STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENDALL JEROME TYUS, JR.,

APPELLANT

APPELLATE CASE NO. 2015-001739

INITIAL BRIEF OF APPELLANT

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II. Did the trial judge err in qualifying a civilian crime scene technician as an expert in fingerprint analysis where the technician lacked requisite knowledge, skill, experience, training, and education to analyze fingerprints and form an opinion?

STATEMENT OF THE CASE

On March 5, 2013, a Charleston County grand jury indicted Appellant for armed robbery (2013-GS-10-1496) and possession of a firearm during the commission of a violent crime (2013-GS-10-1497). R. *(indictments). The state, represented by Chris Lietzow and Ben Lewis, called the case for trial before the Honorable Deadra L. Jefferson and a jury on July 13-15, 2015. Tr. 1-2. Lorelle Proctor and Tamara Van Pala represented Appellant. Tr. 2. The jury found Appellant guilty as charged. Tr. 405, line 17 – Tr. 406, line 1. Judge Jefferson sentenced Appellant to thirteen years' imprisonment for armed robbery and to five years' imprisonment for the weapon. She ordered the sentences to be served concurrently. Tr. 424, line 22 – Tr. 425, line 7; R. *(sentence sheets).

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

STATEMENT OF FACTS

On October 22, 2012, the Under the Sea Restaurant in North Charleston was robbed around 7:30 p.m., shortly before closing. Tr. 148, lines 5-16; Tr. 150, line 19 – Tr. 151, line 1. There were only two people in the restaurant at the time – the owners, Sunny and Hannah Lee. Tr. 148, lines 9-19; Tr. 149, lines 12-16; Tr. 169, lines 18-21. Sunny was cleaning in the back of the restaurant when the robbery occurred. Tr. 148, lines 9-19; Tr. 151, lines 2-4. Hannah was at the front of the restaurant by the register. Tr. 148, lines 18-19. As soon as the robber entered the restaurant, Hannah ran to the back to find Sunny. Tr. 148, lines 17-22; Tr. 151, lines 5-9. Sunny never saw the robber in the restaurant. Tr. 151, lines 10-14.

Hannah and Sunny ran out of the back door and around the strip mall where the restaurant was located. Tr. 151, lines 15-18; Tr. 152, lines 6-17; Tr. 164, lines 6-18. Sunny claimed that while on the side of the building, the pair ran into the robber, whose face was uncovered. Tr. 152, lines 6-17; Tr. 153, lines 18 – Tr. 154, line 3; Tr. 164, line 21 – Tr. 165, line 16; Tr. 165, lines 20-22.[1] Sunny did not see a gun, but claimed he saw the register tray at his side. Tr. 152, lines 21-25; Tr. 165, lines 17-19. When Sunny and Hannah returned to the restaurant, one of them called 911. Tr. 154, lines 15-18.

The police arrived quickly and began searching the area. Tr. 169, line 19 – Tr. 169, line 17. One of the officers found a money tray from a cash register within 125 feet of the front door of the restaurant, in front of an antique store in the same strip mall. Tr. 171, lines 17-25; Tr. 177, lines 5-11. Sunny identified the money tray as belonging in his restaurant's register. Tr. 163, lines 4-13. However, Sunny claimed he and his wife did not see the register tray sitting in front of the antique store when they ran in front of the building to

[1] Sunny did not identify Appellant as the robber. Hannah did not testify.

return to the restaurant. Tr. 166, lines 14-17. Alongside the register tray, the police also found a blue bandana or handkerchief. Tr. 171, lines 22-25; Tr. 178, line 21 – Tr. 179, line 3.

Lisa Kubicsko, a civilian crime scene technician with the North Charleston Police Department, processed the scene. Tr. 182, lines 3-6; Tr. 222, lines 8-12. Kubicsko collected numerous fingerprints, including from the interior of the front door, the base of the cash register, and the cash register tray. Tr. 228, line 14 – Tr. 229, line 11; Tr. 230, line 8 – Tr. 232, line 8; Tr. 237, lines 14-24. Oddly, Kubicsko took photographs of the prints where she recovered them for the countertop, register, and interior door, but took no photographs of the prints she recovered from the cash register tray, which were the only prints identified to Appellant. Tr. 322, line 22 – Tr. 323, line 18; Tr. 325, lines 5-7; Tr. 325, lines 15-18. As a result, she was unable to say exactly *where* those prints were on the cash register tray. Tr. 324, line 24 – Tr. 325, line 4; Tr. 326, lines 3-7. Adding another oddity to the fingerprint collection and examination was the fact that Kubicsko numbered the lift cards with Arabic numerals, except for the lift card from the cash register tray, which, again, were the only prints identified to Appellant. Tr. 325, lines 9-14; Tr. 325, lines 19-24. When Kubicsko collected the cash registry tray, she found cash and coins in the tray. Tr. 233, lines 8-13; Tr. 319, lines 5-7. After processing the tray, she returned it to the restaurant owners. Tr. 233, lines 21-22.

Additionally, Kubicsko swabbed the door, counter, register, and money tray for DNA. Tr. 238, line 8 – Tr. 239, line 16; Tr. 327, line 4 – Tr. 328, line 15. Finally, Kubicsko collected surveillance video from the restaurant capturing the robbery and the bandana found near the cash tray. Tr. 238, lines 2-4; State's Exhibit #1. The video showed a black

male armed with what appeared to be a gun enter the store and take the cash register tray. State's Exhibit #1. The identity of the robber was impossible to determine from the video because the robber's face is covered by a towel or shirt. State's Exhibit #1.

When Kubicsko returned to her office, she selected a latent fingerprint for entry into the Automated Fingerprint Identification System (AFIS). Tr. 239, line 17 – Tr. 241, line 18. Her first search yielded no respondents. Tr. 242, lines 18-20. She widened her search to include finger numbers nine and three and set the database parameters to return ten respondents. Tr. 243, lines 2-10. She received ten respondents, which were ranked from first to tenth based on a score created by the database. Tr. 243, lines 7-17. Kubicsko then compared the first respondent print with the latent print. Tr. 243, lines 17-22. Kubicsko opined the first respondent print and the latent print were a match. Tr. 245, lines 8-24. She claimed *complete certainty* in her examination. Tr. 243, lines 20-22. According to the database, the respondent fingerprint belonged to Appellant. Tr. 245, line 24 – Tr. 246, line 4.

After Kubicsko notified the police of the fingerprint "match," the police obtained a warrant for Appellant's arrest. Tr. 246, lines 9-19. Additionally, the police obtained a search warrant for Appellant's home. Tr. 246, lines 21-23. Kubicsko participated in execution of the search warrant as well. Tr. 246, lines 21-23; Tr. 247, lines 6-14. At Appellant's home, the police found money, including cash and coins, nine live rounds, white sneakers, a jacket with a white stripe, and a gun. Tr. 280, line 3 - Tr. 292, line 18; Tr. 300, line 4 - Tr. 304, line 12. The prosecutor argued the jacket, sneakers, and gun were not only similar, but were the ones worn and used by the robber as seen in the video. Tr. 365, line 18 – Tr. 370, lines 10.

Subsequent to Appellant's arrest, Kubicsko analyzed the remaining latent prints recovered from the restaurant. Tr. 247, line 15 - Tr. 248, line 15; Tr. 258, line 23 – Tr. 259, line 1. She opined that prints labeled L1.1, L1.2, L1.3, and L1.4, which were from the cash registry tray discovered outside the restaurant, were a simultaneous impression. Tr. 248, lines 3-15; Tr. 259, lines 6-14; Tr. 326, lines 10-13. Therefore, she compared those latent prints with the corresponding fingers on Appellant's ten-print card. Tr. 248, line 3 – Tr. 249, line 11. Kubiscko told the jury she identified all four to Appellant. Tr. 248, lines 3-15. Further, she claimed that she identified L1.5, which was another latent print lifted from the register tray, but not part of the simultaneous impression, to Appellant's left index finger. Tr. 264, lines 10-20.

Kubicsko recovered five latent prints from the interior side of the front door of the restaurant. Of those, she excluded Appellant as the person who left one print, and the others were insufficient for identification. Tr. 267, line 24 - Tr. 268, line 25. A print from the bottom of the cash register base was insufficient for identification, and two prints from the cash register tray were inconclusive. Tr. 268, lines 3-17. Her work was verified by Al Hallman, who agreed with her assessment. Tr. 270, lines 8-17. Despite this review and verification process, neither Kubicsko nor Hallman caught the "typographical error" in her report. Tr. 270, line 18. The report indicated she identified certain latent prints to Appellant's prints, but did so in a way that confused the latent prints and the fingers to which they allegedly matched. This was a "copy and paste typo" according to Kubicsko. Tr. 270, line 18 – Tr. 272, line 20. As a result of the error, which was discovered by the prosecutor, Kubicsko amended her report. Tr. 270, line 18 – Tr. 271, lines 2; Tr. 272, line 21 – Tr. 273, lines 18.

The totality of the evidence against Appellant was the fingerprint evidence as testified to by Kubicsko, the civilian crime scene technician. Although the police found a jacket, sneakers, and a gun in Appellant's home, which the prosecutor claimed matched those in the video, that evidence alone was insufficient on which to base a guilty verdict. Certainly, the money found in Appellant's home was insufficient to base a guilty verdict. Furthermore, the arrest and search of Appellant's home was the direct result of the technician's claim to police that she had matched Appellant's fingerprint to the latent print recovered from the cash register tray. Thus, exclusion of the fingerprint would necessitate exclusion of the evidence uncovered as a result of the search of Appellant's home.

ARGUMENT

I. The trial judge erred in permitting a civilian crime scene technician testify regarding her analysis of fingerprints where the state failed to establish the reliability of the science employed by the technician in arriving at her opinions.

Relevant facts

Prior to trial, Appellant filed a motion to suppress the fingerprint evidence. Tr. 16, line 20; Tr. 17, lines 10-16; R. *(Motion to Suppress). The judge indicated she would hear the motion prior to the witness testifying. Tr. 17, lines 20-22; Tr. 50, lines 17-21; Tr. 64, lines 3-6. Although the judge had heard no evidence concerning the reliability of the science on which the state's proposed witness had employed, the judge remarked, "I think we know that fingerprint evidence is reliable." Tr. 50, line 24 – Tr. 51, line 1. Appellant acknowledged that fingerprint evidence is "generally accepted," but noted the test for the admissibility of expert testimony had changed to require more than mere "general acceptance." Tr. 51, lines 4-8. The judge remarked again, "I think fingerprint evidence is more than reliable. I think it's more than accepted generally in our courts." Tr. 51, lines 9-11. Later, the judge stated, "the issues of whether the science was reliable and whether it meets the scientific standard, I think those are all forgone issues. The United States Supreme Court's already addressed all of those issues routinely around the United States." Tr. 92, lines 3-7

While ruling on Appellant's motion to suppress based on a false statement contained in the search warrant, the trial judge revealed her misunderstanding of how fingerprint examinations, including submission of a fingerprint into AFIS, work. Although the technician testified that she had visually compared the prints, the judge based her ruling in

part on what she considered the *objectivity* of the fingerprint comparison process. Specifically, the judge explained, "It would be different if she had to evaluate these prints, if she had to read them, if she had to make the subjective analysis regarding whether it was his print or not, but AFIS is automated. AFIS doesn't reward or punish anybody." Tr. 90, lines 14-19. The judge reiterated her belief in the "totally objective process" of fingerprint examination: "It's not a situation where she lifted a print and she went through a bunch of cards and said, I compared the ridge details and patterns and, blah, blah, blah, and I think it's him. She ran it through AFIS, a totally objective process that flags those whose prints are in the system and whose DNA is in the system." Tr. 101, lines 19-25.

The state presented very little concerning the "science" employed by the technician in arriving at her conclusions. Kubicsko mentioned she "took the complex latent print coursework through Ron Smith and Associates" in December of 2012, which was after she conducted the examination of the prints at issue in Appellant's case. Tr. 190, lines 1-5. According to the technician, Ron Smith and Associates "conduct themselves by a standard that's regularly accepted in the latent examination community." Tr. 190, lines 10-12. Kubicsko indicated she had attended two continuing education courses sponsored by the creator of the system used by North Charleston. Tr. 190, line 24 – Tr. 191, line 5. At the course, the creator went "over the best practices for entering fingerprints and palm prints." Tr. 191, lines 6-7. Additionally, the state presented evidence that Kubicsko was a member of the International Association of Identification, the governing body "for discussing the standards and procedures" for fingerprints. Tr. 192, lines 17-24. She indicated that she "adhered to that and follow[ed] their principles, their advice on conducting latent examinations." Tr. 192, line 25 – Tr. 193, line 3; Tr. 210, line 25 – Tr. 211, line 1.

When Appellant objected that the state had failed to present evidence of quality control procedures used to ensure reliability, the judge interjected that such evidence did not "go to her being an expert." Tr. 194, lines 3-10. Rather, the evidence Appellant sought went to "procedures" and "standards," which the judge stated were "nationwide." Tr. 194, lines 10-12. According to the judge, the "fingerprint standard" had no variance, and examiners "always use the same standard." Tr. 194, lines 12-13. The judge ruled, "I don't think there's any question about the science, so that's a nonissue as far as I'm concerned, unless she's using a different standard. They all use the same standard, and to some extent, it's objective." Tr. 194, lines 13-18. Judge Jefferson claimed no fingerprint examiner could testify with "100 percent certainty about any print" because "[i]t all depends on ridges and on the other stuff that they have to rely on." Tr. 194, lines 19-22.[2] According to the judge, "quality control ha[d] no bearing on whether she is an expert or not." Tr. 194, lines 22-23.

In response, Appellant made clear she was "arguing the Jones[3] factors." Tr. 194, lines 24-25. When Appellant argued the state had failed to satisfy the facts referenced in Jones, the court responded that Jones was "not the issue here" because "[t]here [was] no issue regarding the reliability of the science." Tr. 202, lines 5-10. According to the judge, "there [was] no mystery to [the] science" of "[h]ow fingerprints are examine, how they are evaluated, how latent prints are taken." Tr. 203, lines 1-3. She opined, "It's the same

[2] Kubicsko would testify that she was "100 percent certain" of her identification. Tr. 243, lines 20-22; Tr. 266, lines 5-8; Tr. 326, lines 8-13.

[3] State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979); State v. Jones, 383 S.C. 535, 681 S.E.2d 580 (2009).

science employed across the board by every latent print examiner in this state and every other state." Tr. 203, lines 3-5.

The judge reiterated her position that "[t]here is no question regarding the science that is employed in latent fingerprint examination. It is the same that is employed by every latent print examiner." Tr. 213, lines 9-13. Concerning reliability, the judge ruled that because Kubicsko "testified that her work in this case was reviewed," the "reliability, although not quite relevant to this case, and the scientific weight, that was obviously satisfied." Tr. 206, line 25 – Tr. 207, line 7.

Ultimately, the judge permitted the technician to testify as an expert in crime scene analysis and latent fingerprint examination over Appellant's objection. Tr. 222, lines 1-5. When the technician began testifying before the jury regarding how she compared the latent print and the respondent print, Appellant objected based on Rules 702 and 705, SCRE. Tr. 243, lines 23-25. The judge remarked Appellant "already argued that in camera." She overruled the objection and stated, "It's preserved." Tr. 244, lines 1-2.

Discussion

The South Carolina Rules of Evidence govern the admissibility of scientific evidence. The applicable rule 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.

Rule 702, SCRE. "'All expert testimony must satisfy the Rule 702 criteria, and that includes the [circuit] court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration.'" State v. Cain, 413 S.C. 508,

520-521, 776 S.E.2d 374, 380 (Ct. App. 2015)(quoting State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009)).

In State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999), our Supreme Court held that "[w]hen 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." In order to determine whether the underlying science is reliable, the trial judge must apply the four factor test announced in State v. Jones, 273 S.C. 723, 731, 259 S.E.2d 120, 124. Id. Those factors are (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 19, 515 S.E.2d at 517(citing Jones, 273 S.C. at 731, 259 S.E.2d at 124). Recently, the Supreme Court reiterated the Jones test for determining reliability. State v. Jones, 383 S.C. 535, 681 S.E.2d 580 (2009). The trial judge erred in admitting the testimony of Kubicsko because the underlying science is not reliable.

In Jones, 383 S.C. at 550, 681 S.E.2d at 588, the Supreme Court concluded the trial judge erred in admitting testimony that "barefoot insole impression" testimony revealed Jones' foot to be consistent with the impression made by the wearer of steel toe boot because the "science" lacked reliability. The Court held that although research by two witnesses had been presented and published, it did not satisfy the requirement of "peer review." Id. at 556, 681 S.E.2d at 591. The Court also concluded that the "barefoot insole impression" testing conducted in Jones' case was the first for SLED, and the testing is no longer used by SLED or the FBI. Id. at 557, 681 S.E.2d at 591. The SLED agent testified

that SLED had no established protocol or quality control procedure in place for the testing. Thus, the Court concluded the evidence lacked quality control measures to ensure reliability. Id. Finally, the Court held the testing lacked a consistency of the methodology based upon the testimony of a statistician. The research supporting the testing was a sample of barefoot impressions of 1000 college students. The statistician testified the sample could not be applied to the general population due to the sampling. In addition, the sample involved barefoot impressions, not barefoot insole impressions and the measurements were conducted differently. Id.

In State v. Tapp, 398 S.C. 376, 388, 728 S.E.2d 468, 474-475 (2012), the South Carolina Supreme Court explained that the "expertise, reliability, and ability of the testimony to assist the trier of fact are all threshold determinations to be made prior to the admission of expert testimony, and generally, a witness's expert status will be determined *prior* to determining the reliability of the testimony." (emphasis in original). After a judge qualifies a witness as an expert, the judge should evaluate the substance of the witness's testimony to determine if the testimony is reliable, as required by Rule 702, SCRE. Id. at 389, 728 S.E.2d at 475. The Court held the circuit court erred in admitting the proposed expert "before vetting it for its reliability." Id.

As an initial matter, the trial judge erred in refusing to hold the state to its burden of presenting evidence of reliability of fingerprint comparison. Instead, the judge based her decision on her erroneous conclusion that fingerprint analysis was objective and that all latent print examiners use the same methodologies. Contrary to the judge's conclusions, "[t]he training of personnel to perform latent print identifications varies from agency to agency." Committee on Identifying the Needs of the Forensic Sciences Community,

National Research Council, Strengthening Forensic Science in the United States: A Path Forward, at 136 (2009)(hereinafter "NRC Forensic Science Report" or "the Report"). Although the International Association for Identification and the Scientific Working Group on Friction Ridge Analysis, Study and Technology offer training guidelines, neither are required and there is no auditing of the content of the training programs developed by nonaccredited agencies. Id. at 136-137. Latent print examination is a highly subjective discipline. Id. at 137-138. The most commonly used method of latent print examination is ACE-V: Analysis, Comparison, Evaluation, and Verification. Id. at 137. "The ACE-V method does not specify particular measurements or a standard test protocol, and examiners must make subjective assessments throughout." Id. at 139. In fact, "[i]n the United States, the threshold for making a source identification is deliberately kept subjective, so that the examiner can take into account both the quantity and quality of comparable details." Id. at 139. This means "the outcome of a friction ridge analysis is not necessarily repeatable from examiner to examiner." Id. at 139. "[S]ubjectivity is intrinsic to friction ridge analysis." Id. at 139. "[F]riction ridge analysis relies on subjective judgments by the examiner." Id. at 139. The "criteria for identification ... depend on an examiner's ability to discern patterns (possibly complex) among myriad features and on the examiner's experience judging the discriminatory value in those patterns." Id. at 140.

In light of the inherent subjectivity of fingerprint analysis, the "fingerprint community" contends that a "lengthy apprenticeship (typically two years, at the FBI laboratory) with an experienced latent print examiner enables a new examiner to develop a sense of the rarity of the features and groups of features." Id. at 140-141. As contrary to the judge's opinion that a fingerprint examiner would not testify to 100% certainty, "fingerprint

examiners typically testify in the language of absolute certainty." Id. at 142 (internal quotation marks omitted). "Experts therefore make only what they term 'positive' or 'absolute' identifications – essentially making the claim that they have matched the latent print to the one and only person in the entire world whose fingertip could have produced it." Id. at 142. In light of the "general lack of validity testing for fingerprinting; the relative dearth of difficult proficiency tests; the lack of a statistically valid model of fingerprinting; and the lack of validated standards for declaring a match, such claims of absolute, certain confidence in identification are unjustified." Id. at 142.

Limited information about the accuracy and reliability of friction ridge analysis exists. Id. at 142. Nevertheless, latent print examiners claim zero error rates. Id. at 142. According to the NRC Forensic Science Report, "claims that these analyses have zero error rates are not scientifically plausible." Id. at 142. Further, the Report concluded ACE-V "is not specific enough to qualify as a validated method" for conducting friction ridge analysis. Id. at 142. "ACE-V does not guard against bias; is too broad to ensure repeatability and transparency; and does not guarantee that two analysts following it will obtain the same results." Id. at 142. In fact, there is no available scientific evidence of the validity of the ACE-V method. Id. at 143.

Despite the trial judge's conclusion that fingerprint analysis is unassailable, its subjective nature leaves it quite vulnerable on multiple fronts to attack. At a minimum, the judge erred in failing to require the state to present evidence of the methodology employed by Kubicsko in conducting her analysis and the reliability of the methodology. Not only was the technique used by Kubicsko in conducting her examination unknown, but any publications on the technique, a factor for consideration under the Rule, were unknown.

Although Kubicsko testified that another analyst reviewed her work and agreed with her conclusion, this was hearsay testimony and not supported by any evidence of the technique used by the reviewer. Additionally, the state failed to present evidence of general peer review of latent print examination, which would go to the general reliability of latent print examination.

No evidence was presented regarding whether the method used by Kubicsko was the same method used by other examiners or by Kubicsko in other examinations. Thus, the state presented no evidence of prior application of the method to the type of evidence involved. The judge was satisfied with the simple assertion that Kubicsko conducted fingerprint analysis. There was no requirement on the state to prove the method of analysis used to compare the latent prints with the known prints and whether it had been used by others.

The only quality control measure revealed during the hearing was that Kubicsko's work was reviewed by her peer. This was the same peer who trained her to conduct latent print comparisons. It is unsurprising that the person who trained Kubicsko would agree with her result. Quality control measures should include record keeping and the ability to reproduce the analysis using the records. The peer reviewer simply looked at Kubicsko's conclusion without having any way of evaluating her methodology. While ultimately, it is the conclusion that is most important, the ability to reproduce the analysis is necessary for scientific methodology. Other quality control measures would include (1) how Kubicsko maintained the quality of the lifted print, especially if Kubicsko transferred the lifted print from the print card to some other source; (2) how inputing the print into AFIS affected the quality of the print, if at all; (3) how any enhancements of the print affected the evaluation;

and (4) how to control for bias resulting from AFIS returning scored and numbered respondents. The state presented no testimony regarding quality control measures employed by the technician, and was not required to do so by the judge, who assumed all fingerprint analyses were the same and scientifically reliable.

Finally, the state presented no evidence of the consistency of the method used by the technician in conducting the latent print examination with recognized scientific laws and procedures. As noted by the National Academies of Science, the latent print examination method called ACE-V, which may or may not have been used by Kubicsko, is not specific enough to be considered a scientific method. The technique relies exclusively on the subjectivity of the examiner, who is not required to keep records to allow reproduction of the examination and results. At each stage of ACE-V, the examiner exercises subjectivity, which differs among examiners. Despite this clear subjectivity in the analysis, the judge declared fingerprint examinations to be "objective" and not requiring of proof of reliability prior to admission.

The trial judge erred in permitting the civilian crime scene technician to testify as an expert in latent print examinations without first determining the reliability of the testimony and methodology employed by the technician. The judge made a serious of false assumptions and never required the state to prove the reliability of its witness prior to admitting the testimony. This error requires reversal.

II. The trial judge erred in qualifying a civilian crime scene technician as an expert in fingerprint analysis where the technician lacked requisite knowledge, skill, experience, training, and education to analyze fingerprints and form an opinion.

Relevant facts

When the state offered Lisa Kubicsko, a civilian crime scene technician, as an expert in crime scene analysis and latent fingerprint examination, Appellant objected based on Rules 701 and 702, SCRE. Tr. 185, lines 12-18. Initially, the judge inquired why the technician needed to be qualified as an expert because the judge's understanding of her testimony from the previous day was that she had not engaged in examining or interpreting any prints. Tr. 186, lines 5-14. The state explained the technician conducted "a full-blown examination on the remainder of the prints that were found at the scene" two weeks after the robbery and would render an opinion; thus, she was required to be admitted as an expert in order to testify to her opinion before the jury. Tr. 186, line 19 – Tr. 187, line 2.

The technician graduated in May of 2010 from West Virginia University with a bachelor's degree in forensic investigative science, and was working on her master's degree in criminal justice from Charleston Southern University. Tr. 183, lines 12-18; Tr. 198, lines 1-2. While earning her undergraduate degree, Kubicsko took two courses on fingerprints, earning a certificate of thirty hours for each course. Tr. 188, lines 16-25. Additionally, she worked "for an FBI research project" and "was responsible for obtaining latent prints, ten-print cards, palm print cards and major case prints from test subjects" from August 2008 through December 2008. Tr. 198, lines 2-11.

After graduating, Kubicsko went to work for the North Charleston Police Department as a crime scene technician and began working underneath the current latent

examiner. Tr. 189, lines 2-5. At the time of Appellant's trial, Kubicsko had worked at the North Charleston Police Department "a little over four-and-a-half years" as "a civilian crime scene tech." Tr. 182, lines 3-15. In addition to being a crime scene technician, Kubicsko claimed she was a latent examiner and had been for "probably a little over four years." Tr. 183, lines 3-8. The technician began her employment in December, and in June, she "went to SLED and took their test," which required her to demonstrate that she could "enter a fingerprint into AFIS, do the correct comparisons on the system, and make the right determinations." Tr. 189, lines 8-13. She received a certificate for "demonstrating proficiency in operating the automatic fingerprint identification system from SLED." Tr. 184, lines 2-7; Tr. 200, lines 3-9. After earning her certificate from SLED on June 9, 2011, she began working her own cases. Tr. 189, lines 22-24; Tr. 199, line 25 – Tr. 200, line 2.

While employed, the technician attended "a complex latent course from Ron Smith and Associates" in December 2012, after she had examined the prints in Appellant's case. Tr. 183, line 25 – Tr. 184, line 1; Tr. 190, lines 1-5. She had also attended two annual conferences in California sponsored by Stat Room and Morfo Trak, the creator of the system used by North Charleston. Tr. 190, line 21 – Tr. 191, line 5. She "attended some of the actual courses that they put on that would give you a certificate for those classes." Tr. 191, lines 1-10. One of the conferences was held on April 30, 2012, and she received "a certificate of completion and certificate of training" "for fingerprints, latents plotting and searching Morfo Biz, ten-print quality control and verification, palm print quality control and increasing palm print kit, Photo Shop for latents, advance latent techniques, and latent verification and charting." Tr. 198, line 23 – Tr. 199, line 7.

Also in the Spring of 2012, she attended a continuing education course for forensic professionals sponsored by the Forensic Science Initiative of West Virginia University, but the courses "did not have to do so much with latent work." Tr. 199, lines 8-12.

Additionally, she was a member of the International Association for Identification. Tr. 184, lines 8-11. She was a member beginning in 2010 continuing until at least 2014. Tr. 198, lines 12-21. However, she had no idea of the requirements for membership in the organization. Tr. 210, lines 6-10. She first became a member of the organization as a student, and then her membership status changed to "associate member" when she joined North Charleston, which meant she had to pay dues. Tr. 210, lines 15-21. Kubickso had not published any articles regarding latent print identification. Tr. 191, lines 19-21.

The technician estimated she had examined "[t]housands" of fingerprints or palm prints. Tr. 184, lines 21-23; Tr. 200, lines 10-15. She explained that she examined "over at least 200 a month." Tr. 200, lines 15-19. "Over a hundred times," she had "identified somebody through [his or her] fingerprint that was found at a crime scene." Tr. 184, line 24 – Tr. 185, line 5. She had never "miscorrectly [*sic*] identified somebody via a fingerprint." Tr. 200, line 24 – Tr. 201, line 2.

For quality control, Kubicsko's department used "a blind verification process" in 2012. Tr. 201, lines 6-7. This involved all of her work being given to another latent examiner who did not know her results and would do an examination of those prints. Tr. 201, lines 7-10. Thereafter, the second examiner would sign off that her report was correct and her findings were correct. Tr. 201, lines 10-12.

The technician had testified as an expert in crime scene analysis three times in General Sessions, but had never testified as an expert in latent print examinations. Tr. 187, line 22 – Tr. 188, line 5.

At the conclusion of the *in camera* examination, Judge Jefferson ruled the evidence would assist the trier of fact to understand the evidence or facts at issue, that the comparison of fingerprints was beyond a layperson's knowledge, and that technician had "acquired by study or practical experience the knowledge of the subject matter of her testimony such that it would enable her to give guidance and assistance to the jury in resolving the factual issue, which is beyond the scope of their good judgment and common knowledge." Tr. 211, line 12 – Tr. 213, line 8; Tr. 213, line 13 – Tr. 215, line 12. Ultimately, the judge permitted the technician to testify as an expert in crime scene analysis and latent fingerprint examination over Appellant's objection. Tr. 222, lines 1-5.

Discussion

The qualification of a witness as an expert and the subsequent admission of that witness's opinion testimony are matters within the sound discretion of the trial judge. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); Lee v. Suess, 318 S.C. 283, 285, 457 S.E.2d 344, 345 (1995); Manning v. City of Columbia, 297 S.C. 451, 453, 377 S.E.2d 335, 336-337 (1989); Honea v. Prior, 295 S.C. 526, 530, 369 S.E.2d 846, 849 (Ct. App. 1988). Therefore, an appellate court reviews a trial judge's ruling concerning an expert witness' qualification and the admission of opinion testimony for an abuse of discretion. Strange v. South Carolina Dep't of Highways & Pub. Transp., 307 S.C. 161, 163, 414 S.E.2d 138, 139 (1992); Honea, 295 S.C. at 530; 369 S.E.2d at 849; see also State v. Anderson, 407 S.C. 278, 285, 754 S.E.2d 905, 908 (Ct. App. 2014). "An abuse of discretion

occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005); see also, Suess, 318 S.C. at 285, 457 S.E.2d at 345. If the ruling is "manifestly arbitrary, unreasonable, or unfair," then the trial court abused his discretion. Id.

Rule 702 of the South Carolina Rules of Evidence governs when the admission of expert testimony is appropriate and supplies the bases by which an expert may be qualified to give an opinion. Specifically, the Rule 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.

Rule 702, SCRE. Thus, several criteria must be met prior to the admission of expert testimony. First, the trial court must determine that such evidence will assist the jury to understand the evidence or determine a fact in issue. Second, the witness must be qualified as an expert due to experience or training. Third, the trial court must determine whether the proposed expert testimony satisfies a reliability threshold for the jury's ultimate consideration. State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009). The party offering the expert testimony has the burden of showing the witness possesses the necessary learning, skill, or practical experience to enable the witness to give the opinion testimony. State v. Von Dohlen, 322 S.C. 234, 249, 471 S.E.2d 689, 697 (1996).

The first criterion requires the trial judge to determine whether the proffered testimony, which is based upon specialized knowledge, will assist the jury in understanding evidence or determining a fact. A matter understood without any specialized knowledge does not require the witness to be qualified as an expert. Additionally, if the testimony will not assist the jury's understanding of a relevant matter, then no expert testimony is needed.

See Manning, 297 S.C. at 453-454, 377 S.E.2d at 337 (holding that "[t]o qualify as an expert, a person must have acquired by study or practical experience a special knowledge of a subject matter about which the jury's good judgment and average knowledge is inadequate"); Honea, 295 S.C. at 531, 369 S.E.2d at 849. The third criterion requires the trial judge to ensure the proffered testimony "meets a reliability threshold for the jury's ultimate consideration." White, 382 S.C. at 270, 676 S.E.2d at 686. As explained by the South Carolina Supreme Court, "[r]eliability is a central feature of Rule 702 admissibility." Id.

The second criterion, which is at issue in Appellant's case, requires that the expert's proffered testimony be based upon "knowledge, skill, experience, training, or education." In order for a witness to be competent to testify as an expert, the "witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony." O'Tuel v. Villani, 318 S.C. 24, 28, 455 S.E.2d 698, 701 (Ct. App. 1995). Qualification as an expert "depends on the particular witness' reference to the subject." Gooding v. St. Francis Xavier Hospital, 326 S.C. 248, 253, 487 S.E.2d 596, 598 (1997); Suess, 318 S.C. at 285, 457 S.E.2d at 346. "'[A]n expert is not limited to any class of persons acting professionally.'" Gooding, 326 S.C. at 253, 487 S.E.2d at 598 (citing Botehlo v. Bycura, 282 S.C. 578, 586, 320 S.E.2d 59, 64 (Ct. App. 1984)). In addition, our courts place no exact requirement regarding how that knowledge or skill must be acquired by the witness. Honea, 295 S.C. at 531, 369 S.E.2d at 849. In fact, "[e]ven where the problem presented may be one that usually requires some scientific knowledge or training, a

person with long experience may testify as an expert although he or she did not pursue a special study of the matter." Id.

In McDill v. Mark's Auto Sales, 367 S.C. 486, 491, 626 S.E.2d 52, 55 (Ct. App. 2006), this Court held the trial judge did not err in refusing to qualify a state trooper as an expert in accident reconstruction. Although the trooper had experience in investigating accidents and took a six-week accident reconstruction course along with updating courses, the trooper was not a member of the Highway Patrol's accident reconstruction team. The trooper did not use any particular reconstructive techniques in making his determination of the car speeds; rather, he relied upon statements from the drivers as to their speeds. The trooper had testified in federal court previously concerning his opinion as to accident investigation, not reconstruction. Id. As this Court noted, "if investigating an accident qualified an officer as an expert in accident causation, then every highway patrolman would qualify as an expert." Id.

On the other hand, in Gooding, 326 S.C. at 252, 487 S.E.2d at 597, the South Carolina Supreme Court held an emergency medical technician (EMT) and paramedic, was qualified to testify as an expert in intubation. The EMT testified that in addition to being a certified paramedic, he had intubated over one hundred patients, and instructed and tested physicians on intubation and extubation procedures. Id. at 251, 487 S.E.2d at 597.

In State v. Ellis, 345 S.C. 175, 177-178, 547 S.E.2d 490, 491 (2001), the Supreme Court held a police officer, who was qualified to testify as an expert in crime scene processing and fingerprint identification exceeded the scope of his expertise when he testified as to his conclusion drawn from the measurements and observations he made. In Ellis, the victim was found dead as a result of gunshot wounds near his bicycle and a knife.

The defendant admitted to shooting the victim, but claimed he acted in self-defense when the victim dropped his bike and approached the defendant with the knife. When the victim refused to stop, the defendant shot the victim. The prosecution's theory of the case was that the defendant shot the victim while the victim remained on the bike. Id. at 176, 547 S.E.2d at 491. The police officer testified that the victim was on his bike when he was shot based upon his measurements and observations of the crime scene. Id. at 177-178, 547 S.E.2d at 491. Further, the Court held the error in allowing the officer to testify was not harmless in light of the defendant's contention that he was acting in self-defense. Id. at 178, 547 S.E.2d at 491. The Court held the prosecutor was free to argue that the evidence supported an inference that the victim was on the bicycle at the time of the shooting, and the jury could have concluded as such, but the officer "was not qualified to give such an 'expert' opinion." Id.

In the instant matter, civilian crime scene technician Kubiscko lacked the required knowledge, skill, experience, training, and education to be qualified as an expert in fingerprint analysis, a highly subjective discipline. The technician took two classes concerning fingerprints while an undergraduate. She also participated in a project to collect ten-print cards. The record is devoid of evidence of the content of the fingerprint classes, which could have been anything from actual comparisons to collection. Certainly, the project concerned only the collection of prints from known subjects.

At the time she conducted the comparisons in this case, the technician had been employed by North Charleston for less than two years. She had been certified by SLED regarding her ability to use AFIS for less than two years as well. SLED had not certified the technician as a latent print examiner; rather, SLED had certified that she could use AFIS, a

database limited to use by law enforcement approved by SLED. She worked under the tutelage of another examiner for only six short months. Her attendance at the two continuing education courses prior to her examination of the prints in Appellant's case concerned how to use the technology created by the sponsor of the course and used by North Charleston. The courses had little, if anything, to do with how to conduct the subjective analysis of fingerprint examination.

Kubicsko's membership and claim to adherence to the standards of the International Association for Identification was undermined by her lack of knowledge regarding the requirements of membership, which appeared to be simply paying the membership fee. Further, she failed to testify regarding the standards espoused by the Association or how she adhered to them. She discussed no articles or publications on which she relied for maintaining competence in the area of fingerprint examination.

Kubicsko lacked the "knowledge, skill, experience, training, [and] education" to testify about fingerprint comparisons. The discipline is highly subjective and requires years of study to exercise that subjectivity correctly. Kubicsko's inexperience meant she was not qualified to tell the jury she was absolutely certain that Appellant's fingerprints were on the cash register tray found outside the restaurant, the only real evidence connecting Appellant to the crime. The trial judge erred in permitting the technician to testify as an expert due to her lack of qualifications.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and sentences and remand for a new trial.

Respectfully submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of May, 2016.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
MAY 04 2016
SC Court of Appeals

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENDALL JEROME TYUS, JR.,

APPELLANT

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 J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Kendall Jerome Tyus, Jr. #364677, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 4th day of May, 2016.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of May, 2016.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.