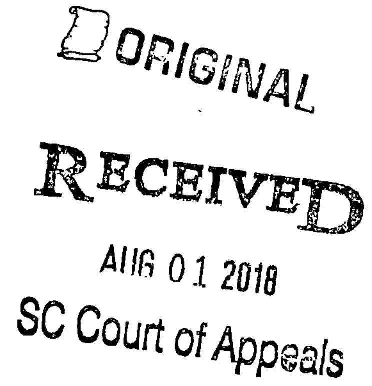
STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Robert E. Hood, Circuit Court Judge



THE STATE,

RESPONDENT,

V.

MIMI JOE MARSHALL,

APPELLANT.

APPELLATE CASE NO. 2017-002329

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STATEMENT OF ISSUES ON APPEAL

I. Whether the trial court erred in refusing to charge the jury on the law of involuntary manslaughter where there was evidence tending to mitigate the offense of murder?

II. Whether the trial court erred in admitting the testimony of Timothy Lee, a crime scene investigator, on crucial blood evidence where he was not qualified as an expert in blood spatter evidence or crime scene reconstruction, and where the evidence failed to satisfy three of the four factors proffered in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), and was thus not reliable?

III. Whether the trial court erred in admitting the testimony of Stan Richards, an expert in blood spatter, on crucial blood evidence where the evidence did not satisfy three of the four factors proffered in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), and where the evidence was unreliable.

STATEMENT OF FACTS

On the morning of Saturday, August 16, 2015, family members discovered Doris Marshall deceased from a wound to the head in the trailer she shared with her husband, the Appellant. Tr. 83, l. 25; Tr. 84, ll. 1-3. Appellant's nephew, Robert Marshall, Jr., had touched off a search by calling the police and other family members after Appellant had shown up, "heartbroken," to the home which Robert Marshall, Jr. shared with his father, Appellant's brother, in the wee hours of the morning. Tr. 115, ll. 16-17. There Appellant confessed that he had "messed up," and indicated that he had shot and killed the decedent. Tr. 116, ll. 5-9. After family members forced entry into Appellant and decedent's home, police responded and began developing their investigation. Tr. 388, ll. 3-5; Tr. 388, ll. 17-19. As the morning hours waned, police developed information that Appellant was at a local hangout called "Tony's Lounge." Tr. 307, l. 9 – Tr. 308, l. 24. After confirming his location, police detained Appellant based on the information discovered at the scene and provided by Robert Marshall, Jr. earlier in the day, as well as accounts from family members at the trailer. Tr. 519, ll. 21-22.

After his detention and transportation to the Richland County Sheriff's Office on August 16, 2015, Appellant gave a statement to Investigator Joe Clarke, of the Richland County Sheriff's Department, in which he confessed to the unintentional killing of his longtime wife. State's Exhibit No. 3. Specifically, Clarke testified that Appellant claimed he had his gun in the front room of the trailer because the trailer park was an unstable place, that the decedent had "come at him," that the decedent grabbed the gun, and "it went up and it went off." Tr. 540, ll. 15-17. Finding Appellant's claims unpersuasive, RCSD served Appellant with arrest warrants and he was taken to the Richland County Detention Center. Tr. 553, ll. 9-12.

Thereafter, on December 15, 2015, a Richland County grand jury indicted Appellant for murder and felon in possession of a firearm. R.__. Appellant pled guilty to the weapons offense, and on October 30, 2017, was tried before the Honorable Robert Hood and a jury for murder. Tr. 1. April Sampson, Sandra Moser, and Samuel McGlothin represented the State. Tr. 1. Alicia Goode, Stephen Krzyston, and Lucas Hawks represented the Appellant. Tr. 1.

During trial, the State's theory centered around what it contended was the factual impossibility of Appellant's claims. In support of that contention the State called two police witnesses that testified to "blood spatter evidence," Timothy Lee and Stan Richards. The assistant solicitors repeatedly elicited testimony and argued that Appellant's contentions to police contradicted what blood spatter evidence showed to be true. Tr. 86, l. 20 – Tr. 88, l. 5; Tr. 89, ll. 5-14; Tr. 541, ll. 5-10; Tr. 642, l. 23 - Tr. 643, l. 5; Tr. 651, l. 17; Tr. 652, ll. 2-7; Tr. 652, ll. 8-9; Tr. 652, ll. 11-13. By contrast, defense counsel argued that the physical evidence was indicative of an unintentional shooting, that the State was wrong in its analysis of the physical evidence, and that there was no evidence of malice aforethought. Tr. 94, ll. 5-12; Tr. 667, l. 17 – Tr. 669, l. 10; Tr. 672, ll. 15-19; Tr. 673, l. 24 – Tr. 674, l. 10. Subsequent to trial, the jury convicted Appellant of murder. Tr. 702, l. 23 – Tr. 705, l. 14. Judge Hood sentenced Appellant to life without the possibility of parole for the murder and a concurrent five-year term on the weapon charge. Tr. 714, ll. 9-15. This appeal follows.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. See e.g., State v. Nance, 393 S.C. 289, 712 S.E.2d 446 (2011); State v. Baccus, 367 S.C. 41, 625 S.E.2d 215 (2006). Thus, the trial court's factual findings are binding on the appellate court unless unsupported by the evidence, clearly erroneous, or controlled by an error of law. See e.g., State v. Winkler, 388 S.C. 574, 698 S.E.2d 596 (2010); State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000); State v. Williams, 326 S.C. 130, 4858 S.E.2d 99 (1997). On appeal, the reviewing court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. State v. Parker, 391 S.C. 606, 707 S.E.2d 799 (2011).

I. The trial court erred in refusing to charge the jury on the law of involuntary manslaughter when there was evidence in the record to support the charge.

On August 16, 2015, after his arrest, Appellant gave a statement to investigator Joe Clarke of the Richland County Sheriff's Department. When called during the third day of trial, Joe Clarke testified to the substance of Appellant's statement, and the assistant solicitor moved, without objection, to admit the Appellant's statement to police. Tr. 521, ll. 20-21; State's Exhibit No. 3. Specifically, Clarke testified that Appellant claimed he had his gun in the front room of the trailer because the trailer park was an unstable place, that the decedent had "come at him," that the decedent grabbed the gun, and "it went up and it went off." Tr. 540, ll. 15-17.

During the charging conference, the trial court incorrectly noted that Appellant's primary hurdle in obtaining an involuntary manslaughter charge was the Supreme Court's decision in State v. Reese, 370 S.C. 1, 633 S.E.2d 898 (2006). Specifically, the trial court argued, as in Reese, that the felonious act of "pointing and presenting," which the trial court had inferred from the testimony at large in this matter, precluded it from instructing on the law of involuntary manslaughter. Tr. 626, ll. 6-10; Tr. 626, ll. 22-25; Tr. 627, ll. 5-8.

Defense counsel Hawks argued that Appellant's statement to Joe Clarke overcame the trial court's concerns and that Appellant's conduct did not bar a charge on involuntary manslaughter. Tr. 627, ll. 9-11. The trial court ruled it would not charge the jury on the law of involuntary manslaughter. Tr. 627, ll. 12-16. Defense counsel continued to argue for the charge by citing to State v. Burriss, 334 S.C. 256, 513 S.E.2d 104 (1999), and by drawing the trial court's attention to the Appellant's statement. Tr. 628, ll. 13-14; Tr. 628, ll. 24-25. In continuing to refuse the charge incorrectly, the trial court clarified its ruling by asserting that defense counsel misunderstood the

case law, and by incorrectly asserting that there was no evidence on the record that Appellant had armed himself in self-defense. Tr. 628, ll. 15-16; Tr. 628, ll. 21-23.

Argument

The law to be charged must be determined from the evidence presented at trial. State v. Crosby, 355 S.C. 47, 51, 584 S.E.2d 110, 112 (2003) (internal citations omitted). A trial court commits reversible error where it fails to give a requested charge on an issue raised by the evidence. State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 485 (Ct. App. 2010) (internal citations omitted). Involuntary manslaughter is defined as either (1) the killing of another without malice and unintentionally, but while one is engaged in the commission of some unlawful act not amounting to a felony and not naturally tending to cause the death or great bodily harm, or (2) the killing of another without malice and unintentionally, but while one is acting lawfully with reckless disregard of the safety of others. Burris, 513 S.E.2d at 109. Trial courts may refuse to charge a jury on the offense of involuntary manslaughter only where it very clearly appears that there is **no evidence whatsoever** tending to reduce the crime from murder to manslaughter. See Burriss, 513 S.E.2d at 109 (internal citations omitted) (emphasis added).

The court in Burriss found that a person can be acting lawfully, even if he is in unlawful possession of a weapon if he was entitled to arm himself in self-defense at the time of the shooting. Id. The Burriss court went on to find that where the circumstances of a case show a defendant was entitled to arm himself in self-defense when the gun went off, he will be entitled to a charge of involuntary manslaughter. See Burriss, 513 S.E.2d at 109. Further, the court found that the negligent handling of a loaded gun will also support a finding of involuntary manslaughter. Id.

Our Supreme Court addressed an analogous case in the matter of State v. Crosby, 355 S.C. 47, 584 S.E.2d 110 (2003). In that case, the appellant-petitioner was convicted of voluntary

manslaughter in a shooting death. Crosby, 584 S.E.2d at 111. Appellant in Crosby testified that he was attempting to break up a fight when the decedent, who was the boyfriend of one of the fight's participants, became enraged at appellant for touching the participant and charged at the appellant. Id. Thereafter, appellant in Crosby testified that he saw the decedent charging him with his hand behind his back, and in response, he went in his pocket, pulled out his gun, closed his eyes, and pulled the trigger without knowing he had pulled the trigger. Id. Specifically, appellant in Crosby testified "I closed my eyes and pulled the trigger. I didn't even know I had pulled the trigger. I was scared. I seen my life in danger. I did not know how to react." Id.

On appeal, this Court affirmed the conviction based on the appellant's testimony that he intentionally pulled out his gun, closed his eyes, and "pulled the trigger." Crosby 584 S.E.2d at 112 citing State v. Crosby, 348 S.C. 387, 395, 559 S.E.2d 352, 357 (Ct. App. 2001). However, our Supreme Court overturned that decision finding that this Court had impermissibly focused on some but not all of the petitioner in Crosby's testimony. Crosby, 584 S.E.2d at 112. Specifically, the Supreme Court found there was "ample evidence" from which the jury could have found that petitioner did not intentionally discharge the weapon. Id.

In the instant case, there is ample evidence in the record from which the jury could have concluded that Appellant killed decedent while acting lawfully in self-defense, but with reckless disregard for the safety of decedent when the gun was unintentionally fired. Specifically, Joe Clarke testified that Appellant told him he kept the shotgun in the house because the trailer park was unstable. Tr. 540, ll. 15-17. Clarke testified that when he pressed Appellant about becoming armed, Appellant claimed he had armed himself to check out around the trailer, that the decedent had been coming in the door at the same time, that the two of them began "talking at each other," that the decedent had an attitude, that she had come at him, that she grabbed the gun and as she

did it went up, and it went off, instantly killing her. Tr. 540, ll. 15-17; Tr. 542, l. 22 – Tr. 543, l. 3; State's Exhibit No. 3.

Clarke further testified that Appellant never admitted to intentionally pointing the gun at the decedent, nor did he ever admit to intentionally pulling the trigger. Tr. 543, l. 21. Specifically, Clarke testified that Appellant claimed that the decedent grabbed the gun, and "it went up and it went off." Tr. 540, ll. 15-17. Further evidence is in the record which establishes that the gun was in such an unsafe condition that it could have discharged without the trigger being pulled. Tr. 593, l. 17 – Tr. 594, l. 7. Lastly, additional evidence is in the record to indicate that Appellant was "heartbroken" and that he had claimed to family members that he had "messed up." Tr. 115, ll. 16-17; Tr. 116, ll. 5-9.

The trial court's reliance on State v. Reese, 370 S.C. 1, 633 S.E.2d 898 (2006), is misplaced. In Reese, the evidence showed that appellant armed himself to commit suicide. Reese, 633 S.E.2d at 900. The appellant in Reese claimed that he was interchangeably waiving the gun back and forth, between himself and decedent, as the decedent approached him to de-escalate his tendency towards suicide. Id. Thus, the facts in Reese differ because appellant in Reese did not arm himself in self-defense, and thus was committing an unlawful act when he intentionally pointed or presented the weapon at the decedent in that case. However, in the instant case like in Burriss and Crosby, evidence crucially exists from which the jury could have found that Appellant lawfully armed himself in self-defense and that the shooting was unintentional. Thus, the trial court erred by denying defense counsel's request for an involuntary manslaughter charge and instead should have granted defense counsel's request. Based on the trial court's erroneous refusal to charge the jury on the law of involuntary manslaughter, this Court should reverse Appellant's conviction for murder, and remand the case for a new trial.

II. <u>The trial court erred in admitting the testimony of Timothy Lee, an expert in crime scene investigation, on crucial blood spatter evidence because he was not qualified as an expert in blood spatter evidence or crime scene reconstruction, and because the evidence failed to satisfy three of the four factors proffered in *State v. Council*, 335 S.C. 1, 515 S.E.2 508 (1999), and was thus not reliable.</u>

Motion and Proffer

As the State prepared to call crime scene investigator Timothy Lee, Defense counsel Krzyston challenged the witness and argued that the State had not met the reliability requirements proffered by <u>White</u>, <u>Jones</u>, and Rule 702, SCRE. Tr. 159, ll. 7-17. The solicitor responded by noting her intent to offer Lee as an expert in "crime scene processing," and that under "<u>Johns</u>," because of the testimony's scientific nature, she did not have to conduct an *in camera* hearing to establish the witness's qualification and reliability. Tr. 159, ll.18-21. Defense counsel Krzyston argued that regardless of the scientific nature of the testimony, the State had the burden of fulfilling the reliability requirements proffered by <u>Jones</u> Tr. 160, ll. 14-17.

During the State's *in camera voir dire* it was established that Lee was certified through the International Association for Identification (IAI) for crime scene investigation, but was not certified as a crime scene analyst (CCSA). Tr. 163, l. 22 - Tr. 164, l. 3. Further, it was established that Lee had previously been admitted as an expert in crime scene processing only eight times in his ten-year tour with the Crime Scene Unit. Tr. 164, ll. 4-8. There was no inquiry regarding any of the <u>Jones</u> factors as illustrated in <u>Council</u> and <u>Ford</u>.

During Appellant's *voir dire*, Lee asserted that he could testify to "blood analysis." Tr. 168, ll. 23-24; Tr. 168, l. 25 – Tr. 170, l. 2. Defense counsel specifically asked, "And are you going

to offer your opinion on what the blood spatter shows?" Tr. 169, ll. 3-4. Lee testified that he could if queried on the subject of blood spatter. Tr. 169, l. 5; Tr. 169, l. 7.

Defense counsel then established that Lee did not do any "tests" when "doing the blood spatter," and that he did not photograph the blood in question with scale, a reference to known measurement standards placed within the focus of the evidentiary photograph. Tr. 169, l. 21 - Tr. 169, l. 25. Further, defense counsel established that Lee did not follow department blood spatter protocols in failing to conduct road-mapping or take measurements of the room in question. Tr. 170, l. 1 – Tr. 170, l. 3.

Turning his attention to the trial court, defense counsel argued that the State could not fulfill the necessary reliability requirements under "Jones." Tr. 170, ll. 17-21. The solicitor argued that they were not offering Lee as an expert in "blood spatter pattern [or] bloodstain pattern," and were only offering him as an expert in the area of crime scene processing. Tr. 171, ll. 3-14. Defense counsel did not object to Lee's qualification as an expert in crime scene processing. Tr. 172, ll. 11-15. Thereafter, the trial court found him qualified only as an expert in crime scene processing. Tr. 178, ll. 9-25.

Testimony Before the Jury

On direct examination, the State eventually began to address the positioning of the decedent's body. Tr. 194, ll. 5-11. The State, begging Lee's opinion asked, "Why is this photo important to you?" Tr. 194, ll. 11-15. Lee testified, "...it shows the limited amount of blood staining over here. And when you look over here, you see more staining that's heavier, so that gives us an indication that a blood letting occurred within –." Tr. 194, ll. 11-15.

Objection and Argument

After objection, defense counsel argued that Lee had moved "significantly beyond the scope" of his expertise and had not been qualified under Rule 702, SCRE and Jones. Tr. 194, l. 23 - Tr. 195, l. 4. The State responded, arguing that the decedent's location "within the room" was important to the investigation, as were why "certain things" were collected. Tr. 195, ll. 5-8. Without addressing the merits of defense counsel's argument, the solicitor continued that Lee was "merely talking about **how he knew where she was,**" and was going to go into "**if there was any evidence that she had been moved.**" Tr. 195, ll. 8-11. Defense counsel argued that such testimony was "squarely within the realm" of blood spatter analysis, that Lee's qualification did not entitle him to opine on blood spatter, and that no reliability inquiry under Rule 702, SCRE and Jones had taken place. Tr. 195, ll. 12-15. Further, defense counsel argued that Lee had not complied with his department's protocols or with commonly accepted practices within the field. Tr. 198, ll. 15-24.

Court's Ruling

The trial judge ultimately ruled Lee could give his opinion concerning the position of the decedent's body. Specifically, the trial court ruled that Lee was certified[1], and that blood spatter analysis was "completely and totally within his expertise." Tr. 202, ll. 21-23. After the judge announced his ruling, Appellant renewed his objection.

Testimony Continued

In front of the jury, the court notably failed to expand the scope of Lee's expertise from crime scene investigation to crime scene reconstruction. Tr. 205, ll. 1-5. When the State asked Lee about an unidentified photograph, Lee testified that the photo gave him "an indication of where an

[1] The trial court was incorrect regarding the matter of Lee's certification. Lee testified that he was a certified crime scene investigator, but had not completed the criteria for certification as a crime scene analyst. Tr. 163, l. 22 - Tr. 164, l. 3.

injury may have occurred," and then cited the presence and location of blood as his basis for so determining. Tr. 205, ll. 14-17. The solicitor continued to elicit testimony on the subject of the decedent's positioning. Tr. 207, l. 4; Tr. 207, ll. 5-11; Tr. 207, ll. 15-17; Tr. 207, l. 20 - Tr. 208, l. 1; Tr. 208, ll. 3-6; Tr. 210, ll. 3-5.

Cross-Examination

On cross-examination, defense counsel established that no measurements were taken at the crime scene, that the photographs taken by Lee "might have been" over or underexposed, and that over or underexposure could lead to inaccurate depiction of probative evidence. Tr. 223, ll. 12-13; Tr. 228, ll. 23-24. Lee also admitted he had not complied with the technical requirements for the prescribed photographic documentation process, and that no stringing, one of two available empirical methodologies, had been done to determine an area of convergence, a reference to the area in which a blood-letting originated. Tr. 235, ll. 9-22. Further, Tr. 238, ll. 9-13. Def. Exhibit 12.

The State's Closing Argument

In closing statements, the solicitor argued that the Appellant's statement to police was false based on the analysis of blood spatter evidence presented, and that as the decedent entered the trailer she "sat down to relax, [and] didn't even have time to untie her shoes," when the Defendant sprung into "deadly action." Tr. 652, I. 11-13; Tr. 643, ll. 6-22. Further, the solicitor highlighted the testimony of Lee and Stan Richards; a crime scene analyst discussed *infra*. Tr. 650, ll. 23-24. Specifically, she claimed that Lee and Richards had discussed how "dynamic" the scene was, how there was a bloodletting of "horrific proportions," and "that it was so clear where everything happened [Lee and Richards] didn't need to do anything." Tr. 651, ll. 12-14; Tr. 651, ll. 14-15. The solicitor argued that Lee and Richards "had told [the jury] about all the stains," and continued

that "He" had talked to the jury about the blood on the scene, and that "He" had discussed that there was no blood by the door or on the end of the couch. Tr. 651, l. 17; Tr. 652, ll. 2-7. The solicitor also argued that "He talked to you about if she would have been shot by the door, there would be blood there." Tr. 652, ll. 8-9. In concluding, the solicitor argued, "How did all the blood end up on the couch and all above where the couch is if she's shot over here? It just doesn't make common sense, and he explained all that to you…" Tr. 652, ll. 11-13. Importantly noted here is the fact that the solicitor never clarified for the jury which witness she was referring to when saying, "He."

Discussion

"Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. Rule 704, SCRE. However, an expert's opinion may not exceed the scope of his expertise. State v. Ellis, 345 S.C 175, 178, 547 S.E.2d 490, 491 (2001). In Ellis, the Supreme Court found reversible error where an expert, qualified only in crime scene reconstruction and fingerprint identification, offered an opinion on the positioning of the victim at the time of the shooting in question. The Supreme Court found the witness's testimony "exceeded the scope of his expertise" when he was permitted, over appellant's objection, to impart to the jury his conclusion, drawn from measurements and observations, regarding the location of the decedent and the position of his body vis-a-vie the bicycle at the time of shooting. Ellis, 547 S.E.2d at 491. The Court further found that, given his qualifications, the witness could permissibly testify to measurements taken at the scene, the recovery of shell casings, and the identification of blood stains. Id. The Supreme Court went on to conclude that an "officer's improper opinion which goes to the heart of the case is not harmless."

Id. (internal citations omitted). Lastly, the Court held the error present, was compounded when the solicitor relied upon the improper opinion testimony throughout his closing arguments. Id.

In the instant case, like in Ellis, the trial court qualified Lee as an expert in "the area of crime scene processing." Tr. 178, ll. 18-19. Despite representations to the contrary, the State went on to elicit gratuitous testimony regarding the decedent's positioning at the time of wound infliction. Tr. 194, ll. 11-15; Tr. 205, ll. 14-17; Tr. 207, l. 5 – Tr. 208, l. 6; Tr. 210, ll. 3-7. The Supreme Court's holding in Ellis makes clear that expert witnesses may not testify beyond the scope of their expertise. Ellis, 547 S.E.2d at 491. The trial court permitted Lee to testify on matters directly related to the interpretation of blood spatter, even though it never modified the scope of his qualification from an expert in "the area of crime scene processing" to expert in "the area of crime scene reconstruction," or "blood spatter interpretation" as is required under Ellis. Id. Tr. 204, l. 25 - Tr. 205, l. 5.

The failure to modify Lee's scope of qualification creates the same scenario as considered by our Supreme Court in Ellis. The trial court's error allowed Lee to testify not only to measurements taken at the scene, recovery of evidentiary items of interest, and identification of the existence of blood stains but also to his conclusions, impermissibly drawn from his visual observation, regarding the location of the decedent at the time of wound infliction. Id. The opinion testimony given by Lee regarding his interpretation of the blood spatter evidence goes beyond what the Supreme Court found permissible in Ellis given the scope of Lee's qualification as found by the trial court in the instant case. Id.

Further, the State's theory at trial crucially relied on the decedent's positioning at wound infliction, as informed by blood spatter evidence. As much is evidenced through the assistant solicitors' repeated focus on the issue. Specifically, the solicitor argued in opening that the blood

spatter evidence would indicate the decedent was sitting at the time of her shooting, and that the decedent couldn't have been shot consistent with Appellant's admissions to police. Tr. 86, l. 20 – Tr. 88, l. 5; Tr. 89, ll. 5-14. The solicitor also elicited the opinion of the lead police investigator, and in so doing bolstered the opinion of Lee and Stan Richards, discussed *infra*. Specifically, the lead investigator opined that he knew Appellant's contentions were not true "because the evidence did not support [them] in any way," and that the decedent had been sitting on the sofa where she was "shot and killed instantly." Tr. 541, ll. 5-10. Further, like in Ellis, the solicitor continued to focus on the evidence in closing. Tr. 642, l. 23 - Tr. 643, l. 5; Tr. 651, l. 17; Tr. 652, ll. 2-7; Tr. 652, ll. 8-9; Tr. 652, ll. 11-13. Thus, like in Ellis, Lee's testimony offered an opinion that was centrally woven into the case, open to close, and which impermissibly went to the ultimate question of whether the victim was shot consistent with Appellant or the State's theory.

The evidence fails three of four Council factors and is thus unreliable

In State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), our Supreme Court found scientific evidence was admissible only after the trial court makes findings under Rule 702, SCRE that (1) the evidence in question would assist the trier of fact; (2) the expert witness in question is qualified; (3) the underlying science is reliable as informed by the Jones standard; and (4) the probative value of the evidence outweighs the danger of unfair prejudice pursuant to a Rule 403 analysis. See Council, 515 S.E.2d at 518 (internal citations omitted). The court in Council added additional clarification by citing to State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990) (internal citations omitted), in enumerating that inquiry under Jones required trial courts to consider several factors, including (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved; (3) the quality control measures used to ensure reliability; and

(4) the consistency of the method with recognized scientific laws and procedures. Council, 515 S.E.2d at 517 (internal citations omitted).

The Supreme Court's holding in State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009), extended the holding in Council to all expert testimony. See White, 676 S.E.2d at 689. In so doing, the Court made clear that it did not distinguish "scientific knowledge" under State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), from experience-based knowledge, by finding that all expert testimony must satisfy the threshold requirements of Rule 702, SCRE and Council. Cf. White, 676 S.E.2d at 688 (finding the foundational reliability requirement for expert testimony does not lend itself to a one size fits all approach, and thus the factors enumerated in Council may in some instances serve no analytical purpose in evaluating nonscientific expert testimony). In establishing reliability as a central tenant of admissibility, the White Court held that "The 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 assessing the admissibility of expert testimony." Id. at 688. The Supreme Court continued,

> ...**The party offering the evidence must establish** that his witness has the necessary qualification in terms of "knowledge, skill, experience, training or education." Rule 702, SCRE. With respect to qualifications, a witness may satisfy the Rule 702 threshold yet the opponent may still challenge the amount or quality of the qualifications. It is in this latter context that the trial court properly concludes that 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. Turning to the reliability factor, a trial court may ultimately take the same approach, but **only after making a threshold determination** for purposes of admissibility.

White, 676 S.E.2d at 688 citing State v. Myers, 301 S.C. 251, 256, 391 S.E.2d 551, 554 (1990) (emphasis added). Further, White held that the trial court in the discharge of its gatekeeping role, "must **initially answer** the always present **threshold questions of qualification and reliability**." White 676 S.E.2d at 689 (emphasis added).

In the instant case, defense counsel specifically requested that the trial court fulfill its gatekeeping role as found by Council and its progeny. Tr. 159, ll. 7-17. Despite defense counsel's requests for gatekeeping under Jones, the inquiry conducted only addressed Lee's qualifications and never reached an inquiry on the threshold question of the methodological reliability of Lee's analysis. Specifically, the State offered no evidence, and the trial court did not enter findings upon any of the Jones factors concerning Lee's methodology, a mere visual inspection, in conducting his assessment of the blood spatter evidence. The state never offered any evidence, and the trial court never entered any findings regarding published and peer-reviewed opinions on the determination of an area of convergence utilizing only visual inspection. The State offered no evidence, and the trial court never entered any findings regarding the prior application of the means utilized, mere visual inspection, in determining the area of convergence. The State never offered any evidence, and the trial court never entered findings or inquired into whether the quality control measures utilized in assuring the methodology, mere visual inspection, were sufficient. Perhaps most importantly, the State offered no evidence, and the trial court entered no findings regarding the consistency of the method employed, mere visual inspection, with the recognized scientific laws and procedures regarding blood spatter evidence. Thus, the evidence was unreliable and the Court's decision to admit Lee's opinion was based not on evidence in the record but blind faith.

In State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001), the Court addressed an analogous situation. Much like the case at bar, physical evidence from the crime scene played a central role in answering the ultimate question. See Jones, 541 S.E.2d at 818. Similarly to the case at bar,

Jones argued that the evidence at issue[2] could not satisfy the Jones reliability requirement. Id. At trial, the government successfully rebutted Jones's arguments by establishing that the analyst's methodology had been formed from a talk on the evidence that the analyst attended in the years prior, three books, and a conversation with a "renowned" expert and researcher, who was working to demonstrate fundamental claims of uniqueness in the evidence at question. Id. On appeal, our Supreme Court found among other fundamental "Jones" flaws, that the methodology employed was inconsistent with recognized scientific laws and proceedings. See Jones, 541 S.E.2d at 819.

In the case at bar, Lee failed to comply with recognized scientific laws and procedures in determining an area of convergence and thus provided unreliable evidence to the jury. Specifically, neither Lee nor anyone else conducted any tests in "doing" the blood spatter analysis, photographed the questioned evidence with "scale," or adhered to quality and technical protocols prescribed for photographic documentation of blood spatter evidence at a crime scene. Tr. 169, l. 21 - Tr. 170, l. 3. Further, Lee admitted in the presence of the jury that photographs he did take may have been over or underexposed, potentially resulting in spoiled evidence, that no physical measurements of the crime scene were ever taken, and that no stringing was used in determining an area of convergence. Tr. 228, ll. 23-24; Tr. 223, ll. 12-13.

The Supreme Court reversed the conviction of Jeffrey Jones where a SLED analyst took inked impressions, pictures, and casts of Jones' feet, and then visually compared those standards with the insole of the boot in question using a set of calipers to take known measurements. Jones, 541 S.E.2d at 813. While the court's reversal in Jones, partially focused on the issue of underlying scientific validity, the lack of quality control procedures and written protocols played prominently.

[2] The evidence at issue in State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001), concerned what is commonly referred to as "barefoot insole impression evidence."

Jones, 541 S.E.2d at 819. In the instant case, defense counsel did not challenge the underlying validity of blood spatter interpretation, but the lack of compliance with technical and quality protocols, the lack of the witness's qualification, and the lack of any empirical basis to prove or test the State's hypothesis on the decedent's location at wound infliction. Thus, it is a lack of reliable evidence in this instance that Appellant contends is in complete discord with recognized scientific laws and procedures, and specifically those proffered by RCSD's protocols. Def. Exhibit No. 12. Further, in Jones, the State's analyst at least made an effort to establish and follow a scientifically minded protocol. Here, Lee largely ignored the work-intensive protocols prescribed for processing, thereby ensuring that the evidence he had to offer was unreliable.

Thus, the prejudice imparted upon Appellant was in some respects more substantial than that imparted upon Jones. Specifically, the lack of underlying empirical data necessarily required the jury and the trial court to take on blind faith and without evidence, Lee's unreliable conclusions, whereas Jones could have attempted to refute the analyst's findings using the empirical data created and utilized by the examiner in conducting his analysis of the evidence. Had the protocols marked as Def. Exhibit 12 been complied with, they would have provided an empirical basis for Lee's opinion. Defense counsel would have been permitted to confront the reliability of Lee's hypothesis through the crucible of a confrontation informed by empirical data. Additionally, the trial court in Jones was minimally afforded evidence upon which to issue a ruling. Here, the trial court was forced into a manifestly arbitrary decision on the threshold question of reliability based not on evidence but blind faith.

Conclusion

The trial court's erroneous decision to permit Lee's opinion testimony, over defense counsel's objection on the grounds that Timothy Lee lacked the necessary qualification to opine, impermissibly undermined the heart of the defense's theory with the unqualified opinion testimony of a police officer, admitted only as an expert in crime processing, and not as an expert in crime scene reconstruction or blood spatter evidence. This error prejudiced the Appellant because a police offer was allowed to opine on the central issue of the case, without having the necessary qualifications, something strictly forbidden by our Supreme Court's holding in Ellis. Further, the Appellant was prejudiced because Timothy Lee's testimonial evidence failed three of the four factors proffered in Council, and was thus not reliable in violation of the Supreme Court's holding in Council and White. Lastly, the trial court also erred in failing to conduct a balancing test under Rule 403, SCRE as is required by Council. Based on the preceding, this Court should reverse the Appellant's conviction for murder, and remand for a new trial.

III. <u>The trial court erred in admitting the testimony of Stan Richards, an expert in blood spatter, on crucial blood evidence because the evidence did not satisfy three of the four factors proffered in *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999), and was thus not reliable.</u>

Relevant facts

Having determined that the State would call an expert witness, Stan Richards, to discuss his analysis of "blood spatter" evidence, the trial court agreed to conduct an *in camera* hearing to "allow defense counsel the ability to cross-examine" him on how he "came to his conclusions." Tr. 401, ll. 16-19. Further discussion will follow, but this seemingly indicates that the trial court misunderstood its role as a gatekeeper by placing the burden upon Appellant's lawyers to establish facts tending to impugn the reliability of Stan Richards's opinion. <u>See</u> <u>White</u>, 676 S.E.2d at 688 (finding the proponent must establish a witness's qualification and the reliability of any opinion testimony).

In-camera testimony began with the solicitor questioning Richards regarding his qualification to analyze blood spatter. Tr. 402, l. 11 - Tr. 404, l. 3. The solicitor then moved on to elicit a general statement from Richards on his "blood stain pattern methodology." Tr. 404, l. 7 - Tr. 405, l. 9. Richards contended that the methodology was peer-reviewed but did not indicate, and the court did not inquire as to who had reviewed the methodology or how it was generally received. Tr. 405, l. 12. Richards' also contended that his methodology was nationally standardized, even though his "taxonomy" might have a "different name to it." Tr. 405, l. 13-14; Tr. 405, ll. 15-17.

When asked how he was involved in the case Richards indicated when he first arrived he talked to investigator Lee, as well as to other investigators on scene, and tried to gather as much

information as possible. Tr. 406, ll. 6-10. He testified that as they were entering the house, they took photographs to document the scene. Tr. 407, ll. 5-8. Interestingly, Richards alleged that the photographs which were taken essentially utilized the road-mapping procedure Timothy Lee had already admitted they had not employed. See Tr. 407, ll. 11-19, and Tr. 235, ll. 9-22; see also Def. Exhibit No. 12. The solicitor then began eliciting testimony from Richards about his observations and opinions on blood spatter evidence. Tr. 407, l. 24 - Tr. 412, l. 8.

***In-Camera* Cross-Examination**

During the cross-examination, Richards testified that he was the author of the "blood-spatter protocols" which were marked as Defendant's Exhibit 12. Tr. 413, ll. 7-10. Richards admitted that, by being the author of those protocols, he knew RCSD's procedures for processing a scene and determining areas of convergence. Tr. 413, ll. 12-18. He further acknowledged that among those guidelines there is a process called "road-mapping." Tr. 413, ll. 16-18. Despite admitting previously that road-mapping was not employed, Richards claimed: "we had road-mapping." Tr. 413, l. 20 – Tr. 414, l. 3. After being pressed by Appellant, Richards admitted the detailed procedure that Toby Wolson described as road-mapping "was not necessarily" followed in this case. Tr. 414, ll. 9-12.

Defense counsel Krzyston then fought the admissibility of Richards' testimony arguing Richards did not follow the protocols he had written and which governed the analysis. Tr. 414, l. 17 - Tr. 415, l. 3. Defense counsel Krzyston specifically cited the lack of compliance with methodology commonly employed in blood spatter analysis as his objection to the admissibility of the evidence. Tr. 415, ll. 9-11. The trial court, again misapprehending the burdened party, asked defense counsel, "where is the testimony or where is the evidence that they did something incorrectly, or even better,, where is the testimony or where is the evidence that the methodology

that they used was improper?" Tr. 415, ll. 21-24. Defense counsel Krzyston maintained that "[the methodology] wasn't improper, it just wasn't complied with." Tr. 415, l. 25 - Tr. 416, l. 1. When the trial court then inquired as to what evidence established that contention, defense counsel asserted that he had already offered it. Tr. 416, ll. 20-22.

Trial Court's Ruling

The trial court overruled defense counsel's objection and found Richards qualified. Tr. 416, l. 23 - Tr. 417, l. 5. The trial court further found that the "science" was without issue, and that "defense counsel had not offered disqualifying evidence of Richards' opinion in "any way, shape, or form." Tr. 416, l. 23 - Tr. 417, l. 5.

Richard's Testimony Before the Jury

After questioning Richards on his qualification, the State offered him as an expert in the field of "bloodstain pattern examination." Tr. 458, ll. 18-20. Defense counsel Krzyston did not object to Richards' qualification but maintained his *in camera* objections to reliability. Tr. 458, ll. 18-20. The solicitor then elicited Richards' opinion that the decedent suffered a blood-letting event while sitting on the couch, throughout the remainder of direct examination.

The State's Closing Argument

In closing statements, the solicitor argued that the Appellant's statement to police was false based on the analysis of blood spatter evidence presented, and that as the decedent entered the trailer she "sat down to relax, [and] didn't even have time to untie her shoes," when the Defendant sprung into "deadly action." Tr. 652, I. 11-13; Tr. 643, ll. 6-22. Further, the solicitor highlighted the testimony of Lee, discussed *supra*, and Richards. Tr. 650, ll. 23-24. Specifically, she claimed that Lee and Richards had discussed how "dynamic" the scene was, how there was a bloodletting of "horrific proportions," and "that it was so clear where everything happened they didn't need to

do anything." Tr. 651, ll. 12-14; Tr. 651, ll. 14-15. The solicitor argued that Lee and Richards "had told [the jury] about all the stains," and continued that "He" had talked to the jury about the blood on the scene, and that "He" had discussed that there was no blood by the door or on the end of the couch. Tr. 651, l. 17; Tr. 652, ll. 2-7. The solicitor also argued that "He talked to you about if she would have been shot by the door, there would be blood there." Tr. 652, ll. 8-9. In concluding, the solicitor argued, "How did all the blood end up on the couch and all above where the couch is if she's shot over here? It just doesn't make common sense, and he explained all that to you…" Tr. 652, ll. 11-13. Importantly noted here is the fact that the solicitor never clarified for the jury which witness she was referring to when saying "he."

Discussion

In State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), the Supreme Court found scientific expert evidence was admissible only after the trial court makes findings under Rule 702, SCRE that (1) the evidence in question would assist the trier of fact; (2) the expert witness in question is qualified; (3) the underlying science is reliable as informed by the Jones standard; and (4) the probative value of the evidence outweighs the danger of unfair prejudice pursuant to a Rule 403, SCRE analysis. See Council, 515 S.E.2d at 518 (internal citations omitted). Council added additional clarification by citing to State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990), in enumerating that inquiry under the Jones standard required the Court to consider several factors, including (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved; (3) the quality control measures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. Council, 515 S.E.2d at 517 (internal citations omitted).

In the instant case, there was evidence in the record that RCSD's personnel did not conduct any tests in "doing" the blood spatter analysis, did not photograph the questioned evidence with "scale," or adhere to other protocols prescribed for photographic documentation of blood spatter evidence, and that the photographs they did take may have been over or underexposed, potentially resulting in spoiled evidence. Tr. 169, l. 25 - Tr. 170, l. 3. Further, there was evidence in the record that no physical measurements of the crime scene were ever taken, and that no stringing was used in determining an area of convergence. Tr. 228, ll. 23-24; Tr. 223, ll. 12-13.

Further, while Richards offered his opinion on what the blood spatter showed, he established no objective basis for his determining such an opinion. Richards testified that the core of his methodology was classification via a taxonomical structure. Tr. 405, ll. 4-6. Despite this representation, Richards never explained the taxonomical structure that was supposedly peer-reviewed and standardized across the country, even though by his admission his taxonomical classification might vary. Tr. 405, ll. 10-17. The trial court entered no findings, undertook no inquiry or discussion, and the State offered no evidence of the publications and peer-reviewed articles which supported the unexplained taxonomical structure used by Richards, meaning that the trial court accepted, on faith and without evidence, Richards's claims that he utilized a commonly accepted taxonomical structure.

Richards never objectively defined the words spatter, impact spatter, or pattern *in camera*. Instead, Richards described impact spatter as "if you can see all those small stains on the [windows behind the decedent], that's spatter." Tr. 410, ll. 14-15. The existence of a taxonomical classification structure implies that there is some objective standard, by which one would classify blood stains, yet the State presented no testimony regarding the effect of size or shape on the classification of blood stains within the undefined taxonomical structure.

After classification via the undefined taxonomical structure, Richards testified, "You may, if it's necessary, go into looking at motion, directionality, then you may go into looking for – looking at the convergence or area of origin. After that, you relate what you found to one pattern – from one pattern to another pattern and how that sequence might evolve." Tr. 404, ll. 20-25 (emphasis added). The State did not offer any evidence on how one might determine directionality, how one might determine an area of convergence or area of origin, or how one might relate, from pattern to pattern, the unique sequential evolution of the scene.

Defense counsel objected to the witness based on the reliability of the testimonial evidence and upon the witness's non-conformance with the methodology. Tr. 414, l. 17 - Tr. 415, l. 3; Tr. 415, ll. 9-11. The trial court previously indicated it had read Council and its progeny, and defense counsel specifically highlighted his objection to Richards' methodological inconsistency. Tr. 203, ll. 17-24; Tr. 415, l. 25 - Tr. 416, l. 1. Despite this, the trial court never entered any findings, and the State never offered any evidence regarding published and peer-reviewed opinions on the determination of an area of convergence utilizing only visual inspection. The State never offered any evidence, and the trial court entered no findings on any evidence regarding the prior application of the means utilized, mere visual inspection, in determining the area of convergence. The State never offered any evidence, and the trial court never entered any findings regarding whether the quality control measures utilized in assuring the methodology was sound were sufficient. Perhaps most importantly, the State offered no evidence, and the trial court entered no findings regarding the consistency of the method employed, mere visual inspection, with the recognized scientific laws and procedures for processing blood spatter evidence. While the trial court did conclude that there were "no issues with the science," its decision was an abuse of discretion. This is so because the repeated failure to substantively consider the Jones factors during

the testimony of Lee and then Richards, means the trial court's finding, that there were "no issues with the science," was based not on evidence but blind faith, and was thus a manifestly arbitrary, unreasonable, and unfair decision which prejudiced the Appellant's ability to rebut the State's claims effectively.

While White, held a trial court may properly conclude that challenges are more appropriate as weight based assessments for the jury, it may only do so after initially determining the threshold issues of qualification and reliability. See White, 676 S.E.2d at 686. In the instant case, the trial court misapprehended its role as gatekeeper, and thus impermissibly allowed the role to be supplanted. The trial court's misunderstanding was made clear when it indicated it would permit *in camera* testimony to allow defense counsel to "cross-examine [Richards] on how he came to [his] conclusions and the science or whatever it [was] behind [the blood spatter evidence]." Tr. 401, ll. 16-19. Misapprehension was again evidenced when the trial court inquired of defense counsel, "where is the testimony or where is the evidence that they did something incorrectly, or even better, where is the testimony or where is the evidence that the methodology that they used was improper?" Tr. 415, ll. 21-24.

The trial court's misapprehension was further evidenced by its comments in refusing to allow *in camera* inquiry when Jennifer Martin, a DNA analyst, was called by the State. Specifically, after the State offered to put Jennifer Martin up to "do the qualification part," the trial court asked defense counsel, "Do ya'll need some kind of hearing on [the DNA] other than the usual?" Tr. 351, ll. 10-11. In response, defense counsel Krzyston stated, "Well not besides the normal gatekeeping function[s] that are performed in White, Council, Jones." Tr. 351, ll. 12-13. Responding with skepticism the trial court inquired, "You need a hearing on that outside the presence of the jury?" Tr. 351, ll. 15-16. Appellant again clarified, "The proponent of the evidence

need[ed] a hearing on th[e] evidence for it to be admissible" under the holding in White. Tr. 351, ll. 12-22.

After calling into question Appellant's reading of White, the trial court asked, "So what evidence do you have to offer that the DNA test done in this case is not reliable?" Tr. 352, ll. 13-14. Appellant argued that it was the proponent of the evidence who had the burden of establishing the evidence's reliability. Tr. 352, l. 15 - Tr. 353, l. 7. In refusing to hold an *in camera* hearing, the trial court ruled, "I'm not doing all that," and distinguished the subject matter of White from DNA evidence by noting the vast difference between dog tracking evidence and something "like DNA that most everybody agrees on both sides of the fence is reliable." Tr. 354. ll. 6-23.

Through its statements, it is clear that the trial court misunderstood its role as gatekeeper despite defense counsel's repeated attempts to direct the court's attention to the issue. The trial court's statements read as a whole reflect an *a priori* acceptance of methodological reliability, rather than the substantive procedural determination of admissibility through inquiry that was requested by defense counsel, and required by White, Council, and Jones. Tr. 401, ll. 16-19; Tr. 352, ll. 13-14. The trial court was in no better a position after the *in camera* testimony of Richards to answer the threshold question of reliability under Council and Jones than it was after the conclusion of Lee's testimony and thus should have refused to allow Richards to testify over Appellant's objections.

Lack of Rule 403, SCRE Balancing Test

Before expert testimony may be introduced to the jury Council specifically requires the trial court to make findings under a Rule 403, SCRE balancing test, that the probative value of the opinion evidence in question is not substantially outweighed by the danger of unfair prejudice or the risk of confusion. See Council, 515 S.E.2d at 518 (internal citations omitted). In the instant

case, the trial court failed to determine that the probative value of Stan Richard's testimony substantially outweighed the danger of unfair prejudice or risk of confusion as required. Council, 515 S.E.2d at 517. The trial court overruled defense counsel's objections to methodological soundness under Council and its progeny. Tr. 416, l. 23 - Tr. 417, l. 5. The result was that Richards bolstered the boot-strapped testimony of Timothy Lee, with data only he and Lee could interpret, and based on their collective, subjective observations. Because the opinion of Richards, like Timothy Lee, was not grounded in empirical data, was not formed by adhering to the proper protocols, could not have been effectively challenged, and was not reliable, the trial court should have refused to admit the evidence and instead should have found that it impermissibly tipped the scales of a Rule 403, SCRE analysis.

Conclusion

In the instant case, the trial court erred in admitting Richards' testimony, and the blood spatter evidence at large because it could not satisfy three of Council's four factors, was not reliable, and because it failed to perform a Rule 403, SCRE balancing test. Such errors constitute an abuse because the lack of evidentiary basis for the trial court's finding was manifestly arbitrary and because it committed an error of law by failing to conduct a Rule 403, SCRE balancing test as required by Council.

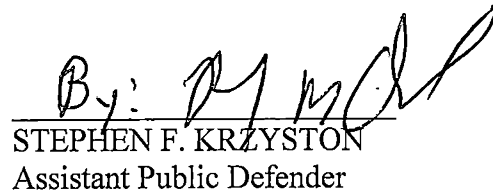
Further, the prejudice imparted upon Appellant by these abuses was more substantial than that established by Jones as discussed *supra*. The lack of underlying empirical data necessarily required the trial court and jury to take on blind faith Richards' conclusions. Thus the risk of confusion and unfair prejudice outweighed the probative value of Richards' opinion testimony and was immense. Further prejudice stems from Richards's testimony because it provided a foundation for the State's theory at trial and was a foundational focus of the solicitor's closing

arguments. The State's opening and closing statements both argued that Appellant's contentions were false based on the foundation which was laid with Timothy Lee's boot-strapped testimony and then bolstered by the testimony of Stan Richards, discussed *supra*. Because of these errors and the resulting prejudice, this Court should reverse Appellant's conviction for murder, and remand the case for a new trial.

CONCLUSION

For the foregoing reasons, Appellant's conviction for murder should be reversed and the case remanded for a new trial.

Respectfully submitted,



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This 1st day of August, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
AUG 01 2018
SC Court of Appeals

Appeal from Richland County

Robert E. Hood, Circuit Court Judge

THE STATE,

RESPONDENT,

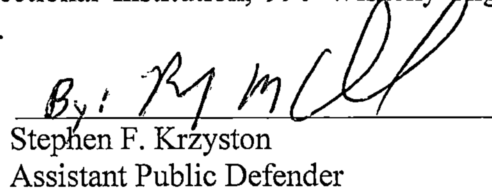
V.

MIMI JOE MARSHALL,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney 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 Melody J. Brown, Esq., at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC, 29201, and Mr. Mimi Joe Marshall #231397 at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 1st day of August, 2018.



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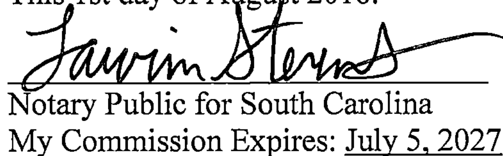
SUBSCRIBED AND SWORN TO before me
This 1st day of August 2018.



Notary Public for South Carolina
My Commission Expires: July 5, 2027