STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILLIE DON HORRY,

APPELLANT

Appellate Case No. 2010-163348

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in permitting the only two witnesses at trial to give expert opinion testimony based on their training and experience regarding files found on the defendant's computer when neither witness was qualified as an expert?

STATEMENT OF THE CASE

Appellant Willie Don Horry was indicted by the Charleston County Grand Jury on March 3, 2008, for second degree sexual exploitation of a minor. R. 225 (Indictment). The charge was based on files from Horry's computer. Horry's case proceeded to trial from May 12 through 14, 2010, before the Honorable Deadra L. Jefferson and a jury. James Smiley and Laree A. Hensley represented Horry. The State was represented by Chad Simpson and Jessica Baldwin. R. 1.

The jury found Horry guilty of the lesser-included offense of third degree sexual exploitation of a minor. R. 258, ll. 18-24. Horry was sentenced to two years imprisonment, suspended upon the completion of a six month active sentence, and three years probation with special conditions. R. 371, ln. 18—R 372, ln. 12; R. 227 (Sentence Sheet).

ARGUMENT

The trial court erred in permitting the only two witnesses at trial to give expert opinion testimony based on their training and experience regarding images and videos found on the defendant's computer when neither witness was qualified as an expert.

During Horry's trial, the State repeatedly elicited opinion testimony from two non-expert witnesses, which was based on their training and experience. Such testimony by lay witnesses is expressly forbidden pursuant to both the South Carolina Rules of Evidence, and controlling case law. See Rule 701, SCRE; State v. Ellis, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001). Further, Horry was prejudiced by this improper opinion testimony, as it addressed the heart of the case; specifically, the testimony addressed whether the files on his computer were illegal. See Ellis, 345 S.C. at 178, 547 S.E.2d at 491. Accordingly, the conviction should be reversed, and the case remanded for new trial.

Rule 701 of the South Carolina Rules of Evidence governs opinion testimony by lay witnesses, and provides as follows:

> If the witness is not testifying as an expert, the 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). Therefore, if a person is not qualified as an expert witness, her testimony regarding opinions or inferences is sharply limited: such testimony must meet the three conjunctive requirements established by the Rule, or it is beyond the scope of lay witness testimony.

Generally speaking, if State desires to enter opinion evidence based on the specialized knowledge of witnesses, then it is required to qualify them as expert witnesses.

See Rule 702, SCRE ("If scientific, 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.*") (emphasis added). Additionally, expert testimony specifically "receives additional scrutiny relative to other evidentiary decisions." As such, the trial court, in its role as gatekeeper, "must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony." Watson v. Ford, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) (listing the three mandatory preliminary findings a court must make prior to permitting expert opinion testimony).

In the present case, only two witnesses testified at Horry's trial: (1) Sergeant Trish Taylor (Taylor) from the Charleston County Police Department; and (2) Mr. William Jerry Roberts, Jr., (Roberts) the Charleston Police Department digital evidence unit director. R. 72, ll. 6; R. 144, ll. 8-14. The State never moved to qualify either witness as an expert; thus, none of the necessary preliminary findings were made to qualify the witnesses as experts, and neither witness was qualified by the court as an expert. No preliminary inquires were performed, and neither Taylor nor Roberts were qualified as expert witnesses.

Thus, the third requirement of Rule 701 is at issue; namely, the lay "witness' testimony in the form of an inference or opinion is limited to those opinions or inferences which . . . do not require special knowledge, skill, experience or training." Rule 701, SCRE. Despite the fact that neither Taylor nor Roberts were expert witnesses, the trial court repeatedly permitted both to give opinion testimony at Horry's trial based on their training and experience. This was error.

A. Lay witness opinion testimony of Taylor.

The State specifically elicited opinion testimony from the two lay witnesses, who answered based on their training and experience, regarding the legality of the files purportedly discovered on Horry's computer.[1] For example, when asked by the State how a person "accesses and looks for certain files on a peer-to-peer network," Taylor responded as follows:

> Well, as I said, I would use a term like one who would be looking for a music file. . .
>
> But I was looking for specific child pornographic videos or pictures. So I would put in terms like pedo, and it would return all these particular, at that time, users who were on this program who had these files available to share.
>
> And they would also list those SHA values. *And it was through the SHA values that don't change that I could recognize which ones were, by the State of South Carolina, were deemed illegal.*"

R. 76, ll. 9-25 (emphasis added).[2] Defense counsel immediately objected on the basis of expertise and foundation; however, the trial court stated that "[Taylor] has been established

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[1] During pre-trial discussions, the trial court explicitly warned that no speaking objections were permitted:

> For the record, so that we all know the rules of the road so to speak, I do not take speaking objections. I expect you to strictly adhere to the rules which means if you object, and I say basis, I expect you to state the basis of your objection. Unless I ask for argument, there is to be none.

R. 30, ll. 6-11.

[2] SHA values were later defined at trial by Roberts as follows: "It's a mathematical algorithm derived from the complex mathematical function that is generally accepted in our field as being able to identifying a unique item." R. 148, ll. 10-13. On cross-

by foundation, *training and experience*." R. 77, ll. 4-5 (emphasis added). After the trial court permitted the State to proceed, the State's following questions undeniably confirmed the fact that Taylor, who was not qualified as an expert witness, was speaking based on her opinion and experience of the SHA values:

> Q.- You said that often you look at the SHA values to determine *from prior experience* that these meet the definition of child pornography?
>
> A- Yes
>
> Q.- *In your opinion*?
>
> A.- Yes.

R. 77, ln. 20—R. 78, ln. 2 (emphasis added).

Thus, not only did the trial court err by permitting Taylor to give opinion testimony based on her training and experience, but also any confusion as to whether Taylor was giving her opinion regarding the ultimate issue of the legality of the files was dispelled by her answers to the State's follow-up questions: Taylor unquestionably gave her non-expert lay opinion that the files purportedly from Horry's computer were deemed illegal child pornography by the State of South Carolina. This was error. Ellis, 345 S.C. at 178, 547 S.E.2d 491.

Yet, this was not the only instance in Horry's trial where the court permitted non-expert opinion testimony going to the heart of the case. The State again elicited testimony from Taylor regarding her opinion that the files from Horry's computer were illegal in South

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examination of Taylor, she admitted that the term "SHA value" was a scientific term or a computer term. R. 131, ll. 7-10.

Carolina based upon SHA values which she purportedly memorized through her experience. As Taylor stated:

> I have been doing this for several years, and I have memorized the SHA values of particular items of interest to me. Ones that I knew before that I had seen and viewed that met the state—what *I found to meet the state requirements for child pornography.*

R. 81, ll. 17-22 (emphasis added). After the defense's objection, a bench conference was held; counsel for Horry offered hearsay and lack of foundation as bases for his objection. R. 82, ll. 4-13. The trial court overruled the objection based on the following rationale:

> [Taylor's] exact testimony was what, through her experience, she has memorized certain SHA values of interest to her that come within the ambit of what is legal and illegal.
>
> You need to lay the appropriate foundation of what she is referring to. The rest of her answer is completely appropriate.

R. 82, ll. 16-22. The State then extracted the following opinion testimony from Taylor:

> Q.- Sgt. Taylor, when you say what is legal and illegal, *this is by your opinion,* correct?
>
> A.- Right.
>
> Q.- Through your *investigatory experience*?
>
> A.- Yes.

R. 82, ln. 25—R. 83, ln. 5 (emphasis added). Taylor then indicated to the jury that she initiated downloads of files with the SHA values that she recognized from prior experience, which she later linked to a computer owned by Horry. R. 83, ll. 7-24; R. 89, ll. 20-24; R. 91, ln. 16—R. 12; R. 102, ll. 4-7; R. 116, ll. 6-25. After the computer was seized, Taylor

gave those SHA values to the computer forensic examiners; in her words, Taylor testified, "That's what I did. That's what I knew to be exact." R. 141, ll. 19-23.

Again, this testimony is impermissible under the clear and unambiguous language of Rule 701 of the South Carolina Rules of Evidence. Taylor testified to specialized, mathematical algorithms germane to science and computers that she purportedly memorized over the course of her experience of several years. R. 81, ll. 17-22; R. 131, ll. 7-10; R. 148, ll. 10-13. Therefore, it is opinion testimony by a lay witness based on her specialized knowledge gained through her training and experience. Further, it again goes directly to the ultimate issue of the case: the legality of the computer files. As such, it constitutes reversible error. Rule 701, SCRE; Ellis, 345 S.C. at 178, 547 S.E.2d 491.

B. Lay witness opinion testimony of Roberts.

Roberts likewise gave opinion testimony, despite the fact that he was never qualified as an expert witness. See Rules 701 and 702, SCRE; see also Watson, 389 S.C. at 446, 699 S.E.2d at 175; Ellis, 345 S.C. at 178, 547 S.E.2d 491. Specifically, when Roberts was asked why he concluded 54 titled items from the seized computer were items of interest, the defense objected on the basis of opinion. R. 156, ln. 7—R. 157, ln. 4. However, the trial court specifically rejected that basis, but sustained it on the basis of leading instead:

> [The State] can ask his opinion based on his education, training and experience if he lays the appropriate foundation.
>
> The appropriate objection is leading.

R. 157, ll. 5-11. Immediately thereafter, the State reworded its question to Roberts, and proceeded to elicit testimony regarding his conclusion "that these were items of interest"

because they appeared to him to be a prepubescent child in the videos or images. R. 157, ll. 14-19. Thus, because the trial court erroneously failed to sustain the objection on the basis of improper opinion testimony, the State was free to reword its question into a non-leading format to obtain the opinion testimony it initially sought from Roberts. Rule 701, SCRE; Ellis, 345 S.C. at 178, 547 S.E.2d 491.

Additionally, the State later questioned Roberts about what is indicated in a computer user's actions by the presence of a large number of files in a computer folder for incomplete downloads, yet a small number of files in another folder for completed downloads. The defense objected on the basis of conclusion and speculation, which the trial court interpreted and overruled as follows:

> Although [Roberts] *has not been qualified as an expert*, he does not need to be under Rule 701. He can provide lay witness testimony as long as it's within his perception, and *as long as it is based within the ambit of his training and it is*.
>
> So the objection is overruled.

R. 160, ll. 5-10 (emphasis added). The State then elicited testimony from Roberts that, based on his expertise of a user going into Limewire,[3] it was unusual for a user to delete all the files of child pornography, yet still find many others remaining either in the incomplete folder and a relatively small amount remaining in the complete folder. R. 160, ll. 12-18. As evidenced by the trial court's own rulings, Roberts was not an expert witness, yet he was permitted to give his opinions based on his education, training, and experience. As such, this was error. Rule 701, SCRE; Ellis, 345 S.C. at 178, 547 S.E.2d 491.

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[3] "Limewire" was essentially described at trial as computer software enabling peer-to-peer file-sharing. R. 161, ln. 2—R. 163, ln. 23; R. 169, ln. 9—R. 170, ln. 1.

Moreover, Horry was prejudiced by the trial court's repeated erroneous admissions of lay witness opinion testimony. First, the testimony of Taylor and Roberts was not harmless as it went to the heart of the case. "An officer's improper opinion testimony which goes to the heart of the case is not harmless." Ellis, 345 S.C. at 178, 547 S.E.2d 491. Here, the jury was instructed on both second and third degree sexual exploitation of a minor; thus, the jury was permitted to convict Horry for possession, receipt, or distribution of child pornography if Horry knew the content and character of the images. See S.C. Code Ann. § 16-15-405 and 410 (West, Westlaw current through End of 2011 Sess.). As previously indicated, lay witnesses Taylor and Roberts were permitted to give opinion testimony regarding the ultimate issue: whether the files from the computer were illegal pornography. This testimony went to the heart of the case. Accordingly, it was not harmless.

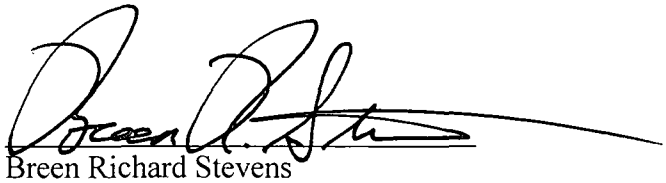
Second, the jury was exposed to this same error on multiple occasions and from both Taylor and Roberts. Thus, the jury repeatedly heard the impermissible lay witness testimony going to the heart of the case from the only two people who testified in the trial.

Finally, the State repeatedly relied on testimony from Taylor and Roberts during its closing arguments linking SHA values to the determination that child pornography was knowingly present on the computer. R. 211, ln. 25—R. 212, ln. 14; R. 212, ln. 24—R. 213, ln. 2; R. 214, ll. 17-25; R. 218, ll. 16-21. Accordingly, Horry was prejudiced by the trial court's erroneous admission of lay witness opinion testimony in his case. Ellis, 345 S.C. at 178, 547 S.E.2d 491.

CONCLUSION

For the foregoing reasons, Willie Horry respectfully requests reversal of his conviction, and remand for a new trial.

Respectfully submitted,



Breen Richard Stevens
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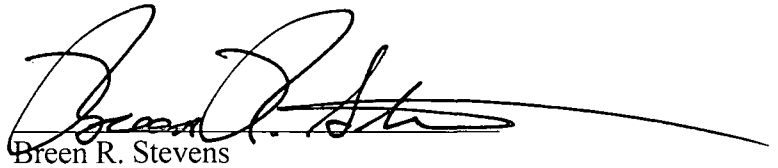
This 17th day of December, 2012.

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 August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

December 17, 2012



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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William Blitch, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon Willie Horry, 8597 Sugar Hill Road, Hollywood, SC 29449, this 21st day of December, 2011.

Breen Richard Stevens
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of December, 2012.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022 .