STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Honorable Larry B. Hyman, Circuit Court Judge

DANIEL HAMRICK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2015-002164

REPLY BRIEF OF APPELLANT PURSUANT TO WHITE V. STATE

JOHN H. STROM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT IN REPLY

I.

The trial court committed reversible error by admitting the results of Appellant's warrantless blood draw as the State failed to establish that exigent circumstances left law enforcement with no time to secure a warrant.

In its brief, the State argues that exigent circumstances justified law enforcement's failure to secure a search warrant prior to compelling Appellant to undergo a non-consensual blood draw. Resp't Br. p. 9 - 12. The State advances that, since the accident occurred early in the morning, it was unlikely that a magistrate or municipal court judge was available to sign a warrant. *Id.* The State further posits that the Mt. Pleasant Police Department's malfunctioning breathalyzer contributed to the exigency and rendered a "less invasive alternative" test unavailable. *Id.*

Notably absent from the State's brief are any citations to the trial record showing where the solicitor called a police officer, a magistrate judge, or any other witness during the pre-trial hearing to testify as to the existence of these facts. Instead of having witnesses with direct knowledge of these alleged facts testify; the solicitor simply avowed that the above-referenced circumstances existed and the trial court agreed. App. 95, l. 17 - 100, l. 20.

The only actual evidence submitted to the court for review at the pre-trial hearing was video footage from the dash cameras of various police cars. Problematically, the State did not enter any of these videos into the record at the hearing. App. 101, l. 3 - 118, l. 24. However, the police car dash camera videos later entered into the record during trial all show that, within a half-hour of the accident, at least five to six police cars were at the accident scene. *See* State's Ex. No.: 35 and 37; *see also* Defense Ex. No.: 25 (all on file with this court).

Later, during trial, evidence and testimony established that the first officer arrived within five minutes of the accident and that Garland was taken by ambulance to a nearby hospital only minutes after the accident occurred. App. 352, l. 16 - 355, l. 24. Furthermore, if one adopts the State's definition of "arrest" for the purposes of the three hour time limit to conduct a blood draw pursuant to § 56-5-2950(A), the police had until around 7:50 a.m. - nearly four and a half hours after the accident - to secure a search warrant. Resp't. Br. p. 14 - 19.

Discussion

Warrantless searches and seizures "conducted outside the judicial process, without prior approval by judge or magistrate, are **per se unreasonable** under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967) (*emphasis added*); *see also State v. Weaver,* 361 S.C. 73, 80–81, 602 S.E.2d 786, 790 (Ct. App. 2004). The exceptions to the warrant requirement are "jealously and carefully drawn." *Coolidge v. New Hampshire*, 403 U.S. 443, 91 (1971).

"Only in a few specifically established and well-delineated situations will a warrantless search withstand constitutional scrutiny, even when law enforcement has probable cause to conduct it." *State v. Brown*, 289 S.C. 581, 347 S.E.2d 882 (1986). **The burden rests on the prosecution to establish the existence of such an exceptional situation.** *Id.* at 587, 347 S.E.2d at 886 (*citing to Vale v. Louisiana,* 399 U.S. 30, 90 S.Ct. 1969, 26 L.Ed.2d 409 (1970)(*emphasis added*).

One of these narrow exceptions to the warrant requirement is when law enforcement is faced with an emergency or exigent circumstance in which "there is a compelling need for official action and no time to secure a warrant." *Id.* at 587, 347 S.E.2d at 886. The natural metabolization of alcohol in the blood stream is not a *per se* exigent circumstance. *Missouri v.*

McNeely, 133 S.Ct. 1552 (2013). Rather, the reasonableness of a warrantless blood draw must be determined on a case by case basis looking at the totality of the circumstances. *Id.*

Therefore, at the pre-trial hearing, the State had the burden to prove that, under the facts of Appellant's case, an emergency or exigent circumstance excused their failure to secure a search warrant prior to subjecting Appellant to a nonconsensual blood test, a "compelled physical intrusion beneath [his] skin and into his veins". *Id.* Facts are established by the presentation and testing of evidence. Arguments by attorneys are not evidence.

Here, the State also failed to proffer any testimony at the pre-trial hearing that the accident constituted an exigent circumstance or emergency leaving police with **no time to secure a warrant**. *See Brown*, 289 S.C. at 587, 347 S.E.2d at 886. Crucially, the State presented no testimony supporting the solicitor's bare assertion - adopted by the State on appeal - that there were no Charleston County Magistrates or Mt. Pleasant Municipal Judges to review search warrants between 3:25 a.m. and 7:50 a.m. App. 158, ll. 14-25; *see also* Resp't. Br. p. 10 - 11.[1]

The testimony developed later at trial failed to show how, with so many officers responding so quickly to the accident scene, police found themselves "with no time" to secure a search warrant. App. 352, l. 16 - 355, l. 24. Garland was quickly taken to the hospital by ambulance, freeing police to investigate the accident. *Id.*

While the police had to close a lane of traffic, there were almost no cars traveling in the early morning hours immediately after the accident and law enforcement had sufficient manpower to both investigate the accident and handle the traffic pattern changes. *See* State's Exhibit No.: 35 (on file for this Court's viewing). Contrary to the trial court's declaration, police routinely secure warrants by providing information over the telephone to another officer

[1] This Court may take judicial notice of the fact that there are eighteen Magistrate Judges in Charleston County and five Municipal Judges in Mt. Pleasant.

who relays that information to a magistrate. App. 158, l. 14 - 160, l. 21; *see State v. Sullivan,* 267 S.C. 610, 614-15, 230 S.E.2d 621, 623 (1976) (finding a search warrant affidavit may be based on hearsay information.).

The failure of Mt. Pleasant's breathalyzer could not have created an exigent circumstance for two reasons. First, as the State repeatedly argued at trial and on appeal, under § 56-5-2946, police are not required to offer Appellant a breathalyzer prior to seeking a blood draw when they have probable cause to believe Appellant committed a felony DUI. Second, using the State's 4:50 a.m. time of formal arrest, the failure of the breathalyzer machine at 6:00 a.m. still left police with almost two hours to secure a warrant under the time constraints the police imposed on themselves by arresting Appellant before securing a search warrant. App. 423, l. 15 - 424, l. 17.

The police had over four and a half hours from the time the first officer arrived until the expiration of the three hour post-arrest statutory testing window during which they could secure a warrant for a blood draw. This lengthy amount of time contrasts sharply with "imminent destruction of evidence" required for the exigent circumstances exception. *Cf: State v. Dupree*, 319 S.C. 454, 457, 462 S.E.2d 279, 281-282 (1995) (holding that police acted reasonably when forcibly removing crack cocaine from defendant's mouth as exigent circumstances made it probable that, unless the police removed the crack cocaine, it would be destroyed.).

The trial court erred in ruling that exigent circumstances excused law enforcement's failure to secure a warrant before to compelling Appellant to undergo an intrusive blood draw where the State did not present evidence at the pre-trial hearing that exigent circumstances left police with no time to secure a warrant. Accordingly, Appellant is entitled to a new trial.

II.

The trial court committed reversible error by admitting the results of Appellant's warrantless blood draw where the Fourth Amendment requires police to, absent exigent circumstances, secure a search warrant prior to compelling a suspect to undergo a highly intrusive non-consensual blood draw.

In addition to arguing that exigent circumstances justified Appellant's nonconsensual, warrantless blood draw, the State avers that "the carefully tailored balancing test employed by the state of South Carolina, coupled with our clear implied consent provisions," renders the Fourth Amendment's warrant requirement inapplicable to felony DUI investigations. Resp't Br. p. 12 - 13. This argument is wholly without merit.

A. South Carolina's Implied Consent Statutes

No statutory scheme - however carefully crafted - can supplant the Fourth Amendment. *State v. Forrester*, 343 S.C. 637, 644, 541 S.E.2d 837, 840 (2001) (recognizing that the federal Constitutional "sets the floor for individual rights" while the state constitution and government "establishes the ceiling.). Individuals suspected of felonies are provided the same constitutional protections afforded to those suspected of misdemeanors.

Among those protections is the interposition of a neutral and detached magistrate between the citizen and law enforcement "engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 38 S.Ct. 367 (1948). The trial court erred when ruling that the provisions of S.C. Code Ann. § 56-5-2946 and § 56-5-2950(A) takes precedence over the Fourth Amendment's warrant requirement. App. 88, l. 18 - 94, l. 23. The State repeats this same error in its brief. Resp't. Br. p. 12 - 13.

The three hour post-arrest testing time limit imposed by § 56-5-2950(A) cannot act as a statutorily imposed *per se* exigent circumstance exception to the warrant requirement as the State argues. Resp't. Br. p. 12 - 13. As an initial matter, § 56-5-2950(A) only applies **after an arrest has**

been made. Nothing in § 56-5-2950(A) prevents an officer from seeking a search warrant prior to arresting a suspected drunk driver, as police routinely do for other crimes.

Absent two specific exceptions, § 56-5-2950(A) requires that the arresting officer offer the arrested driver the opportunity to voluntarily take a breathalyzer test before asking or compelling the driver - with a search warrant - to undergo a blood draw. The time limits imposed on when the tests may be conducted are an additional evidentiary protection created by our General Assembly. *See Forrester*, 343 S.C. at 644, 541 S.E.2d at 840. Neither the time limits nor the requirement of first offering a breathalyzer test is required by the Fourth Amendment, nor are they substitutes for Fourth Amendment protections.

Similarly, § 56-5-2946 simply allows an officer to forego first offering a breathalyzer test to a suspect, as would be required under § 56-5-2950(A), when there is probable cause to believe a felony has been committed. It also allows the officer to forego securing the opinion of a medical expert that a breath sample is physically impossible prior to conducting a blood draw as would normally be required under § 56-5-2950(A). Resp.'t Br. p. 13.

The statute has no bearing on whether or not law enforcement must secure a search warrant prior to conducting the blood draw. That determination is made based on Fourth Amendment jurisprudence. Rather, § 56-5-2946 excuses police from complying with the requirements of § 56-5-2950(A) in certain circumstances. In sum, § 56-5-2946 is a narrow statutory exception to the broader statutorily imposed duties in § 56-5-2950(A).

Accordingly, both § 56-5-2946 and § 56-5-2950(A) operate independently of Fourth Amendment protections. However, like all statutes they are subordinate to the federal Constitution. As such, they cannot form the basis of a system that circumvents the Fourth Amendment's warrant requirement as the State urges in its brief. Resp't. Br. p. 12 - 13.

B. South Carolina's "Carefully Tailored Balancing Test"

The State's brief also references a "carefully tailored balancing test" purportedly employed by our courts. Resp't. Br. p. 12. The State relies on the Supreme Court's opinion in *Cupp v. Murphy*, 412 U.S. 291, 93 S.Ct. 2000 (1973), and on this Court's opinion in *State v. Williams*, 297 S.C. 290, 292, 376 S.E.2d 773, 774 (1989), to supply that balancing test: "the warrantless blood seizure of appellant's blood did not violate his fourth amendment rights if there was probable cause to arrest at the time of the accident." Resp't Br. p. 12.

A blood draw constitutes a highly invasive procedure subject to Fourth Amendment protections against unreasonable searches. *Schmerber v. California*, 384 U.S. 757, (1966). The State's "balancing test", allowing warrantless blood draws **whenever** police have probable cause to arrest, is no longer good law following the Supreme Court's decisions in *Missouri v. McNeely*, 133 S.Ct. 1552 (2013) and *Birchfield v. N. Dakota*, 136 S.Ct. 2160 (2016). The State's brief ignores how these two recent opinions dramatically narrow the circumstances under which a compelled warrantless blood draw will be found constitutional. Resp't. Br. p. 9- 13.

When it decided *Cupp* over four decades ago, the Supreme Court addressed warrantless searches conducted incident to arrest to prevent the destruction of incriminating "highly evanescent" evidence on the person of the arrestee. 412 U.S. at 296, 93 S.Ct. at 2004. In *Cupp*, police had probable cause to believe that Cupp strangled his wife. *Id.* at 292, 93 S.Ct. at 2002. Cupp voluntarily went to the police station to talk with law enforcement about his wife's death. *Id.* Once at the station, police noticed what they believed to be dried blood on Cupp's finger. Cupp refused to allow police to scrape samples from his fingernails. *Id.*

Without a warrant, police seized Cupp and took fingernail scrapings, which testing confirmed contained traces of skin and blood. In affirming Cupp's conviction, the Court held that

"considering the existence of probable cause, **the very limited intrusion undertaken incident to the station house detention**, and **the ready destructibility of the evidence**, we cannot say that this search violated the Fourth [Amendment]." *Id.* at 296, 93 S.Ct. at 2004 (*emphasis added*).

In relying on *Cupp*, the State is ignoring the Supreme Court's holding in *Birchfield* that, "the Fourth Amendment does not permit warrantless blood tests incident to arrests for drunk driving." 136 S.Ct. at 2185. A compelled blood draw is a highly intrusive search:

> Requiring an arrestee to insert the machine's mouthpiece into his or her mouth and to exhale "deep lung" air is no more intrusive than collecting a DNA sample by rubbing a swab on the inside of a person's cheek or **scraping underneath a suspect's fingernails. . . .**
>
> **The same cannot be said about blood tests. They "require piercing the skin" and extract a part of the subject's body and thus are significantly more intrusive than blowing into a tube**. A blood test also gives law enforcement a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. That prospect could cause anxiety for the person tested.

Birchfield, 136 S. Ct. at 2164. (*emphasis added*)(*internal citations omitted*).

The Court in *Birchfield* also rejected warrantless blood draws incident to arrest in circumstances, like Appellant's case, where a breathalyzer test was refused or impractical due a person's injuries or resistance. 136 S.Ct. at 2184. With respect to when injuries prevent a suspect from providing a breath sample, "the police may apply for a warrant if need be." *Id.* at 2185. Likewise, when a suspect refuses to provide a breath sample, "courts have held that such conduct qualifies as a refusal to undergo testing . . . . and it may be prosecuted as such. **And again, a warrant for a blood test may be sought**." *Id.* (*emphasis added*).

This Court's opinion in *Williams,* slightly less than three decades ago, relied heavily on *Cupp* and *Schermber*. 297 S.C. at 292, 376 at 774. Williams was subjected to a warrantless blood draw following a car accident. *Id.* at 291, 376 at 773. This Court concluded that the police had

probable cause to arrest Williams for DUI. Relying on *Cupp* and *Schermber*, the Court concluded that no search warrant or formal arrest was required prior to conducting the blood draw, which the Court described as a "limited search necessary to preserve highly evanescent evidence." *Id.* at 292, 376 at 774.

In relying on *Williams*, the State is ignoring the holding in *McNeely*, that the "natural metabolization of alcohol in the bloodstream does not present a *per se* exigency that justifies an exception to the Fourth Amendment's search warrant requirement." 133 S.Ct. at 1557. *Williams* is premised on the notion that the natural dissipation of alcohol in the blood stream inevitably creates an exigent circumstance because an individual's BAC is "highly evanescent evidence" always at risk of imminent destruction. 297 S.C. at 292-93, 376 S.E.2d at 774.

McNeely rejected this premise. Relying on a better understanding of the body's metabolic processes, the Court observed that "BAC evidence from a drunk-driving suspect naturally dissipates over time in a gradual and relatively predictable manner." *McNeely,*133 S.Ct. at 1561. The consistent rate of dissipation makes accurate extrapolation of an individual's past BAC possible.

Unlike the blood under Cupp's fingernails or the crack cocaine in Dupree's mouth, Appellant could not force his body to more quickly metabolize alcohol. This fact coupled with modern communication methods allowing police to quickly secure a search warrant, renders the *per se* exigency rationale in *Williams* no longer valid. *Id.* at 1562-63.

Therefore, the State's arguments that South Carolina's statutory scheme and case law somehow supplants or circumvents the Fourth Amendment's warrant requirement are without merit and Appellant is entitled to a new trial.

III.

The trial court erred reversibly by allowing Officer Harris to testify about an experiment he conducted when the court refused to rule on whether Harris was qualified as an expert in accident reconstruction and, instead, erroneously ruled that Harris' testimony regarding his experiment was a proper subject for lay witness opinion testimony as it was based his "rational perception" and on the State's need to rehabilitate a key prosecution witness.

A. Trial court committed a "patent error" in refusing to rule on whether Officer Harris was qualified as an expert in accident reconstruction and Harris' testimony could not have been harmless.

The State argues that any error in the trial court's failure to rule on whether Officer Harris could be qualified as an expert in accident reconstruction was harmless given that Officer Harris had the necessary skills, education, experience, and training to be an expert. Resp't. Br. p. 23 - 24. A review of Harris' *voir dire* testimony reveals he manifestly lacked the background necessary to testify as an expert in accident reconstruction and his improper lay opinion testimony could not have been harmless.

Harris' *vior dire* was limited because the State only offered to qualify him as an expert in accident reconstruction **after the defense's cross examination**. App. 493, l. 2 - 503, l. 9. The trial court's refusal to rule on whether Harris was an expert and the court's rushed determination that his traffic cone experiment was "based on his rational perception" contributed to the limited nature of the *voir dire*. *Id.*

The trial record establishes that Harris had never been qualified in any court as an expert in accident reconstruction before Appellant's trial. App. 499, ll. 7-12. His training consisted of three entry level courses in accident reconstruction that he took over a period of several years. Only one of the classes addressed vehicle-pedestrian accidents. App. 392, l. 19 - 395, l. 13. He did not use any accident reconstruction software and had no training or education in engineering or physics. He held no certifications in the field of accident reconstruction. *Id.*

Further, the methods Harris used when conducting his cone experiment were unreliable, did not adhere to the scientific method, and rendered his experiment incapable of repetition. Reliability is a central concern when accessing the admissibility of expert witness testimony. *State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001). The reliability factors for admission of scientific evidence include: publications and peer reviews of the technique used by the expert; prior application of the method to the type of evidence involved in the case; the quality control procedures used to ensure reliability; and the consistency of the method with recognized scientific laws and procedures. *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999).

Harris' experiment satisfies none of these factors. Unlike defense expert Woodrow Poplin, Harris did not record his results either in writing or with a video. He could not recall what day he conducted the experiment. He simply stated that "I did it at different speeds. I wanted to know so I did it at 30, 35, 40 [mph] . . . . I would hit it and swerve back out." App. 504, ll. 14-19. Without any supporting documentation, Harris assured the jury that he was able to recreate the accident when traveling at 40 mph. App. 505, ll. 1-3.

Harris is similar to the crime scene processing officer in *State v. Ellis*, 345 S.C. 175, 177, 547 S.E.2d 490, 491 (2001). In *Ellis*, the trial court erred in allowing an officer, qualified in the field of "crime scene processing" to testify as to how the shooting occurred. *Id.* The officer could testify to "measurements taken at the scene, to the recovery of shell casings, and to the identification of blood stains." *Id.* However, the officer in *Ellis*, lacked the qualifications "to impart to the jury his conclusion, drawn from these measurements and observations, regarding the location of the victim and the position of his body vis-a-vis the bicycle at the time of the shooting." *Id.* at 177-178, 547 S.E.2d at 491.

Harris could - at most - testify to measurements he made at the accident scene, such as the distances between cones, how far the paver crossed into the travel lane, and where Garland's body came to rest. *State v. Kelly*, 285 S.C. 373, 329 S.E.2d 442 (1985) ("[a] police officer may not give his opinions as to the cause of an accident. He may only testify regarding his direct observations unless he is qualified as an expert."); *see also* S.C. Code Ann. § 23-6-187 (authorizing Department of Public Safety to charge up to one thousand dollars per day for each trooper "trained in Advanced Accident Investigation" that testifies in a civil case).

Harris was not qualified to testify as to his "conclusion, drawn from these measurements and observations, regarding the location" of Appellant's car vis-à-vis the construction lane at the time it struck Garland. *Ellis*, 345 S.C. at 177-178, 547 S.E.2d at 491.

Harris' testimony could not have been harmless. He asserted, without the expertise or factual basis, that Appellant was speeding when his car swerved into the construction zone and struck Garland. He testified that, based on his cone experiment, it was possible for Appellant's car to hit Garland standing in the construction zone without hitting either of the two nearest construction cones. App. 504, l. 14 - 505, l. 3. Where Garland was standing when he was struck was the key issue at trial and central to the proximate cause determination.

In addition, Harris was not identified by the State as an expert in accident reconstruction prior to trial. App. 493, l. 2 - 503, l. 9. Nor did the State inform Appellant before trial of Harris' experiment with the traffic cones. *Id.* This unexpected, late in trial, qualification unfairly surprised Appellant and deprived the defense of the opportunity to adequately prepare. *Strange v. S.C. Dept. of Highways and Public Transp.*, 307 S.C. 161, 163-164, 414 S.E.2d 138, 139 (1992) (holding that trial court committed an abuse of discretion by qualifying plaintiff's traffic engineering expert as an expert in accident reconstruction mid-trial.).

B. Officer Harris' testimony exceeded the limitations imposed on lay opinion testimony under Rule 701, SCRE.

The State's second argument for admitting Officer Harris' lay opinion testimony misapprehends the limitations imposed on lay witness opinion testimony under Rule 701, SCRE. Without citing to any supporting legal authority, the State proposes that Harris' "opinions were rationally based on his observations" and that "the experiment with the cones could be admitted as lay testimony without an abuse of discretion . . . because lay opinion evidence can be impressions drawn from collected, observed facts." Resp't. Br. p. 24 (*verbatim*).

Rule 701, SCRE, limits lay witness opinion testimony "to those opinions or inferences which (a) are **rationally based on the perception of the witness . . . and** (c) **do not require special knowledge, skill, experience or training**." (*emphasis added*). Accident reconstruction is a recognized field of expertise that requires education and specialized training. *Estate of Haley ex rel. Haley v. Brown*, 370 S.C. 240, 256, 634 S.E.2d 62, 70 (Ct. App. 2006) ("A plethora of South Carolina cases allow testimony by experts in accident reconstruction").

The "perception" of a lay witness is limited to first hand observations. *In re Thomas S.*, 402 S.C. 373, 741 S.E.2d 27 (2013) (holding that the trial court erred in allowing social worker to give improper lay witness testimony where she had not personally observed petitioner abuse his victim and lacked personal knowledge of the reasons why petitioner committed offenses.). Lay witnesses cannot base their opinion on information provided to them by others. *Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 764 S.E.2d 249 (Ct. App. 2014) (holding that portions of fire chief's testimony regarding whether fire was intentionally set was improper opinion testimony not based on his direct perceptions.).

Harris did not witness the accident. As a lay witness, his "perception" is limited to what he directly observed at the accident scene. By contrast, the "collected, observed facts" that

Harris relied on in conducting his cone experiment and in determining the point of impact were based on observations made by other witnesses. *Kelly*, 285 S.C. at 374, 329 S.E.2d at 443 (holding that where police officer was not qualified as an expert, officer's testimony as to the cause of accident was an improper opinion based on his direct observations of accident scene and was inadmissible.).

C. The Defense did not "open the door" to Officer Harris' improper lay opinion testimony and the State's desire to rehabilitate Officer Harris' credibility is not a valid reason for admitting otherwise inadmissible lay opinion testimony.

The State's final argument, also made without reference to any supporting legal authority, for admitting Officer Harris' lay opinion testimony is that Harris' testimony about his experiment with the cones "was necessary to rehabilitate him on redirect following the defense's aggressive cross." Resp't. Br. p. 25-26. In actuality, improper lay opinion testimony does not become admissible simply because a witness wilted under a "hard attack" by the opposing party during cross-examination. *Id.*

Furthermore, the trial court erred in ruling that the defense "opened the door" to Harris' cone experiment and accident reconstruction testimony. App. 711, l. 4 - 713, l. 17; *see also* Resp't. Br. p. 25. Harris' first mentioned a "possible point of impact" - the key determination in an accident reconstruction - while being questioned by the State. App. 434, l. 3 - 435, l. 9.

"I marked a possible point of impact based on what information I had been given. I didn't locate the direct point of impact. I marked the spot of possible point of impact based on what someone told me." App. 435, ll. 5-8. It was only after the defense impeached Harris' investigation, his amateurish reconstruction efforts, and his qualifications that the State sought to bolster Harris' credibility by qualifying him as an expert and introducing the cone experiment he conducted.

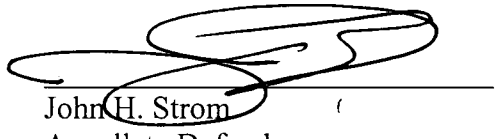
The defense cannot "open the door" to opinion testimony from an expert witness that it did know existed prior to trial. *Strange*, 307 S.C. at 164, 414 S.E.2d at 139; *Kelly*, 285 S.C. at 374, 329 S.E.2d at 443 *citing to Thompson v. S.C. Highway Dept.*, 224 S.C. 338, 79 S.E.2d 584 (1953) (holding that a police officer may not give opinion as to cause of accident unless he has been qualified as an expert).

Defense's cross-examination remained within the scope of Harris' direct testimony. Accordingly, the Defense did not "open the door" to Officer Harris' improper lay opinion testimony and the State's desire to rehabilitate Officer Harris' credibility is not a reason for admitting otherwise inadmissible lay opinion testimony.

CONCLUSION

By reason of the foregoing additional arguments, Appellant Daniel Hamrick respectfully requests this Court reverse his conviction and remand his case to the Charleston County Court of General Sessions for a new trial.

Respectfully Submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of October, 2016.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Charleston County

Honorable Larry B. Hyman, Circuit Court Judge

DANIEL HAMRICK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Reply Brief of Appellant pursuant to White v. State in the above referenced case has been served upon J. Rutledge Johnson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Reply Brief of Appellant pursuant to White v. State has been served on Daniel Hamrick, #357581, at MacDougall Correctional Institution, 1516 Old Gilliard Road, Ridgeville, SC 29472, this 27th day of October, 2016.

John H. Strom
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of October, 2016.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025