

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TYRONE BEATY,

APPELLANT

Appellate Case No. 2010-167826

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in allowing a police officer to testify that a gunshot wound to the victim's hand was a defensive wound and could not have occurred while the victim was reaching for a handgun on his person where the officer was qualified as an expert in forensic investigation only?

STATEMENT OF THE CASE

An Horry County Grand Jury indicted Appellant for murder and armed robbery. R. 297. Heather von Herrmann prosecuted Appellant, and G. Scott Bellamy represented Appellant. R. 1. From July 12, 2010 through July 16, 2010, Appellant was tried before the Honorable Steven H. John and a jury. R. 1. The jury began its deliberations at 12:10 p.m. on July 15, 2010. R. 290 lines 5-6. At 6:15 p.m., the jury requested to go home and resume deliberations the following day. R. 291 lines 4-15. Judge John honored the jury's request. R. 291 line 18 – R. 292 line 24. The jury resumed deliberations at 9 a.m. the following day. R. 292 lines 23-24. At 11:50 a.m., the jury returned with its verdict finding Appellant guilty as charged. R. 293 lines 6-10; R. 294 lines 15-22. Judge John then sentenced Appellant to thirty-four years for murder, and thirty years for armed robbery. R. 295 line 15 - R. 296 line 3.

Appellant filed a timely notice of appeal. This brief follows.

STATEMENT OF FACTS

The police discovered the body of Miles Slay, the victim, on October 21, 2005. R. 101 lines 7-13; R. 103 lines 7-12. Corey Smalls, an admitted drug dealer, testified that on October 20, 2005, he received a telephone call from the victim requesting a large quantity of cocaine. R. 3 lines 1-2; R. 5 line 2 – R. 6 line 3. Corey testified that he contacted Appellant requesting the cocaine on the victim's behalf. R. 7 lines 1-2. According to Corey, Appellant said he was unable to obtain the desired quantity. R. 7 lines 4-5. Corey, and his cousin Antonio Smalls, then drove to Murrells Inlet to pick up Appellant. R. 11 line 20 – R. 12 line 2. Corey claimed Appellant, who was with his cousin Neil Hill, wanted to rob the victim, and Corey agreed. R. 12 lines 6-22. The four then went to Food Lion where they purchased flour and sandwich bags. R. 14 lines 7-10. Appellant then placed the flour and some real cocaine in the sandwich bags. R. 14 lines 10-13. Afterwards, Corey met the victim at a gas station. R. 20 lines 22-25. Corey got into the car with the victim, and the two proceeded to a pre-determined area for the robbery. R. 24 lines 22-24; R. 27 line 19 – R. 28 line 15. When Corey and Miles arrived at the location, Appellant walked over to them. R. 31 line 22. Corey exited the victim's vehicle. R. 31 lines 24-25.

Corey claimed that by the time he made it to the second vehicle where Antonio and Neil were waiting, he heard Appellant say "He's grabbing for something. He's grabbing for something." R. 33 lines 13-17. Corey then observed Appellant and the victim "tugging-a-war" with a bag of money. R. 33 lines 18-20. According to Corey, Appellant pulled out a gun and shot into the victim's vehicle three times. R. 33 lines 21-22. Appellant ran toward the second vehicle. R. 34 lines 5-6. Appellant threw a bag of money in Corey's lap. R. 34 lines 6-7. Corey testified that Appellant realized the victim was still alive as they were

driving off and ordered that the car be stopped. Appellant “jumped back out the car and went back and finished him off.” R. 34 lines 9-12. The four left the immediate area together, but went their separate ways shortly thereafter. R. 37 line 25 – R. 38 line 11; R. 39 line 2 – R. 40 line 8.

Neil Hill also testified on behalf of the prosecution. Neil testified that Appellant called him on October 20, 2005 asking Neil to accompany Appellant to Murrells Inlet because Corey owed Appellant a large sum of money. R. 105 lines 16-18; R. 106 lines 10-16. When Neil and Appellant arrived at Corey’s house, Corey and Antonio were leaving. R. 107 lines 5-8. Neil testified Appellant confronted Corey about his debt, and Corey responded he had to “go take care of something” and afterwards he would pay the debt and buy more. R. 109 lines 3-8. Neil and Appellant got into the car with Corey and Antonio. R. 108 lines 8-10. Neil testified there was no conversation in the car about ripping off a potential drug buyer. R. 109 lines 14-23. The four drove to Food Lion, where Appellant purchased tape, flour and sandwich bags. R. 110 lines 2-9. Neil observed Appellant placing the flour in sandwich bags, and “figured out that it was going to be a drug rip.” R. 110 lines 10-15; R. 122 lines 21-23. Neil fell asleep in the car and woke up to gunshots. R. 115 lines 19-20. Neil observed Appellant jumped into the car, followed by Corey. R. 116 lines 12-13. Corey instructed the occupants to take the events of that day with them to their graves and that if he heard anyone knew anything, he would pay that person a visit. R. 116 lines 14-21; R. 131 line 13 – R. 132 line 5. Upon further questioning, Neil testified he heard three or four gunshots and did not hear a second set of shots. R. 117 lines 11-14. The four separated shortly thereafter. R. 117 line 20 – R. 118 line 2.

Antonio Smalls testified that on October 20, 2005, he overheard Corey on the phone with the victim who wanted to purchase a large quantity of cocaine. R. 141 line 19 – R. 143 line 1. He then heard Corey make phone calls trying to fill that order. R. 143 lines 2-10. Thereafter, Corey and Antonio drove to Murrells Inlet to pick up Appellant and Neil. R. 143 lines 16-17; R. 144 line 24 – R. 145 line 1. The four then went to Food Lion where Appellant purchased flour, duct tape, and plastic bags. R. 146 lines 2-7. Antonio testified there was a plan for a drug rip, which included giving the purchaser the flour in the bag so he would think he was getting drugs. R. 147 lines 21-25. The four drove to Foxtrot apartments, where they dropped off Corey, who was supposed to meet the victim. R. 152 lines 18-21; R. 153 lines 6-8. Antonio, Neil, and Appellant then drove to another location. R. 153 lines 13-14.

Corey and the victim arrived at the location where Antonio, Neil and Appellant waited. R. 157 lines 10-11; R. 160 line 13- R. 161 line 1. Antonio testified that he saw Appellant with a gun on his lap at that point. R. 157 lines 10-16. Corey got out of the victim's car and walked toward Antonio. R. 162 lines 5-8. Corey remained outside of the car, standing near the back. R. 162 lines 13-19. Appellant then got out of the car and walked to the victim's car. R. 162 lines 20-23. Antonio did not see the gun on Appellant at that time. R. 163 line 6. Antonio then heard three gunshots and saw Appellant leaving the victim's car. R. 163 lines 12-19. Antonio testified he did not see Appellant fire the shots, but did not observe anyone else near the victim's vehicle at the time. R. 163 lines 20-24. He observed Appellant trying to reach for something at the victim's car and then heard two more gunshots. R. 164 lines 6-9. Appellant returned to the car, and Corey asked why he did that. R. 166 lines 4-5. Appellant responded that the victim was reaching for something. R.

166 line 7. The four left the immediate area together and then went their separate ways. R.

166 lines 14-21; R. 167 lines 12-13; R. 168 lines 21-25.

ARGUMENT

The trial judge erred in allowing a police officer to testify that a gunshot wound to the victim's hand was a defensive wound and could not have occurred while the victim was reaching for a handgun on his person where the officer was qualified as an expert in forensic investigation only.

Dr. Cynthia Schandl testified as an expert in the field of forensic pathology for the prosecution. R. 206 lines 8-9. Dr. Schandl testified she performed an autopsy on the victim on October 22, 2005. R. 206 lines 13-17. She testified she could not tell “exactly how many times he was shot. He was shot either five, or six, or seven times.” R. 211 lines 21-22. Dr. Schandl explained that all of the gunshot wounds went all the way through the victim's body except one; thus, there were at least two holes in the body for each shot. R. 211 line 23 – R. 212 line 2. According to Dr. Schandl, determining how many times the victim was shot was complicated by the fact that shots went all the way through the body which would make it possible for a bullet to re-enter the body and go through a second time. R. 212 lines 3-6. Concerning the gunshot wound to the victim's right hand, Dr. Schandl testified the bullet went through the hand and may have re-entered at some other place. R. 214 lines 12-14. When the prosecutor asked Dr. Schandl if the gunshot wound to the victim's hand was consistent with a defensive wound, Dr. Schandl responded affirmatively explaining that “any wound that's to the hands or even to the forearms is considered a defensive wound because one can presume that one would attempt to defend themselves if they were being fired upon.” R. 219 lines 7-14.

The prosecution called Peter Cestare to testify. Cestare testified he was employed with the Horry County Police Department as a Specialist in charge of the crime scene,

property, and evidence sections. R. 233 lines 12-15. At the time of trial, Cestare was in his eighth year with Horry County, but had been in policing since 1981. R. 233 lines 21-22. He explained his current duties were “supervise on a day to day basis the crime scene investigators ... respond to investigations ... oversee and direct their responsibilities and duties at investigations.” R. 234 lines 3-6. He testified that he analyzed crime scenes and was “called upon periodically to reconstruct crime scenes.” R. 234 lines 7-12. Cestare testified that his educational experience and training was as follows:

Prior to Horry County, I was employed by the New York City Housing Police Department under N.Y.P.D. I was a detective, rose through the ranks from police officer to detective commander there. I was in charge of their special investigations unit which would consist of major cases, homicides, mechanical deaths, things of that nature. I’ve been trained by the N.Y.P.D in crime scene processing, forensics process, DNA collection and handling of evidence by N.Y.P.D and the Department of Justice, blood stain pattern interpretation and analysis by both N.Y.P.D. and the Department of Justice, crime scene processing and analysis by N.Y.P.D. and the Department of Justice, crime scene reconstruction by N.Y.P.D. and the Department of Justice, ballistics alignment, laser and trajectory by N.Y.P.D. and the Department of Justice - - I’m sorry, by N.Y.P.D., AFIS, Automated Fingerprint Identification System, through both SLED and Motorola, the manufacturer of the equipment. I’m trained in photography through Nikon, the Nikon School of Photography, and I’ve been trained in fingerprinting, fume and chemical treatment and alternate light source, both by N.Y.P.D. and by Horry County Police Department.

R. 234 line 16 – R. 235 line 12. The prosecutor asked “so would all of those things sort of fall under the purview of forensic investigation.” R. 235 lines 13-14. Cestare responded affirmatively. R. 235 line 15. Thereafter, the prosecutor moved to have Cestare qualified as an expert in the field of forensic investigation. R. 235 lines 22-24. Appellant did not object. R. 236 lines 2-3. Thus, the court qualified Cestare to give his opinion in the filed of forensic investigation. R. 236 lines 4-5.

Cestare testified that a gun was recovered from the victim's body when officers removed him from the vehicle. R. 243 line 18 – R. 244 line 15. The gun was found on the victim's right side under his t-shirt tucked into the waistband of his pants. R. 244 lines 11-15. The prosecutor then asked if Cestare had an opinion about whether or not the victim was attempting to reach that weapon. R. 247 lines 21-23; R. 248 line 6-7. Appellant objected. R. 247 lines 24-25. The trial judge instructed the witness not to answer the question at that point. R. 248 line 8. Thereafter, an off-the-record bench conference took place. R. 248 lines 10-11. The prosecutor then asked more questions concerning the gun. R. 248 lines 12-19. The prosecutor offered a photograph of the victim's hand into evidence. R. 249 lines 2-3. Appellant objected based on relevance and the cumulative nature of the photograph in light of the pathologist's testimony concerning the number and types of wounds. R. 249 lines 5-10. Cestare then testified that the photograph was taken "to specifically show something that [he] observed on the victim's hand that day." R. 249 lines 21-22. Based upon that testimony, the judge admitted the photograph into evidence over Appellant's objection. R. 249 lines 23-24.

Cestare testified that the photograph showed a defensive wound on the victim's right hand. R. 250 lines 9-15. When Appellant objected, the trial judge permitted Cestare to testify "based upon the Court qualifying him as a forensic investigator and his experience." R. 250 lines 18-21. Cestare testified based upon the photograph, he could tell "the victim's hand was up in a defensive manner blocking something coming at him, a shot." R. 250 lines 22-24. When Cestare began testifying regarding a bruising pattern, Appellant objected again. R. 251 lines 6-9. The trial judge explained he understood the objection was to exceeding his qualifications; however, he overruled the objection. R. 251 lines 10-14. The

prosecutor then asked if there was any way to determine the sequence of the shots. R. 253 lines 20-21. Cestare started to testify regarding what he could say based on scene as he observed it. R. 253 lines 22-25. Appellant objected and explained that the pathologist testified there was no way to determine the order of the shots. R. 254 lines 1-4. The trial judge explained that he did not understand the answer to be what Appellant said and instructed Cestare to answer. R. 254 lines 5-8. Cestare testified that the injury to the hand was a defensive wound, indicating the hand was up. R. 254 lines 10-12. Using two photographs, Cestare testified the victim's arm was "in a downward angle towards the front passenger floorboard." R. 254 lines 12-15. He further stated that "for the shot to have been through his hand, it could not have occurred where his hand is now, so therefore, his hand had to be up when that shot occurred." R. 254 lines 15-18. The trial judge ruled he would allow that testimony. R. 254 line 20.

In order for an individual "[t]o be competent to testify as an expert, 'a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.'" Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-253, 487 S.E.2d 596, 598 (1997)(quoting O'Tuel v. Villani, 318 S.C. 24, 28, 455 S.E.2d 698, 701 (Ct. App. 1995)). Our Rules of Evidence provide that "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill or experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE.

In State v. Ellis, 345 S.C. 175, 177-178, 547 S.E.2d 490, 491 (2001), the Supreme Court held a police officer, who was qualified to testify as an expert in crime scene processing and fingerprint identification exceeded the scope of his expertise when he testified as to his conclusion drawn from the measurements and observations he made. In Ellis, the victim was found dead as a result of gunshot wounds near his bicycle and a knife. The defendant admitted to shooting the victim, but claimed he acted in self defense when the victim dropped his bike and approached the defendant with the knife. When the victim refused to stop, the defendant shot the victim. The prosecution's theory of the case was that the defendant shot the victim while the victim remained on the bike. Id. at 176, 547 S.E.2d at 491. The police officer testified that the victim was on his bike when he was shot based upon his measurements and observations of the crime scene. Id. at 177-178, 547 S.E.2d at 491. Further, the Court held the error in allowing the officer to testify was not harmless in light of the defendant's contention that he was acting in self defense. Id. at 178, 547 S.E.2d at 491. The Court held the prosecutor was free to argue that the evidence supported an inference that the victim was on the bicycle at the time of the shooting, and the jury could have concluded as such, but the officer "was not qualified to give such an 'expert' opinion." Id.

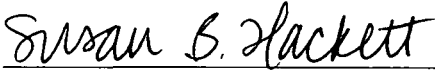
Cestare was qualified as an expert in the field of forensic investigation. Although Cestare testified that he had received some training in crime scene reconstruction at some unknown time in his thirty-year career as a police officer and that all of the training he listed "sort of f[ell] under the purview of forensic investigation," Cestare was not qualified to testify as an expert concerning the location of the victim's hand at the time of the shooting. He was qualified to testify regarding his forensic investigation of the crime scene, which he

did, but he was not qualified to testify regarding the positioning of the victim's body at the time of the shooting. Cestare based his conclusion that the victim was not reaching for his gun because the victim's hand was up when it was shot. Cestare concluded the hand had to be up at the time the hand was shot because it could not have been shot in the position it was found when the police arrived – downward angle toward the floorboard. Cestare's testimony exceeded his qualifications as an expert in forensic investigation as it went beyond explaining processing a crime scene and the results of that process. Cestare made outrageous conclusions based upon inadequate data and training.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and sentences and remand this matter to the Circuit Court.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

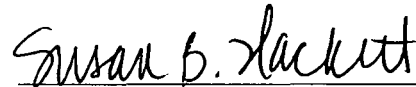
ATTORNEY FOR APPELLANT

This 23rd day of January, 2013.

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."

January 23rd, 2013



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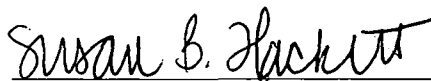
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CERTIFICATE OF SERVICE

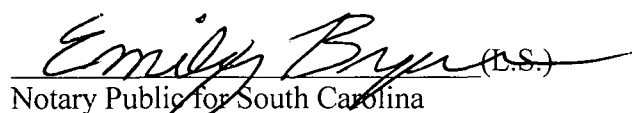
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rd day of January, 2013.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of January, 2013.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2022.