ORIGINAL

RECEIVED
MAR 08 2016
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Markley Dennis, Circuit Court Judge

THE STATE

RESPONDENT,

V.

MARQUIS MCDONALD,

APPELLANT

APPELLATE CASE NO. 2014-002181

INITIAL BRIEF OF APPELLANT

NICHOLAS MERMIGES
Principal

Law Office of Nick Mermiges, LLC
1720 Main St. #202
Columbia, SC 29201
803-587-0472

ROBERT M. DUDEK
Chief Appellate Defender

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

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Articles

STATEMENT OF ISSUES ON APPEAL

1) DID THE TRIAL COURT ERR IN PERMITTING AT&T'S RECORDS CUSTODIAN, JAMES DOBBINS, TO TESTIFY TO THE LOCATION OF CELLULAR PHONES WITHOUT QUALIFYING HIM AS AN EXPERT UNDER RULE 702?

2) DID THE TRIAL COURT ERR IN PERMITTING SLED AGENT, MEGAN LUKACS, TO TESTIFY AS TO THE LOCATION OF CELLULAR PHONES WITHOUT PROPERLY QUALIFYING HER AS AN EXPERT UNDER RULE 702?

3) DID THE TRIAL COURT ERR IN ITS RULING REGARDING EVIDENCE OF APPELLANT'S PRIOR FELONY CONVICTION UNDER RULE 609 AND RULE 403?

STATEMENT OF THE CASE

Appellant was indicted by the Horry County Grand Jury for the offenses of murder and armed robbery. His case came on for trial on October 6, 2014 before the Honorable Markley Dennis, and a jury. Gregory McCollum, Esq. represented the appellant and Bradley Richardson, Esq. and Travis Hyman, Esq. represented the state. Tr. 1.

On October 9, 2014 the jury found appellant guilty of both offenses. Judge Dennis sentenced the Appellant to 45 year for murder, and 30 years for armed robbery, to run concurrently.

This appeal follows.

STATEMENT OF FACTS

This unfortunate case arises from a drug deal gone bad. On February 26, 2013, appellant, Marquis McDonald, had planned to purchase marijuana from the victim, Anthony Liddell, a student at Coastal Carolina. It is undisputed that Mr. McDonald drove his uncle's car to the Coastal Carolina campus to meet with Mr. Liddell. Also present at the scene was Stephon "Black" McClain, who was separately charged and did not testify at appellant's trial. Appellant, McClain and Liddell all met in appellant's car, apparently to finalize a drug purchase. The record evidence reveals that Mr. McDonald was in the driver's seat, Mr. McClain was in the front passenger seat, and Mr. Liddell was in the back seat of the vehicle. Tr. 442 l. 10 – 443 l. 7. An eyewitness testified that at some point a fight broke out, shots were fired, and Mr. Liddell was killed. Tr. 189 l. 7 – 193 l. 18. Ballistics taken from inside the car tended to show that the shots were fired from the passenger seat of the vehicle. Tr. 383 l. 10 – 385 l. 24.

Mr. McDonald testified in his own defense and stated that he had purchased marijuana from Mr. Liddell before, and that he intended to purchase marijuana again on the night in question. He had no intention of committing a robbery. Tr. 696 l. 1- l. 6. Mr. McDonald testified that he had no idea Mr. McClain would pull a gun, or shoot anyone. Tr. 699 l. 6 – l. 17. After the shooting occurred, Mr. McDonald fled the scene, alone, in his uncle's vehicle.

After the incident, Mr. McDonald's car was recovered. A search of the car revealed no shell casings, no live rounds, no hand guns, no cell phones, no marijuana, and no cash. Tr. 349 l. 8 – l. 20; Tr. 376 l. 6 – l. 14. The murder weapon was never recovered, no marijuana was ever recovered, and the victim's cell phone was never recovered. Tr. 549 l. 6 – l. 10. The state's only eyewitness did not identify Mr. McDonald as the shooter, and her testimony of seeing two gunshots at close proximity during a fight was contradicted by physical evidence including the absence of stippling on the victim and defects (i.e., bullet holes) inside of Mr. McDonald's vehicle. Tr. 383 l. 10 – 385 l. 24; Tr. 617 l. 2 – l. 5. The record is devoid of any evidence of gunshot residue, blood spatter, or other physical evidence tending to show that Mr. McDonald shot the weapon. It is likewise devoid of any communication between Mr. McDonald and Mr. McClain relating to a robbery – rather, the state only presented evidence of the intention to purchase marijuana.Tr. 672. l. 4- l. 17.

Throughout the case, the state introduced lay testimony tending regarding the locations of the cellular phones of the victim, the appellant and Mr. McClain. This evidence included "phone maps" and "GPS tracking," which the Court relied upon in denying the Appellant's Motion for Directed Verdict. Tr. 660 l. 1 – l. 22; Tr. 672 l. 2 – 673 l. 9.

ARGUMENT

1) THE TRIAL COURT ERRED IN PERMITTING AT&T'S RECORDS CUSTODIAN, JAMES DOBBINS, TO TESTIFY TO THE LOCATION OF CELLULAR PHONES WITHOUT QUALIFYING HIM AS AN EXPERT UNDER RULE 702.

During its case in chief, the state called James Dobbins, a private contractor for AT&T, and presented him as a "records custodian" for AT&T. Tr. 249 l. 6 – l. 15. While Mr. Dobbins initially testified as to types of records AT&T keeps in the regular course of business, Mr. Dobbins went on to testify that AT&T's records include "the location of your phone where the call originated." Tr. 251 l. 5 – l. 16. Mr. Dobbins then specifically began to explain how AT&T's cell phone towers interact with users' cellphones in order to find their location:

> Q. Okay. And so whenever you're talking about the location of a cell phone, you're talking about with regard to a tower?
>
> A. A tower or an area covered by a tower, yes.
>
> Q Okay, okay. And I'm sorry for mish-moshing the terminology a little bit. Now, it's a radio signal. I'm sure we've all seen cell towers and passed down the road. How does a certain phone call determine which tower to bounce off of? You may have already answered that.
>
> A Yeah, it will typically go to the tower that's nearest.
>
> Q Okay.
>
> A. But if it's congested, it could go to a secondary tower or -- and pass along the towers as you move from one location to another.
>
> Q Okay. Now, that information regarding tower location –
>
> Tr. 254 l. 1 – Tr. 255 l. 6.

Counsel for the Appellant then objected and advised the Court that the state was using the witness to introduce expert testimony. The Court asked the state whether they were "offering [Mr. Dobbins] as an expert witness," to which the state replied in the negative. Tr. 255 l. 7 – l. 22. The Court then permitted testimony to continue, without conducting the required analysis relating to qualifications or reliability as required by rule 702, or otherwise instructing the jury on the testimony it had just received. The witness went on to reiterate that AT&T stores "latitude and longitude," "tower location," and "the location that the call started and stopped on." Tr. 255. L. 23 – Tr. 256 l. 13. The State reiterated these statements during continued questioning, specifically asking the witness to explain how "call location" corresponds with the particular date and time of a call from a specific number. Tr. 259 l. 10 – Tr. 262 l. 21. The state used the specific phone numbers elicited through Mr. Dobbin's testimony to identify the phone of the victim, and subsequently argued that *the location data of the victim's phone* was evidence of the robbery. Tr. 450 l. 8 - l. 25; Tr. 672 l. 20 – Tr. 673 l. 11. This phone location evidence was, in fact *the only evidence of robbery presented by the state in opposition to Appellant's motion for directed verdict.*

SCRE 620 provides:

> A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

Further, SCRE 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are

> helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.
>
> Finally, SCRE 702 provides:
>
> 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.

"[A] lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training." *Watson v. Ford Motor Co.,* 389 S.C. 434, 446 (2010). Mr. Dobbins was not present when any of these calls were made, and does not have personal knowledge of where they were actually made from. Rather, Mr. Dobbins' testimony regarding the manner in which cellular phone towers interact with cell phones and radio signals in order to record a phone's location clearly requires "special knowledge, skill, experience or training," such that before Mr. Dobbins could provide such testimony, he would need to be qualified as an expert pursuant to rule 702. *See e.g., US v. EADY*, 2013 WL 4680527 (D.SC 2013) (conducting *Daubert/702* analysis for cell phone location testimony); *United States v. Yeley–Davis*, 632 F.3d 673, 684 (10th Cir.2011) (same); *U.S. v. Reynolds*, --- Fed.Appx. ----, (6th Cir. 2015) (same); *U.S. v. Machado-Erazo*, 950 F. Supp 2d 49 (DDC 2013) (same); *Collins v. State, 172 So. 3d 724* (Miss. 2015) (same); *State v. Patton*, 419 S.W.3d 125, 132 (Mo. Ct.App.2013) (same); *Wilder v. State,* 191 Md.App. 319, 991 A.2d 172, 180 (Mo. Ct. App. 2010) (same).

"[T]he trial courts of this state have a gatekeeping rule with respect to all evidence sought to be admitted under Rule 702, whether the evidence is scientific or nonscientific.

In the discharge of its gatekeeping rule, a trial court **must assess the threshold foundational requirements of qualifications and reliability** and further find that the proposed evidence will assist the trier of fact." *State v. White*, 382 S.C. 265, 274 (2009) (emphasis added); *see also State v. Council,* 335 S.C. 1 (1999).

Mr. Dobbins' testimony was not limited to authenticating business records that would otherwise be hearsay (i.e., the traditional role of a records custodian). Rather, Mr. Dobbins's testimony included a detailed explanation of a highly technical and specialized part of the cellular phone industry. The "location" information, which was based on this specialized testimony, was then presented as irrefutable evidence of the physical location of the phones of the appellant, his alleged co-conspirator, and the victim. The Court never conducted any inquiry regarding Mr. Dobbins' qualifications to provide this critical testimony, and moreover, did not make any inquiry regarding the reliability of Mr. Dobbins' opinions.

Mr. Dobbins' testimony, which was clearly admitted in error, and without the mandated rule 702 analysis, permeated the remaining portion of the state's case.[1] Cell phone location evidence was referenced throughout the trial on a number of occasions, including:

- The State, in its opening, argued that phone evidence and "GPS Tracking" would prove the Appellant's guilt Tr. 133 l. 14 – l. 25; Tr. 137 l. 5 – l 12.
- "Phone Maps" tracking the movements of the Appellant's phone, the alleged co-conspirator's phone, and the victim's phone, were presented by SLED Agent Megan Lukacs to the jury. Tr. 660 l. 1 – Tr. 669 l. 13.
- Because the victim's cell phone was never recovered, his phone location was the evidence that the Court relied upon in finding that the State had satisfied the

[1] SLED Agent Megan Lukacs supplied similar lay testimony over counsel's objection, addressed *infra.*

corpus delicti requirement of the armed robbery charge, denying Appellant's Motion for Directed Verdict. Tr. 672 l. 2 – 673 l. 9.

- The State, in its closing, argued that the "victim's cell phone was taken away" to establish guilt for armed robbery. Tr. 745 l. 5 – l. 11.
- The State, in its closing, further referred to phone locations as evidence of guilt Tr. 755 l. 12 – l. 21.

These numerous, specific references do not adequately account for what a large role the cell phone location information played in the State's case. The mapping data formed the backbone of the State's theory of the case, and their narrative as to how each event occurred during the date in question.

Given the absence of any eyewitnesses identifying Mr. McDonald as the shooter, the absence of any murder weapon, the absence of any shell casings in Mr. McDonald's vehicle, the ballistic evidence tending to show that Mr. McDonald's passenger *and not Mr. McDonald* fired a weapon, and the absence of any physical evidence which would satisfy the *corpus delicti* requirement of the armed robbery charge, there can be no doubt that the improper admission of this cellphone data was not a mere harmless error. It was deeply prejudicial to the Appellant, and likely tipped the scales, resulting in his conviction. Moreover, the Appellant was prejudiced because he was not put on notice that the State planned to introduce the aforementioned expert testimony, which prevented Appellant from securing his own expert who could contest the underlying credibility of this evidence. *Wilder,* 991 A. 2d 127 at 196-197 ("By channeling testimony that is actually expert testimony to Rule 702, the [2000] amendment [to Federal Rule 701] also ensures that a party will not evade the expert witness disclosure requirements... simply by calling an expert witness in the guise of a layperson.")

The reliability of cell phone tower data has been repeatedly called into question[2], and even *expert testimony* on cell phone location information has been found *unreliable and inadmissible* by at least one federal court.[3] The trial court's decision to admit this testimony without determining the qualifications of the witness and the reliability of the underlying opinion was contrary to law and deprived the Appellant of a fair trial.

2) THE TRIAL COURT ERRED IN PERMITTING SLED AGENT, MEGAN LUKACS, TO TESTIFY AS TO THE LOCATION OF CELLULAR PHONES WITHOUT PROPERLY QUALIFYING HER AS AN EXPERT UNDER RULE 702.

The State went on to call SLED analyst Megan Lukacs during its case in chief. Agent Lukacs initially testified about "mapping the call records" using information from cellular towers. Tr. 651 l. 11 – l. 15. Prior to her providing any of the "maps" she had plotted based upon cell phone location data, Defense counsel raised the 702 issue with the court. The Court specifically permitted the witness to continue this line of testimony, stating "she certainly can render a 701 opinion." Tr. 655 l. 3 – l 15. Defense counsel again raised the matter during the course of Agent Lukacs' testimony, after the state attempted to admit the "map" she had generated as evidence. Tr. 660 l. 6 – Tr. 661 l. 18. The Court then appeared to conduct an incomplete analysis pursuant to rule 702, making no attempt to determine the reliability of Agent Lukacs' testimony, and allowed her testimony to continue.

The State went on to admit three exhibits (38, 39 and 40) which were "call records maps" for the Appellant's cellphone, the alleged co-conspirator's cellphone, and the victim's cellphone Tr. 662 l. 2 – l. 19. Agent Lukacs testified, referring to the maps, as to the

---

[2] "PROSECUTORS' USE OF MOBILE PHONE TRACKING IS 'JUNK SCIENCE,' CRITICS SAY," ABA JOURNAL, June 1, 2013; "EXPERTS SAY LAW ENFORCEMENT'S USE OF CELLPHONE RECORDS CAN BE INACCURATE," WASHINGTON POST, June 27, 2014.

[3] *United States v. Evans*, 892 F.Supp.2d 949, 954 (N.D.Ill.2012).

location of specific phones at specific times on the date of the crime. Tr. 663 l. 9 - Tr. 669 l. 13.

By her own admission, Agent Lukacs was not present at the scene of the crime, and did not personally retrieve any cell phones. Rather, she was merely tasked with analyzing data, with the assistance of specialized software, to formulate an opinion as to the locations of the Appellant, the victim, and the alleged Co-Conspirator on the date of the incident. Using this specialized software, Agent Lukacs produced three "maps" showing movements throughout the day, which were then introduced into evidence.

Given the highly technical and specialized nature of this analysis, Agent Lukacs' testimony regarding locations of specific phones and specific times is not properly admitted as lay testimony.[4] Rather, her qualifications and the reliability of her opinions should have been subjected to the appropriate Rule 702 analysis. While the South Carolina Supreme Court has not answered the specific question of whether cell phone location testimony (of the kind offered by Agent Lukacs) must always be considered "expert" testimony, other courts have considered the issue in depth.

In *State v. Collins,* the Mississippi Supreme Court, citing a Maryland appeals court, recently considered the specific question of whether cell phone "mapping" testimony must be treated as expert testimony, and concluded that it should:

> The Maryland court recognized that "cellular telephone technology has become generally understood." [...] It also acknowledged that certain information regarding cell phone bills may be readily discerned by a juror familiar with his own cell phone bill. *Id.* However, it noted that the detective's testimony "implicated much more than mere telephone bills." *Id.* He had "elaborated on the information provided by the cell phone records — the bills and records of calls — by his use of a Microsoft

[4] For the sake of brevity, appellant has not re-stated each case cited in its first argument, but incorporates them herein by reference.

> software program to plot location data on a map and to convert information from the cellular phone records in order to plot the locations from which [the appellant] used his cell phone[,]" which the court found "required some specialized knowledge or skill not in the possession of the jurors." *Id.* at 199-200. The court ultimately held that "the better approach is to require the prosecution to offer expert testimony to explain the functions of cell phone towers, derivative tracking, and the techniques of locating and/or plotting the origins of cell phone calls using cell phone records." [...] This is because the detective's "description of the procedures he employed to plot the map of [the appellant's] cell phone hits was not commonplace. Because his explanation of the method he employed to translate the cell phone records into locations is demonstrably based on his training and experience[;]" thus, the court concluded that the detective should have been qualified as an expert and the State should have been obliged to fulfill the discovery obligations attendant with calling an expert witness. *Collins,* 172 So. 3d at 741-742 (Miss. 2015).

During the course of Agent Lukacs' testimony, after Defense counsel's second objection, the Court acknowledged that the opinions being offered constituted expert testimony. Tr. 660 l. 20 – Tr. 661 l. 18. However, the Court incorrectly treated Agent Lukacs' *scientific* testimony (which is based upon physics, and the manner in which cell phone signals are transmitted and recorded) as *experience testimony*, explicitly declining to conduct a "peer review" analysis under *Jones* and instead stating that "it's similar to bloodhound expert." Tr. 661 l. 6 – l. 18.

The most recent South Carolina Court of Appeals case regarding expert testimony standards and bloodhound experts, *State v. White*, specifically notes that testimony based upon "practical experience" such as bloodhound testimony, is treated differently than testimony that is based on "scientific evidence." *White*, 382 S.C. at 377. With respect to the admission of scientific evidence, the Court must consider "(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." *Id.* at 376 (citations omitted). Conducting this analysis prior to the admission of scientific testimony is critical in order to "**prevent the fact finders from being misled by the aura of infallibility surrounding unproven scientific methods.**"[5] *Id.* (emphasis added). In short, the Court erroneously found that Agent Lukacs' expert testimony was properly admissible because it applied the wrong standard.

Further, while the Court did qualify Agent Lukacs as an expert during the trial, she does not appear to have disclosed as an expert beforehand, such that the Appellant was deprived of the right to secure his own expert to contest the reliability of Agent Lukacs' opinions. This allowed the State to present these findings as indisputable fact to the jury, which profoundly prejudiced the defense of the case.

3) THE TRIAL COURT ERRED IN ITS RULING REGARDING EVIDENCE OF APPELLANT'S PRIOR FELONY CONVICTION UNDER RULE 609 AND RULE 403.

A. THE COURT APPLIED THE INCORRECT LEGAL STANDARD IN ITS RULE 609 ANALYSIS

SCRE 404 (B)(1) provides that evidence of a prior crime may not be admitted "to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Moreover, before such evidence is admitted to impeach a Defendant, the Court must weigh the evidence and find that "probative value of the evidence outweighs its prejudicial effect to that defendant." SCRE 609(B).

In the instant case, the Appellant elected to testify on his own behalf. Prior to taking this testimony, Defense counsel moved to exclude reference to the Appellant's 2010

[5] A review of the record reveals that both the State and the Court treated the cell phone location data without any doubt or skepticism – falling into the very trap that *White* warned against.

conviction for Assault and Battery of a High and Aggravated Nature, asserting that this past crime was highly prejudicial due to its similarity to the charge of murder, and was not probative as to the Appellant's character for truthfulness. Tr. 675 l. 7 – 676 l. 16. The Court stated that there was "no question" that this prior conviction would be admitted into evidence. Tr. 676 l. 17 – l. 24. The Court went on to perform a Rule 403[6] balancing test as provided for in subsection (a)(1), and conclude that the evidence should be admitted.

SCRE 609 provides, in relevant part:

> **(a) General Rule.** For the purpose of attacking the credibility of a witness,
>
> **(1)** evidence that a witness **other than an accused** has been convicted of a crime shall be admitted, **subject to Rule 403**, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that **an accused** has been convicted of such a crime shall be admitted if the court determines that **the probative value of admitting this evidence outweighs its prejudicial effect** to the accused;

By improperly applying the Rule 403 standard (which is reserved for witnesses "other than the accused") the Court set an erroneously high bar for exclusion of Appellant's prior convictions. In order to exclude evidence pursuant to Rule 403, the party seeking exclusion must establish that the "probative value is **substantially outweighed** by the danger of unfair prejudice." (emphasis added). In contrast, an accused under rule 609(a)(1) must only establish that "the probative value of admitting this evidence outweighs its prejudicial effect." *See e.g., US v. Tse,* 375 F. 3d 148, 163 (1st Cir. 2004) (noting that "the [403] standard of prejudice differs from the standard of prejudice applicable to the court's consideration of requests by the government to impeach a

[6] Note that the Court specifically stated that the applicable rule "requires me to conduct a 403 analysis." Tr. 676 l. 17 – l. 24.

defendant with prior convictions" and holding that "**the failure to apply the different standards for exclusion was an error of law.**")(emphasis added).

B. ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED NATURE IS NOT A CRIME OF DISHONESTY, AND AS SUCH, THE COURT'S ADMISSION OF THIS EVIDENCE WAS PLAIN ERROR

When seeking to introduce evidence of prior crimes, SCRE 609 limits the state to introducing conviction evidence which impeaches the Defendant's "character for truthfulness." South Carolina Courts have expressly rejected the notion that crimes of violence are probative as to truthfulness. In *State v. Al-Amin,* the South Carolina court of appeals considered whether armed robbery constituted a crime of dishonesty, and concluded that it is "the **larcenous element**" of armed robbery, rather than the violent element of armed robbery, which makes a crime dishonest. *State v. Al-Amin*, 353 S.C. 405 (Ct. App. 2003). *Al-Amin* recognizes that crimes of violence have little to no true probative value as to the Defendant's character for truthfulness, which the Court failed to consider in its (erroneously applied) 403 analysis.

C. THE COURT'S LIMITATION ON THE STATE'S ABILITY TO CROSS EXAMINE THE WITNESS ON HIS PRIOR FELONY WAS MORE PREJUCIAL THAN PROBATIVE

After erroneously applying Rule 403 analysis to the Appellant's prior conviction, the Court ruled that the State would be permitted to ask the Appellant whether he had been convicted of a felony, but would not be permitted to ask him about the details of this felony.[7] Tr. 677 l. 9 – 678 l. 17. Admission of this evidence greatly prejudiced the Appellant's case, as the jury was left to speculate as to what that prior felony might be.

[7] While *Green v. State*, 338 S.C. 428 (2000) has suggested that this may be an appropriate balancing tactic in some instances, the underlying reasoning in *Green* (where the Plaintiff was charged with drug conspiracy, no direct evidence of drug sale existed, and the Defendant had multiple prior drug convictions)

D. THE COURT ERRED IN EXCLUDING EVIDENCE OF THE APPELLANT'S SENTENCE, HAVING RULED THAT THE STATE COULD INTRODUCE EVIDENCE OF A PRIOR FELONY

Having received the Court's ruling that the state would be permitted to introduce an unspecified prior felony as evidence against the Appellant, counsel requested that the Court permit him to ask the Appellant about the sentence for this prior felony: specifically, whether the Appellant received probation and successfully completed probation. Tr. 681 l. 11 – 682 l. 4. This would have allowed the jury to have some sense of the severity of the prior crime, taking some of the sting out of the amorphous claim that a felony had been committed. The Court denied this request and ruled that if this evidence were admitted, the State would be permitted to introduce the specific nature of the prior crime.

Evidence of the Appellant's sentence of probation, and the fact that he had completed probation, was relevant to give the jury a sense of the severity of his prior felony. The probative value of this evidence was not substantially outweighed by its prejudice on the state, and as such, the Court erred in excluding this evidence under Rule 403.

E. THE CUMULATIVE EFFECT OF THE AFOREMENTIONED EVIDENTIARY ERRORS RESULTED IN SUBSTANTIAL PREJUDICE TO THE APPELLANT

The cumulative effect of the aforementioned rulings, arising from an error of law with respect to the appropriate evidentiary standard, resulted in substantial prejudice to the appellant, and given the very questionable evidence of guilt in this case, these errors were clearly not harmless. Rather, they had the effect of depriving the Appellant of the right to a fair trial.

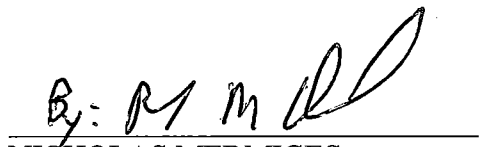
---

does not support the Court's conclusion in this case. Moreover, it does not appear that the Court in this case applied the five factors regarding admission of prior crimes as articulated in *State v. Colf*, 337 S.C. 622 (2000).

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed in this case and remanded to the Horry County Court of General Sessions for a new trial.

Respectfully submitted,



NICHOLAS MERMIGES
Law Office of Nick Mermiges, LLC

ROBERT M. DUDEK
Chief Appellate Defender

ATTORNEYS FOR APPELLANT

This 8th day of March, 2016.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARQUIS MCDONALD,

APPELLANT

APPELLATE CASE NO. 2014-002181

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 Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 8th day of March, 2016.

ROBERT M. DUDEK
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of March, 2016.

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