STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Lexington County

Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHNNIE LEE LAWSON,

APPELLANT

APPELLATE CASE NO. 2015-002467

FINAL BRIEF OF APPELLANT

LAURA R. BAER
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

Rules

Constitutional Provisions

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial court erred in overruling defense counsel's objection to testimony that Appellant's ten-print card originated from Kirkland Correctional Institution as improper character evidence where the defense was willing to stipulate to the admission of the ten-print card?

II.

Whether the trial court erred in refusing to include a limiting instruction to the jury regarding the prior bad acts evidence admitted by implication from the testimony that Lawson's ten-print card originated at Kirkland Correctional Institution?

III.

Whether the trial court erred in admitting the testimony of State's witness, James Hickman, where (1) he was not qualified to provide expert testimony in fingerprint analysis due to his failure to update his training and maintain any certifications, and (2) his testimony was not reliable in light of his failure to follow any written policies or procedures and failure to have his results verified by a blind review?

STATEMENT OF THE CASE

On April 13, 2015, the Lexington County Grand Jury indicted Appellant Johnnie Lee Lawson for one count of breaking into a motor vehicle. R. 458.

On November 17-20, 2015, Lawson appeared before the Honorable R. Knox McMahon and a jury for trial on the above offense. Lawson was represented by Aimee Zmroczek, and the State was represented by assistant solicitors Sutania Radlein and Robert Elam. R. 1. The jury found Lawson guilty. R. 428. Judge McMahon sentenced Lawson to the maximum penalty of five years incarceration. R. 441.

This appeal follows.

STATEMENT FACTS

Introduction

Lawson was arrested in an auto-breaking case after the State's latent fingerprint examiner, James Hickman, determined that one of Lawson's fingerprints from his ten-print card[1] "matched" the partial fingerprint found on the inside of the car window. R. 20, ll. 2-4; R. 149, l. 17 – 150, l. 14. Defense counsel challenged the admissibility of Hickman's expert testimony because of his failure to maintain any certifications or abide by any formal policies or procedures regarding fingerprint analysis. R. 253, l. 19 – 260, l. 5. Defense counsel also objected to testimony, after the admission of Lawson's ten-print card into evidence, that Lawson's fingerprints were collected by the "Department of Corrections, Kirkland Correctional Institute." R. 227, ll. 21-25. The objection was overruled despite counsel's willingness to stipulate to the authentication and admission of the ten-print card and argument that Lawson's prior imprisonment was improper character evidence. R. 228, l. 13 – 233, l. 3. The solicitor then had the witness repeat his testimony that the ten-print card originated in 2003 at Kirkland Correctional Institute. R. 235, ll. 3-9. Although the solicitor and trial judge agreed that the testimony regarding Kirkland was provided only for the purpose of authenticating the ten-print card, the judge refused to give a limiting instruction to the jury regarding the implicit evidence that Lawson had a prior conviction. R. 367, l. 24 – 371, l. 22.

---

[1] A ten-print card is the fingerprint card made either using ink and paper or a digital scan machine, which includes individual prints of each of a person's fingers and thumb and "slaps" of the four fingers of each hand together and then of the thumbs. These ten-print cards can then be loaded into the Automated Fingerprint Identification System ("AFIS"). R. 216, l. 7 – 220, l. 7.

Trial

Jessica and Blake Wilbanks were moving into a new home in Cayce when Mrs. Wilbanks heard a scraping noise outside at approximately 10:30 p.m. She walked toward their two-door Volvo, which was parked in the street, thinking it may be her husband. When she got closer, she saw a slender black male standing on the passenger side of the car. When the man saw her, he ran away towards a church across the street. R. 37, l. 11 – 43, l. 8; R. 43, l. 17 – 46, l. 10; R. 48, ll. 1-8; R. 48, l. 24 – 51, l. 10; R. 70, ll. 17-21. Mrs. Wilbanks did not see the person's face. R. 48, ll. 9-10. She went inside to get her husband. R. 43, ll. 9-16; R. 51, l. 13 – 52, l. 16. When they came outside, they discovered that the passenger side window of the car was partially down and that there was damage to the area between the windows. R. 52, l. 17 – 54, l. 15; R. 55, l. 14 – 56, l. 22.

Police responded to the scene. R. 56, l. 23 – 57, l. 23. Officers found a crowbar located near the church. R 140, l. 18 – 141, l. 8. Though the police later photographed the area where it was found, they never photographed the crowbar itself. Investigator Jason Merrill was unable to see any fingerprints on it and the crowbar was too large to use the fuming chamber in his office to develop any latent prints. R. 142, l. 19 – 145, l. 2; R. 171, ll. 11-15. Rather than sending it to another agency to look for latent prints or DNA, or at the very least storing it for the defense to conduct such testing, the investigator threw the crowbar in a dumpster. R. 168, l. 13 – 172, l. 8; R. 204, l. 4 – 206, l. 3. Thus, a spoliation charge was given to the jury. R. 371, l. 23 – 376, l. 25; R. 420, ll. 8-21.

The physical description provided by Mrs. Wilbanks was too vague to develop any suspects. Merrill testified that the description "could fit thousands or millions of people." R. 149, ll. 6-9. Thus, the only lead that the police had were the partial fingerprints collected from

the outside and inside of the passenger side window of the Volvo using hinge-lifters.[2] R. 132, l. 5 – 138, l. 16. Mrs. Wilbanks testified that she noticed the apparent fingerprints on the glass of the window on the night of the incident but admitted that they did not wash the Volvo very often. R. 62, ll. 2-11. The three hinge-lifters collected by Merrill were submitted to the Lexington County Sheriff's Department for examination in August 2014. R. 149, ll. 10-21. Merrill received a report in September 2014, indicating that "a match was made on one of the fingerprints . . . submitted in th[e] case and it was . . . a match to a Johnny L. Lawson." R. 149, l. 22 – 150, l. 5.

Objection to Testimony that Lawson's Ten-print Card Originated at a Prison

Anticipating the solicitor's future attempt to admit Lawson's ten-print card into evidence, defense counsel said that she would stipulate to its admission but argued that the information regarding his arrests on the back was improper. R. 91, ll. 3-14. The solicitor argued that the entire ten-print card should be admitted, without redaction, as a business record. R. 91, ll. 16-22. Judge McMahon ruled that the prior criminal history was not admissible and instructed the solicitor to either redact it or offer it through the authenticating witness and substitute a redacted copy later. R. 91, l. 23 – 92, l. 14; see R. 344, l. 12 – 345, l. 11. Defense counsel again offered to stipulate to the fingerprint cards' admission as long as none of Lawson's prior arrests were on it, but the State would not accept the stipulation. R. 92, ll. 16-25.

South Carolina Law Enforcement Division ("SLED") agent Seraphim Haftoglou, the Automated Fingerprint Identification System ("AFIS") supervisor, testified regarding the collection and retention of known fingerprints. Haftoglou testified that fingerprints are collected

[2] Merrill described a hinge-lifter as an all in one adhesive strip with a light colored backer attached to it, used for lifting latent fingerprints. R. 132, ll. 13-18.

mainly following arrests at detention centers. R. 215, ll. 2-9. Following a bench conference, Haftglou added that fingerprints are also collected for background checks for certain jobs. R. 215, ll. 10-25. Haftglou identified State's Exhibit 16 as a ten-print card that he had certified and it was admitted into evidence. R. 222, l. 11 – 224, l. 11.

Following the admission of the ten-print card into evidence, the solicitor elicited testimony that the card belonged to Lawson. R. 224, l. 19 – 225, l. 6. Haftglou also read the identifying characteristics and demographic information printed on the card, which included that Lawson is a black male, 5'10" tall, 169 pounds, with brown eyes and black hair. R. 225, ll. 12-23. Haftglou further testified that Lawson's fingerprint card was collected via a live scan machine **on July 23, 2003 at the "Department of Corrections, Kirkland Correctional Institute."** R. 226, l. 18 – 227, l. 24. Defense counsel objected. R. 227, l. 25 – 233, l. 3.

Defense counsel argued that the court previously granted her motion to redact all information regarding arrests or criminal history, which should include the reference to Kirkland Correctional Institute because it implies that Lawson was previously arrested and imprisoned. R. 228, l. 14 – 230, l. 1. Judge McMahon referenced State v. Anderson, 386 S.C. 120, 687 S.E.2d 35 (2009), stating that it requires that the State lay a foundation of "when the prints were taken, where they were taken, on what specific date and if they were assigned a unique state identification, identifying number or it [the ten-print card] wouldn't be admissible." R. 230, l. 3 – 231, l. 6. Defense counsel responded that her objection is not to the authenticity of the ten-print card, to which she is willing to stipulate. Rather, she argued that the information on the ten-print card was improper character evidence. R. 231, ll.7-18. Judge McMahon stated that the State did not accept the stipulation such that the solicitors were required to authenticate the ten-

print card. The judge further stated that Lawson's "prior criminal history has not come into evidence." R. 231, ll. 19-24.

Defense counsel argued that the only reason that the solicitors did not accept the stipulation was because they wanted the opportunity to let the jury know that Lawson had been at a correctional facility. R. 231, l. 25 – 232, l. 7. Judge McMahon said that what the State wants is not relevant, but that they are not required to stipulate. He analogized the case law stating that the State does not have stipulate to a defendant's prior burglary convictions where they serve as the basis for a first degree burglary charge. R. 232, ll. 8-14. Defense counsel argued that the burglary cases are distinguishable because they involved proof of an element of the offense. R. 232, ll. 15-19.

Judge McMahon ruled that his prior ruling regarding redaction of the criminal history did not include the reference to where the fingerprints were collected. He ruled that the State still had to authenticate the document and was not required to accept the stipulation. R. 232, l. 20 – 233, l. 3. When the jury returned from the luncheon recess, **the solicitor** resumed the examination of Haftglou and **again elicited that the ten-print card originated** on July 23, 2003 **at Kirkland Correctional Institute.** R. 235, ll. 3-9.

Objection to Admissibility of Fingerprint Examiner's Testimony

The solicitor next called latent fingerprint examiner, James Hickman, of the Lexington County Sherriff's Department to testify. R. 241. Hickman had been a latent print examiner for thirty-six years and an AFIS operator for ten to fifteen years. R. 243, ll. 16-25. Hickman explained that his job consists of determining the quality of the latent prints obtained from various locations and entering them into the AFIS system. He also conducts comparisons of latent prints to known prints to determine if they match. R. 241, l. 19 – 243, l. 15. Hickman

completed basic training at the South Carolina Criminal Justice Academy and earned an Associate's Degree in Police Administration from Midland's Technical College. Specific to fingerprint examination, he had on the job training with a supervisor when he first started in Orangeburg, South Carolina in the 1970's. R. 241, ll. 5-18; R. 244, ll. 1-19. He has also taken an 8-hour fingerprint recognition course at Midland's Technical College, a 40-hour basic fingerprint comparison class at the South Carolina Criminal Justice Academy, a 40-hour advanced latent print comparison course at the South Carolina Criminal Justice Academy, and a 120 hour advanced administrative latent print examiners course with the Federal Bureau of Investigation in Quantico, Virginia.[3] Hickman said that he also took a course in criminal investigations through the Institute of Applied Science in Chicago, Illinois, which included latent prints and fingerprint identification. R. 241, ll. 5-18; R. 244, ll. 1-18.

Hickman claimed that he is "constantly keeping up to date with fingerprint and latent print analysis." R. 244, ll. 20-24. He then described that he communicates with other fingerprint examiners, visits websites, has a small collection of books, and receives several trade magazines. R. 244, l. 25 – 245, l. 10; see also R. 296, ll. 13-25. Additionally, he said that fingerprint comparison makes up the majority of his job, estimating that he had examined thousands of fingerprints. R. 247, l. 15 – 248, l. 1. Interestingly, Hickman had only been qualified as an expert to testify in the South Carolina courts five times. R. 248, ll. 2-9.

The solicitor asked that Hickman be qualified as an expert in fingerprint analysis. Defense counsel then conducted her voir dire. R. 248, ll. 10-18. Hickman admitted that he was no longer a member of International Association of Identification ("IAI"), though he was a member prior to his retirement and return as a part-time employee. R. 248, l. 21 – 249, l. 9. He

[3] Hickman later testified that his class at Quantico was in the mid-1980s. R. 296, ll. 2-12.

further admitted that he has no certifications and that the last schooling that he attended regarding fingerprints was in the late 1990s or early 2000s. R. 249, ll. 10-23. Later on in the trial, Hickman claimed that he was a "certified senior" with the IAI and claimed the certification is good for life, with no need for renewal. R. 293, l. 22 – 295, l. 15. He also claimed to have some basic familiarity with the National Academy of Science but was not familiar with their report "Strengthening Forensic Science in the United States: A Path Forward."[4] R. 297, ll. 1-7.

Hickman does not abide by any clearly defined policies or procedures nor are the procedures that he follows written in any form of guidelines, protocols, or manuals. R. 249, l. 24 – 250, l. 4; R. 252, l. 25 – 253, l. 6. Though aware of the Scientific Working Group on Friction Ridge Analysis, Study and Technology ("SWGFAST") and its recommendations regarding best practices in fingerprint analysis, Hickman does not follow any of their guidelines because there is no requirement that he do so. R. 251, l. 12 – 252, l. 1; R. 298, ll. 4-17. He does not regularly read any peer reviewed journals. R. 250, ll. 11-12. He does not rely upon or apply any error rates to his analysis. R. 250, ll. 13-21. He also does not rely on any validation studies, but said that every match he makes is validated by another examiner in the office. R. 250, l. 22 – 251, l. 5. Regarding the methodology he uses, Hickman said that he has always used the analysis, comparison, evaluation, and verification ("ACE-V") methodology, even before it was named as such. R. 252, ll. 5-24. Hickman maintained that the "quality assurance control" is the verification by a second examiner, which acts as a check and balance. R. 253, ll. 7-11.

Defense counsel objected to Hickman's qualifications as an expert under Rule 702, SCRE, which states: "If scientific, technical, or other specialized knowledge will assist the trier

---

[4] See Committee on Identifying the Needs of the Forensic Sciences Community, et al., *Strengthening Forensic Science in the United States: A Path Forward* (2009), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf (discussing the lack of standardization and oversight in friction ridge analysis, amongst other forensic science disciplines).

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." R. 254, ll. 2-10. Counsel agreed that fingerprint evidence is generally accepted in the scientific community. However, she argued that Hickman was not qualified due to his lack of certification and the significant passage of time since his last course or training. She further argued that his testimony would lack reliability, citing State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012), in light of his failure to document any specific procedures, methodology, and quality controls that he utilizes. R. 254, l. 10 – 256, l. 4. Defense counsel also noted that the court must consider the degree to which the trier of fact would be relying upon the testimony. R. 254, ll. 15-18. Hickman's testimony that "one fingerprint makes a match" would be significant in light of the fact that the only evidence allegedly linking Lawson to the crime was the fingerprint. R. 255, l. 24 – 256, l. 4.

In response, the solicitor cited Hickman's many years of on-the-job-training and attendance of various courses. R. 256, l. 7 – 257, l. 8. He argued that Hickman's lack of certifications and written policies has no bearing on his expert qualification. R. 257, ll. 8-23. Thus, the State alleged that its questioning during voir dire provided a sufficient basis for Hickman to be qualified as an expert. R. 257, ll. 24-25.

Judge McMahon found that Hickman was qualified to provide expert testimony. R. 249, l. 2 – 259, l. 23. He found that "fingerprints is a recognized...scientific field in South Carolina." Regarding Hickman's expertise, the judge found that he had sufficient training or experience or education in fingerprint analysis based on his forty-two years in law enforcement, thirty-six of which were as latent print examiner; ten to fifteen years as an AFIS operator; his classes and on-the-job training; review on the internet and websites of other experts in the field; his explanation

of fingerprints; and the volume of cases in which he has been involved. R. 258, l. 2 – 259, l. 11. Regarding reliability, Judge McMahon cited the fact that Hickman's examinations are validated and that he was previously been qualified as an expert in the field of fingerprint analysis in other cases. R. 259, ll.12-17.

Testimony Regarding Partial Fingerprint

When the jury returned to the courtroom, they were instructed that Hickman was qualified to testify in the area of fingerprint testimony and give his opinion. R. 260, ll. 8-20. Hickman told the jury that fingerprints are "the most positive means of identification that we have." R. 264, ll. 6-7. He went on to say:

> **When I say it's him; it's him. It's that print.** There's no way, like DNA is, is great and it's coming along and it's a good thing to have, but DNA gives you a ratio, like it's 10 million to 1 that it could be you, but **whenever I match a fingerprint up and make a positive identification, it is you; it is no one else.**

R. 264, ll. 10-16 (emphasis added). Hickman testified that it was his opinion that the latent print submitted for identification belonged to Lawson. R. 284, ll. 22-25.

Regarding the process that he used to reach that determination, Hickman said that he received three lifts related to the present case. He evaluated them and determined that Lift 2 was of sufficient quality to put into AFIS. He determined that the print was from a middle finger, consistent with a hand facing downward on the inside of a car window. Thus, he restricted the AFIS search parameters to look only at middle fingers. R. 265, l. 3 – 273, l. 14. He then began the AFIS search, which yielded a list of twenty candidates, purportedly with the strongest candidate listed first. He then conducted a visual comparison. **Because the first candidate, Lawson, was a match, Hickman did not examine any of other candidates.** R. 273, l. 15 – 274, l. 6; R. 301, l. 16 – 303, l. 12; R. 316, ll. 20-25. Hickman said that the AFIS program ranks the twenty candidates, with the first being the most likely match and generates a score.

However, Hickman had "no earthly idea" what the scores are based upon. R. 324, l. 11 – 326, l. 11; R. 333, l. 21 – 334, l. 4.

Hickman then showed the jury a presentation reflecting eight "minutia points" that were in the same general location or same location on the latent and known prints. Hickman said that he only marked eight points so that the presentation would not be cluttered but that he actually found approximately fifteen. R. 277, l. 14 – 281, l. 7. While he pointed out two additional points on re-direct examination, Hickman admitted that his written report referenced only eight points. R. 292, l. 4 – 293, l. 19; R. 328, l. 12 – 330, l. 2. He could not recall when, but he said that he went "back and count[ed] the rest of the points" "sometime later on." R. 312, ll. 15-21.

Hickman said that there are no standards in the United States regarding the number of points you have to identify but that his personal standard is "usually, eight." R. 281, l. 8 – 282, l. 11; R. 291, l. 25 – 292, l. 3. When asked how many points or characteristics the average complete fingerprint has, Hickman responded: "You're probably going to get different answers from different people, but I -- I would say, no, I don't know, but I would say some 150, 200." R. 300, ll. 12-16. However, because of movement and the limited amount of ridge detail, he said that there were only fifteen points available on the latent print provided in this case. R. 313, ll. 2-13. Hickman said that two different people may have two or three of the same minutia points. R. 303, ll. 1-6. He further stated that only if there were unexplained differences between the latent and known print would he rule it an exclusion. R. 305, l. 21 – 308, l. 14. In this case, he said that the differences between the latent and known print were due to movement and limited ridge detail. R. 313, ll. 2-6.

Regarding verification, Hickman said that in some cases the reviewing analyst will conduct a blind review, where he does not know what the initial analyst did or concluded. R.

308, ll. 19-25. In other cases, the initial analyst provides his reports and the purported match. R. 308, l. 25 – 309, l. 3. Glenn Ross was the review analyst who verified Hickman's conclusion in this case. R. 299, ll. 15-24; R. 308, ll. 15-18. Hickman could not recall specifically, but he believed that Ross knew that Hickman had made a match and just reviewed that finding rather than conducting a full examination. R. 309, ll. 4-15. Ross did not generate any report. R. 309, ll. 16-17. Hickman testified that the reviewing analyst has never disagreed with his identifications and he has "never misidentified anyone" in his career. R. 309, l. 22 – 310, l. 3; R. 317, ll. 11-13.

Denial of Request for Limiting Jury Charge

The defense submitted a written request for jury charges, which included a request for a charge on prior bad acts. R. 443 Specifically, defense counsel requested that the jury be charged:

> In regard to evidence of an alleged bad act on another occasion, specifically that the fingerprints were captured at Kirkland Correctional Institution, this evidence is limited to consideration by you as it relates to: the identity of the person charged with the commission of the crime on trial. The evidence is limited to those purposes and uses. This evidence can NOT be used for any other purpose. This type of evidence must NOT be considered in any other fashion.

R. 449. The solicitor objected to the prior bad acts charge, arguing that there was no testimony regarding prior bad acts and that a reference to the name of the facility would be a charge on the facts. R. 367, l. 23 – 368, l. 17. Defense counsel argued that the she offered to stipulate to the admission of the ten-print card, but that the State chose to elicit testimony regarding Kirkland Correctional, which is also listed on the back of ten-print card exhibit. R. 368, l. 19 – 369, l. 8. The solicitor clarified that he had since redacted "Corr." from the back of the ten-print card, though "Kirkland" remained. R. 369, ll. 9-13. The solicitor further claimed that there was no

undue emphasis placed upon the reference to Kirkland in the testimony, which was only made to authenticate the record. R. 369, ll. 9-20.

Judge McMahon said that he would not mention Kirkland Correctional Institute in his charge to the jury because "that's a charge having to do with the facts of the case." R. 369, ll. 21-25. He found that the State could not highlight it as a prior bad act since it was only mentioned for one purpose – authentication of State's Exhibit 16. He further found that a jury charge would "highlight . . . that he [Lawson] committed a bad act." R. 369, l. 25 – 370, l. 18.

Defense counsel pointed out that the solicitor elicited the testimony regarding Kirkland twice, both prior to the objection and again after the jury come back, which is why she was making the request. R. 370, ll. 19-24. Judge McMahon responded:

> I'm not complaining. I understand why you put it in there and I, I agree that was a kind of -- but reading *Anderson*, *State v. Anderson*, it indicates that to authenticate they have to put up the place, the time and date. So then it highlights [an] inference that he has a prior bad act and there's no testimony whatsoever that he has a prior bad act.

R. 370, l. 25 – 371, l. 6. He then ruled: "I decline to charge that." R. 371, l. 22.

ARGUMENT

I. The trial court erred in overruling defense counsel's objection to testimony that Appellant's ten-print card originated from Kirkland Correctional Institute as improper character evidence where the defense was willing to stipulate to the admission of the ten-print card.

Introduction

Despite Lawson's ten-print card having already been admitted into evidence, the trial judge allowed the solicitor to elicit testimony that Lawson's ten-print card was made at the "Department of Corrections, Kirkland Correctional Institute." R. 224, l. 3-11; R. 227, ll. 18-24. Defense counsel objected, arguing that the reference to the prison was improper character evidence. R. 227, l. 25 – 230, l. 1; R. 231, l. 7 – 232, l. 19. The trial judge misinterpreted our Supreme Court's holding in State v. Anderson, 386 S.C. 120, 687 S.E.2d 35 (2009), as requiring that the solicitor lay the foundation of when and where the prints were taken even where the defense was willing to stipulate to the admission of the ten-print card. R. 230, l. 3 – 231, l. 6; R. 231, ll. 20-24; R. 232, l. 20 – 233, l. 2. The Anderson Court noted that authentication of evidence does not foreclose its exclusion based on irrelevance or unfair prejudice. Id. at 128 n. 8, 687 S.E.2d at 39 n. 8. Further, the Court found that defense counsel in Anderson did not preserve an argument that the prints' collection "by a law enforcement agency" implied a prior conviction constituting prior bad act evidence, such that the Court would "express no opinion as to whether this type of evidence was properly admitted." Id. at 124 n. 2, 687 S.E.2d at 37 n. 2

The trial judge further erred in ruling that the State was not required to accept the defense's stipulation to the ten-print card's admission, improperly analogizing the holding in first degree burglary cases that a defendant cannot require the state to stipulate to a defendant's prior convictions in lieu of informing the jury about the prior convictions. R. 231, ll. 19-20; R. 232, ll. 8-14; R. 232, l. 25 – 233, l. 2; see State v. Benton, 338 S.C. 151, 153-56, 526 S.E.2d 228, 229-31

(2000); State v. Hamilton, 327 S.C. 440, 86 S.E.2d 512 (Ct. App. 1997). As defense counsel pointed out, the prior burglary convictions were an element of the offense in those cases. R. 232, ll. 15-19. Notably, after the lunch break, the solicitor again elicited that the ten-print card was made at Kirkland Correctional Institute. R. 235, ll. 3-9. As will be discussed more fully *infra* in Issue II, the trial judge also failed to provide any limiting instruction regarding the testimony that Lawson's fingerprints were collected at a prison. Thus, the jury was free to infer that Lawson had a prior conviction and consider that information in reaching its verdict.

Discussion

A. The Reference to Kirkland Correctional Institution Implied that Lawson Had a Prior Criminal Record

"In a criminal case, the State cannot attack the character of the defendant unless the defendant first places his character in issue." State v. Nelson, 331 S.C. 1, 6, 501 S.E.2d 716, 718 (1998); Rule 404(a)(1), SCRE. "In a similar vein, evidence of other crimes or bad acts is generally inadmissible to prove the crime charged unless the evidence tends to establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or plan, or (5) identity." Nelson, 331 S.C. at 6, 501 S.E.2d at 718; Rule 404(b), SCRE. "Both rules are grounded on the policy that character evidence is not admissible 'for purposes of proving that the accused possesses a criminal character or has a propensity to commit the crime with which he is charged.'" Nelson, 331 S.C. at 6, 501 S.E.2d at 718-19.

In State v. Tate, 288 S.C. 104, 105, 341 S.E.2d 380, 381 (1986), the Court found that the six-man photographic array containing the mug shot of the defendant should not have been admitted into evidence because it implied that he had a prior criminal record, and thereby improperly placed his character into evidence. The Court cited precedent that a "mug shot" cannot be admitted into evidence unless: "(1) The state had a demonstrable need to introduce the

photograph; and (2) the photographs themselves, if shown to the jury, must not imply that the defendant had a prior criminal record; and (3) the photograph must not be introduced in such a manner to draw attention to the source or implication of the photograph." 288 S.C. at 105, 341 S.E.2d at 381. The Tate Court found that neither of the first two prerequisites were met. Id. at 106, 341 S.E.2d at 381. Specifically, the Court found that **"the markings on the photographs, particularly the date, which was almost one year prior to the trial of this case, would clearly infer to the jury that appellant had a prior criminal record."** Id. (emphasis added). The Tate Court ruled that "[t]he prejudicial effect of these photographs outweighs their probative value and the prejudice was neither cured nor rendered harmless by other events which occurred at trial." Id.

In State v. Owens, 293 S.C. 161, 166, 359 S.E.2d 275, 277 (1987), the Court rejected the appellant's argument that testimony of three state witnesses injected improper evidence of his prior criminal record because each witness stated he met appellant in prison. The Owens Court found that such was not "testimony regarding any prior bad act by appellant," as the evidence produced "indicated only that appellant was in jail for the crime for which he was then being tried." 293 S.C. at 166, 359 S.E.2d at 277. Additionally, the appellant had himself introduced testimony by three inmates and a corrections officer who each stated he knew appellant in prison. Id. Thus, the testimony of the State's witnesses did not prejudice Owens. Id.

In State v. Council, 335 S.C. 1, 11-13, 515 S.E.2d 508, 513-14 (1999), the Court affirmed the denial of the defense's motion for mistrial after SLED agent Counts testified that he obtained the defendant's fingerprint card from "SLED records for comparison." The Court found that it was "questionable whether the jury even understood the implication of Count's statement," and cited to other cases where "references to a defendant's past conduct were too vague to be

prejudicial." 335 S.C. at 13, 515 S.E.2d at 514. The Council Court distinguished Tate, writing:

> In *Tate*, appellant's mug shot was introduced into evidence. The date on the mug shot was almost one year prior to the trial thus inferring to the jury that appellant had a prior criminal record. In this case, the fingerprint card was never introduced into evidence, and therefore the jury was not aware of when SLED obtained the card. Therefore, there was no evidence before the jury of when or for what purpose the fingerprint card was made.

Id. at 13, n. 7, 515 S.E.2d at 514 n. 7.

In the present case, **the State's witness testified twice as to both the date and location – July 23, 2003 and Kirkland Correctional Institute – that Lawson's ten-print card originated.** R. 227, ll. 18-24; R. 235, ll. 3-9. Testimony was previously elicited that the incident about which Lawson was on trial occurred on March 14, 2014.[5] Thus, like Tate and unlike Owens and Council, the testimony implied to the jury that Lawson was **previously imprisoned at Kirkland Correctional Institute for a prior offense**. As such, defense counsel properly objected to the testimony as improper character evidence since Lawson did not testify or otherwise present evidence to put his character at issue. R. 231, ll. 12-14; Rule 404, SCRE.

B. The Testimony Regarding Kirkland Correctional Institution Was Not Required to Authenticate the Ten-print Card as a Business Record Because the Defense Offered to Stipulate

The trial judge failed to appreciate the import of the defense's offer to stipulate to the admission of Lawson's ten-print card. He erroneously held that the State could refuse the stipulation and that regardless of any stipulation that the State was required to authenticate the ten-print card. On the contrary, the solicitor was required to accept the stipulation, at which

[5] The trial transcript reveals that there were numerous references to March 14, 2014 in front of the jury. R. 7, ll. 14-21; R. 17, ll. 8-9; R. 23, ll. 7-11; R. 24, ll. 6—9; R. 37, ll. 11-19; R. 128, ll. 17-22; R. 148, ll. 9-11; R. 149, ll. 17-21; R. 155, ll. 5-8, R. 194, ll. 17-20; R. 195, ll. 14-16, R. 196, ll. 5-8; R. 199, ll. 22-24; R. 202, ll. 19-21.

point authentication became unnecessary. See State v. Henderson, 347 S.C. 455, 459, 556 S.E.2d 691, 693 (Ct. App. 2001).

In State v. Rich, 293 S.C. 172, 173, 359 S.E.2d 281 (1987), the trial court overruled the defendant's objection to the admission of the inked impressions that the agent compared to the latent prints because the proper foundation was never laid. The Rich Court ruled that the admissibility of fingerprint cards against a defendant under the public records or business records exceptions did not absolve the State from the usual requirements of authentication. 293 S.C. at 174, 359 S.E.2d at 282. Thus, the Court held that the witness should not have been allowed to testify about data contained in an unauthenticated document. Id. at 174, 359 S.E.2d at 282.

More recently, in State v. Anderson, 386 S.C. 120, 123-24, 687 S.E.2d 35, 37 (2009), the defense objected to the admission of the defendant's ten-print card, arguing that it had not been properly authenticated pursuant to Rich. The trial judge ruled that Rich required the State to present testimony as to when and how the print card was taken, which it subsequently did through the testimony of SLED agent Joseph Means. Anderson, 386 S.C. at 124, 687 S.E.2d at 37. The trial judge admitted the ten-print card into evidence over defense counsel's objection that the State failed to establish by whom the fingerprints were taken. Id. at 124-25, 687 S.E.2d at 37.

The Anderson Court upheld the admission of the ten-print card, ruling that it was properly authenticated without evidence of who actually collected the prints. Id. at 128, 687 S.E.2d at 39. However, because Rich was decided prior to our State's adoption of the Rules of Evidence, the Anderson Court took the opportunity to "supplement the analysis in *Rich* with an application of the pertinent Rules of Evidence as well as subsequent appellate decisions." Id. The Court explained that Rule 901(a), SCRE, provides: "[t]he requirement of authentication or

identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Id. at 128-29, 687 S.E.2d at 39. "Although not exhaustive, Rule 901 further provides examples of authentication or identification which conform with the requirements of the rule." Id.

The Court noted that even if the State's evidence "did not precisely fit within one of the enumerated examples provided in Rule 901," Anderson's ten-print card was authenticated under a more generalized approach to Rule 901. Id. at 131, 687 S.E.2d at 41. Such was accomplished by the expert's testimony regarding how an arrestee's fingerprints are taken, stored, and maintained. Id. at 131-32, 687 S.E.2d at 41. The testimony was "sufficient to support a finding that the matter in question was] what [the State] claimed," in compliance with Rule 901(a), SCRE. Id. at 132, 687 S.E.2d at 41.

In Anderson, there was some concern over whether the known fingerprints from the ten-print card could have been tampered with or altered in some way. Id. at 132, 687 S.E.2d at 41. However, the Court rejected the defense's contention that Rich should be strictly construed to require the person who actually took the fingerprints testify regarding the reliability or authenticity of the ten-print card. Id. The Court found that such a requirement "would create an unrealistic standard and, at times, an insurmountable obstacle for the State." Id. Importantly, however, the Court specifically noted that the authentication of evidence is only the initial step to admissibility, as the evidence may be otherwise excluded as irrelevant or unfairly prejudicial. Id. at 128 n. 8, 687 S.E.2d at 39 n. 8. Additionally, the Court found that trial counsel did not properly preserve his objection that the testimony regarding the collection of the prints by a law enforcement agency implied a prior conviction constituting prior bad act evidence. Id. at 124 n.

2, 687 S.E.2d at 37 n. 2. Therefore, the Court said that it would "express no opinion as to whether this type of evidence was properly admitted." Id.

In both Rich and Anderson the defense objected to the admissibility of the ten-print card. The present case is distinguishable because Lawson's attorney was willing to stipulate to the admission of State's Exhibit 16 so long as the references to prior bad acts were redacted. Thus, the testimony regarding when and where the ten-print card was made was unnecessary. Moreover, State's Exhibit 16 was admitted into evidence prior to when the solicitor elicited the testimony regarding Kirkland Correctional Institute. R. 224, l. 3 – 227, l. 24. Further, the solicitor took advantage of the court's ruling by eliciting testimony that the ten-print card was made in 2003 at Kirkland **a second time** when the jury returned from lunch. R. 232, ll. 1-8. This supported defense counsel's argument that the solicitors' refused to accept the stipulation because they wanted the opportunity to let the jury know that Lawson had been at a correctional facility. R. 235, ll. 3-9.

Here, the trial judge erroneously ruled that the State could not be required to accept the defendant's offer to stipulate to the authenticity and admission of Lawson's ten-print card. R. 231, ll. 19-20; R. 232, ll. 8-14; R. 232, l. 25 – 233, l. 2. The case law regarding stipulations has developed over the past twenty years, and our Court has clarified that its earlier rulings should not be read to imply that the State can never be required to accept a stipulation. See State v. Henderson, 347 S.C. 455, 459, 556 S.E.2d 691, 693 (Ct. App. 2001). In State v. Anderson, 318 S.C. 395, 399, 458 S.E.2d 56, 58 (Ct. App. 1995), this Court held that absent a stipulation as to subject matter jurisdiction, Anderson had no real right to object to the admission into evidence of his prior driving under suspension and driving under the influence convictions. While the dissent in Anderson would have held that the solicitor was required to accept the defense's offer

to stipulate to jurisdiction of the trial court, the majority found that such an argument was not preserved. 318 S.C. at 399-400, 458 S.E.2d at 58-59. However, the majority noted that a stipulation requires the assent of both the solicitor and defendant to be effective. Id. at 390 n. 2, 458 S.E.2d at 58 n. 2.

In State v. Hamilton, 327 S.C. 440, 86 S.E.2d 512 (Ct. App. 1997), this Court held that because two prior burglary and/or housebreaking convictions are an element of first degree burglary under the statute, the defendant cannot require the State to stipulate to the prior convictions in lieu of informing the jury about the prior convictions. See also State v. Benton, 338 S.C. 151, 153-56, 526 S.E.2d 228, 229-31 (2000). Referencing Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644 (1997), the Hamilton Court noted that without referencing the prior convictions, "there would have been a substantial gap in the evidence necessary for the jury to convict Hamilton of burglary in the first degree." 327 S.C. at 446, 86 S.E.2d at 515. The Court further held that "[e]vidence which is logically relevant to a material element of the offense charged should not be excluded merely because it may also show guilt of another crime." Id. at 447, 86 S.E.2d at 515-16.

However, in State v. Henderson, 347 S.C. 455, 459, 556 S.E.2d 691, 693 (Ct. App. 2001), this Court clarified that its prior holdings in Anderson and Hamilton did **not** mean "that a stipulation could never be required." Henderson involved the erroneous admission of language concerning a defendant's right to independent testing on the Datamaster form from the defendant's breathalyzer test. 347 S.C. at 457-59, 556 S.E.2d at 692-93. S.C. CODE ANN. § 56-5-2950(a) provides: "A person's request or failure to request additional blood or urine tests is not admissible against the person in the criminal trial." However, the State ordinarily must lay a foundation for admission of the results, including proof that all proper procedures were followed

and that all statutory rights were explained. City of Columbia v. Wilson, 324 S.C. 459, 463, 478 S.E.2d 88, 90 (1996).

In Henderson, the defendant "offered to stipulate that 'the [breathalyzer] test was performed pursuant to SLED procedures and that he was advised of his statutory rights.'" 347 S.C. at 457-58, 556 S.E.2d at 692. The State refused the stipulation but agreed to redact the "additional tests" language from the SLED report before it was admitted into evidence. Id. However, the trial judge inexplicably allowed that portion of the report to be read to the jury. Id. The Henderson Court ruled: "Given the offer to stipulate by Henderson's counsel, there was no plausible reason why this language should have been read to the jury." Id. at 458, 556 S.E.2d at 693. Thus, the Court ruled that the State was not required to lay a foundation for the Datamaster test results. Id.

Here, evidence that the defendant was previously incarcerated at the Department of Corrections would generally not be admissible. Rule 404, SCRE; see also State v. Tate, 288 S.C. 104, 341 S.E.2d 380 (1986) (holding defendant prejudiced by implication that he had a prior criminal record). Like Henderson, the defense's offer to stipulate to the authentication and admission of the redacted ten-print card rendered testimony to authenticate the record before the jury unnecessary. Thus, the cases announcing the requirements for authentication of a ten-print card by testimony of when and where it originated were not applicable. Compare State v. Rich, 293 S.C. 172, 359 S.E.2d 281 (1987); State v. Anderson, 386 S.C. 120, 123-24, 687 S.E.2d 35, 37 (2009).

In sum, the trial court erred in overruling defense counsel's objection to the testimony that Lawson's ten-print card was made in 2003 at the Department of Corrections, Kirkland Correctional Institute. The reference implied to the jury that Lawson had a prior criminal

history. As such it constituted improper character evidence because Lawson did not first put his character at issue. Furthermore, the testimony was unnecessary because the defense was willing to stipulate to the authenticity and admission of the ten-print card and the solicitor was not using the evidence to establish a material fact or element of the crime charged. As will be discussed more fully *infra*, the trial judge also failed to give a limiting instruction to the jury regarding the prison reference. Lawson is accordingly entitled to a new trial.

II. The trial court erred in refusing to include a limiting instruction to the jury regarding the prior bad acts evidence admitted by implication from the testimony that Lawson's ten-print card originated at Kirkland Correctional Institute.

The trial judge refused the defense's request to include a limiting instruction regarding prior bad acts in the jury charge. R. 367, l. 23 – 371, l. 22. He ruled that to mention the testimony regarding Kirkland in the jury charge would be an improper charge on the facts and highlight that Lawson committed a bad act.[6] R. 369, ll. 21-25; R. 370, ll. 14-15. He further ruled that the testimony that Lawson's fingerprints were collected at a prison was offered only to authenticate the ten-print card and that the State could not argue that he committed a prior bad act. R. 370, ll. 11-18. Of course, because the trial judge failed to give a limiting instruction the jury was never told of the limited purpose of the testimony. Thus, the jury certainly could have considered Lawson's prior incarceration in its deliberations, in violation of his Sixth Amendment right to a fair and impartial trial. U.S. CONST. AMEND. VI; State v. Gore, 283 S.C. 118, 120, 322 S.E.2d 12, 13 (1984) ("Under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than prior criminal or immoral acts.").

Initially, the trial judge erred in finding that a portion of the requested charge was a "charge on the facts." In Mullaly v. Smyth, 96 S.C. 14, 79 S.E. 634 (1913), our Supreme Court wrote: "The judge has a right to charge the jury what the law is applicable to any facts proven, and, further, a statement by him of what facts are admitted or not contested is not a charge on

---

[6] The decision of whether to request the limiting instruction in light of the potential for drawing additional attention to Lawson's prior incarceration was a matter of trial strategy. See Tate v. State, 912 So.2d 919, 928 (Miss. 2005) ("Whether to request [a prior bad acts] instruction is a matter of trial strategy in the exclusive province of the defendant, in consultation with his or her attorney."); Phillips v. State, 675 S.E.2d 1, 9 (Ga. 2009) ("Where trial counsel testifies that he chose not to seek a limiting instruction because he did not wish to draw attention to the prior convictions, the omission was trial strategy and not evidence of ineffective assistance of counsel.").

the facts." Here, it was not contested that the solicitor introduced testimony that Lawson's ten-print card originated at Kirkland Correctional Institute. The solicitor even argued at the charge conference that the references to Kirkland were "just for authenticating that this record was made . . . at a facility and it was the actual record of the defendant." R. 369, ll. 15-17. Even the trial judge agreed that testimony was "for one purpose and one purpose only, authentication for State's Exhibit Number 16." R. 370, ll. 12-14; R. 370, ll. 16-18. Thus, the requested charge was not a charge on the facts.

Regardless of whether the charge should have specified the substance of the prior bad act evidence, the fact remained that the jury heard twice that Lawson's fingerprints were collected in 2003 at a correctional institution. R. 227, ll. 18-24; R. 235, ll. 3-9. The solicitor contended that the **only purpose** of such testimony was to authenticate the ten-print card. R. 369, ll. 15-17. Rule 105, SCRE, provides: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." This Court has accordingly found that where prior bad act evidence is admitted for a specific purpose, the Court should instruct the jury on the limited purpose for which the evidence can be considered. Thus, the trial judge erred in failing to give any limiting instruction to the jury in this case.

Our Courts have endorsed the provision of limiting instructions regarding evidence of prior bad acts. In State v. Hamilton, 327 S.C. 440, 447, 86 S.E.2d 512, 516 (Ct. App. 1997), this Court ruled: "When evidence of other crimes is admitted for a specific purpose, the trial judge should instruct the jury to limit its consideration of this evidence to the particular purpose for which it is offered." There, the trial judge "carefully instructed the jury on at least three

occasions" to consider evidence of Hamilton's prior convictions only in determining whether Hamilton was guilty of one of the aggravating factors which would support first degree burglary. 327 S.C. at 447-48, 86 S.E.2d at 516. The judge further admonished the jury not to consider the prior convictions as evidence of Hamilton's bad character or as evidence that Hamilton had acted in accordance with prior conduct. Id. In State v. Benton, 338 S.C. 151, 156, 526 S.E.2d 228, 231 (2000), the Court ruled: "[T]he trial court, as it did here, should, on request, instruct the jury on the limited purpose for which the prior crime evidence can be considered." See also State v. Anderson, 318 S.C. 395, 399, 458 S.E.2d 56, 58 (Ct. App. 1995) (finding no prejudice from motion to sever where jury was instructed to limit consideration of any alleged prior convictions to the trial court's "jurisdiction or the right to try this case.").

The Courts have admonished the failure to give a limiting instruction on the jury's consideration of a defendant's prior convictions in numerous cases, holding that the failure was reversible error. State v. Smalls, 260 S.C. 44, 194 S.E.2d 188 (1973); State v. Staley, 294 S.C. 451, 365 S.E.2d 729 (1988); State v. Young, 305 S.C. 380, 384, 409 S.E.2d 352, 355 (1991); State v. Bryant, 307 S.C. 458, 460-61, 415 S.E.2d 806, 808 (1992). In Smalls, the defendant was prejudiced by the trial court's denial of his request that the jury be instructed that his prior convictions were to be considered solely as to the defendant's credibility. 260 S.C. at 47-48, 194 S.E.2d 189-90. The Smalls Court ruled: "Since the jurors were not so instructed, they were free to consider the prior convictions for any purpose, including the probability that appellant committed the crime because he had demonstrated a prior criminal tendency. This was highly prejudicial." Id. In Bryant, the Court explained that though the prejudice is even more egregious where the prior convictions are for similar crimes, the Court "has never limited the entitlement to a limiting charge" to such cases. 307 S.C. at 460-61, 415 S.E.2d at 808.

Here, defense counsel requested a limiting instruction regarding the consideration of Lawson's prior incarceration, which was implied in the testimony that his ten-print card was made at Kirkland Correctional Institute. It was undisputed that such testimony was allowed solely for the purpose of authenticating the record. Yet, the jury was never of informed of that limitation. Lawson was prejudiced because the jury was left to consider the evidence for any purpose. Lawson is accordingly entitled to a new trial.

III. The trial court erred in admitting the testimony of State's witness, James Hickman, where (1) he was not qualified to provide expert testimony in fingerprint analysis due to his failure to update his training and maintain any certifications and (2) his testimony was not reliable in light of his failure to follow any written policies or procedures and failure to have his results verified by a blind review.

Defense counsel challenged the admissibility of Hickman's testimony regarding the fingerprint analysis that he conducted based on his lack qualification of as an expert and the lack of reliability regarding his results in this case. R. 254, l. 2 – 256, l. 4. The trial judge ruled that "fingerprints" are a "recognized . . . scientific field in that courts [of] South Carolina." R. 258, ll. 2-13. He further found that Hickman qualified as an expert in fingerprint analysis based on his classes, his on-the-job training from the 1970s, his review of other experts' websites, his explanation of fingerprints, and the number of fingerprints that he has examined. R. 258, l. 17 – 280, l. 7. Additionally, Hickman was a current member of the South Carolina Law Enforcement Officers' Association and used to be a member of the International Association of Identification and South Carolina International Association for Identification. R. 259, ll. 7-11. The trial judge also noted that Hickman had previously been qualified as an expert in the field of fingerprint analysis on five other occasions. R. 259, ll. 15-17. The trial judge's only arguable ruling regarding reliability was that Hickman was "validated on each examination," acting as "a check and balance." R. 259, ll. 12-14.

Rule 702, SCRE, 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." 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 State v. White, 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009), our Supreme Court made clear that "[t]he familiar tenet of evidence law that a continuing challenge to evidence goes to 'weight, not admissibility' has never been intended to supplant the gatekeeping role of the trial court in the first instance in assessing the admissibility of expert testimony, including the threshold determination of reliability." Thus, the Court ruled that both scientific and nonscientific expert testimony must satisfy Rule 702, SCRE, both in terms of expert qualifications and reliability of the subject matter. 382 S.C. at 273, 676 S.E.2d at 688.

In State v. Tapp, 398 S.C. 376, 384, 728 S.E.2d 468, 472 (2012), the trial judge admitted expert testimony of Agent Prodan in the areas of crime scene analysis and victimology over the defense's objection. Tapp's trial occurred prior to the White decision. 398 S.C. at 387, 728 S.E.2d at 474. Nonetheless, Tapp's attorney preserved the issue of the admissibility of Prodan's testimony based on the failure to determine its reliability. Id. The Tapp Court clarified that "the reliability of a witness's testimony is not a pre-requisite to determining whether or not the witness is an expert." Id. at 388, 728 S.E.2d at 474. Rather, "**the expertise, reliability, and the 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." Id. at 388, 728 S.E.2d at 474-75 (emphasis in original) (additional emphasis added). Thus, though the majority in Tapp ultimately found the error harmless, the Court found that the trial court erred by not properly vetting the testimony for its reliability before its admission into evidence. Id. at 389-91, 728 S.E.2d at 475-76.

The solicitor in the present case cited to State v. Anderson, 407 S.C. 278, 754 S.E.2d 905 (Ct. App. 2014), in support of his argument that Hickman was qualified as an expert in fingerprint analysis. R. 257, ll. 13-23. In Anderson, this Court held that the crime scene investigator, Brad McClelland, was qualified as an expert in fingerprint analysis. 407 S.C. at 285-86, 754 S.E.2d 908-09. Notably, in addition to attending various trainings, McClelland was a certified AFIS examiner. Id. at 281, 754 S.E.2d at 906. McClelland explained that his AFIS certification was based on a proficiency test administered by SLED that required comparing ten-print cards of known prints to unknown prints until he accurately matched all of the cards. Id.

Here, Hickman initially testified that he did not have any certifications in fingerprint analysis. R. 249, ll. 3-23. However, Hickman later testified that he was a "certified senior" with the International Association of Identification. He explained that he would not be listed on their website as certified and does not have a certification number because he was certified "a long time before they started that." R. 294, l. 2 – 295, l. 19. Hickman claimed that his certification was valid for life.[7] R. 294, ll. 7-11. Additionally, with the exception of AFIS training that was conducted in 2002 or 2003, all of Hickman's training was from the 1970s through the 1990s. R. 248, l. 21 – 249, l. 23; R. 332, ll. 12-16. Thus, the witness in Anderson did not have the same problems with the staleness of his training that were present here.

Judge McMahon cited two pre-White cases in support of his admission of Hickman's testimony – State v. Myers, 301 S.C. 251, 391 S.E.2d 551 (1990), and State v. Goode, 305 S.C.

---

[7] The International Association for Identification website reflects that the IAI Latent Print certification requires technical training, practical experience, education, examinations, and either oral board testing or presentation of a case for review, all of which is subject to the final review of the Latent Print Certification Board. Recertification is necessary every five years and requires the accumulation of eighty hours of continuing education/professional development credits and proof of continued competency by passage of a comparison test. International Association for Identification, *Latent Print Certification Requirements*, http://www.theiai.org/certifications/latent_print/requirements.php (last visited Aug. 26, 2016).

176, 406 S.E.2d 391 (1991). In Myers, our Supreme Court held that the trial court erred in disqualifying the defense's proposed expert, Judy Koelpin, in the field of blood spatter patterns and their interpretation. 301 S.C. at 255-58, 391 S.E.2d at 553-55. Though Koelpin had been a forensic science investigator, her blood spatter training was limited to a one week seminar. Id. at 255, 391 S.E.2d at 554. The Court wrote: "[W]e have made it clear that, generally, defects in the amount and quality of education or experience go to the weight to be accorded the expert's testimony and not its admissibility." Id. at 256, 391 S.E.2d at 554. At oral argument, the State conceded that the interpretation of blood spatter is a matter outside the knowledge of ordinary jurors such that expert testimony would be helpful to the jurors. Id. at 256, 391 S.E.2d at 554-55. Recognizing a defendant's right to present a complete defense, the Myers Court held that it was error for the trial judge to refuse to qualify Koelpin as an expert. Id. However, the Court qualified its' holding as being "*in the particular facts and circumstances of this case.*" Id. (emphasis added). Additionally, there was no discussion of reliability in Myers.

In Goode, the Court found no error in the qualification of two officers, McMahan and Coster, as experts in the areas of "lane of impact" and "post-impact speed." 305 S.C. at 177-78, 406 S.E.2d at 392-93. McMahan, who had been a state trooper for four to five months at the time of the accident, received twelve weeks training in the South Carolina Highway Department Academy, including specific training on determining the point of impact in accident investigations. Id. at 178, 406 S.E.2d at 393. Coster was a sixteen-year veteran with the Highway Patrol and had received advanced accident investigation and reconstruction training. Id. He had investigated approximately 1,600 accidents. Id. Coster detailed the formula he used to determine Goode's speed and stated that during his accident reconstruction classes the formula had been tested and verified as accurate. Id. The Goode Court noted that a trial judge does not

abuse his discretion "as long as the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge." Id. In light of the officers' testimony regarding their qualifications, the Court found no abuse of discretion. Id. Like Myers though, there was no discussion of reliability in Goode.

Assuming *arguendo* that Hickman was qualified as an expert witness, the trial court erred in admitting his testimony in light of its lack of reliability. See State v. Tapp, 398 S.C. 376, 388, 728 S.E.2d 468, 474-75 (2012) ("[T]he expertise, reliability, and the 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)). Hickman arrogantly proclaimed to the jury that when he matches a fingerprint and makes a positive identification, "it is you; it is no one else." R. 264, ll. 6-16. However, a 2005 article in the Journal of Criminal Law and Criminology suggests that there is a minimum of a 0.8% error rate for forensic fingerprint identifications. Simon A. Cole, Ph.D., *MORE THAN ZERO: Accounting for Error in Latent Fingerprint Identification*, 95 J. Crim. L. & Criminology 985, 1033-34 (Spring 2005). "While a 0.8% false positive rate may sound highly reliable to a layperson, it would lead to enormous numbers of false convictions" in light of the number of requests for latent print analysis in U.S. crime laboratories each year. Id. at 1034.

Drs. Lyn and Ralph Haber published an article on the lack of validity testing of the ACE-V method of fingerprint analysis. Lyn Haber, Ph.D. & Ralph Haber, Ph.D., *Scientific Validation of Fingerprint Evidence under Daubert*, 7 Law, Probability & Risk 87 (2008), *available at*

http://lpr.oxfordjournals.org/content/7/2/87.full.pdf+html. Regarding verification procedures in the ACE-V method, they wrote:

> Verification testing fails in several ways to provide evidence of validity. In casework verification testing, ground truth is unknown, and agreement between two examiners might mean either that they both were correct in the identification or that they both made an error either by chance or carelessness, or because some property of the method led both to make the error. Further, **most verification testing in crime laboratories is non-blind, which permits contamination and bias to reduce the chances of detecting errors**. Crime laboratories closely guard and do not publish results on the number of verifications they do, the number of those that produced different conclusions, how those differences were resolved and whether the differences are resolved in ways that reduce errors. The extent to which errors are reduced by current practice is simply unknown.

Id. at 97 (internal citation omitted). The article further exposes the flaw in the logic that skilled examiners do not make errors when there is a lack of standardization in the training and experience required to be an examiner, further noting that the three FBI examiners who concurred in the misidentification of the Madrid bomber were among the most senior, most experienced and most trained at the FBI. Id.

Hickman testified that there is no standard in the United States for how many points you have to match to make an identification but he follows a personally standard of "usually, eight." R. 281, ll. 8-12. He claimed that he follows the ACE-V methodology. R. 252, ll. 5-24. However, Hickman said that he does not conduct technical procedures under any clearly defined or written policies and procedures. R. 249, l. 24 – 250, l. 4; R. 252, l. 25 – 253, l. 6. He does not follow the Scientific Working Group on Friction Ridge Analysis, Study and Technology ("SWGFAST") guidelines, explaining that there is no requirement that he do so. R. 251, l. 12 – 252, l. 1; R. 297, l. 25 – 298, ll. 4-16. When asked to explain the numeric scores next to the twenty potential matches on the AFIS report, Hickman said that he had "no earthly idea" what those scores are based upon. Yet, he agreed with the solicitor that "the computer can generate a

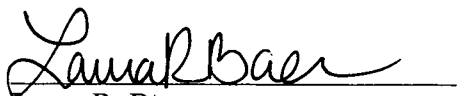
most likely score significantly separating the other possible [matches] that it returned." R. 324, l. 11 – 325, l. 25; R. 333, l. 21 – 334, l. 4.

Hickman originally said that every examination is validated by another examiner and indicated "[i]f he doesn't agree with me, there's no identification." R. 250, l. 22 – 251, l. 5; R. 253, ll. 7-11. However, he later explained the difference between a blind and non-blind verification, only the former of which involves a complete and independent examination. R. 308, l. 19 – 309, l. 3. Hickman said: "Most of the time, they go ahead and -- most of the examiners will go ahead and examine everything, but in this particular -- the way we do it is they just examine the one print." R. 279, ll. 4-7. Though he would not give a definitive response, Hickman "believed" that Glenn Ross conducted a non-blind verification of his results in this case. R. 308, ll. 15-18; R. 309, ll. 4-15. No report is ever generated by the verifying examiner. R. 309, ll. 16-17; R. 326, l. 23 – 327, l. 5. Hickman averred that his work has never been disagreed with on review and that he has never misidentified anyone. R. 309, l. 22 – 310, l. 3; R. 317, ll. 11-13.

Respectfully, Hickman has never been subject to a modern proficiency test to determine if his methods and conclusions are reliable. The verification process used was non-blind, increasing the chance of bias to reach the same conclusion. The jury was falsely led to believe that Hickman's analysis was infallible. Thus, under the facts of this case, the trial judge erred in failing to exclude Hickman's testimony. The admission of the testimony allowed the jury to consider unreliable evidence from an unqualified "expert." Lawson is accordingly entitled to a new trial.

CONCLUSION

Based on the foregoing, Appellant Johnnie Lee Lawson respectfully requests that this Court reverse his conviction and grant him a new trial.



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 10th day of April, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

April 10, 2017

Laura R. Baer
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589