RECEIVED

3 2017

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County

Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DANIEL MARTINEZ HERRERA,

APPELLANT

APPELLATE CASE NO. 2014-001299

FINAL BRIEF OF APPELLANT

JOHN H. STROM
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I.

Did the trial court err in refusing to grant a directed verdict of acquittal where the evidence merely raised the suspicion of Appellant's guilt, and where the State failed to present any substantial circumstantial evidence that the weight of the marijuana at issue amounted to ten pounds or more as required for trafficking under S.C. Code Ann. § 44-53-370(e)(1)(a)?

II.

Did the trial court err reversibly by allowing Detective Jared Hunnicutt to give expert opinion testimony on the weight of six vacuumed sealed bags purporting to contain marijuana where the State failed to establish that the methodology used by Hunnicutt to weigh the marijuana was scientifically reliable under *State v. Jones*?

STATEMENT OF THE CASE

On October 8, 2010, the Laurens County Grand Jury indicted Appellant, Daniel Herrera, for one count of trafficking in marijuana of over ten pounds and under one hundred pounds. R. 184 - R. 183. On December 16, 2013, Appellant proceeded to trial *in absentia* before the Honorable Eugene C. Griffith, Jr. and a jury. R. 2, ll. 1 - R. 7, ll. 24.

Deputy Solicitor Dale Scott and Assistant Solicitor Taylor Daniel represented the State. Chelsea McNeill represented Appellant. The jury found Appellant guilty as charged. On June 6, 2014, the Honorable Frank R. Addy, Jr. unsealed Judge Griffith's sentencing order and imposed a five year sentence of incarceration. R. 3, ll. 180 – R. 181, ll. 5.

STATEMENT OF FACTS

Procedural History

On August 12, 2010, Glenda Armstrong discovered a package on the side porch of her Laurens County home. R. 25, ll. 11 – R. 27, ll. 6. The box was addressed to a "Yems Smith" and listed a return address from Texas. *Id.* Armstrong took the box inside, became curious, and opened it. Upon seeing the contents of the box, Armstrong called the Laurens City Police Department. *Id.*

Police Officer Brandy Anderson responded to Armstrong's call and inspected the box. R. 38, ll. 2 – R. 39, ll. 13. She believed the box contained several sizeable vacuum sealed bags of what appeared to be marijuana. *Id.* Anderson took control of the box and returned to the police station.

Later on August 12th, two Hispanics, one male one female, knocked on Armstrong's back door. They explained to Armstrong that they believed a package containing children's clothes had been sent to her house by mistake. R. 29, ll. 15 – R. 30, ll. 15. Armstrong lied to the two, telling them that she had returned the box to the post-office. *Id.* Once the two individuals left, Armstrong contacted the police.

The following morning, Investigator Walter Bentley planned a "controlled pick-up" from the post office. R. 73, ll. 4 – R. 74, ll. 9. Bentley arrived at the post-office in downtown Laurens around 8:30 a.m. The post-office opened at 9:00 a.m. Upon pulling into the parking lot in an unmarked vehicle, Bentley immediately noticed a Hispanic male, later identified as Appellant, waiting in an adjacent vehicle for the post office to open. R. 76, ll. 13 R. 77, ll. 14.

When the post-office opened, Bentley – who was not in uniform and had concealed his gun and badge – followed Appellant into the post-office. R. 78, ll. 1 – R. 80, ll. 22. Appellant and Bentley were the only "customers." *Id.* Bentley claimed Appellant asked the postal employee to look for a box that was mistakenly delivered to Ms. Armstrong's address. *Id.*

Once the employee went into the back room a second time to look for the box, Bentley stepped from behind Appellant in line and told Appellant "I have your package and you are under arrest." Bentley claimed Appellant responded "oh shit, Señor." R. 91, ll. 14-20. Appellant was then taken into custody.

Trial

Appellant was not present for trial. Defense counsel moved for a continuance arguing that Appellant did not receive proper notice of his trial date and may not read or speak English. R. 1, ll. 17 – R. 5, ll. 3. The court denied the motion for continuance. R. 7, ll. 3-24.

Trial Testimony of Glenda Armstrong

Armstrong testified at trial about discovering the box on her side porch and contacting law enforcement. Armstrong recalled with irritation that at the time of the incident about "twelve Mexican people" were living at the house next door and that there "was all sorts of activity going on all the time." R. 24, ll. 23-25; R. 32, ll. 3-15.

Armstrong described the man who asked about the package as being approximately twenty-five to twenty-six years old, weighing roughly one hundred sixty-five to one hundred seventy-five pounds and standing about five foot seven inches tall. R. 87, ll. 1-6. She described the female as also in her mid-twenties, weighing about one hundred and twenty pounds, and being roughly four foot nine inches. *Id.* Despite giving such detailed descriptions, law enforcement never had Armstrong attempt a photographic lineup identification of Appellant. R. 90, ll. 23 – R. 91, ll. 5.

Trial Testimony of Walter Bentley

Bentley was the lead investigator and had attempted to arrange the controlled pickup at the post office. Bentley believed Appellant may have recognized him as law enforcement when he first confronted Appellant as Bentley frequently ate at the local Mexican restaurant where Appellant

worked. R. 91, ll. 6-20. Bentley opined also that Appellant roughly matched the description provided Armstrong. R. 92, ll. 6-11.

Bentley searched Appellant after placing him under arrest and found a slip of paper with the name "Yems Smith" and Armstrong's address in Appellant's pocket. *Id.* at ll. 15-18. Bentley averred that efforts to locate a "Yems Smith" were unavailing and that he did not believe the person existed. R. 81, ll. 10-25. Bentley also apparently attempted to coordinate with the DEA and the Post Office regarding the return address in Texas, but failed to uncover any additional information. R. 85, ll. 2-15.

Trial Testimony of Jared Hunnicutt

Hunnicutt, an investigator with the Laurens Police Department, was called by the State to testify concerning analysis work he performed on the vacuum sealed bags of marijuana. The State proffered Hunnicutt "as an expert in the field of marijuana detection and analysis" R. 109, ll. 19-22. Defense counsel objected, arguing that the identification of marijuana was not outside the knowledge of an average juror and that, if expert testimony was necessary, the witness lacked sufficient training and qualifications. R. 107, ll. 18 – R. 108, ll. 3.

Hunnicutt had been a Laurens police officer for ten years. He was a criminal justice major and graduate of Lander University. R. 100, ll. 3-23. In May of 2010, seven months before Appellant's trial, Hunnicutt attended a two day marijuana seminar conducted by SLED. R. 95, ll. 21 – R. 99, ll. 22. Over the sixteen-hours of instruction, he had been taught various methods of visually identifying marijuana as well as a single chemical test for identifying marijuana. *Id.*

In order to be certified by SLED as capable of recognizing marijuana, Hunnicutt had to determine when a substance was or was not marijuana one hundred times. *Id.* On *voir dire* cross-

examination, Hunnicutt stated that he had been taught the different parts of marijuana and how to weigh drugs by zeroing a digital scale. R. 104, ll. 15 – R. 105, ll. 18.

The trial court declined to qualify Hunnicutt as an expert in the analysis of marijuana. R. 108, ll. 9-25. Specifically, the court believed that the two day course was insufficient training and that the State had failed to provide the court with proof that Hunnicutt had any analyst certification. The court also voiced concern over the reliability of Hunnicutt's supposed weighing and analysis techniques. *Id.*

Having failed to qualify Hunnicutt as an expert marijuana analyst, the State then sought to qualify him as an expert in marijuana identification. R. 114, ll. 12 – R. 115, ll. 5. Defense counsel renewed her objections. *Id.* The Court qualified Hunnicutt as an expert in the identification of marijuana given his decade of law enforcement experience. *Id.* In keeping with the court's ruling, when the jury returned Hunnicutt testified he believed the six vacuum sealed bags taken from the box contained marijuana. R. 117, ll. 21 – R. 119, ll. 11.

After Hunnicutt stated that he had also weighed the bags, defense counsel objected arguing that the weight of the marijuana was beyond his expertise. R. 119, ll. 14-24. The State countered rhetorically "when do you have to be qualified as an expert to weigh something, that is not an opinion testimony. Anybody can testify if they personally weighed, what the results are." R. 119, ll. 25 – R. 120, ll. 3. The trial court overruled the objection, finding that the weight of the drugs was part of the identification. R. 120, ll. 10-11.

Drug Weight Evidence and Testimony

Hunnicutt testified that he weighed each bag of marijuana individually, the six bags had a combined weight of ten pounds and two and seventy-eight hundredth ounces. R. 121, ll. 3 – R. 122, ll. 12. That is only 1.7% over the minimum required for trafficking. Less than three ounces

separated trafficking from possession with intent to distribute. On cross-examination, Hunnicutt admitted that he did not weigh the vacuum sealed bags independently when determining the amount of marijuana. R. 150, ll. 14 – ll. 19. Instead, Hunnicutt confessed that he "weighed a bag, the same size and consistency of that and it comes out to two and three tenths grams."

Despite the marijuana weighing just over the ten pound minimum for trafficking, Hunnicutt did not send the marijuana to SLED or any other law enforcement agency to verify its weight. He also failed to check the accuracy of scales he used and during cross-examination he defensively denied that the maintenance of the scales was his responsibility. R. 124, ll. 3 - R. 126, ll. 21. Hunnicutt made no written report. The bag he used was never introduced at trial.

With respect to the marijuana itself, Hunnicutt stated that he did not remove any "stems" and that he was not ever qualified to identify marijuana "stems" only marijuana itself. R. 127, ll. 4-20. When reminded by defense counsel that he was an expert in marijuana identification, Hunnicutt posited "earlier you [defense counsel] asked me if stems were marijuana and I told you no . . . [law enforcement] don't test stems." R. 127, ll. 13-24.

While showing Hunnicutt a marijuana stem, defense counsel asked him if he included the weight of stems when calculating the total drug weight. R. 128, ll. 2-19. Hunnicutt became confused and was suddenly unable to cogently describe what he believed a stem was. *Id.* On redirect, Hunnicutt reasserted his expertise, but contradicted his earlier testimony in an effort to agree with the State's contention that "the stems [*sic*] is part of the marijuana plant. . . ". R. 129, ll. 5-10. Hunnicutt was the State's final witness and the defense did not present any evidence or testimony.

Directed Verdict, Jury Instructions, and Verdict

Defense counsel moved for a directed verdict arguing that the State had failed to present sufficient evidence that Appellant "knowingly" attempted to possess trafficking quantities of marijuana. R. 130, ll. 9 – R. 133, ll. 7. The State countered that it had "proven there was in fact ten pounds or more of marijuana" and was not required to prove that Appellant knew it was going to be that much marijuana. R. 133, ll. 9 – R. 135, ll. 5. The Court denied Appellant's directed verdict.

The court charged on the lesser-included offense of possession with intent to distribute. Appellant argued that the State had included portions of the marijuana plant that, under S.C. Code Ann. § 44-53-110(27)(b), were explicitly excluded from the definition of marijuana. Appellant specifically identified the State's reliance on "stems" and "seeds" to push the weight of marijuana over the threshold amount for trafficking. R. 137, ll. 1 – R.144, ll.18.

During deliberations the jury requested a definition of marijuana. R. 200, ll. 11-22. The trial court sent back the statutory definition of marijuana in § 44-53-110(27). *Id.*; R. 186. The court also provided the jury with the statutory explanation of the weight of a controlled substance under § 44-53-392: "Notwithstanding any other provision of this article, the weight of any controlled substance referenced in this article is the weight of that substance in pure form or any compound mixture thereof." R.187.

After deliberations, the jury returned a verdict of guilty of one count of trafficking in marijuana. R. 174, ll. 2 – R. 176, ll. 21.

ARGUMENTS

I

The trial court erred in refusing to grant a directed verdict of acquittal where the evidence merely raised the suspicion of Appellant's guilt, and where the State failed to present any substantial circumstantial evidence that the weight of the marijuana at issue amounted to ten pounds or more as required for trafficking under S.C. Code Ann. § 44-53-370(e)(1)(a).

Appellant was entitled to a directed verdict on the indictment for trafficking in marijuana as the State failed to present evidence any substantial circumstantial evidence that the total weight of the marijuana in Appellant's case, defined in § 44-53-110(27)(a), amounted ten pounds or more as law enforcement did not remove portions of the marijuana plant excluded from the definition of marijuana before weighing the drugs; the State used unscientific methods to account for the weight of packaging; and failed to verify the accuracy of the scale.

Directed Verdict Standard

Our Supreme Court has held that when reviewing a trial judge's refusal of a defendant's motion for a directed verdict, that it is required to consider "not whether there is 'any' evidence to support the conviction, but whether viewing the evidence in the light most favorable to the prosecution, there is sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt." *State v. Stewart*, 278 S.C. 296, 295 S.E.2d 627, 632 (1982), citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979); *see, also, State v. Asbury*, 328 S.C. 187, 493 S.E.2d 349 (1997). The accused is entitled to a directed verdict when the State fails to present evidence to support every element of the charged offense. *See State v. Brown*, 360 S.C. 581, 586, 602 S.E.2d 392, 395 (2004); *see also State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011).

When considering a motion for directed verdict of acquittal, "the trial court is concerned with the existence or non-existence of evidence, not its weight." *Brown*, 360 S.C. at 586, 602 S.E.2d at 395. Specifically, the trial court "should grant a directed verdict motion when the

evidence *merely raises a suspicion* that the accused is guilty." *State v. Odems*, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011) (emphasis added) (citation omitted).

"Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." *See State v. Buckmon*, 347 S.C. 316, 322, 555 S.E.2d 402, 404-05 (2001) (citing *State v. Lollis*, 343 S.C. 580, 541 S.E.2d 254 (2001)). Therefore, a case based solely upon circumstantial evidence should be submitted to the jury only "if there is any substantial circumstantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced." *Bostick*, 392 S.C. at 139, 708 S.E.2d at 776-777 (citing *State v. Mitchell,* 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)).

Statutory Definition of Marijuana

In the present case, the State alleged that Appellant's trafficked in marijuana by knowingly attempting to possess or bring into the State ten pounds or more of marijuana, but less than one hundred pounds. S.C. Code Ann. § 44-53-370(e)(1)(a). Under South Carolina law, 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.

§ 44-53-110(27)(a).

Explicitly excluded from the statutory definition of marijuana are "the ***mature stalks*** of the marijuana plant or fibers produced from these stalks," and "the sterilized seed of the marijuana plant which is incapable of germination." § 44-53-110(27)(b)(i), (iv) (*emphasis added*). A plant stalk is defined "a ***stem*** or main axis of a herbaceous plant. [A] ***stem*** or similar structure that supports a

plant part such as a flower, flower cluster, or leaf. [A] slender or elongated support structure."[1] The American Heritage Dictionary 1187 (2d College Ed. 1982) (*emphasis added*).

There is no South Carolina case law interpreting the statutory definition of marijuana or its exclusion of "mature stalks" and "non-germinating seeds." However, a 1985 South Carolina Attorney General Opinion assessing whether the weight of marijuana plant roots should be included when determining whether to bring a trafficking charge is instructive. 1985 Op Atty Gen, No. 85-64, p 175. Further, South Carolina's statutory definition mirrors the definition adopted by the federal government and many states. *Id.*; *see also* 21 USCS § 802 (15).

The Attorney General's Opinion states that "the most prevalent view [of other states' courts] is that mature stalks and other excluded material should not be weighed in determining the amount of marijuana confiscated." 1985 Op Atty Gen, No. 85-64, p 175 (*citing Lang v. State*, 165 Ga. App. 576 (1983); *State v. Kerfoot*, 675 S.W.2d. 658 (Mo. Ct. Cir. 1984); *U.S. v. Wright*, 742 F.2d 1220 (9th Cir. 1984)(*overruled on other grounds U.S. v. Valles–Valencia*, 823 F.2d 381 (9th Cir.1987)); *Purifoy v. State*, 359 So. 2d. 446 (Fla. 1978); *Kenny v. State*, 382 So. 2d. 304 (Fla. 1978)).[2]

---

[1] With respect to plant development "mature" is defined as: "having reached full natural growth or development" The American Heritage Dictionary 773 (2d College Ed. 1982). "Stem" is defined unambiguously as a part of the stalk: "the main ascending axis of a plant; ***stalk***; or trunk. ***[A] slender stalk*** supporting or connecting another plant part, such as a leaf or flower" *Id.* at 1193 (*emphasis added*). "Stem, in botany, is the plant axis that bears buds and shoots with leaves and, at its basal end, roots. ***The stem is the stalk of a plant*** or the main trunk of a tree." "Stem" *Britannica School*. Encyclopædia Britannica, Inc., 2015. Web. (May 28, 2015) http://library.eb.com.rlsc.idm.oclc.org/levels/referencecenter/article/69567 (*emphasis added*).

[2] At the time these cases were decided, Florida's legislature had removed the exclusions from the statute. However, the courts held that the exclusions still applied to these cases and the criminal convictions were reversed as "the weight of the mature stalks of marijuana was erroneously included in the total weight of the marijuana." 1985 Op Atty Gen, No. 85-64 (*citing Jordan v. State*, 419 So. 2d. 363 (1982)).

The Attorney General's opinion ultimately concludes "it is most likely that the South Carolina court would follow the majority of jurisdictions with similar statutes and not allow statutorily excludable portions of the marijuana plant to be weighed when determining the amount of confiscated contraband."[3] *Id.* The opinion then noted – in contradiction of current law – that it could be "***the burden of a defendant*** to prove that any contraband contained excludable matter." *Id.*

Discussion

In order to survive a directed verdict motion on the trafficking charge, the State had to present direct or substantial circumstantial evidence that Appellant attempted to possess or bring into the State ten pounds or more of marijuana. *State v. Parker*, 351 S.C. 567, 571 S.E.2d 288 (2002). The evidence presented by the State merely raised the suspicion of Appellant's guilt, as the State failed to present any substantial circumstantial evidence that the total amount of marijuana, as defined under the above-discussed statute, met or exceeded ten pounds.

The State Included Excludable Materials When Testing Drug Weight

The State alleged the marijuana that Appellant attempted to possess weighed ten pounds and two and seventy-eight hundredths ounces. R. 121, ll. 6- R. 122, ll. To reach this weight, Hunnicutt begrudgingly admitted that the marijuana at issue contained a large amount of stems and seeds, none of which he removed before weighing the drugs. R. 128, ll. 22 – R. 129, ll. 14. On cross-examination he initially claimed that he was "not certified in telling what stems are," but eventually admitted that "stems" were not part of what he understood to be marijuana R. 127, ll. 10 – R. 128, ll. 19. Nevertheless, he concded that he did not separate the marijuana from the stems before weighing the drugs.

[3] In addressing the specific question asked, the opinion posits that while the mature stalks of a marijuana plant would likely be excluded from the total weight, the statute does not list roots as excludable material when determining the weight of marijuana. 1985 Op Atty Gen, No. 85-64.

The trial court erred in ruling that marijuana "stems" were not part of the statutorily excluded "stalk" of a marijuana plant and, therefore, could be included determining the amount of marijuana. R. 139, ll. 15-20. In reaching this conclusion, the trial court summarily and inaccurately defined "stalks" as the part of the plant that "is attached to the roots. It is not the stem of a leaf. Stem versus stalk, there is a difference. Stem being smaller part of the plant versus the stalk being heavier or more region [*verbatim*] part of the plant." R. 139, ll. 15-20.

Both standard dictionaries and academic encyclopedias define a plant "stem" as a component of the plant's stalk or as the scientifically accurate term for a "stalk." Therefore, when the statutory definition of marijuana explicitly excludes "mature stalks," the State cannot include the weight of "stems" in the amount of marijuana, as they admittedly did in Appellant's case. 1985 Op Atty Gen, No. 85-64; R.127, ll. 14 – R. 130, ll. 7.

Further, the State presented no evidence at trial that the seeds found in the marijuana were sterile or non-germinating. *Id.* If the seeds were incapable of germination then they would also be excluded from the statutory definition of marijuana and could not contribute towards the weight of the drugs. § 44-53-110(27)(b)(iv); *see also Brown*, 360 S.C. at 586, 602 S.E.2d at 395.

The State did not Properly Account for the Weight of Packaging

Hunnicutt testified that he did not attempt to weigh the six vacuum sealed bags that contained the marijuana. R. 122, ll. 23 – R. 124, ll. 10. Instead, he approximated the weight of the vacuum sealed bags by selecting a bag that appeared to him to be roughly the same size and "consistency" as the bags containing marijuana. *Id.* The State never produced this bag at trial.

Further complicating an accurate determination of total marijuana weight was Hunnicutt's professed ignorance as to the accuracy of the scale used to weigh the marijuana. R. 124, ll. 11-14; R. 126, ll. 14-16. Hunnicutt stated that he zeroed the scale before placing each bag on it, but that he

did not know if the scale was accurate. *Id.* He believed that insuring the proper functioning of the scale was simply not his responsibility. *Id.* Despite the marijuana weighing less than 2% over the minimum for trafficking, Hunnicutt did not seek a second opinion on its weight from SLED, another police agency, or a crime laboratory technician. R. 124, ll. 15 – R. 125, ll. 16.

Conclusion

The total weight of the marijuana was the central issue in Appellant's case. Trafficking is a crime based on the total drug weight that the accused handled or attempted to handle. *State v. Raffaldt*, 318 S.C. 110, 456 S.E.2d 390 (1995). The minimum weight for trafficking in marijuana is ten pounds. § 44-53-370(e)(1)(a). The State accused Appellant of trafficking in ten pounds and two and seventy-eight hundredths ounces of marijuana. R. 183.

The State's own drug expert, Hunnicutt, testified that: (1) he did not remove portions of the marijuana plant which are excluded from the definition of marijuana; (2) he did not weigh the vacuum sealed bags that the marijuana was found in, but rather weighed a bag that he believed was similar and subtracted its weight from the total; and (3) he did not verify his results by requesting a peer-review and he took no steps to insure the accuracy of the scale he relied on.

Accordingly, the evidence relied upon by the State does not amount to substantial circumstantial evidence reasonably tending to prove Appellant's guilt, or from which his guilt may be fairly and logically deduced. *See Bostick*, 392 S.C. at 139, 708 S.E.2d at 776-777. Therefore, the trial court erred in refusing to grant a directed verdict motion because "the evidence *merely raises a suspicion*" that Appellant attempted to possess or bring into the State ten pounds or more of marijuana. *Odems*, 395 S.C. at 586, 720 S.E.2d at 50 (emphasis added) (citation omitted).

II

The trial court erred reversibly by allowing Detective Jared Hunnicutt to give expert opinion testimony on the weight of six vacuumed sealed bags purporting to contain marijuana where the State failed to establish that the methodology used by Hunnicutt to weigh the marijuana was scientifically reliable under *State v. Jones*.

The trial court correctly ruled that Hunnicutt lacked sufficient skill, knowledge, and training to testify as an expert in marijuana analysis. R. 109, ll. 19 – R. 111, ll. 6. However, over the objection of defense counsel, the trial court qualified Detective Jared Hunnicutt as an expert in the identification of marijuana, which the trial court determined included opinion testimony on the weight of the marijuana at issue. R. 119, ll. 19 – R. 120, ll. 22.

The trial court abused its discretion in allowing Hunnicutt to provide expert testimony as to the weight of the marijuana in Appellant's case. *Id.* Such expert opinion testimony was beyond the scope of his expertise and the methodology utilized by Hunnicutt was not sufficiently reliable under the *Jones* test., 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001); R. 95, ll. 4 – R. 115, ll. 5; § 44-53-110(27)(b).

Discussion

All expert testimony must satisfy the Rule 702, SCRE, criteria. *State v. White*, 382, S.C. 265, 270, 676 S.E.2d 684, 686 (2009). Under this rule, the trial court exercises a gatekeeping function to insure the proposed expert testimony meets a reliability threshold for the jury's consideration. *Id.* This inquiry requires that the proposed expert testimony meets a sufficient level of reliability, regardless of whether it is scientific or nonscientific. *Id.* Trial courts should be cautious in conferring an expert label upon a witness because juries may accord excessive or undue weight to "expert" testimony. *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010).

Accordingly, trial courts are required to establish whether: (1) the expert has the requisite qualifications, experience, and/or credentials; (2) the methodology by which the evidence is obtained is reliable; and (3) the evidence will assist the trier of fact. *Id.* Evaluating the reliability of the proposed expert testimony is the central concern of Rule 702 admissibility. *State v. Jones,* 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001); *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 147, 119 S.Ct. 1167 (1999).

With respect to reliability of scientific expert testimony and evidence, the trial court must examine the following factors: (1) publications and peer reviews of the technique used by the expert; (2) prior application of the method to the type of evidence involved in the case; (3) quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. *State v. Jones,* 273 S.C.723, 731-732, 259 S.E.2d 120, 124-125 (1979).

When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable. *State v. Council,* 335 S.C. 1, 21, 515 S.E.2d 508, 518 (1999). On appeal, the trial judge's decision to admit or exclude evidence is reviewed under an abuse of discretion standard. *Id.* at 20, 515 S.E.2d at 518.

The South Carolina Supreme Court's decisions regarding "barefoot sole impressions" in *State v. Jones,* and mitochondrial DNA (mtDNA) analysis in *State v. Council* are instructive and, at a minimum, provide guideposts for determining the level of scientific reliability required by courts when evaluating the admissibility of expert testimony.

In *Jones,* the State sought to introduce "barefoot insole impression evidence," which theorizes that the regular wearer of a pair of shoes imparts the impression of his foot into the insole

of the shoes. 343 S.C. 562, 572, 541 S.E.2d 813, 819. Barefoot insole impression evidence consists of "inked impressions of the suspected wearer's feet, photos of the suspected wearer's known insoles, and a standing cast of the suspected wearer's foot [which] are compared to the impressions in the boots, both visually and by using calipers to compare distances between toes and other features among the various exhibits." *Id.*

The State's expert testified that there were several methods used in making "barefoot insole impression" comparisons and that his work was published and subject to peer review. The expert specifically named three texts that he relied on, and several professional discussions he had with named experts as the basis for reaching his conclusion in the present case. *Id.*

The Supreme Court held that "barefoot insole impression" evidence is not scientifically reliable under the *Jones* test and thus inadmissible. *Id.* at 573, 541 S.E.2d at 819. The Court noted that while the expert was peer reviewed, much of his earlier work was discredited. *Id.* Moreover, SLED had no experience conducting this kind of work and had no written protocol to insure accuracy and repeatability. *Id.* at 574, 541 S.E.2d at 819. Further, the Court concluded that there was no existing recognized scientific laws or proceedings regarding the field of "barefoot insole impression." *Id.*

By comparison, in *State v. Council* the Court affirmed the trial court's determination that mtDNA analysis evidence was admissible. 335 S.C. 1, 515 S.E.2d. 508 (1999). At trial, the State's expert testified on proffer that he conducted the analysis using a widely recognized and accepted methodology within the scientific community. *Id.* at 17, 515 S.E.2d at 517. Further the expert testified that he confirmed the mtDNA evidence "based on a scientific objective standard" that was capable of repetition and replication by any qualified scientist. *Id.* at 18, 515 S.E.2d. at 516-517.

Looking to the *Jones* test, the Court concluded: "[mtDNA] analysis has been subjected to peer review and many articles have been published about this technology. *Id.* The F.B.I. validated the process and determined its [statistical] rate of error. Its underlying science has been generally accepted in the scientific community. Further, while forensic application of mtDNA analysis is fairly new, the technology has been used in other contexts for several years." *Id.* On appeal, the trial court's ruling was upheld, mtDNA analysis evidence was admissible under *Jones* and Rule 702 SCRE. *Id.* at 21, 515 S.E.2d at 518.

In the present case the trial court abused its discretion in holding that the methodology utilized by Hunnicutt to determine the weight of the marijuana was sufficiently reliable under the *Jones* standard. R. 108, ll. 18 – R. 109, ll. 22; R. 119, ll. 19 – R. 120, ll. 21. First, Hunnicutt provided no evidence that he had received any technical certifications in marijuana analysis or had experience in proper crime lab methodology. *Id.* Instead, Hunnicutt simply stated that he had attended a two-day, sixteen hour marijuana field identification course. *Id.* He candidly admitted that he had no formal education relating to marijuana analysis.[4] *Id.*

Second, Hunnicutt's testimony detailing how he weighed the marijuana provided no guidance to the trial court on the reliability of his methods or whether he followed or was even aware of the statutory definition of marijuana when weighing the drugs in question. To wit, Hunnicutt admitted that he did not weigh the vacuum sealed bags independently from the marijuana

---

[4] The trial court appeared to contradict itself in ruling that Hunnicutt was not an expert in marijuana "analysis and detection", but that he could, as an expert in "marijuana identification" testify as to the weight of the substance. R. 109, ll. 19 – R. 111, ll. 6.

Weighing the marijuana in a scientifically accurate manner would seem to require analyzing and detecting what portion of a substance satisfied the definition of marijuana. Identifying a substance as marijuana seems more straightforward, simply requiring that the person have the necessary experience, knowledge, training to know what marijuana typically looks likes. That expertise is distinct from having the expertise to analyze the amount of marijuana.

to determine their weight, but rather selected a bag, not produced at trial, that he believed, was sufficiently similar so as to approximate weight of the packaging. R. 123, ll. 8-25. Hunnicutt was also unable to cogently identify whether certain parts of the marijuana at issue qualified as statutorily excludable materials such as "mature stalks" and "non-germinating seeds." More troubling, he seemed totally ignorant of the statutory definition of marijuana. R. 127, ll. 7 – R. 128, 19.

Third, Hunnicutt never identified any training, authoritative text, or law enforcement policy that supported his informal method of weighing marijuana as scientifically reliable. Finally, despite the marijuana weighing only 1.7% above the minimum trafficking weight, Hunnicutt did not submit his methods or the drugs for peer-review. R. 124, ll. 11 – R. 125, ll. 10.

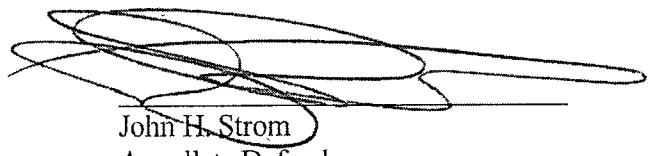
Any assertion of harmless error by the State would be untenable. Hunnicutt's testimony could not be harmless because it was the only evidence the State presented which alleged that the amount of marijuana reached the threshold weight required for trafficking. Hunnicutt's inclusion of excludable plant material and his failure to accurately account for the weight of the vacuum sealed bags brings into doubt whether the actual amount of marijuana, as defined in § 44-53-110(27), was sufficient evidence to support the trafficking charge. R. 123, ll. 4 –R. 128, ll. 19.

Therefore, the trial court's error in admitting Hunnicutt's testimony was not harmless because it was critical to Appellant being found guilty of trafficking marijuana. *State v. Mitchell,* 378 S.C. 305, 316, 662 S.E.23d 493, 499 (2008). Accordingly, the trial court committed reversible error in holding that Hunnicutt's expertise in the identification of marijuana allowed him to offer expert opinion testimony on the weight of the marijuana at issue in a sufficiently scientifically reliable manner as required by *State v. Jones*.

CONCLUSION

Based on the foregoing reasons Appellant, Daniel Herrera, respectfully requests that this Court issue an Order of Acquittal on his conviction (Issue I); or, in the alternative, that Appellant's conviction be reversed and his case remanded to the Laurens County Court of General Sessions for a new trial (Issue II).

Respectfully submitted,



John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of December, 2015.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

December 1, 2015

John Harrison Strom
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Laurens County
Eugene C. Griffith, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DANIEL MARTINEZ HERRERA,

APPELLANT

APPELLATE CASE NO. 2014-001299

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant and Designation of Matter in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, Senior Assistant Deputy Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 1st day of December, 2015.

John H. Strom
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 1st day of December, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: May 12th, 2025.