. Supp. Tr. 8, ll. 24. The trial court reasoned that while Applicant was under custodial interrogation and was not advised of his *Miranda* rights on October 13, 2011:

> The third statement [Appellant] gave was ***really set in a way as a courtesy to him, because he just was in no condition for whatever reason to write a statement on the second interview, and thus it was carried over.*** And the Court finds that by the time he sat down for his third interview, he had clearly been advised of his rights, and he had clearly waived those rights, each and every one. Now when Agent Bass sat down and ***did not mention among the numerous rights that she did mention on the tape of the third statement, failed to mention the right, the specific right to counsel right then or the right to stop and talk to counsel.*** The Court does not find that that somehow were coercive, that there had been a failure to advise Mr. Huckabee of that specific right because he had heard that right at least twice, and initialed the form so that he was aware of the right. And he expressed clearly an intention to go forward in the statement on the third occasion without reservation.

2d. Supp. Tr. 7, ll. 12 – 2d. Supp. Tr. 8, ll. 4 (*emphasis added*). The trial court concluded, "all of the statements are in compliance with the Fifth and Sixth Amendment rights of the defendants as well as under the safeguards of *Miranda* … these statements were knowing and intelligently given." 2d. Supp. Tr. 8, ll. 24 – 2d. Supp. Tr. 9, ll. 2. The trial court concluded that the statements were without coercion, undue influence, and that the Appellant and co-defendant gave them free of duress and without any promise reward or threat of punishment. 2d. Supp. Tr. 9, ll. 3-7.

Trial: Testimony of Investigator Turner

On May 14, 2013, Appellant proceeded to trial. After presenting testimony from the nurse who treated minor child upon admittance to the hospital and the forensic pathologist who conducted the autopsy; the State started to call the law enforcement officers involved in the investigation. Tr.

232, ll. 7-15. The State first called Turner to testify about the October 7, 2011 and October 10, 2011 interrogations. Tr. 237, ll. 3-25. The State also used Turner to enter the video footage of the October 7, 2011 interrogation and Appellant's partial written statement made following the October 10, 2011 interrogation. Tr. 238, ll. 15 – Tr. 239, ll. 16. Defense counsel renewed his objections to the statements and the trial judge overruled it. Tr. 239, ll. 12-16.

After Turner laid the foundation, the video footage and written statement were entered into evidence. Tr. 244, ll. 12 – Tr. 245, ll. 12. Turner then read Appellant's written statement:

> I came home about 7:30 from the shop, and I was laying on the chair watching t.v. Then I hear Minor child scream out, and she hit the front --- she hit the floor. Then I pick her up, and she was breathing. I ran to the kitchen, and I'm not sure exactly what he's trying –saying so far. I can't understand that. Then I look out the window and saw Tia at the neighbor backdoor. Then they came to the back door. That when I put her in the back of the car.

Tr. 245, ll. 13-21. Turner also testified about the October 13, 2011 interrogation. Tr. 246, ll. 11-13. As Appellant had not confessed any responsibility for the death, he and Bass "played good cop, bad cop. I wanted him to feel as comfortable as possible . . . . I wanted him to think he had a friend in me while we were there in the interview and that he could tell me whatever." Tr. 247, ll. 16-25. Turner stated that it was during the third interview that Appellant started to make incriminating statements. Tr. 249, ll. 5-7. For example, Appellant stated that minor child had ran into his cigarette on one occasion which may have caused the burn marks. *Id.*

Turner testified that he told Appellant that he and co-defendant had both denied harming the minor child and "I basically told him them, well, that only left a third person, and would be [Appellant's] son."

Trial: Testimony of Lt. Bass

The State called Bass as its next witness. Tr. 252, ll. 14. Bass' testimony laid the foundation for the three-hours of video footage from Appellant's third interview. Tr. 298, ll. 12 – Tr. 299, ll. 6. Defense counsel renewed his previous objection, was overruled, and the video was

Tr. 299, ll. 6. Defense counsel renewed his previous objection, was overruled, and the video was published to the jury. Tr. 299, ll. 12-17. In addition to playing the video, the jury was given transcripts of the video interrogation. Tr. 303, ll. 13-23. After finishing the video, Bass testified that she "suspected that the [Appellant] was not being truthful." Tr. 306, ll. 20-24.

On cross-examination Bass admitted that she deliberately misled Appellant as to what Hunt was telling law enforcement in an effort to illicit information from him. Tr. 320, ll. 18-25. Bass also admitted that Hunt's statements had inconsistencies as she shifted from ignorance to claiming Appellant was solely responsibility for minor child's death and was responsible for the burn marks on minor child. Tr. 333, ll. 4-21. Bass then reluctantly detailed a series of love letters between Hunt and a correctional officer which began shortly after Hunt wrote a plaintive letter to Appellant's mother expressing her love and loyalty to Appellant. Tr. 318, ll. 14-20. Bass also testified to journal entries kept by Hunt revealing obsessive behavior calculated to maintain her relationship with Appellant.[11] Tr. 324, ll. 16-21.

Trial: Testimony of Appellant

Appellant testified at trial that co-defendant, Hunt, was a controlling and jealous person, who was dishonest and manipulative throughout their relationship. Tr. 765, ll. 6-19.

Appellant recalled he and Hunt met over the internet while she was still married. Tr. 712, ll. 5-24. Hunt told Appellant that she was independently wealthy. Tr. 715, ll. 1-3. This was untrue and the parties relied solely on Appellant's income during the relationship. *Id.* Hunt pushed Appellant to let her and her minor child move into his house. Tr. 713, ll. 21-23. Once cohabitating, Hunt was the dominant force in the relationship and infiltrated every aspect of Appellant's life. Tr.

[11] Hunt's journal entries were entered into the record at trial as Defense's Ex. No. 1 and 2. R.* (Hunt Letters).

Tr. 719, ll. 15-21. He also testified that both he and Hunt removed two of minor child's teeth because Hunt thought they were loose. Tr. 718, ll. 17 – Tr. 719, ll. 14.

Hunt was responsible for the children's medical care and activities. Tr. 717, ll. 3-10. Hunt signed Appellant and the minor children up for Medicaid and food stamps. Tr. 404, ll. 1-2; Tr. 511, ll. 14-17. Appellant testified about his fear of SCDSS and that he avoided reporting Hunt's abuse out of fear that he would lose his son. Tr. 756, ll. 20 – Tr. 757, ll. 10. Appellant admitted he should have sought treatment for minor child and reported Hunt's abuse. Tr. 757, ll. 11-24. Appellant stated that, at the time of minor child's death, his relationship with Hunt was over and that he was going to ask her to leave his house. Tr. 758, ll. 3-23. Appellant also explained his learning disabilities and the effect that he believed they had on his responses to law enforcement and to the minor child's medical conditions. Tr. 759, ll. 8-23.

State's Closing Argument

The State extensively referenced statements from Petitioner's third interrogation in its closing argument. As the only interrogation that contained incriminating statements, the third interrogation provided the State with evidence that Appellant was aware of the abuse and that, in retrospect, Appellant believed he should have taken action. Tr. Vol. II. 58, ll. 6-14.

The State emphasized: "if you will remember in [Appellant's] statement that we listened to . . . he said in response to a question by either Lieutenant Bass or one of the Bennettsville Police Department questioners. Didn't you see those burns? You were around that child. Doesn't you see those burns. He said, 'Yes.'" Tr. Vol. II. 25, ll. 2-8. The State then assured the jurors of Lt. Bass' credibility, averring that "having worked with them for years I can say this; that they take every case seriously, but I think as we are all sitting here this is an especially poignant case because you've got a child" Tr. Vol. II. 43, ll. 7-15.

Finally, the State pointed to the gradual admission of knowledge from Appellant that was extracted from him during the three hour interrogation: "well, 'I didn't see anything.' Then gradually, 'Well, yeah, I saw some bruises. A couple.' Then it goes to, 'Well, yeah, I saw bruises. I should have said something.'"

Discussion

In *Jackson v. Denno*, 378 U.S. 368, 376 (1964), the United States Supreme Court held that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." In order to introduce a statement produced during custodial interrogation, the prosecution must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with *Miranda v. Arizona*, 384 U.S. 436 (1966); *see also State v. Moses*, 390 S.C. 502, 512, 702 S.E.2d 395, 400 (Ct. App. 2010); *State v. Goodwin*, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009); *State v. Miller*, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007).

"*Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980); *State v. Howard*, 296 S.C. 481, 488, 374 S.E.2d 284, 288 (1988). While there is no requirement as to specific words or phrases, the warnings given to a suspect must be the "fully effective equivalent" of the *Miranda* warnings. *California v. Prysock*, 453 U.S. 355, 359-60 (1981); *State v. Singleton*, 284 S.C. 388, 391, 326 S.E.2d 153 (1985), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Strict compliance with *Miranda* is not required but, the warnings must meaningfully convey the substance of the suspect's rights.

Duckworth v. Eagan, 492 U.S. 195, 203 (1989); *State v. Easier*, 322 S.C. 333, 338, 471 S.E.2d 745, 749 (Ct. App. 1996).

The trial court committed a reversible error in finding that the earlier *Miranda* warnings, given three days before on October 10, 2011, were sufficient to advise Appellant of his rights during the October 13, 2011 interrogation. Tr. 7, ll. 3-12 (10/15). **Lt. Bass admitted that she did not comply with the requirements of *Miranda* when advising the Appellant of his rights prior to the October 13, 2011 videotaped statement**. 1st. Supp. Tr. 94, ll. 4-10; *State v. Ridgely*, 251 S.C. 556, 567, 164 S.E.2d 439, 444 (1968) (officer's warning that the court would appoint a lawyer for the defendant "should he be charged with anything" did not comply with the requirements of *Miranda*). Crucially, **Bass did not inform Appellant that he had the right to an attorney, to consult with an attorney, or to have an attorney appointed if he could not afford one**. Unlike in Appellant's two prior interrogations, law enforcement did not have him sign and initial a waiver; instead Appellant was orally given an "abbreviated" warning.[12]

The trial court erroneously determined that the October 13, 2011 interrogation was "set in a way as a courtesy to him, because he was really in no condition for whatever reason to write a statement on the second interview, and thus [the *Miranda* warnings] was carried over." Tr. 7, ll. 12-15 (10/15). The statement referenced by the trial court as justification for law enforcement's courteous extension of a third interrogation, is an incomplete and short introductory paragraph, consistent with Appellant's testimony from the October 7, 2011. Of the three interrogations, only the October 13, 2011 interrogation yields admissions from the Appellant that he should have reported Hunt's abuse.

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[12] The initialed and signed *Miranda* waivers from October 6, 2011 and October 10, 2011, were entered into the record as State's Exhibit No. 77 and 78. R.* (Oct. 6, 2011 *Miranda* Waiver); R.* (Oct. 10, 2011 *Miranda* Waiver).

There was no evidence supporting the trial court's conclusion that the October 13, 2011 interrogation was simply an extension of the prior written statement; particularly in light of law enforcement's prolonged and aggressive questioning during the interrogation and Appellant's wide ranging answers. Appellant was incarcerated during the three day gap between interrogations and law enforcement knew that Appellant was only semiliterate with serious medical problems when they began the October 13, 2011 interrogation.

Furthermore, Lt. Bass traded on Appellant's upcoming bond hearing and concern for his son to encourage Appellant to let Bass "help him." 1st. Supp. Tr. 117, ll. 20 – 1st. Supp. Tr. 118, ll. 4. The third interrogation was nearly three hours long and the only one where Appellant made any incriminatory answers; such as reflecting that he should not have disciplined minor child and that he should have pushed Hunt to seek medical care for minor child instead of following her instructions. Tr. 757, ll. 11-24. Appellant never admitted to molesting minor child and denied any knowledge of minor child's fatal urinary tract infection. Tr. 717, ll. 3-10; 3d. Supp. Tr. 33, ll. 9-22.

This interrogation came a week after his arrest and was Appellant's third interrogation. All of these pressures were deliberately exploited by law enforcement when interrogating Appellant and overcame the Appellant's free will. As such, the trial court erred in determining that the video footage and transcript of Appellant's third interrogation was admissible as freely and voluntarily given.

Bass should have fully *re-Mirandized* Appellant on October 13, 2011, as the three day break in interrogation combined with the coercive pressure of law enforcement and Appellant's continued incarceration created circumstances where Appellant's capacity for self-determination

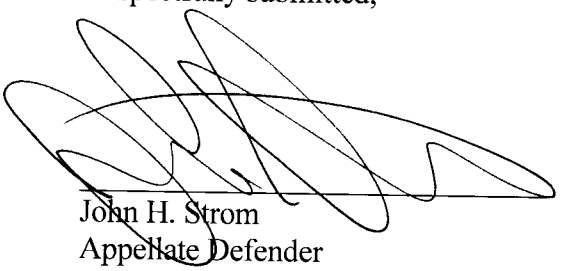
and the voluntariness of his statements were in doubt. There was simply no justifiable reason for law enforcement to not *re-Mirandize* Appellant as they had in the prior two interrogations.

Accordingly, the trial court committed reversible error by in admitting Appellant's videotaped interrogation after law enforcement testified that they failed to fully re-*Mirandize* Appellant, including failing to advise him of his right to an attorney and his right to terminate the interview, when three days had elapsed since his previous custodial interrogation.

CONCLUSION

By reason of the foregoing arguments, Appellant's conviction should be reversed and this case remanded to the Marlboro County Court of General Sessions for a new trial.

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of February, 2015.

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Marlboro County
J. Michael Baxley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

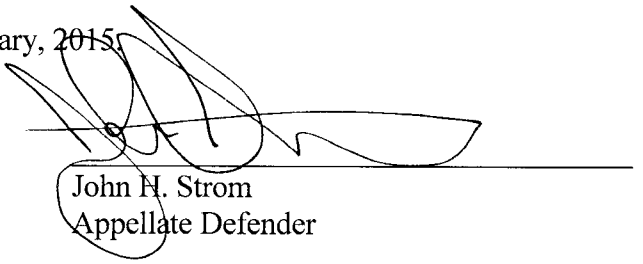
ALEXANDER CARMICHAEL HUCKABEE, III,

APPELLANT.

APPELLATE CASE NO. 2013-001409

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 5th day of February, 2015.



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of February, 2015.
Rhonda Denise Foxworth (L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021 .