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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY
Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2014-001299

THE STATE,

Respondent,

vs.

DANIEL MARTINEZ HERRERA,

Appellant.

INITIAL BRIEF OF RESPONDENT

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II. The trial court did not abuse its broad discretion by qualifying a witness as an expert in marijuana identification and by permitting the witness to testify as to the identification and weight of the marijuana at issue because the evidence and testimony presented during trial established the witness's testimony could assist the jury in understanding the issues raised in Appellant's case, the witness was personally qualified to testify as an expert, and the subject matter of the witness's testimony met a threshold level of reliability in light of the witness's expert qualifications. Furthermore, any error was harmless and had no impact on Appellant's case.

STATEMENT OF THE CASE

On October 8, 2010, the Laurens County Grand Jury indicted Appellant for trafficking in marijuana, greater than ten pounds but less than one hundred pounds (2010-GS-30-01918). Laurens County Assistant Public Defender Chelsea McNeill represented Appellant. The State was represented by Deputy Solicitor Dale Scott and Assistant Solicitor Taylor Daniel. On December 16, 2013, Appellant was tried in his absence before the Honorable Eugene C. Griffith, Jr. and a jury. On December 18, 2013, the jury convicted Appellant as indicted. Judge Griffith imposed a sentence that was sealed until Appellant was apprehended.

On June 6, 2014, Appellant appeared before the Honorable Frank R. Addy, Jr. for sentencing. Judge Addy unsealed Judge Griffith's sentence and Appellant was committed to the South Carolina Department of Corrections for five years.

Thereafter, Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

On August 12, 2010, Glenda Armstrong returned to her home at 107 McDowell Street in Laurens, South Carolina—where she had lived for twenty-two years—and found a package on her side porch. (Tr. pp. 44-48). Armstrong picked up the package and inspected it, noting that it came from Texas and was addressed to "Yems Smith, 107 McDowell Street, Laurens, [SC] 29360." (Tr. pp. 46-47, 61). Labels on the outside of the package indicated that it contained blinds. (Tr. pp. 47-48, 61). Armstrong, who had not ordered anything, asked her neighbor if the package was for her and her neighbor replied it was not. (Tr. p. 46). Armstrong, curious as to why the package listed her address, took the package inside and opened it. (Tr. pp. 46-47). Upon peeking inside, Armstrong noticed several air-compressed packages of what she believed to be marijuana and contacted the Laurens City Police Department. (Tr. pp. 46-48).

Officer Brandy Anderson from the Laurens City Police Department responded to a dispatch call around 6:00 p.m. about a package containing possible drugs at 107 McDowell Street. (Tr. pp. 58-59). Upon arriving at that address, Officer Anderson met with Armstrong and viewed the package. (Tr. pp. 59-60). Relying on her prior law enforcement experience, Officer Anderson determined the package contained marijuana based on the substance's appearance and odor. (Tr. pp. 60-62). Officer Anderson seized the package and all of its contents. (Tr. pp. 50, 63).

After leaving Armstrong's home, Officer Anderson called Detective Leanne Riggott and asked Riggott to meet her at the police station to take custody of the package. (Tr. pp. 63-65). Once at the police station, Riggott took control of the package and weighed its contents. (Tr. pp. 65-66, 80). Riggott then secured to package in her locked office overnight in accordance with department procedure. (Tr. p. 80).

Meanwhile, two Hispanic adults—one man and one woman—came to Armstrong's house inquiring about the package. (Tr. pp. 50, 67). Armstrong told them she had returned the package to the post office and it could be picked up there. (Tr. pp. 50-51). According to Armstrong, the man "tried to convince [her] . . . that [she] had the pot and [she] wasn't going to give it up." (Tr. p. 50). Armstrong insisted that she had returned the package to the post office. (Tr. 50). The man then stated that the package contained clothing for his children to go to school. (Tr. p. 51). Armstrong again insisted she had taken the package to the post office and that it could be retrieved from there. (Tr. p. 51). After the two left, Armstrong called law enforcement and provided a description of the man and woman. (Tr. pp. 50, 67-68). Law enforcement used this information to generate an incident report. (Tr. p. 68).

The following morning, Detective Walter Bentley, a fourteen-year law enforcement veteran, took possession of the package to attempt to arrange a controlled pickup from the post office. (Tr. pp. 93-95). Bentley planned to take the package to the post office, speak with postal employees and explain that when the suspect arrived to pick up the package, he or she would be placed under arrest. (Tr. p. 95, 98). He and Detective Tony Lynch went to the Laurens Post Office to attempt the controlled pickup, arriving at approximately 8:30 a.m. in an unmarked SUV. (Tr. p. 97-99). The post office did not open until 9:00 a.m., but another car was already waiting in the parking lot when Bentley and Lynch arrived. (Tr. pp. 97-98). The car contained a Hispanic male matching the description of the suspect. (Tr. pp. 97-98). Bentley decided his previous plan of a controlled pickup would not work because the suspect was already in the parking lot, so he elected to wait and follow the suspect into the post office instead. (Tr. pp. 98-99). When the post office opened, the suspect (later identified as Appellant) entered. (Tr. p.

99). Bentley, dressed in plain clothes, took off his firearm, placed his badge in his pocket, and followed Appellant into the post office. (Tr. p. 99). Appellant approached the counter and explained that he lived at 109 McDowell Street, but his package had accidentally been sent to 107 McDowell Street and the resident of 107 McDowell Street had sent the package back to the post office. (Tr. p. 99). The postal employee looked for the package to no avail and told Appellant it was not there. (Tr. pp. 99-100). When Appellant asked the employee to look again for the package, Bentley interjected and stated he had Appellant's package. (Tr. pp. 99-100). Appellant replied, "Oh shit, Senior." (Tr. p. 100). Bentley placed Appellant under arrest and searched him. (Tr. p. 100). Appellant had two slips of paper in his pocket with the name "Yems Smith" and the McDowell Street address written on both. (Tr. pp. 100-01; State's Ex. No. 3).

Bentley subsequently investigated both the name "Yems Smith" and the name and address on the package's shipment label from Texas without success. (Tr. p. 101, 105-06). He also passed the information and names along to different federal law enforcement agencies but did not receive any responsive information. (Tr. p. 105-06).

Detective Jared Hunnicutt, the marijuana analyst for Laurens Police Department, later examined and analyzed the package's contents. Hunnicutt, a ten-year veteran of the police force, graduated from Lander University with a degree in criminal justice management. (Tr. p. 127). He attended and successfully completed the South Carolina Law Enforcement Division (SLED) course in Columbia to become a marijuana analyst, requiring a 100% accuracy rate when testing one-hundred different samples. (Tr. pp. 123-125). Based on his experience and training, Hunnicutt concluded that the green, leafy substance within the package was marijuana. (Tr. pp. 144-146). Hunnicutt also weighed the marijuana, which totaled 10 pounds, 2.78 ounces. (Tr. pp. 148-49).

Appellant was charged with trafficking in marijuana, more than ten pounds but less than one hundred pounds and was released from pretrial detention on bond. (Tr. pp. 17- 23). Appellant failed to appear for his trial and was tried in his absence after the trial court denied his counsel's motion for a continuance. (Tr. pp. 17-23).The State presented Armstrong, Anderson, Riggott, Bentley, Hunnicutt, and Captain John Stankus as witnesses. The State originally sought to admit Hunnicutt as an expert in the field of marijuana analysis, but the court ruled he was not so qualified. (Tr. pp. 135-38). However, the court did allow Hunnicutt to testify as an expert in marijuana identification. (Tr. p. 137-38, 141-42).

At the close of the State's case, Appellant moved for a directed verdict arguing that the State did not present sufficient evidence that Appellant "knowingly" attempted to possess the requisite amount of marijuana to be convicted of trafficking. (Tr. p. 157-60). The State responded that it had satisfied its burden of establishing that the weight of marijuana qualified as trafficking and that there was no requirement Appellant knew the exact weight of the marijuana. (Tr. p. 160-61). The court denied Appellant's motion and submitted the case to the jury. (Tr. p. 163).

Appellant requested jury instructions on the lesser included offenses of possession with intent to distribute and possession. (Tr. p. 164, 169). Appellant argued there was some discrepancy regarding the total weight of the marijuana and therefore Appellant was entitled to jury instructions on lesser included offenses. (Tr. p. 164-71). Over the State's objection, the trial court agreed to charge the jury on the lesser included offense of possession with intent to distribute. (Tr. p. 164-71).

During deliberations, the jury sent a note inquiring about Hunnicutt's testimony and whether stems counted towards the requisite ten pound requirement for trafficking in

marijuana as charged. (Tr. p. 200). The court provided the jury with the statutory language of marijuana in response. (Tr. p. 201, 204; Court's Ex. 2 & 3). After deliberating for seventy-five minutes in total, the jury convicted Appellant of trafficking in marijuana, more than ten pounds but less than one hundred pounds. (Tr. pp. 200-02).

ARGUMENT

I. The trial court properly denied Appellant's motion for a directed verdict and submitted the case to the jury where the State presented substantial evidence from which the jury could fairly and logically find Appellant intended to possess ten pounds or more of marijuana as required for trafficking under S.C. Code Ann. § 44-53-379(e)(1)(a).

Appellant contends the trial court erred in denying his directed verdict motion. In support of that contention, Appellant maintains the State failed to present sufficient evidence to establish he had knowledge of the requisite amount of marijuana or was attempting to possess the marijuana. Additionally, Appellant asserts that the State failed to remove portions of the plant excluded under the statutory definition of marijuana, such as sterilized seeds and mature plant stalks, before calculating the total weight; failed to use scientifically verified weighing methods; and failed to verify the accuracy of its scale. To the contrary, the State presented evidence and testimony establishing Appellant was aware of the drugs, knew the listed addressee and address where the drugs were delivered, attempted to retrieve the drugs from two different locations, and responded in an inculpatory manner when confronted by law enforcement. Additionally, the State presented evidence that the total weight of the marijuana (absent its packaging) was 10 pounds, 2.78 ounces. Viewing that evidence and testimony in a light most favorable to the State as required, the jury could logically and rationally conclude Appellant attempted to possess over ten pounds of marijuana. Accordingly, the trial court properly denied Appellant's directed verdict motion and submitted the case to the jury. Appellant's conviction should be affirmed.

STANDARD OF REVIEW

When presented with a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence and not its weight. State v. Long, 325

S.C. 59, 62, 480 S.E.2d 62, 63 (1997). The trial court should deny a directed verdict motion and submit the case to the jury if there is any substantial evidence reasonably tending to prove the guilt of the accused or from which guilt may be fairly or logically deduced. State v. Robinson, 310 S.C. 535, 538, 426 S.E.2d 317, 319 (1992); see State v. Littlejohn, 228 S.C. 324, 329, 89 S.E.2d 924, 926 (1955) ("[O]n a motion for direction of verdict, the trial judge is concerned with the existence or non-existence of evidence, not with its weight; and, although he should not refuse to grant the motion where the evidence merely raises a suspicion that the accused is guilty, it is his duty to submit the case to the jury if there be any substantial evidence which reasonably tends to prove the guilt of the accused, or from which his guilt may be fairly and logically deduced."); see also Crawford v. United States, 375 F.2d 332, 334 (D.C. Cir. 1967) ("The jury question of whether there was proof of guilt beyond a reasonable doubt presents a stricter or higher standard than the trial court's consideration of whether there is sufficient evidence to allow the jury to find guilt beyond a reasonable doubt, and it rests in the unreviewable ratiocinations of twelve reasonable persons whose deliberations are protected by the highest security.").

On appeal from the denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). If there is ***any*** direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must affirm the trial judge's ruling. State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004). The appellate court may only reverse the trial judge's denial of a directed verdict motion if there is no evidence supporting the trial judge's ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). "[U]nless

there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986); see also Crawford, 375 F.2d at 334 ("It is not the function of appellate judges to weigh the evidence and decide that if they had doubts other reasonable persons were compelled to have the same doubts. If that were the test the jury of twelve would be relegated to the very low grade function of secondary fact finders.").

ANALYSIS

In South Carolina, it is illegal to traffic in marijuana. See S.C. Code Ann. § 44-53-370(e)(1) (Supp. 2006) (prohibiting trafficking in marijuana). In relevant part, South Carolina's definition of trafficking marijuana includes: "Any person . . . who is knowingly in actual or constructive possession or who ***knowingly attempts to become in actual or constructive possession***" of ten pounds or more of marijuana. S.C. Code Ann. § 44–53–370 (emphasis added). In drug cases, the element of knowledge is seldom established through direct evidence, but may be proven circumstantially. State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009) (citing State v. Attardo, 263 S.C. 546, 550, 211 S.E.2d 868, 869 (1975)). Knowledge can be proven by the evidence of acts, declarations, or conduct of the accused from which the inference may be drawn that the accused knew of the existence of the prohibited substances. Id. "It is the amount of [the illicit drug], rather than the criminal act, which triggers the trafficking statute, and distinguishes trafficking from distribution and simple possession." State v. Taylor, 323 S.C. 162, 167, 473 S.E.2d 817, 819 (Ct. App. 1996) (citing State v. Raffaldt, 318 S.C. 110, 117, 456 S.E.2d 390, 394 (1995)).

If the amount of marijuana, or any mixture containing included portions of the marijuana plant, is ten pounds or more the trafficking statute is applied." See Raffaldt, 318 S.C. at 117, 456 S.E.2d at 394 ("If the amount of cocaine, or any mixture containing cocaine, is ten grams or more the trafficking statute is applied.").

In the case at bar, looking at the evidence and all reasonable inferences in the light most favorable to the State as required, the State presented direct evidence that Appellant knew the package contained marijuana through the testimony of Glenda Armstrong, who recalled Appellant questioned her as to whether she had kept "the pot" for her own use. (Tr. 50). Additionally, the State presented substantial circumstantial evidence that Appellant had knowledge of the marijuana through the testimony of various witnesses and other evidence. Appellant went to two different locations in search of the package. (Tr. 50, 98-101). He responded "Oh Shit, Senior" when confronted by law enforcement at the post office. (Tr. 100). Furthermore, when arrested, Appellant had two slips of paper with the listed addressee of the package (Yems Smith) and the McDowell Street address on his person when arrested. (Tr. 100; State's Ex. No. 3). Thus, the evidence and testimony presented during trial established Appellant had knowledge of the package's contents. Critically, viewing that evidence and testimony in a light most favorable to the State as required, the jury could have rationally and logically concluded Appellant knew the package contained more than ten pounds of marijuana when he was arrested at the post office while trying to recover the package.

Furthermore, the State presented sufficient evidence that the marijuana weighed more than the requisite ten pounds necessary to convict Appellant of trafficking in marijuana pursuant to S.C. Code Ann. § 44-53-370(e)(1). Pursuant to S.C. Code Ann. § 44-53-110 (27)(a), marijuana is defined as:

> (i) ***all species or variety of the marijuana plant and all parts thereof whether growing or not***;
> (ii) ***the seeds of the marijuana plant***;
> (iii) the resin extracted from any part of the marijuana plant; or
> (iv) every compound, manufacture, salt, derivative, mixture, or preparation of the marijuana plant, marijuana seeds, or marijuana resin.

(emphasis added); see also State v. Scott, 303 S.C. 360, 363, 400 S.E.2d 784, 786 (Ct. App. 1991) ("Marijuana, including marijuana seeds, is, of course, a controlled substance."). However, the statutory definition of marijuana excludes "mature stalks" and "the sterilized seed of the marijuana plant which is incapable of germination." Id.

Jared Hunnicutt, a marijuana analyst certified by SLED who was admitted as an expert in the identification of marijuana, testified that the green leafy substance in the package was marijuana. (Tr. 122-26, 138-42, 143-46). Additionally, Hunnicutt testified that the total weight of the marijuana, absent any packaging material, was 10 pounds, 2.78 ounces.[1] (Tr. 146, 148-49). Hunnicutt further testified that the total weight included stems, which he testified were part of the marijuana plant and therefore properly included in the total marijuana weight. (Tr. 155-56). When questioned regarding the accuracy of the scale used, Hunnicutt testified that the scale used had been calibrated by an evidence technician at the Greenwood County Sheriff's Department, where he tested and weighed the marijuana. (Tr. 151). Viewing that evidence and testimony in a light most favorable to the State as required, the jury could have rationally and logically concluded the total weight of the marijuana in question was more than the requisite ten pounds to satisfy a trafficking conviction. Appellant's conviction should be affirmed.

[1] Hunnicutt testified that although he did not weigh the actual bags separately, he did weigh a bag of the same size and consistency and subtracted that weight. (Tr. 150-51).

ARGUMENT

II. The trial court did not abuse its broad discretion by qualifying a witness as an expert in marijuana identification and by permitting the witness to testify as to the identification and weight of the marijuana at issue because the evidence and testimony presented during trial established the witness's testimony could assist the jury in understanding the issues raised in Appellant's case, the witness was personally qualified to testify as an expert, and the subject matter of the witness's testimony met a threshold level of reliability in light of the witness's expert qualifications. Furthermore, any error was harmless and had no impact on Appellant's case.

Appellant contends the trial court erred by admitting Laurens Police Department Marijuana Analyst Hunnicutt's expert testimony regarding marijuana identification and weight. In support of that contention, Appellant maintains the testimony was improperly admitted because it was beyond the scope of Hunnicutt's expertise and his methodology was not reliable. Specifically, Appellant argues the trial court abused its discretion in finding that Hunnicutt's methodology to determine the weight of the marijuana was sufficiently reliable because Hunnicutt had no formal education or technical certifications regarding marijuana analysis,[2] Hunnicutt's testimony provided no guidance as to whether his methods were reliable or as to whether he knew the definition of marijuana, Hunnicutt's testimony failed to identify any text or policy that supported his weighing method, and Hunnicutt's methodology did not include any peer review. To the contrary, Hunnicutt's testimony as to the marijuana identification and weight was properly admitted during trial because it satisfied all of the requirements for the admission of expert testimony. Specifically, the evidence and testimony presented during trial established the agent's testimony could assist the jury in understanding and resolving the

[2] Appellant repeatedly asserts that Hunnicutt lacked the proper training and skills regarding marijuana analysis; however, this argument is unavailing, as Hunnicutt was not admitted as an expert in marijuana analysis based on any coursework, certifications, or formal training. The trial court sustained defense counsel's objection to the State's offer of Hunnicutt as an expert in marijuana analysis, but did allow Hunnicutt to testify as an expert in marijuana identification (including weight) based on his prior law enforcement experience handling marijuana. (Tr. 122-42).

issues raised in Appellant's case. Likewise, the evidence and testimony presented during trial demonstrated Hunnicutt personally possessed the requisite knowledge, skill, training, and experience to qualify as an expert in marijuana identification. Furthermore, the evidence and testimony presented during trial established Hunnicutt's testimony was reliable in light of his own expert qualifications and the steps he took in this particular case. As a result, Hunnicutt's expert testimony was admissible, and the trial court did not abuse its broad discretion by qualifying him as an expert and permitting him to present his expert testimony regarding marijuana identification to the jury. Appellant's conviction should be affirmed.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Trial courts have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice."); see also State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) ("[D]eference is due to the trial court's admission of the evidence.").

Likewise, a decision as to whether to admit or exclude expert testimony rests within the trial judge's sound discretion and will not be reversed on appeal absent a prejudicial abuse of that discretion. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); see State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009) ("A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); see Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) ("A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair.").

ANALYSIS

"Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge." Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). "Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions." Id. at 445-46, 699 S.E.2d at 175. "The qualification of a witness as an expert falls largely within the discretion of the trial judge." State v. Myers, 301 S.C. 251, 255, 391 S.E.2d 551, 554 (1990).

Pursuant to the South Carolina Rules of Evidence, expert testimony is admissible under the following circumstances:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE; see also State v. Irick, 344 S.C. 460, 465, 545 S.E.2d 282, 285 (2001) (explaining an expert's testimony is admissible where "it is relevant and based on some factual predicate in the record"). Before admitting expert testimony, the trial court must find (1) the expert's testimony will assist the trier of fact; (2) the expert has the required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. State v. Martin, 391 S.C. 508, 513, 706 S.E.2d 40, 42 (Ct. App. 2011); see also State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 819 (2001) ("Scientific evidence is admissible under Rule 702, SCRE, if the trial judge determines: (1) the evidence will assist the trier of fact; (2) the expert witness is qualified; (3) the underlying science is reliable, applying the factors found in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979); and (4) the probative value of the evidence outweighs its prejudicial effect.").

A witness can properly be qualified as an expert where "the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge." State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 467 (Ct. App. 1998). In determining whether a witness's knowledge, skill, training, or experience qualifies the witness as an expert, no mandatory set of qualifications is required. Henry, 329 S.C. at 274, 495 S.E.2d at 467; see State v. Peer, 320 S.C. 546, 554-555, 466 S.E.2d 375, 380 (Ct. App. 1996) ("The criteria for admitting the testimony of an expert is not whether the expert holds a degree in the specialty field he seeks to testify about, but whether he has such expertise in a

business, profession, or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony."). Instead, an expert can become sufficiently skilled or knowledgeable to be able to provide an opinion helpful to the jury in a multitude of ways. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d 80, 86 (2008). Significantly, "[t]he test for qualification [as an expert] is a relative one that is dependent on the particular witness's reference to the subject[,]" and "defects in the amount and quality of education and experience go to the weight of the expert's testimony and not its admissibility." Lee v. Suess, 318 S.C. 283, 285-86, 457 S.E.2d 344, 346 (1995).

In addition to ensuring the expert is qualified, the trial court must also ensure the testimony "meets a threshold level of reliability, regardless of whether it is scientific or nonscientific." State v. Tapp, 387 S.C. 159, 165, 691 S.E.2d 165, 168 (Ct. App. 2010). In cases involving scientific expert testimony, the trial court should consider the following factors: (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). However, in cases involving nonscientific expert testimony, the factors applied in an analysis of scientific evidence cannot readily be applied. See State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 688 (2009) ("The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the Council factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony."). Accordingly, no formulaic approach can or must be applied to determine reliability in cases involving nonscientific expert testimony. Id.

In the present case, the evidence and testimony presented during trial established (1) Hunnicutt's expert testimony regarding marijuana identification could assist the jury in understanding and resolving the issues raised in Appellant's case; (2) Hunnicutt had the requisite knowledge, skill, training, and experience to qualify as an expert; and (3) the subject matter of Hunnicutt's testimony was reliable. See State v. Martin, 391 S.C. 508, 513, 706 S.E.2d 40, 42 (2011) (instructing expert testimony is admissible where the trial court finds "(1) the expert's testimony will assist the trier of fact, (2) the expert possesses the requisite knowledge, skill, experience, training, or education, and (3) and the expert's testimony is reliable"). Under those circumstances, the trial court did not abuse its discretion by qualifying Hunnicutt as an expert in Appellant's case and permitting him to testify before the jury about the package's contents and weight.

Initially, Hunnicutt's testimony was necessary in Appellant's case to assist the trier of fact as to issues in Appellant's case—whether the substance in the package was marijuana and the total weight of the marijuana—because the subject matter is beyond the ordinary knowledge of the average juror. See Watson, 389 S.C. at 446, 699 S.E.2d at 175 ("[I]n executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony. First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury."). Therefore, the trial court correctly determined it was necessary for Hunnicutt to testify as an expert in order to identify the package's contents as marijuana and the exact weight of the marijuana.

Beyond the ability of Hunnicutt's testimony to assist the jury, Hunnicutt was also personally qualified to offer an expert opinion as to the package's contents and the

marijuana's weight based on his own knowledge, skill, training, and experience. See Henry, 329 S.C. at 278, 495 S.E.2d at 469 ("[T]he relevant inquiry concerning qualification of the proffered expert is whether the witness possesses the necessary skill, learning, education, training, knowledge, or experience to enable the witness to give opinion testimony."). Hunnicutt's testimony was non-scientific, based upon his prior law enforcement experience of handling marijuana cases frequently for more than a decade. (Tr. 139-42). See Martin, 391 S.C. at 513-14, 706 S.E.2d at 42-43 (finding no error in the qualification of a witness as an expert even though the witness's expertise was based in part on in-house training he had received through his employment at SLED). Hunnicutt had the requisite qualifications, training, and expertise to be qualified as an expert in marijuana identification. Hunnicutt had been a member of law enforcement for more than ten years and had made numerous marijuana arrests during his decade as an officer. (Tr. 127, 138). He testified that he had seen marijuana "thousands" of times during his law enforcement career and that he was very familiar with identifying marijuana. (Tr. 127-28). Hunnicutt further testified he was familiar with several unique characteristics of marijuana, including its particular odor and appearance, based on his law enforcement experience. (Tr. 125, 139-41).

Critically, Hunnicutt's practical experience in marijuana identification coupled with his training from SLED demonstrated his expertise on the subject matter and enabled him to assist the jury with a matter beyond the knowledge of an ordinary layperson. See Honea v. Prior, 295 S.C. 526, 530, 369 S.E.2d 846, 849 (Ct. App. 1988) ("A witness may be competent to testify as an expert although the witness acquired his or her knowledge ***through practical experience and not by scientific study, training, or research***." (emphasis added)); see also Gadson v. Mikasa Corp., 368 S.C. 214, 228, 628

S.E.2d 262, 270 (Ct. App. 2006) ("An expert is not limited to any class of persons acting professionally. There is no exact requirement concerning how knowledge or skill must be acquired." (citations omitted)); cf. Peer, 320 S.C. at 554, 466 S.E.2d at 380 (finding no error in the trial judge's qualification of a witness as an expert in sound where the witness had over five years of law enforcement experience, was trained by ***another*** officer who was certified in the use of sound meter equipment, was capable of demonstrating how a sound level meter worked, and had handled approximately ten cases during the one-and-a-half years he had been conducting sound tests); State v. Goode, 305 S.C. 176, 178, 406 S.E.2d 391, 393 (Ct. App. 1991) (finding no abuse of discretion in the qualification of a witness as an expert on a "lane of impact" issue where the witness had twelve weeks of training that included some specific training on determining the point of impact in accidents, one week of road training with a municipal police force, and four to five months of experience as a state trooper). That Hunnicutt had not previously been qualified as an expert witness as to marijuana identification in general sessions court is not dispositive, as "[e]very expert has a first time." United States v. Garcia, 752 F.3d 382, 391 (4th Cir. 2014) (holding that the trial court did not err in qualifying an FBI agent as a decoding expert for the first time, as she had the requisite experience, including an exclusive focus on narcotics trafficking for the preceding five years). Any possible defects in the amount and quality of education and experience of Hunnicutt are also not dispositive, as such would "go to the weight of the expert's testimony and not its admissibility." Lee, 318 S.C. at 285-286, 457 S.E.2d at 346. As a result, the trial court properly found Hunnicutt to be personally qualified as an expert in marijuana identification.

Finally, Hunnicutt's testimony as to the identification of the package's contents as marijuana and the weight of the marijuana met the threshold of reliability necessary for it to be admissible during Appellant's trial. Critically, looking to the relevant foundational factors established in Appellant's case, Hunnicutt's testimony demonstrated he personally possessed the necessary qualifications to be considered an expert in marijuana identification based on his own knowledge, skill, training, and experience. Cf. Henry, 329 S.C. at 277-78, 495 S.E.2d at 468-49 ("The challenge mounted by Henry blithely ignores the recognized principle of law that a witness is competent as an expert provided the witness has acquired by reason of study or experience or both such knowledge and skill in a business, profession, or science that ***she is better qualified than the jury*** to form an opinion on the particular subject of testimony." (emphasis added)). Similarly, Hunnicutt's testimony made clear that he had dealt with marijuana on an extremely frequent basis for more than ten years and was aware of its unique characteristics. Additionally, Hunnicutt testified that he was trained during his coursework at SLED to weigh marijuana on a digital scale and that the scale must be reset to zero before weighing samples. (Tr. p. 132). Further, Hunnicutt testified that the evidence technician with the Greenwood County Sheriff's Department calibrated the scale. (Tr. 151). Based on the establishment of these factors, the trial court properly found a sufficient threshold level of reliability had been established and correctly admitted Hunnicutt's expert testimony.

Because Hunnicutt's testimony satisfied all of the requirements for the admission of expert testimony in South Carolina, his expert testimony on marijuana identification and weight was properly introduced during trial, and Appellant was able to properly challenge that testimony through cross-examination and by calling the jurors' attention to any defects or deficiencies he believed existed in regard to the knowledge, skill, training,

or experience of Hunnicutt. See Wilson v. Rivers, 357 S.C. 447, 453, 593 S.E.2d 603, 605 (2004) ("Any defects in the amount of [an expert's] education and experience, if any, go to the weight of his testimony and not its admissibility."); see also Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 596 (1983) ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."); see generally 31A Am. Jur. 2d Expert and Opinion Evidence § 90 ("Such matters as defects in an expert's education or experience, the lack of an expert's specialization or lack of specialized training, the degree of an expert's certainty as to his or her opinion, or the quality of the expert's conclusions go to the weight to be given expert opinion testimony."). Accordingly, the trial court did not abuse its broad discretion by qualifying Hunnicutt as an expert and permitting the agent to present his expert testimony to the jury, and its ruling was not arbitrary, unreasonable, or unfair. See Fields, 363 S.C. at 26, 609 S.E.2d at 509 ("A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair."). Appellant's convictions should be affirmed.

HARMLESS ERROR

Assuming arguendo that the trial court abused its broad discretion in qualifying Hunnicutt as an expert in marijuana identification, such error is harmless and had no impact on the jury's verdict.

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. See State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, (2013) (subjecting the erroneous qualification of a forensic interviewer to a harmless error analysis); see also Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992) (stating error is

harmless beyond a reasonable doubt if it did not contribute to the verdict obtained); State v. Watts, 321 S.C. 158, 165, 467 S.E.2d 272, 277 (Ct.App.1996) ("In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt." (citing Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967))). The key factor for determining whether a trial error constitutes reversible error is "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (internal citations omitted). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). "Whether an error is harmless depends on the circumstances of the particular case." Tapp, 398 S.C. at 389, 728 S.E.2d at 475 (quoting State v. Mitchell, 378 S.C. 305, 316, 662 S.E.2d 493, 499 (2008). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it 'could not reasonably have affected the result of the trial.'" Id. (quoting State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971)).

Expert testimony is not necessarily required for the identification of marijuana, particularly when the identification is made by a seasoned member of law enforcement. See United States v. Gaskin, 364 F.3d 438 (2d Cir. 2004) (finding neither actual drug exhibits nor reports of chemical analysis are required to support conviction for possession of controlled substance; lay testimony and circumstantial evidence may be sufficient to

establish identity of substance involved in alleged narcotics transaction); United States v. Zielie, 734 F.2d 1447, 1456 (11th Cir. 1984) (finding that the introduction of a chemical analysis of the substance is not essential to conviction and the uncorroborated testimony of a person who observed a defendant in possession of a controlled substance is sufficient if the person is familiar with the substance at issue); Bowman v. State, 32 N.E.3d 812 (Ind. Ct. App. 2015) (holding in some instances, the identification of an illegal substance can be established based on the witness's experience with the substance if the circumstances of the identification support the conclusion the witness's identification is reliable); Sinclair v. State, 995 So. 2d 552 (Fla. Dist. Ct. App. 2008) (holding a sufficiently experienced police officer may opine regarding the identity of crack cocaine); State v. Northrup, 16 Kan. App. 2d 443, 825 P.2d 174 (1992) (holding expert testimony or chemical analysis was not required to determine substance is marijuana in light of other circumstantial evidence); Sims v. State, 255 Ark. 87, 499 S.W.2d 54 (1973) (finding law enforcement officers qualified to testify as to marijuana identification based on sight and smell without chemical analysis). Therefore, Hunnicutt was able to testify that the substance in the package was marijuana based on his law enforcement experience absent being qualified as an expert.

Even assuming the trial court abused its broad discretion in qualifying Hunnicutt as an expert in marijuana identification, Appellant's conviction should not be reversed based on such an insignificant error. See State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) ("[A]ppellate courts will not set aside convictions due to insubstantial errors not affecting the result."). Appellant's conviction should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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October 13, 2015

STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM LAURENS COUNTY
Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2014-001299

THE STATE,

Respondent,

vs.

DANIEL MARTINEZ HERRERA,

Appellant.

PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

John H. Strom, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 13th day of October, 2015.

Megan Harrigan Jameson

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SC Court of Appeals

October 13, 2015

John H. Strom, Esquire
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RE: State v. Daniel Martinez Herrera – Appellate Case No. 2014-001299

Dear Mr. Strom:

I am enclosing two copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

Megan Harrigan Jameson

Megan Harrigan Jameson
Assistant Attorney General
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MHJ/

Enclosures

cc: The Honorable Jenny A. Kitchings (original and one enclosed)
Victim Services