

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Clarendon County

Honorable Roger M. Young, Circuit Court Judge

RECEIVED
OCT 27 2017
SC Court of Appeals

THE STATE,

RESPONDENT,

v.

CHAD MORRIS,

APPELLANT

APPELLATE CASE NO 2016-001713

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court commit reversible error by admitting improper lay witness opinion testimony as to the miles per hour speed lay witnesses believed Appellant's boat was traveling at the time of the fatal collision when the lay witnesses lacked the necessary skills, training, and experience to accurately estimate the speed of Appellant's boat at night?

STATEMENT OF THE CASE

On September 11, 2014, the Clarendon County Grand Jury indicted Appellant Chad Morris for one count of reckless homicide by operation of a boat and one count of failure of a water craft operator to render assistance in an accident resulting in death. R. ____.

On July 11-15, 2016, Appellant proceeded to trial before the Honorable Roger Young and a jury. Tr. 1. Shaun Kent represented Appellant, and Assistant Solicitor Chris Durant represented the State. The jury found Appellant not guilty of reckless homicide by operation of a boat, but guilty of the lesser included offense of neglect homicide by operation of a boat and guilty of failing to render assistance in an accident resulting in death. Tr. 700, l. 21 – 701, l. 13. The trial court sentenced Appellant to five years imprisonment on the failure to render assistance charge and thirty days on the negligent homicide conviction. Tr. 721, ll. 1-12.

ARGUMENT

Did the trial court commit reversible error by admitting improper lay witness opinion testimony as to the miles per hour speed lay witnesses believed Appellant's boat was traveling at the time of the fatal collision when the lay witnesses lacked the necessary skills, training, and experience to accurately estimate the speed of Appellant's boat at night?

Relevant Facts

Appellant's convictions stem from a fatal boating accident on Lake Marion that occurred in the early morning hours of July 4, 2014. Tr. 78, l. 13 – 84, l. 15. That night, Appellant was driving a bass boat on Lake Marion in Clarendon County. *Id.* His friends, Jessica Long and Frank Card were riding with him in the boat. Tr. 492, l. 1 – 495, l. 7. Other friends of Appellant, Gregg Mains and his wife Lori Puckett, were following Appellant in their boat. *Id.*

At approximately 12:30 a.m., Appellant's boat was heading away from area known as Scarborough's landing. Tr. 415, l. 25 – 417, l. 16. Hailey Bordeaux, Stephen Stafford, Justin Cromer, and Caroline Cromer were also on Lake Marion that night in Stafford's bass boat. Tr. 117, l. 22 – 123, l. 25. The group of friends had planned a lake weekend at Cromer's lake house. Earlier in the night, after consuming several beers the Cromers, Stafford, and Bordeaux decided to put Cromer's boat in the water. *Id.*

At the time of the collision, Cromer's boat was floating in the middle of the lake with their engine off. Tr. 124, l. 1 – 125, l. 21. Those in Appellant's boat claimed Cromer's boat's nighttime running lights were off. Tr. 607, l. 22 – 611, l. 8. Appellant's bass boat struck in the right front bow of Cromer's boat. *Id.* Caroline Cromer, Justin Cromer, and Stafford were all thrown from the boat. Bordeaux was not and tragically sustained fatal blunt force trauma injuries to her head. Tr. 354, l. 23 – 355, l. 4.

Appellant stopped his boat immediately after the collision. Tr. 607, l. 22 – 615, l. 16. Someone in Appellant's boat, most likely Jessica Long, and those from Cromer's boat began exchanging recriminations, each blaming the other for the collision. Tr. 236, l. 5 – 239, l. 24. After a few minutes at the collision scene, Appellant – fearing that his boat was damaged and taking on water – left the area and headed towards the nearest known sand bar near Long's family's lake house. Tr. 610, l. 25 – 611, l. 8.

By the time Appellant left, other boats had arrived at the accident and were assisting with Bordeaux's treatment. Tr. 607, l. 22 – 615, l. 16. Several people who were on nearby docks also drove their boats to the collision scene and attempted render aid. Bordeaux was taken in pontoon boat to a nearby boat landing where emergency medical technicians began CPR. Tr. 263, l. 2 – 265, l. 7.

While Appellant was consulting with a member of Long's family about the accident, a game warden drove by in his boat. Tr. 611, ll. 6 - 24. The warden initially drove past the area, but eventually saw people on the lake shore attempting to get his attention and pulled around to meet with Appellant. *Id.* After checking on the condition of his boat, Appellant followed the DNR officer to a nearby boat landing. Tr. 611, l. 16 – 613, l. 7.

Appellant passed two field sobriety tests and voluntarily answered all of law enforcement's questions. Tr. 501, l. 6 – 502, l. 1. Appellant was adamant that he did not see Cromer's boat and that Cromer's boat did not have its nighttime running lights on. Tr. 610, ll. 1 – 22. Appellant estimated he was traveling approximately twenty miles per hour at the time of the collision. Tr. 614, ll. 16 – 22. Appellant explained that he stayed at the accident scene following the collision in an effort to render aid, but that he left after the people from Cromer's

boat started threatening him and because he feared that his boat was damaged in the collision. Tr. 616, l. 3 – 617, l. 15.

Appellant's Trial

At trial the State averred that Petitioner acted recklessly, not merely negligently, when driving his boat at a high rate of speed on the night of the incident. Tr. 106, l. 12 – 111, l. 8. The State alleged that Appellant failed to render aid and provide insurance information as required by law. *Id.* The State further contended that Appellant's failure to remain in the area after the collision manifested an indifference to human and to the consequences of his actions. *Id.*

The defense countered that Appellant was— at the most — negligent. The defense argued extensively that, unlike roads, there is no speed limit on Lake Marion. Tr. 111, l. 10 – 116, l. 1. Further, the defense argued that Appellant discharged his duties under the law by stopping after the collision and that Appellant only left once help arrived for Cromer's boat and because Appellant feared that his boat was taking on water. *Id.*

The testimony of independent witnesses (i.e. those not either in Appellant's boat or Bordeaux's boat) was essential to the State's case. There were several people who testified that they witnessed the collision. Despite it being dark at the time of the collision, many of these people claimed that they were able to accurately estimate that Appellant was traveling between thirty-five and sixty miles per hour based solely on the sound of the boat's engine and the appearance of the boat's trim. R. 80, l. 7 – 81, l. 21; R. 211, l. 11 – 212, l. 14.

Prior to trial, defense counsel objected to these witnesses testifying as to the miles per hour speed they believed Appellant was traveling at the time of the collision. Tr. 55, l. 1 – 59, l. 10. Defense counsel reasoned that a lay witness did not have the necessary training, experience, or skill to visually estimate a boat's speed at night with accuracy. *Id.* Defense counsel also

contended that lay witness opinion testimony as to Appellant's potential speed was unduly prejudicial and of only marginal probative value as to whether Appellant was reckless or merely negligent because there is no legal speed limit on the lake. *Id.*

The State posited that the witnesses were qualified by virtue of having witnessed the accident and from their own individual experiences with boats. *Id.* The trial court agreed with the State and found the following lay witnesses' opinion testimony on the miles per hour speed of Appellant's boat admissible and not unfairly prejudicial. Tr. 88, l. 9 – 89, l. 12.

Jonathan Waynick's Testimony

Waynick was standing on a friend's dock when he first saw a boat heading towards Scarborough's Landing about ten minutes before the collision. Tr. 194, l. 9 - 197, l. 21. Waynick testified that, based on his experience with bass boats, this unknown boat was traveling approximately forty to fifty miles per hour. *Id.*

Waynick testified that the same bass boat collided with Cromer's stationary boat about as the boat was returning from Scarborough's Landing. Tr. 199, l. 2 – 203, l. 7. He estimated that the boat was going approximately the same speed it was when it passed him the first time. Waynick further believed – based on seeing Morris' nighttime running lights – that Morris' boat flew roughly fifteen to twenty feet in the air after impacting Bordeaux's boat. *Id.*

Stephen Stafford's Testimony

Stafford was at his family's lake house on the night of the collision. Stafford's family owned a bass boat that he frequently drove. He was on his bass boat at the time of collision. Stafford first saw Appellant's boat as it passed him from a couple hundred yards away in the dark. Tr. 79, l. 21 – 80, l. 16. Stafford estimated, based on his experience that Appellant was traveling at around fifty to sixty miles per hour. *Id.*

On cross-examination, Stafford admitted that he only saw Appellant's boat briefly and from a considerable distance in the middle of the night on a largely unlit lake. Tr. 82, l. 23 – 84, l. 15. Stafford further conceded that he had no formal training relating to speed visualization. *Id.* Finally, Stafford reluctantly admitted that he had at least six beers that night and that he could not see the shoreline of the lake so to compare it with Appellant's speed. *Id.*

Testimony of Zanne Morris

On the night of the collision Morris watched Appellant's boat drive past him on its way to Scarborough's Landing. Morris estimated, based on his experience pulling his children on an inflatable tube that Appellant was going faster than thirty-five miles per hour. Morris could not provide a more exact speed. Tr. 211, l. 15 – 213, l. 17.

Discussion

The trial court erred by ruling that Waynick, Stafford, and Morris were qualified to give lay opinion testimony on the mile per hour speed they believed Appellant's boat was traveling either immediately before or during the collision. Speed calculations, as a sub-field of accident reconstruction, require a knowledge, skill, experience, training, or education in order for the opinions to be admissible. None of these gentlemen had the requisite background and their opinion testimony on the mile per hour speed of Appellant's boat should have been ruled inadmissible as improper lay witness opinion testimony.

The South Carolina Rules of Evidence allow a party to present opinion or inference testimony regarding "an ultimate issue to be decided by the trier of fact" if a proper foundation for admitting the testimony has been established. Rule 704, SCRE; *see also State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001) (holding that opinion may be offered on ultimate issue only where witness is otherwise qualified).

However, lay witness opinion testimony is only admissible when:

[T]he witness' testimony in the form of opinions or inferences is limited to those opinions or inferences *which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.*

Rule 701, SCRE (*emphasis added*). The “perception” of a lay witness is limited to that witness’ first hand observations and personal knowledge regarding the subject of his testimony. *State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (1996) (holding that lay witness’ opinion that murder victim may have stolen defendant’s crack cocaine prior to being killed was admissible because it was rationally related to events that she witnessed and to her knowledge of the two men.).

An example of admissible lay witness identifications can be found in *State v. Fripp*, 396 S.C. 434, 721 S.E.2d 465 (Ct. App. 2012). On appeal, Fripp challenged the trial court’s admission of testimony from two store employees identifying him as the burglar in the store’s surveillance footage. The Court of Appeals affirmed the trial court’s admission of the employees’ testimony reasoning that the requirements of Rule 701, SCRE, had been satisfied.

Unlike the three men in Appellant’s case, both employees testified that they “knew Fripp ‘very well’ and “saw him all the time.” 396 S.C. at 438-39, 721 S.E.2d at 467. One of the employees also knew Fripp through his family. Both recognized a very distinctive blue shirt that they frequently saw Fripp wear when he patronized the store he was convicted of burglarizing. Furthermore, the Court held that the identifications were “helpful in determining a key fact in issue - whether Fripp was the person depicted on the videotape.” *Id.*

In upholding the admission of the employee’s identification, the Court of Appeals approvingly quoted the Fourth Circuit:

[T]estimony by those who knew defendants over a period of time and in a variety of circumstances offers to the jury a perspective it could not acquire in its limited exposure to defendants. Human features develop in the mind's eye over time. These witnesses had interacted with defendants in a way the jury could not, and in natural settings that gave them a greater appreciation of defendants' normal appearance. Thus, their testimony provided the jury with the opinion of those whose exposure was not limited to three days in a sterile courtroom setting.

This fuller perspective is especially helpful where, as here, the photographs used for identification are less than clear.

Fripp, 396 S.C. at 440, 721 S.E.2d at 468 *quoting* *U.S. v. Allen*, 787 F.2d 933, 936 (4th Cir. 1986) *vacated on other grounds*, 479 U.S. 1077, 107 S. Ct. 1271(1987) (quotations omitted).

Here, three men, none of whom could determine the approximate distance that they watched Appellant's boat traveled, opined that Appellant was traveling somewhere between thirty-five and sixty miles per hour. Tr. 79, l. 21 – 80, l. 18; Tr. 194, l. 9 - 197, l. 21; Tr. 211, l. 15 – 213, l. 17; *see 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).

While these gentlemen may have had experience driving boats, they manifestly did not have experience in calculating the miles per hour speed of a boat based on their observations. *State v. Ellis*, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001) (officer qualified as expert in crime scene processing and fingerprinting was qualified to testify to measurements taken at murder scene, to recovery of shell casings, and to identification of blood stains, but was not qualified to testify as expert with respect to crime scene reconstruction); *see also Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 764 S.E.2d 249 (Ct. App. 2014) (volunteer fire chief's testimony that

fire at issue was unintentional did not consist of permissible perceptions from a lay witness, *even though chief extinguished fire*; statements were opinions that required special knowledge, skill, experience, or training to be properly made)(*emphasis added*).

Allowing these men to opine that Appellant was traveling potentially in excess of fifty miles per hour in the middle of the night could not have been harmless error as the central issue at trial was whether Appellant was safely operating his boat. *State v. Grampus*, 288 S.C. 395, 343 S.E.2d 26 (1986) *abrogated on other grounds by State v. Easler*, 327 S.C. 121, 489 S.E.2d 617 (1997). Therefore, the trial court's admission of these gentlemen's improper lay opinion testimony mandates that Appellant receive a new trial.

CONCLUSION

By reason of the foregoing arguments, Appellant's conviction should be reversed and this case remanded to the Clarendon County Court of General Sessions for a new trial.

A handwritten signature in black ink, appearing to read "Taylor D Gilliam", written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of October, 2017.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Honorable Roger M. Young, Circuit Court Judge

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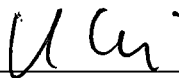
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Chad Morris, #368942, at Wateree River Correctional Institution, PO Box 189, Rembert, SC 29128-0189, this 27th day of October, 2017.



Taylor D Gilliam
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of October, 2017.

 (L.S)

Notary Public for South Carolina
My Commission Expires: 5/12/2025