STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable Thomas A. Russo, Circuit Court Judge
Appellate Case No. 2015-001055

THE STATE,

Respondent,

v.

JOHNNY NEAL SEXTON, II

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. The circuit court properly allowed the State's expert to testify regarding the contents of two mason jars found in Appellant's residence because he was a certified methamphetamine lab technician, who was qualified as an expert on clandestine methamphetamine labs, and based on his knowledge, training and experience, including his investigations of over a hundred methamphetamine labs, he was able to identify the liquids in the jars by their smell and appearance.

II. Appellant's counsel opened the door to testimony regarding Appellant's failure to attend custody hearings involving his children during cross-examination of a State's witness when counsel asked the witness if Appellant had moved out of the residence a month before law enforcement found items related to the manufacturing of methamphetamine, and if he came to the residence to confront the witness about her drug use and take the children away.

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On April 13, 2015, the Lexington County Grand Jury indicted Appellant Johnny Neal Sexton, III, on three counts of unlawful conduct toward a child. The case was called for a jury trial on April 15, 2015, before the Honorable Thomas A. Russo, Circuit Court Judge. Appellant did not appear for trial, and the case proceeded *in absentia.*

The State presented testimony establishing Appellant was the children's father, and the family, including the three children, lived in a small camper between November 1, 2013, and February 21, 2014. The children's mother testified Appellant manufactured methamphetamine in the camper and his van during that time, and she and Appellant smoked methamphetamine inside the camper while the children were present. During cross-examination, Appellant implied the mother testified against him because he left her in January 2013, and prior to the arrival of law enforcement on February 21, 2014, he confronted her about her drug use and threatened to take the children away from her, all of which the mother denied. (Trial Transcript [TT], pp. 80-110; Record on Appeal [R.], pp. 80-110).

A Lexington County Deputy testified he went to the camper in January 2014, and served eviction paperwork on Appellant personally. When he went back to the camper in February 2014 to eject the family, he met a Department of Social Services caseworker who was going to the camper as well. Appellant was not at the camper when they arrived, and the deputy served the writ of ejectment on the mother, who consented to the deputy and caseworker entering the camper. The children were sitting inside the camper, and the deputy saw items he believed may be related to manufacturing methamphetamine sitting in the kitchen area, so he immediately got everyone outside and contacted narcotics investigators. (TT, pp. 110-123; R., pp. 110-123).

Agent Michael Merckle of the Lexington County Sheriff's Department testified he had sixteen years experience in law enforcement, he had worked with the Department's Narcotics Enforcement Team for five years, and had received specialized training in the identification and detection of methamphetamine labs. He attended federal training and was certified as a methamphetamine technician to locate, identify, and safely handle methamphetamine. As of the date of trial, he had worked over a hundred methamphetamine labs, and testified ten to twelve times in General Sessions Court. Over Appellant's general objection, the court qualified Agent Merckle as an expert regarding clandestine methamphetamine labs. (TT, pp. 168-170; R., pp. 168-170).

Agent Merckle testified he responded to the camper location in February 2014, to investigate the possibility of a methamphetamine lab. After describing the different types of methamphetamine labs, he stated the chemicals required to manufacture methamphetamine are very toxic and flammable, and having them around children, especially in a small, confined space like the camper, would be extremely dangerous. (TT, pp. 170-177; R., pp. 170-177).

The camper contained items associated with a methamphetamine lab, including mason jars containing liquid substances, coffee filters and a coffee grinder containing what appeared to be ground pseudoephedrine, which is a central ingredient in methamphetamine. Over Appellant's objection, Agent Merckle testified, based on his training and experience, the mason jars contained Coleman camp fuel and ether, which he identified by the smell and appearance. He further testified the chemicals in the jars were destroyed because they are potentially harmful, and cannot be stored in an enclosed evidence storage facility to be handled by personnel who are not specifically trained to do so. (TT, pp. 177-184; R., pp. 177-184).

The caseworker who was present at the camper in February, 2014, testified she was there to investigate an allegation of child abuse or neglect received by the Department of Social Services. She stated there was little food inside the camper, and the children were only "minimally clean." The children were placed in emergency protective custody that day due to the circumstances and risk of harm to them. There were several subsequent hearings regarding the children' custody, and the mother, who was incarcerated, attended each one. (TT, pp. 203-212; R., pp. 203-212).

The State then asked the caseworker if Appellant had attended any of the hearings or shown any interest in getting his children back, and she replied "no." Appellant objected, arguing all the custody hearings occurred outside the dates included in the indictments and the State's question elicited "improper bad act evidence," and moved for a mistrial. The State responded that the question related to Appellant's allegation he came to get the children in February 2014, because he wanted to take care of them because of the mother's drug use, and showed he had no interest in the children. The court denied the mistrial motion, finding the question was an appropriate response to Appellant's allegations. (TT, pp. 213-216; R., pp. 213-216).

The jury convicted Appellant on all charges, and the court sentenced him to three consecutive eight year terms of incarceration, for a total sentence of twenty-four years. (May 6, 2015 Hearing Transcript, Sentencing Sheets dated April 17, 2015; R., pp. 268-273, 274-282). This appeal followed.

ARGUMENT

I. The circuit court properly allowed the State's expert to testify regarding the contents of two mason jars found in Appellant's residence because he was a certified methamphetamine lab technician, who was qualified as an expert on clandestine methamphetamine labs, and based on his knowledge, training and experience, including his investigations of over a hundred methamphetamine labs, he was able to identify the liquids in the jars by their smell and appearance.

Appellant contends the circuit court erred in allowing Agent Merckle to testify regarding the liquids in the two mason jars found in Appellant's residence because he should not have been qualified as an expert, and his testimony was "not reliable" because the liquids were not tested before they were destroyed. As a threshold matter, any issue regarding Agent Merckle's qualification as an expert was not properly preserved for appellate review. Further, the failure to test the liquids prior to destruction went to the weight of his testimony rather than its admissibility.

A. Standard of Review

"In criminal cases, the appellate court sits to review errors of law only." State v. Johnson, 413 S.C. 458, 776 S.E.2d 367, 371 (2015). "The admission or exclusion of evidence rests in the sound discretion of the trial judge, and will not be reversed on appeal absent an abuse of discretion," which occurs "when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Id.* (citations omitted). The trial court's discretion includes admission of expert testimony. State v. Barrett, 416 S.C. 124, 785 S.E.2d 387, 389 (Ct. App. 2016).

B. Issue Preservation

In order to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court. State v. Thompson, 413 S.C. 590, 776 S.E.2d 413, 422 (Ct. App.

2015). While the party need not use the exact name of a legal doctrine, the objection must be sufficiently specific to make the point clear to the trial court. *Id.*

Appellant did not contest Agent Merckle's qualifications pre-trial, and when the State offered him as an expert, Appellant merely stated "I object," but cited no basis for the objection. Therefore, the issue of whether the circuit court erred in qualifying Agent Merckle as an expert is not preserved for review.

Even if preserved for review, however, it is clear the circuit court properly qualified Agent Merckle under Rule 702, SCRE, as an expert in clandestine methamphetamine labs. Agent Merckle had sixteen years law enforcement experience, with five specifically in narcotics investigations. He attended federal training by the Drug Enforcement Agency, was certified as a methamphetamine lab technician, with recertification annually, and had investigated over a hundred such labs during his five years in narcotics. He had testified in multiple General Sessions cases, and hundreds of magistrate court cases. Thus, he had the specialized knowledge, training and experience required by Rule 702. *See* Rule 702, SCRE.

C. Admissibility of Testimony

Finally, Appellant argues Agent Merckle's testimony identifying the liquids in mason jars found in the camper was "unreliable," and therefore inadmissible, because the liquids were not tested before they were destroyed. This argument conflates the admissibility of evidence, which is a court function, with determination of the evidence's credibility, which is inherently a jury function.

As with all witnesses testifying at trial, the jury gives such weight and credibility to an expert's testimony as it deems appropriate, and the jury is free to accept or reject the testimony of an expert witness. *See* State v. White, 382 S.C. 265, 676 S.E.2d 684, 686-687 (2009) (the trial

court properly instructed the jury that they were to give expert dog handler's testimony such weight and credibility as they deemed appropriate as with any and all witnesses testifying at trial); State v. Commander, 384 S.C. 66, 74-75, 681 S.E.2d 31, 35 (Ct. App. 2009); State v. Commander, 384 S.C. 66, 681 S.E.2d 31, 35 (Ct. App. 2009) (same). In this case, the circuit court charged the jury it had to determine the credibility of the expert's testimony, which was to be given no more weight than any other witness' testimony, and the jurors were not required to accept the expert's opinion, even if it was uncontradicted. (TT, pp. 255-256; R., pp. 255-256). Accordingly, based on the evidence and jury charge, the jurors knew Agent Merckle's opinion regarding the mason jars' contents was premised on the smell and appearance of the liquids, the liquids were destroyed without any forensic testing, and they could completely disregard Agent Merckle's testimony.

Appellant's reliance on the circuit court's observations regarding the propriety of a spoliation charge as indicating the court questioned the reliability of Agent Merckle's opinion is misplaced. Rather than questioning the reliability of Agent Merckle's opinion, the court merely found the charge was appropriate because the liquids were destroyed without any forensic testing, and specifically stated the State was not precluded from addressing the destruction issue and what the evidence showed in closing argument. (TT, pp. 224-226; R., pp. 224-226). In short, the court properly recognized the ultimate credibility of Agent Merckle's opinion regarding the liquids was an issue for the jury.[1]

[1]Appellant's contentions regarding the mother's credibility based on her admitted drug use and purported motivation to testify against the Appellant are irrelevant to the issue regarding admissibility of Agent Merckle's testimony, and nothing more than a red herring. The jury heard all those allegations during the mother's testimony and Appellant's closing argument, and knew it had to determine her credibility.

The circuit court acted within its discretion in qualifying Agent Merckle as an expert and allowing his testimony regarding the mason jars' contents. Therefore, the circuit court's rulings should be affirmed.

II. Appellant's counsel opened the door to testimony regarding Appellant's failure to attend custody hearings involving his children during cross-examination of the children' mother by asking her if Appellant had moved out of the residence a month before law enforcement found items related to the manufacturing of methamphetamine, and if he came to the residence to confront the witness about her drug use and take the children away.

Appellant asserts the circuit court erred in allowing the Department of Social Services to testify Appellant had not attended any of the custody hearings after the children were removed from the home in February 2014. The testimony at issue was responsive to allegations Appellant raised during his cross-examination of the mother.

The defendant may open the door to otherwise inadmissible evidence through his own introduction of evidence or witness examination. State v. Culbreath, 377 S.C. 326, 333, 659 S.E.2d 268, 272 (Ct. App. 2008). A party cannot complain of prejudice from the admission of evidence to which he opened the door. State v. Robinson, 305 S.C. 469, 409 S.E.2d 404, 408 (1991); Culbreath, 659 S.E.2d at 272 (same).

The followed exchange took place during Appellant's cross-examination of the mother, whose testimony was admittedly crucial to the State's case:

> Q. Ms. Norris, the police had actually been by the camper in Siesta Cove some time in January to serve an initial eviction notice, is that correct ?
>
> A. That's what I have heard.
>
> Q. And Johnny moved out of the camper some time in January to his aunt's house in Blythewood, didn't he?
>
> A. No, sir.
>
> Q. Because besides being behind in the rent and being evicted, you guys were having problems and he decided to leave and you didn't want to go to the aunt's house because you didn't get along with her, is that right?
>
> A. No, sir.

Q. And he had been away for about a month and then he came that day in February **to confront you because he had heard that you had been using drugs**, isn't that correct?

A. No, sir.

Q. He came there **to confront you because he heard you had been using drugs and you got into an argument because he wanted to take the kids away and you wouldn't let him**?

A. No, sir.

Q. And then after he left, the police and DSS showed up and you thought that he had called DSS on you, didn't you?

A. No, sir.

Q. You thought he called DSS on you and you knew you were in trouble and so you decided to throw him under the bus, isn't that correct?

A. No, sir.

(TT, pp. 105-106; R., pp. 105-106) (emphasis added).

The clear intent of Appellant's questions was to allege he did not live at the camper in February 2014, he was so concerned about the children he tried to remove them from the mother's custody on the very same day law enforcement and the DSS caseworker came to the camper, and the mother testified against him only because she thought he was cheating on her and he called DSS. In response to Appellant's allegations, the State asked the DSS caseworker if Appellant had attended any of the hearings regarding the children' custody. (TT, p. 213; R., p. 213).

The context of the State's question is critical. The caseworker was the State's last witness, and the only one who could testify from first-hand knowledge of the custody proceedings. If the defense did not put up evidence, Appellant could then argue in closing he was so concerned for the children' safety he tried to remove them from the mother's custody,

and the State could not respond effectively.[2] (TT, pp. 62-65, 249; R., pp. 62-65, 249). The relevance and importance of the caseworker's testimony is amply demonstrated by the fact he did argue the mother testified because she had a grudge against him, but he did **not** argue he was so concerned about the children's safety he tried to remove them from her custody, which he could not argue with any credibility in light of the evidence he had shown absolutely no interest in their well-being after February 21, 2014. (TT, pp. 247-250; R., pp. 247-250).

Contrary to Appellant's contentions, the caseworker's testimony was not impermissible "bad act" evidence, and it had nothing to do with Appellant's character. Simply failing to attend custody hearings regarding your children is not the type of "bad act" evidence envisioned by Rule 404(b), SCRE, nor does it prove bad character. The testimony was relevant in light of the Appellant's attempt to create a scenario in which he was so concerned about the children's safety he tried to take them out of the mother's custory, it rebutted that attempt, and the State did not use it for any other purpose.

The circuit court did not abuse its discretion in admitting the caseworker's testimony Appellant did not attend any of the custody hearings after the children were taken into protective custody. Therefore, the court's ruling and Appellant's convictions should be affirmed.

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[2]The very real probability Appellant would undertake such a strategy is amply demonstrated by his pre-trial motion to exclude any reference to the children's drug tests, which were positive, and then arguing in closing the State failed to present any evidence drug tests were performed on the children to show they were exposed to methamphetamine. Defendants cannot raise issues during the State's case and then preclude the State's ability to present evidence relevant to those issues. Unlike defendants, the State does not get a "do-over" after an adverse verdict.

CONCLUSION

Based on the foregoing, the circuit court's rulings and Appellant's convictions should be affirmed.

Respectfully submitted,

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August 3, 2016

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appellate Case No. 2015-001055

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Respondent,

v.

JOHNNY NEAL SEXTON, II

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled, "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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August 3, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
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SC Court of Appeals

Appeal From Richland County
The Honorable Robert E. Hood, Circuit Court Judge
Appellate Case No. 2014-001366

THE STATE,

Respondent,

v.

JOHNNY NEAL SEXTON,

Appellant.

PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Final Brief of Respondent on Appellant by depositing two copies in the United States mail, postage prepaid, addressed to:

LaNelle Cantey Durant
Assistant Appellate Defender
South Carolina Commission on Indigent Defense
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I further certify all parties required by Rule to be served have been served.

This 3rd day of August, 2016

Sally B. Ellison

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Re: The State v. Johnny Neal Sexton, II
Appellate Case No. 2015-001055

Dear Ms. DuRant:

Enclosed are two copies of the Final Brief of Respondent, with proof of service, in the above-referenced case.

Sincerely,

Deborah R.J. Shupe
Senior Assistant Deputy Attorney General

DRJS/sbe

Enclosures

cc: The Honorable Jenny A. Kitchings (original and 10 copies enclosed)
Victim Services (with enclosure)