

STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM LAURENS COUNTY  
Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2016-002523

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S.C. SUPREME COURT

THE STATE,

Respondent,

vs.

DANIEL MARTINEZ HERRERA,

Petitioner.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEALS**

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## **STATEMENT OF ISSUE ON CERTIORARI**

The Court of Appeals properly found the trial court did not abuse its broad discretion by qualifying a witness as an expert in marijuana identification and by permitting the witness to testify as to the identification and weight of the marijuana at issue because the evidence and testimony presented during trial established the witness's testimony could assist the jury in understanding the issues raised in Herrera's case, the witness was personally qualified to testify as an expert, and the subject matter of the witness's testimony met a threshold level of reliability in light of the witness's expert qualifications. Furthermore, any error was harmless and had no impact on Herrera's case.

## STATEMENT OF THE CASE

### Procedural History

On October 8, 2010, the Laurens County Grand Jury indicted Petitioner Daniel Martinez Herrera for trafficking in marijuana, greater than ten pounds but less than one hundred pounds (2010-GS-30-01918). On December 16, 2013, Herrera was tried in his absence in the Laurens County Court of General Sessions before the Honorable Eugene C. Griffith, Jr., circuit court judge, and a jury. On December 18, 2013, the jury convicted Herrera as indicted. Judge Griffith imposed a sentence that was sealed until Herrera was apprehended.

On June 6, 2014, Herrera appeared before the Honorable Frank R. Addy, Jr., circuit court judge, for sentencing. Judge Addy unsealed Judge Griffith's sentence and Herrera was committed to the South Carolina Department of Corrections for five years.

Herrera filed a timely notice of appeal. On appeal, Herrera argued: (1) the trial court erred in denying his motion for a directed verdict when the State failed to present any evidence that the weight of the marijuana at issue was ten pounds or more and (2) allowing expert testimony regarding the weight of six vacuum-sealed bags of marijuana when the State failed to establish that the methodology used to weigh the marijuana was scientifically reliable. Following the submission of briefs, the Court of Appeals affirmed Herrera's conviction and sentence in an unpublished opinion without oral argument. State v. Daniel Martinez Herrera, Op. No. 2016-UP-424 (Ct. App. filed October 12, 2016). Thereafter, Herrera petitioned for rehearing on October 27, 2016; however, in this petition for rehearing, Herrera abandoned his issue regarding the trial court's failure to grant a directed verdict. The Court of Appeals issued an order denying the petition for rehearing on November 17, 2016. On January 19, 2017, Herrera filed a petition for a writ of certiorari and accompanying appendix with this Court. In this petition, Herrera only

challenges the expert testimony presented at his trial and does not challenge the Court of Appeals' determination that the trial court properly denied Herrera's motion for a directed verdict.

### **Factual History**

On August 12, 2010, Glenda Armstrong returned to her home at 107 McDowell Street in Laurens, South Carolina—where she had lived for twenty-two years—and found a package on her side porch. (R. pp. 23-27). Armstrong picked up the package and inspected it, noting that it came from Texas and was addressed to “Yems Smith, 107 McDowell Street, Laurens, [SC] 29360.” (R. pp. 25-26, 40). Labels on the outside of the package indicated that it contained blinds. (R. pp. 26-27, 40). Armstrong, who had not ordered anything, asked her neighbor if the package was for her and her neighbor replied it was not. (R. p. 25). Armstrong, curious as to why the package listed her address, took the package inside and opened it. (R. pp. 25-26). Upon peeking inside, Armstrong noticed several air-compressed packages of what she believed to be marijuana and contacted the Laurens City Police Department. (R. pp. 25-27).

Officer Brandy Anderson from the Laurens City Police Department responded to a dispatch call around 6:00 p.m. about a package containing possible drugs at 107 McDowell Street. (R. pp. 37-38). Upon arriving at that address, Officer Anderson met with Armstrong and viewed the package. (R. pp. 38-39). Relying on her prior law enforcement experience, Officer Anderson determined the package contained marijuana based on the substance's appearance and odor. (R. pp. 39-41). Officer Anderson seized the package and all of its contents. (R. pp. 29, 42).

After leaving Armstrong's home, Officer Anderson called Detective Leanne Riggott and asked Riggott to meet her at the police station to take custody of the package. (R. pp. 42-44). Once at the police station, Detective Riggott took control of the package and weighed its

contents. (R. pp. 44-45, 59). Based on the large quantity of marijuana, Officer Anderson concluded the threshold for trafficking had been met. (R. p. 45). Detective Riggott then secured the package in her locked office overnight in accordance with department procedure. (R. p. 59).

Meanwhile, two Hispanic adults—one man and one woman—came to Armstrong’s house aggressively inquiring about the package. (R. pp. 29, 46). Armstrong told them she had returned the package to the post office and it could be picked up there. (R. pp. 29-30). According to Armstrong, the man “tried to convince [her] . . . that [she] had the pot and [she] wasn’t going to give it up.” (R. p. 29). Armstrong insisted she had returned the package to the post office. (R. p. 29). Perplexingly, the man then changed his story and stated the package contained clothing for his children to go to school. (R. p. 30). Armstrong again insisted she had taken the package to the post office and the man could retrieve it from there. (R. p. 30). After the two left, Armstrong called law enforcement and provided a description of the man and woman. (R. pp. 29, 46-47). Law enforcement used this information to generate an incident report. (R. p. 47).

The following morning, Detective Walter Bentley, a fourteen-year law enforcement veteran, took possession of the package to attempt to arrange a controlled pickup from the post office. (R. pp. 72-74). Detective Bentley planned to take the package to the post office, speak with postal employees and explain that when the suspect arrived to pick up the package, he or she would be placed under arrest. (R. pp. 74, 77). He and Detective Tony Lynch went to the Laurens Post Office to attempt the controlled pickup, arriving at approximately 8:30 a.m. in an unmarked SUV. (R. pp. 76-78). The post office did not open until 9:00 a.m., but another car was already waiting in the parking lot when Detectives Bentley and Lynch arrived. (R. pp. 76-77). The car contained a Hispanic male matching the description of the suspect. (R. pp. 76-77). Detective Bentley decided his previous plan of a controlled pickup would not work because the

suspect was already in the parking lot, so he elected to wait and follow the suspect into the post office instead. (R. pp. 77-78). When the post office opened, the suspect (later identified as Herrera) entered. (R. p. 78). Detective Bentley, dressed in plain clothes, took off his firearm, placed his badge in his pocket, and followed Herrera into the post office. (R. p. 78). Herrera approached the counter and explained that he lived at 109 McDowell Street, but his package had accidentally been sent to 107 McDowell Street and the resident of 107 McDowell Street had sent the package back to the post office. (R. p. 78). The postal employee looked for the package to no avail and told Herrera it was not there. (R. pp. 78-79). When Herrera asked the employee to look again for the package, Detective Bentley interjected and stated he had Herrera's package. (R. pp. 78-79). Herrera replied, "Oh shit, Senior." (R. p. 79). Detective Bentley placed Herrera under arrest and searched him. (R. p. 79). Herrera had two slips of paper in his pocket with the name "Yems Smith" and the McDowell Street address written on both. (R. pp. 79-80, 188).

Detective Bentley subsequently investigated both the name "Yems Smith" and the name and address on the package's shipment label from Texas without success. (R. pp. 80, 84-85). He also passed the information and names along to different federal law enforcement agencies but did not receive any responsive information. (R. pp. 84-85).

Detective Jared Hunnicutt, the marijuana analyst for Laurens City Police Department, later examined and analyzed the package's contents and concluded the green, leafy substance within the package was marijuana. (R. pp. 94-95, 117-19). Detective Hunnicutt also weighed the marijuana, which totaled 10 pounds, 2.78 ounces. (R. pp. 121-22).

Based on the information discovered during the investigation, Herrera was charged with trafficking in marijuana, more than ten pounds but less than one hundred pounds. (R. pp. 1-7). Herrera was released from pretrial detention on bond. (R. pp. 1-7). Herrera failed to appear for

his trial and was tried in his absence after the trial court denied his counsel's motion for a continuance. (R. pp. 1-7). The State presented Armstrong, Officer Anderson, Detective Riggott, Detective Bentley, Detective Hunnicutt, and Captain John Stankus as witnesses.

The State originally sought to admit Detective Hunnicutt as an expert in the field of marijuana analysis. (R. pp. 101, 106-08). Detective Hunnicutt, a ten-year veteran of the police force who had dealt with marijuana thousands of times, graduated from Lander University with a degree in criminal justice management. (R. p. 100, 103, 105). He attended and successfully completed the South Carolina Law Enforcement Division (SLED) course in Columbia to become a marijuana analyst, requiring a one-hundred percent accuracy rate when testing one-hundred different samples. (R. pp. 96-98). Detective Hunnicutt testified he was trained in analyzing marijuana microscopically based on "physical, observable distinctive characteristic[s] of marijuana," as well as chemically based on a Duquenois-Levin test. (R. p. 98-99). Detective Hunnicutt testified he performs both the microscopic and chemical analysis every time he tests marijuana. (R. p. 99). Furthermore, Detective Hunnicutt testified he was trained how to properly use a digital scale, including how to properly zero it out, during his specialized training. (R. p. 105). Detective Hunnicutt testified although he had never testified as an expert in General Sessions proceedings, he had testified as an expert in marijuana analysis in magistrate's court. (R. p. 106).

After proffered testimony regarding his qualifications, including cross-examination from defense counsel, the trial court refused to qualify Detective Hunnicutt as an expert in marijuana analysis. (R. pp. 108-11). However, the trial court did allow Detective Hunnicutt to testify as an expert in marijuana identification based on his career experience with marijuana, including

“thousands” of experiences dealing with marijuana on a daily basis throughout his decade in law enforcement. (R. pp. 100-03, 110-15).

Before the jury, Detective Hunnicutt testified he was intimately familiar with the distinctive and pungent odor of marijuana and could readily distinguish marijuana from other substances based on its odor, as well as its appearance and touch. (R. pp. 112-13). He testified he also could identify marijuana “chemically and microscopically.”(R. p. 114). Detective Hunnicutt testified he performed an analysis of the six bags collected in this case on August 20, 2013, at the Greenwood Sheriff’s Office. (R. pp. 115-16). Detective Hunnicutt testified he tested a sample from each bag individually and confirmed each sample was marijuana based on microscopic and chemical analysis. (R. pp. 116-19). Detective Hunnicutt also testified he weighed each bag individually by placing each entire bag on the scale, then added the total weight of all six bags together, and finally, subtracted the weight of the bags to reach a total weight of the marijuana—10 pounds and 2.78 ounces. (R. pp. 121-23). On cross-examination, Detective Hunnicutt explained he did not empty out and weigh each bag without marijuana for fear of possibly losing some of the marijuana substance, but he instead elected to weigh a bag of identical size and consistency. (R. pp. 123-24). He testified he did not personally calibrate the scale, but that the evidence technician who oversees the laboratory had calibrated the scale prior to his use. (R. p. 124).

At the close of the State’s case, Herrera moved for a directed verdict arguing the State did not present sufficient evidence that Herrera “knowingly” attempted to possess the requisite amount of marijuana to be convicted of trafficking. (R. pp. 130-33). The State responded it had satisfied its burden of establishing that the weight of marijuana qualified as trafficking and that

there was no requirement Herrera knew the exact weight of the marijuana. (R. pp. 133-34). The trial court denied Herrera's motion and submitted the case to the jury. (R. p. 136).

Herrera requested jury instructions on the lesser included offenses of possession with intent to distribute and possession. (R. pp. 137, 142). Herrera argued there was some discrepancy regarding the total weight of the marijuana and therefore Herrera was entitled to jury instructions on lesser included offenses. (R. pp. 137-44). Over the State's objection, the trial court agreed to charge the jury on the lesser included offense of possession with intent to distribute. (R. pp. 137-44).

During deliberations, the jury sent a note inquiring about Detective Hunnicutt's testimony and whether stems counted towards the requisite ten pound requirement for trafficking in marijuana as charged. (R. p. 173). The court provided the jury with the statutory language of marijuana in response. (R. pp. 174, 177, 186-87). After deliberating for seventy-five minutes in total, the jury convicted Herrera of trafficking in marijuana, more than ten pounds but less than one hundred pounds. (R. pp. 173-75).

## ARGUMENT

**The Court of Appeals properly found the trial court did not abuse its broad discretion by qualifying a witness as an expert in marijuana identification and by permitting the witness to testify as to the identification and weight of the marijuana at issue because the evidence and testimony presented during trial established the witness's testimony could assist the jury in understanding the issues raised in Herrera's case, the witness was personally qualified to testify as an expert, and the subject matter of the witness's testimony met a threshold level of reliability in light of the witness's expert qualifications. Furthermore, any error was harmless and had no impact on Herrera's case.**

Herrera contends the Court of Appeals erred in affirming the trial court's ruling allowing Detective Hunnicutt, the Laurens City Police Department Marijuana Analyst, to provide expert testimony regarding marijuana identification and weight. In support of that contention, Herrera argues the Court of Appeals erroneously determined Detective Hunnicutt's testimony pertaining to marijuana identification was non-scientific expert opinion testimony and maintains the testimony was improperly admitted because it was beyond the scope of Detective Hunnicutt's expertise and his methodology was not reliable. Specifically, Herrera argues the trial court abused its discretion in finding Detective Hunnicutt's methodology to determine the weight of the marijuana was sufficiently reliable because Hunnicutt had no formal education or technical certifications regarding marijuana analysis,<sup>1</sup> Detective Hunnicutt's testimony provided no guidance as to whether his methods were reliable or as to whether he knew the definition of marijuana, Detective Hunnicutt's testimony failed to identify any text or policy that supported his weighing method, and Detective Hunnicutt's methodology did not include any peer review.

To the contrary, Detective Hunnicutt's testimony as to the marijuana identification and weight was properly admitted during trial because it satisfied all of the requirements for the

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<sup>1</sup> Herrera repeatedly asserts Detective Hunnicutt lacked the proper training and skills regarding marijuana analysis, however, this argument is unavailing, as Hunnicutt was not admitted as an expert in marijuana analysis based on any coursework, certifications, or formal training. The trial court sustained defense counsel's objection to the State's offer of Hunnicutt as an expert in marijuana analysis, but did allow Hunnicutt to testify as an expert in marijuana identification (including weight) based on his prior law enforcement experience handling marijuana. (R. pp. 95-115).

admission of expert testimony. Specifically, the evidence and testimony presented during trial established Detective Hunnicutt's testimony could assist the jury in understanding and resolving the issues raised in Herrera's case. Likewise, the evidence and testimony presented during trial demonstrated Detective Hunnicutt personally possessed the requisite knowledge, skill, training, and experience to qualify as an expert in marijuana identification. Furthermore, the evidence and testimony presented during trial established Detective Hunnicutt's testimony was reliable in light of his own expert qualifications and the steps he took in this particular case. As a result, Detective Hunnicutt's expert testimony was admissible, and the trial court did not abuse its broad discretion by qualifying him as an expert and permitting him to present his expert testimony regarding marijuana identification to the jury. Therefore, the Court of Appeals correctly affirmed the trial court's admission of Hunnicutt's expert testimony. Herrera's petition for a writ of certiorari should be denied.

#### **STANDARD OF REVIEW**

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Trial courts have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial court's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court."); State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be

disturbed absent a showing of probable prejudice.”); see also State v. Bixby, 388 S.C. 528, 556, 698 S.E.2d 572, 587 (2010) (“[D]eference is due to the trial court’s admission of the evidence.”).

Likewise, a decision as to whether to admit or exclude expert testimony rests within the trial court’s sound discretion and will not be reversed on appeal absent a prejudicial abuse of that discretion. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006); see State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009) (“A trial court’s decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion.”). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000); see Fields v. Reg’l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (“A trial court’s ruling on the admissibility of an expert’s testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair.”).

### ANALYSIS

In South Carolina, it is illegal to traffic in marijuana. See S.C. Code Ann. § 44-53-370(e)(1) (Supp. 2006) (prohibiting trafficking in marijuana). In relevant part, South Carolina’s definition of trafficking marijuana includes: “Any person . . . who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession” of ten pounds or more of marijuana. S.C. Code Ann. § 44–53–370. “It is the amount of [the illicit drug], rather than the criminal act, which triggers the trafficking statute, and distinguishes trafficking from distribution and simple possession.” State v. Taylor, 323 S.C. 162, 167, 473 S.E.2d 817, 819 (Ct. App. 1996) (citing State v. Raffaldt, 318 S.C. 110, 117, 456 S.E.2d 390, 394 (1995)). If the amount of marijuana, or *any mixture* containing included portions of the marijuana plant, is ten pounds or more the trafficking statute is applied.” See

Raffaldt, 318 S.C. at 117, 456 S.E.2d at 394 (“If the amount of cocaine, or any mixture containing cocaine, is ten grams or more the trafficking statute is applied.”).

Therefore, to secure a conviction for trafficking in marijuana, the State must present sufficient evidence that the marijuana in question weighed more than the requisite ten pounds necessary to convict a defendant of trafficking in marijuana pursuant to S.C. Code Ann. § 44-53-370(e)(1). Pursuant to S.C. Code Ann. § 44-53-110 (27)(a), marijuana is defined as:

- (i) *all species or variety of the marijuana plant and all parts thereof whether growing or not;*
- (ii) *the seeds of the marijuana plant;*
- (iii) the resin extracted from any part of the marijuana plant; or
- (iv) every compound, manufacture, salt, derivative, mixture, or preparation of the marijuana plant, marijuana seeds, or marijuana resin.

(emphasis added); see also State v. Scott, 303 S.C. 360, 363, 400 S.E.2d 784, 786 (Ct. App. 1991) (“Marijuana, including marijuana seeds, is, of course, a controlled substance.”). However, the statutory definition of marijuana excludes “mature stalks” and “the sterilized seed of the marijuana plant which is incapable of germination.” Id.

“Expert testimony may be used to help the jury to determine a fact in issue based on the expert’s specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge.” Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). “Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions.” Id. at 445-46, 699 S.E.2d at 175. “The qualification of a witness as an expert falls largely within the discretion of the trial judge.” State v. Myers, 301 S.C. 251, 255, 391 S.E.2d 551, 554 (1990).

Pursuant to the South Carolina Rules of Evidence, expert testimony is admissible under the following circumstances:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCORE; see also State v. Irick, 344 S.C. 460, 465, 545 S.E.2d 282, 285 (2001) (explaining an expert's testimony is admissible where "it is relevant and based on some factual predicate in the record"). Before admitting expert testimony, the trial court must find (1) the expert's testimony will assist the trier of fact; (2) the expert has the required knowledge, skill, experience, training, or education; and (3) the testimony is reliable. State v. Martin, 391 S.C. 508, 513, 706 S.E.2d 40, 42 (Ct. App. 2011); see also State v. Jones, 343 S.C. 562, 572, 541 S.E.2d 813, 819 (2001) ("Scientific evidence is admissible under Rule 702, SCORE, if the trial judge determines: (1) the evidence will assist the trier of fact; (2) the expert witness is qualified; (3) the underlying science is reliable, applying the factors found in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979); and (4) the probative value of the evidence outweighs its prejudicial effect.").

A witness can properly be qualified as an expert where "the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge." State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 467 (Ct. App. 1998). In determining whether a witness's knowledge, skill, training, or experience qualifies the witness as an expert, no mandatory set of qualifications is required. Henry, 329 S.C. at 274, 495 S.E.2d at 467; see State v. Peer, 320 S.C.

546, 554-555, 466 S.E.2d 375, 380 (Ct. App. 1996) (“The criteria for admitting the testimony of an expert is not whether the expert holds a degree in the specialty field he seeks to testify about, but whether he has such expertise in a business, profession, or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.”). Instead, an expert can become sufficiently skilled or knowledgeable to be able to provide an opinion helpful to the jury in a multitude of ways. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d 80, 86 (2008). Significantly, “[t]he test for qualification [as an expert] is a relative one that is dependent on the particular witness’s reference to the subject[,]” and “defects in the amount and quality of education and experience go to the weight of the expert’s testimony and not its admissibility.” Lee v. Suess, 318 S.C. 283, 285-86, 457 S.E.2d 344, 346 (1995).

In addition to ensuring the expert is qualified, the trial court must also ensure the testimony “meets a threshold level of reliability, regardless of whether it is scientific or nonscientific.” State v. Tapp, 387 S.C. 159, 165, 691 S.E.2d 165, 168 (Ct. App. 2010). In cases involving scientific expert testimony, the trial court should consider the following factors: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. State v. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999). However, in cases involving non-scientific expert testimony, the factors applied in an analysis of scientific evidence cannot readily be applied. See State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 688 (2009) (“The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the Council factors for scientific evidence serve no useful analytical purpose when evaluating

nonscientific expert testimony.”). Accordingly, no formulaic approach can or must be applied to determine reliability in cases involving nonscientific expert testimony. Id.

In the present case, the evidence and testimony presented during trial established (1) Detective Hunnicutt’s expert testimony regarding marijuana identification could assist the jury in understanding and resolving the issues raised in Herrera’s case; (2) Detective Hunnicutt had the requisite knowledge, skill, training, and experience to qualify as an expert; and (3) the subject matter of Detective Hunnicutt’s testimony was reliable. See State v. Martin, 391 S.C. 508, 513, 706 S.E.2d 40, 42 (2011) (instructing expert testimony is admissible where the trial court finds “(1) the expert’s testimony will assist the trier of fact, (2) the expert possesses the requisite knowledge, skill, experience, training, or education, and (3) and the expert’s testimony is reliable”). Under those circumstances, the trial court did not abuse its discretion by qualifying Detective Hunnicutt as an expert in Herrera’s case and permitting him to testify before the jury about the package’s contents and weight.

Initially, Detective Hunnicutt’s testimony was necessary in Herrera’s case to assist the trier of fact as to issues in Herrera’s case—whether the substance in the package was marijuana and the total weight of the marijuana—because the subject matter is beyond the ordinary knowledge of the average juror. See Watson, 389 S.C. at 446, 699 S.E.2d at 175 (“[I]n executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony. First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury.”). Therefore, the trial court correctly determined it was necessary for Detective Hunnicutt to testify as an expert in order to identify the package’s contents as marijuana and the exact weight of the marijuana.

Beyond the ability of Detective Hunnicutt's testimony to assist the jury, Detective Hunnicutt was also personally qualified to offer an expert opinion as to the package's contents and the marijuana's weight based on his own knowledge, skill, training, and experience. See Henry, 329 S.C. at 278, 495 S.E.2d at 469 (“[T]he relevant inquiry concerning qualification of the proffered expert is whether the witness possesses the necessary skill, learning, education, training, knowledge, or experience to enable the witness to give opinion testimony.”). Detective Hunnicutt's testimony was non-scientific, based upon his prior law enforcement experience of handling marijuana cases frequently for more than a decade.<sup>2</sup> (R. pp. 112-15). See Martin, 391 S.C. at 513-14, 706 S.E.2d at 42-43 (finding no error in the qualification of a witness as an expert even though the witness's expertise was based in part on in-house training he had received through his employment at SLED). Detective Hunnicutt had the requisite qualifications, training, and expertise to be qualified as an expert in marijuana identification. Detective Hunnicutt had been a member of law enforcement for more than ten years and had made numerous marijuana arrests during his decade as an officer. (R. pp. 100, 111). He testified he had seen marijuana “thousands” of times during his law enforcement career and that he was very familiar with identifying marijuana. (R. pp. 100-01). Detective Hunnicutt further testified he was familiar with several unique characteristics of marijuana, including its particular odor and appearance, based on his law enforcement experience. (R. pp. 98, 112-14).

Critically, Detective Hunnicutt's practical experience in marijuana identification coupled with his training from SLED demonstrated his expertise on the subject matter and enabled him to assist the jury with a matter beyond the knowledge of an ordinary layperson. See Honea v. Prior,

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<sup>2</sup> As discussed above, the trial court refused to qualify Detective Hunnicutt as an expert in the scientific field of marijuana analysis based on his SLED training (R. pp. 108-11).

295 S.C. 526, 530, 369 S.E.2d 846, 849 (Ct. App. 1988) (“A witness may be competent to testify as an expert although the witness acquired his or her knowledge *through practical experience and not by scientific study, training, or research.*” (emphasis added)); see also Gadson v. Mikasa Corp., 368 S.C. 214, 228, 628 S.E.2d 262, 270 (Ct. App. 2006) (“An expert is not limited to any class of persons acting professionally. There is no exact requirement concerning how knowledge or skill must be acquired.” (citations omitted)); cf. Peer, 320 S.C. at 554, 466 S.E.2d at 380 (finding no error in the trial judge’s qualification of a witness as an expert in sound where the witness had over five years of law enforcement experience, was trained by *another* officer who was certified in the use of sound meter equipment, was capable of demonstrating how a sound level meter worked, and had handled approximately ten cases during the one-and-a-half years he had been conducting sound tests); State v. Goode, 305 S.C. 176, 178, 406 S.E.2d 391, 393 (Ct. App. 1991) (finding no abuse of discretion in the qualification of a witness as an expert on a “lane of impact” issue where the witness had twelve weeks of training that included some specific training on determining the point of impact in accidents, one week of road training with a municipal police force, and four to five months of experience as a state trooper). That Detective Hunnicutt had not previously been qualified as an expert witness as to marijuana identification in general sessions court is not dispositive, as “[e]very expert has a first time.” United States v. Garcia, 752 F.3d 382, 391 (4th Cir. 2014) (holding that the trial court did not err in qualifying an FBI agent as a decoding expert for the first time, as she had the requisite experience, including an exclusive focus on narcotics trafficking for the preceding five years). Any possible defects in the amount and quality of education and experience of Detective Hunnicutt are also not dispositive, as such would “go to the weight of the expert’s testimony and not its admissibility.”

Lee, 318 S.C. at 285-286, 457 S.E.2d at 346. As a result, the trial court properly found Detective Hunnicutt to be personally qualified as an expert in marijuana identification.

Finally, Detective Hunnicutt's testimony as to the identification of the package's contents as marijuana and the weight of the marijuana met the threshold of reliability necessary for it to be admissible during Herrera's trial. Critically, looking to the relevant foundational factors established in Herrera's case, Detective Hunnicutt's testimony demonstrated he personally possessed the necessary qualifications to be considered an expert in marijuana identification based on his own knowledge, skill, training, and experience. Cf. Henry, 329 S.C. at 277-78, 495 S.E.2d at 468-49 ("The challenge mounted by Henry blithely ignores the recognized principle of law that a witness is competent as an expert provided the witness has acquired by reason of study or experience or both such knowledge and skill in a business, profession, or science that ***she is better qualified than the jury*** to form an opinion on the particular subject of testimony." (emphasis added)). Similarly, Detective Hunnicutt's testimony made clear that he had dealt with marijuana on an extremely frequent basis for more than ten years and was aware of its unique characteristics. Additionally, Detective Hunnicutt testified he was trained during his coursework at SLED to weigh marijuana on a digital scale and the scale must be reset to zero before weighing samples. (R. p. 105). Further, Detective Hunnicutt testified that the evidence technician with the Greenwood County Sheriff's Department calibrated the scale. (R. p. 124). Based on the establishment of these factors, the trial court properly found a sufficient threshold level of reliability had been established and correctly admitted Detective Hunnicutt's expert testimony.

Because Detective Hunnicutt's testimony satisfied all of the requirements for the admission of expert testimony in South Carolina, his expert testimony on marijuana identification and weight was properly introduced during trial, and Herrera was able to properly

challenge that testimony through cross-examination and by calling the jurors' attention to any defects or deficiencies he believed existed in regard to the knowledge, skill, training, or experience of Hunnicutt. See Wilson v. Rivers, 357 S.C. 447, 453, 593 S.E.2d 603, 605 (2004) ("Any defects in the amount of [an expert's] education and experience, if any, go to the weight of his testimony and not its admissibility."); see also Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 596 (1983) ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."); see generally 31A Am. Jur. 2d Expert and Opinion Evidence § 90 ("Such matters as defects in an expert's education or experience, the lack of an expert's specialization or lack of specialized training, the degree of an expert's certainty as to his or her opinion, or the quality of the expert's conclusions go to the weight to be given expert opinion testimony."). Accordingly, the trial court did not abuse its broad discretion by qualifying Detective Hunnicutt as an expert and permitting the agent to present his expert testimony to the jury, and its ruling was not arbitrary, unreasonable, or unfair. See Fields, 363 S.C. at 26, 609 S.E.2d at 509 ("A trial court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair."). Herrera's petition for a writ of certiorari should be denied.

#### **HARMLESS ERROR**

Assuming arguendo that the trial court abused its broad discretion in qualifying Detective Hunnicutt as an expert in marijuana identification, such error is harmless and had no impact on the jury's verdict.

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. See State v. Kromah, 401 S.C. 340, 737 S.E.2d 490, (2013) (subjecting the

erroneous qualification of a forensic interviewer to a harmless error analysis); see also Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992) (stating error is harmless beyond a reasonable doubt if it did not contribute to the verdict obtained); State v. Watts, 321 S.C. 158, 165, 467 S.E.2d 272, 277 (Ct.App.1996) (“In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt.” (citing Chapman v. California, 386 U.S. 18 (1967))). The key factor for determining whether a trial error constitutes reversible error is “whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (internal citations omitted). After an error is found, the appellate court must then review the other evidence considered at trial besides the erroneously admitted evidence. State v. Baccus, 367 S.C. 41, 55, 625 S.E.2d 216, 223 (2006). Error is harmless beyond a reasonable doubt if it does not contribute to the verdict. State v. Fletcher, 379 S.C. 17, 25, 664 S.E.2d 480, 484 (2008). “Whether an error is harmless depends on the circumstances of the particular case.” Tapp, 398 S.C. at 389, 728 S.E.2d at 475 (quoting State v. Mitchell, 378 S.C. 305, 316, 662 S.E.2d 493, 499 (2008). “No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it ‘could not reasonably have affected the result of the trial.’” Id. (quoting State v. Key, 256 S.C. 90, 180 S.E.2d 888 (1971)).

Expert testimony is not necessarily required for the identification of marijuana, particularly when the identification is made by a seasoned member of law enforcement. See United States v. Gaskin, 364 F.3d 438 (2d Cir. 2004) (finding neither actual drug exhibits nor reports of chemical analysis are required to support conviction for possession of controlled

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substance; lay testimony and circumstantial evidence may be sufficient to establish identity of substance involved in alleged narcotics transaction); United States v. Zielie, 734 F.2d 1447, 1456 (11th Cir. 1984) (finding that the introduction of a chemical analysis of the substance is not essential to conviction and the uncorroborated testimony of a person who observed a defendant in possession of a controlled substance is sufficient if the person is familiar with the substance at issue); Bowman v. State, 32 N.E.3d 812 (Ind. Ct. App. 2015) (holding in some instances, the identification of an illegal substance can be established based on the witness's experience with the substance if the circumstances of the identification support the conclusion the witness's identification is reliable); Sinclair v. State, 995 So. 2d 552 (Fla. Dist. Ct. App. 2008) (holding a sufficiently experienced police officer may opine regarding the identity of crack cocaine); State v. Northrup, 16 Kan. App. 2d 443, 825 P.2d 174 (1992) (holding expert testimony or chemical analysis was not required to determine substance is marijuana in light of other circumstantial evidence); Sims v. State, 255 Ark. 87, 499 S.W.2d 54 (1973) (finding law enforcement officers qualified to testify as to marijuana identification based on sight and smell without chemical analysis). Therefore, Detective Hunnicutt was able to testify that the substance in the package was marijuana based on his law enforcement experience absent being qualified as an expert. Furthermore, other members of law enforcement, including Officer Anderson, also testified that the package's contents and weight rose to the level of trafficking in marijuana without the need for any expert testimony.

For the foregoing reasons, any error in the qualification of Detective Hunnicutt as an expert in marijuana identification—assuming one occurred—was entirely harmless and had no impact on the outcome of Herrera's case. See State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d

152, 156 (2006) (“[A]ppellate courts will not set aside convictions due to insubstantial errors not affecting the result.”). Herrera’s petition for a writ of certiorari should be denied.

**CONCLUSION**

For all the foregoing reasons, this petition for a writ of certiorari should be denied.

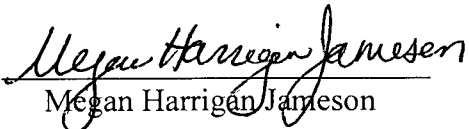
Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

February 21, 2017

STATE OF SOUTH CAROLINA  
In the Supreme Court

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**S.C. SUPREME COURT**

APPEAL FROM LAURENS COUNTY  
Eugene C. Griffith, Jr., Circuit Court Judge

Appellate Case No. 2016-002523

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THE STATE,

Respondent,

vs.

DANIEL MARTINEZ HERRERA,

Petitioner.

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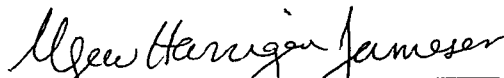
**PROOF OF SERVICE**

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I, Megan Harrigan Jameson, certify that I have served the within Return to the Petition for a Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

John H. Strom, Esquire  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.  
This 21st day of February, 2017.



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