STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KENDRICK LAMONT MIMS,

APPELLANT

APPELLATE CASE NO 2016-000291

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in qualifying a sheriff as an expert witness in cocaine and cocaine valuation when the testimony did not assist the jury in understanding the evidence or determining a fact in issue and when the testimony's probative value was substantially outweighed by the danger of unfair prejudice?

STATEMENT OF THE CASE

Appellant was indicted for trafficking cocaine, 400 or more grams under S.C. Code Ann. 44-53-0370(e)(2)(e) by a grand jury in Lexington County during the May 2013 term of Court. R. 239. The prosecution, represented by Gill Bell and Casey Rankin, called the case for trial on February 10, 2016 before the Honorable R. Knox McMahon and a jury. R. 1. Robert T. Williams represented Appellant. R. 1. After a two-day trial, the jury found Appellant guilty. R. 276, ll. 15 – 19. Judge McMahon sentenced Appellant to twenty-five years in prison. R. 279, ll. 15 – 20.

This brief follows.

ARGUMENT

The trial judge erred in qualifying a sheriff as an expert in cocaine valuation and permitting the sheriff to testify as to his opinion of the value of the cocaine, because the probative value of his testimony was substantially outweighed by the danger of unfair prejudice and his testimony did not relate to a fact in issue.

The facts giving rise to the indictment took place following a traffic stop on February 18, 2013. R. 20, ll. 14 – 15; R. 26, l. 16 – R. 28, l. 14. Corporal Adam Antley with the South Carolina Highway Patrol initiated the stop and approached the passenger side of a green F-150 truck in which Appellant was a passenger. R. 30, l. 25 – R. 31, l. 20. Antley seized a beer can from the interior of the truck and poured it out. R. 33, l. 15 – R. 34, l. 3. At that point, Antley determined that Appellant was going to receive a ticket for having an open container of beer in the vehicle. R. 34, ll. 17 – 22. Antley came to the conclusion that the driver and Appellant "were guilty"[1] because they were overly helpful during the traffic stop. R. 36, l. 19 – R. 37, l. 12. Antley performed a sobriety test on the driver and did not "observe any clues that he was under the influence at that time." R. 38, ll. – 19.

Even though Antley could have written Appellant a ticket for the open container of beer, he was not done with his investigation. R. 39, ll. 9 – 14. Although he had seized evidence with which he could write a ticket for the open container of beer, he testified that he had probable cause to search the truck to see if there were any more open containers. R. 99, ll. 14 – 16. Even though Antley rarely frisks people on the side of the road for speeding violations, he decided to ask Appellant to get out of the vehicle in order to pat him down for weapons. R. 39, l. 19 – R. 40, l. 7;

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[1] It is unclear what Antley meant when he made this claim.

R. 102, l. 23 – R. 103, l. 4. The purpose, according to Antley is twofold: safety reasons and "to further investigate crimes." R. 40, ll. 8 – 12.

Antley testified that as Appellant stepped out of the truck, he appeared to be hunched over and holding something up in his pants. R. 42, ll. 17 – 23. Following a pat down, Antley felt a hard object in Appellant's pants which he thought was a gun. R. 46, ll. 1 – 12. After Antley attempted to take Appellant to the ground, Appellant took off running. R. 49, ll. 17 – 22.

Antley gave chase into the woods, leading him over a barbed wire fence. R. 54, l. 10 – R. 57, l. 4. During this time, Antley attempted to subdue Appellant twice by deploying his taser. R. 54, l. 10 – R. 57, l. 4. Because these attempts were unsuccessful, Antley chased Appellant for another 100 – 200 yards and lost visual contact for 20 – 30 seconds. R. 57, l. 16 – R. 59, l. 20.

Antley then saw Appellant lean down, pull something from his groin area, and put a bag on the ground. R. 59, l. 25 – R. 60, l. 19. Antley testified that Appellant then placed leaves on top of the bag. R. 59, l. 25 – R. 60, l. 19. Appellant then surrendered to Antley. R. 60, l. 20 – R. 61, l. 7.

Antley grabbed the bag which he claimed to have seen Appellant cover with leaves and waited with Appellant until other officers arrived. R. 64, ll. 7. – 21. He described the package inside the bag as slightly larger than his hand, wrapped in black tape and cellophane. R. 64, l. 22 – R. 65, l. 4. He did not conduct a field test on the substance in the bag. R. 65, ll. 5 – 7. Antley used his pocketknife to cut through the tape and cellophane, pulled back the wrapping, and noticed white powder on the tip of his knife. R. 65, ll. 5 – 22. Antley believed the substance was powder cocaine. R. 65, l. 23 – R. 66, l. 2.

The package was placed into a BEST kit which was submitted to the evidence locker at the SCHP Lexington Office. R. 68, l. 14 – R. 69, l. 4. Sergeant Christopher Shelton was the

evidence custodian in 2013 for the South Carolina Highway Patrol. R. 151, ll. 17 – 19. He testified that other than the chemical analysis, there were no tests conducted for DNA or fingerprints. R. 166, ll. 14 – 17.

At trial, the prosecution called two expert witnesses: Lynn Black, a chemist with SLED and Lieutenant Samuel Gunter, a member of the Lexington County Sheriff's Multi-Agency Narcotics Enforcement Team (MET). R. 206, 234. Gunter, who supervised eleven agents at the time, had the primary duty of narcotics enforcement. R. 234, ll. 16 - 22. In particular, his team uses informants, buys drugs, and executes search warrants based off of their probable cause buys. R. 234, l. 23 – R. 235, l. 1. Gunter attended Northern Illinois University, and he first became employed with the Sheriff's Office in 1991. R. 235, ll. 2 – 10. He testified that he had worked approximately one thousand narcotics cases over the course of approximately thirteen years. R. 235, ll. 15 – 17; R. 236, ll. 20 – 23. Gunter explained that as a result of his participation in controlled buys, he was familiar with the typical pricing of cocaine when it is located on the street. R. 236, ll. 17 – 19. Gunter testified that he kept up with the price of cocaine on the street. R. 235, ll. 24 – R. 237, l. 8. Although he had testified in Magistrate's Court and General Sessions Court, he had never been qualified as an expert. R. 237, l. 18 – R. 238, l. 3. He did not recall testifying specifically about cocaine valuation. R. 238, ll. 13 – 21. The prosecution sought to have him qualified as an expert in cocaine and its valuation. R. 238, ll. 4 – 6.

Appellant engaged in voir dire of Gunter concerning his qualifications as an expert in cocaine valuation. Gunter admitted that he did not recall testifying in any cases specifically to cocaine valuation. R. 238, ll. 13 – 21. Appellant twice objected to the prosecutor's request to quality Gunter as an expert in cocaine valuation. R. 202, l. 17 – R. 203, l. 9; R. 239, ll. 1 – 2.

Nevertheless, the trial judge allowed him to give opinion testimony regarding cocaine and cocaine's valuation. R. 203, ll. 12 – 14; R. 239, ll. 16 – 21.

In response to the prosecutor's questioning, Gunter opined that the value of the cocaine seized by Corporal Antley was between $30,000 and $35,000. R. 241, ll. 7 – 10. Gunter testified that he was unaware of the quality of the cocaine seized following the traffic stop. R. 243, l. 24 – R. 244, l. 1. In fact, he was not involved with the evidence in any degree whatsoever. R. 226, ll. 23 – 25; R. 244. Ll. 23 – 25. His testimony was limited to determining the value of the cocaine based on its weight.

During his closing argument, the solicitor relied upon Gunter's testimony to undermine Appellant's argument that the cocaine did not belong to him. The solicitor argued to the jury:

> So let's talk about some of the defense contentions. One is that the trooper never actually saw the bag come directly out of Mr. Mims' pants, that maybe I guess it was already on the ground. Well, you heard out expert get up here and talk about the value and he said between 30 and $35,000. I don't know exactly where it falls in there; maybe it's a little less; maybe it's a little more. Either way you put it, that's a lot of money. How likely is it that somebody had just left that much cocaine just sitting in the middle of the woods where Mr. Mims' just happened to surrender. Very unlikely.

R. 258, ll. 10 – 20.

DISCUSSION

Rule 702 of the South Carolina Rules of Evidence governs when the admission of expert testimony is proper 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 (emphasis added).

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. Here, it did not. 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 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. The trial judge erred in qualifying Gunter as an expert in cocaine valuation, because the cocaine valuation was neither relevant nor a fact in issue. Appellant was indicted for trafficking cocaine under S.C. Code Ann. 44-53-0370(e)(2)(e), which provides that:

> Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of:
>
> (2) ten grams or more of cocaine or any mixtures containing cocaine, as provided in Section 44-53-210(b)(4), is guilty of a felony which is known as "trafficking in cocaine" and, upon conviction, must be punished as follows if the quantity involved is:
>
> (e) four hundred grams or more, a term of imprisonment of not less than twenty-five years nor more than thirty years with a mandatory minimum term of imprisonment of twenty-five years, no part of which may be suspended nor probation granted, and a fine of two hundred thousand dollars;

S.C. Code Ann. § 44-53-370.

Under that provision, the indictment likewise charged Appellant with trafficking cocaine in an amount exceeding 400 grams. R. 281. The statute is silent as to value; evidence of weight alone controls the severity of the crime. As read by the clerk following the jury's deliberations, Appellant was found guilty of the crimes listed in the indictment: trafficking in

cocaine more than 400 grams. R. 276, ll. 15 – 19. Gunter's testimony was not necessary in order to assist the jury in determining the weight of the evidence or to determine a fact in issue. Appellant did not testify, and he offered no evidence regarding ownership of the cocaine.

As a result, the probative value of Gunter's testimony in describing the value of the cocaine was substantially outweighed by the danger of unfair prejudice.

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 403, SCRE.

There is a reasonable probability that the jury's verdict was influenced by Gunter's testimony. Gunter was called to testify regarding the value of cocaine which he never handled even though the value of cocaine was a non-issue. His irrelevant testimony characterized Appellant as a major drug dealer based on the value of the cocaine alone, when the monetary value of the drugs was irrelevant.

During closing arguments, the prosecution called for the jury to speculate based on Gunter's testimony, even though he was not involved in Appellant's case, had no knowledge of the quality of the cocaine, and did not opine whether Appellant or someone else left the cocaine in the woods. In fact, the prosecution does not elicit the testimony which it argues is relevant:

> [It] would go towards evidence that this - - nobody would leave this amount of this value of cocaine in the middle of the woods, which makes it much more likely that Mr. Mims is the one who had it on him and dropped it in the woods as opposed to him just happening - - just happening to stumble across approximately $30,000 worth of cocaine in the woods. So we do believe that sort of testimony would be proper and relevant in this case, Your Honor.

R. 203, l. 20 – R. 204, l. 3.

Gunter, as the prosecution's last witness, never offers an opinion whether Appellant would leave the valued amount of cocaine in the woods. There does not seem to be any logical relevance behind the prosecution's choice to call him as a witness. None of the evidence as discussed above, namely that "nobody would leave this amount of ... cocaine in the woods," is offered during the prosecution's case after the actual value is determined by Gunter. Without additional context, Gunter's testimony is irrelevant as to Appellant's case. The resulting prejudice stems from the notion that the jury heard about how the cocaine was valuable and likely attributed its ownership to Mims without reliable facts or evidence from Gunter. Gunter is unable to offer an opinion regarding possession, substantially lowering the probative value of his testimony. Prior to trial, he had no involvement whatsoever with the evidence in Appellant's "[A]lthough an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts." State v. Kromah, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013).

The qualification of a witness as an expert and the subsequent admission of that witness' 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. "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.

The admission of Gunter's testimony resulted in prejudicial opinions which never materialized in the form of probative evidence. His testimony was unnecessary and irrelevant; its lack of probative value likely confused the jury and certainly prejudiced Appellant.

CONCLUSION

Appellant respectfully requests this Court reverse his conviction and sentence based upon the trial court's error in admitting the sheriff's testimony as an expert in cocaine and cocaine valuation when the value of the cocaine was irrelevant and not in issue.

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This 12th day of January, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief 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."

January 12, 2017

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