ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Marlboro County

J. Michael Baxley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ALEXANDER CARMICHAEL HUCKABEE, III,

APPELLANT.

APPELLATE CASE NO. 2013-001409

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENTS IN REPLY

I.

The State is attempting a *post hoc* redefinition of LaRosa's supposed expertise in an effort to recast his testimony as equivalent to that of a crime scene re-constructionist. LaRosa was admitted and testified as an expert "criminal profiler".

LaRosa's testimony consisted of conjectural deductions devised by applying the pseudoscientific concepts of "victimology" to information selected by law enforcement in order to create a profile of the "typical offender" who would commit the crime in question. The State argues that "LaRosa's testimony before the jury was limited to facts regarding the crime scene . . . and ***logical inferences*** that he, as an experienced investigator, was able to make." Resp't Br. p. 16. The State further surmises that LaRosa was simply "asked to look at a crime scene and ***make deductions*** based on what he saw." *Id.* p. 20. The State also contends that LaRosa:

> [E]xpressly emphasized that he could not say that Appellant was the perpetrator of the abuse in the case. ***Nothing in LaRosa's assertion that he believed that law enforcement should focus on a male, larger than a three year old, who had access to the child on multiple occasions,*** usurped the jury's role in determining guilt. The testimony was helpful, however, in assessing how the Victim's injuries could have occurred.

Id. at p. 21 (*emphasis added*).

What the State euphemistically describes as "logical inferences" and "deductions" is an "offender profile". Our Supreme Court has defined "criminal profiling" as, "a technique where a combination of forensics, behavior, victimology, crime scene assessment, crime scene reconstruction are put together to make an assessment of a violent crime to determine . . . possible characteristics and traits of the offender." *State v. Tapp*, 398 S.C. 376, 384 728 S.E.2d 468, 472 (2012). Left unsaid by the State in the above-quoted excerpt is that LaRosa's testimony went

beyond the mechanics of how the injuries occurred and speculated, under the guise of court-sanctioned expertise, on what kind of person would inflict those injuries. R. 455, ll. 8-21 .

Nor was LaRosa's testimony "largely cumulative" to the testimony of the forensic pathologist. Resp't. Br. p. 21. A forensic pathologist may render an opinion concerning the scientific bases of a victim's injuries or death in a criminal trial." *State v. Commander*, 396 S.C. 254, 265, 721 S.E.2d 413, 419 (2011). A properly qualified medical examiner may "opine that the victim's death was a homicide ***so long as the testimony does not speak to the defendant's 'state of mind at the time of the killing***,' . . . such testimony "would cross the line between proper expert testimony and testimony in the form of a legal conclusion." *Id.* at 269, 721 S.E.2d at 421 (2011) (*citing State v. Young*, 662 A.2d. 904, 907 (Me. 1995)(*emphasis added*). Pathologists are prohibited from giving "expert testimony addressing the state of mind or guilt of the accused" because such a determination is exclusively the domain of the jury. *Id.* at 268, 721 S.E.2d at 420-421.

LaRosa's testimony before the jury is also readily distinguishable from that of an expert in crime scene reconstruction. An expert in crime scene reconstruction is qualified to give opinion testimony as to how a crime physically happened based on the evidence processed at the crime scene. *State v. Baccus*, 367 S.C. 41, 47, 625 S.E.2d 216, 219 (2006) (crime scene reconstruction testified she found the victim in the rear bedroom where a window had been broken, observed bloody footwear impressions from the bedroom to the side door of the residence and concluded that during the process of entering the window the suspect was cut); *Cf. State v. Ellis*, 345 S.C. 175, 547 S.E.2d 490 (2001) (police officer qualified in crime scene processing exceeded scope of expertise when he testified about his conclusion on how the crime occurred).

LaRosa, as a "criminal profiler", explicitly testified to the jury the on mental state of the type of person who would commit this crime:

> If this case came to us as a ***traditional profile*** and we had this victim on the side, say on the side of the road, we didn't know who she belonged to or what the history was. ***I would be telling the local authorities that you would be looking for an adult male, approximately the age of twenty five to forty . . . that this individual would have direct access over this child where they were able to have complete control over a period of time.*** . . . This is a repeated assault upon this child over a period of time where we're looking at burns that are in the healing process. It is directed specifically at the genital area of this child. ***And it gets into all kinds of offender behavior*** that is not pleasant to talk about or get into. But the categories that we would look at would be that this is a ***preferential or a situational***, and then we would get into a subcategories and ***paint a picture for the authorities of what kind of guy we would be looking for.***[1]

R. 478, ll. 9 – R. 479, ll. 9 (*emphasis added*). The State's attempts to reclassify LaRosa as an expert in crime scene reconstruction or to portray his testimony as simply cumulative of testimony by the forensic pathologist are unavailing.

LaRosa's testimony is beyond a doubt criminal profile testimony. As will be explained in greater detail below this kind of "expert" testimony has been ruled inadmissible in the vast majority of other jurisdictions that have addressed it. Accordingly, this Court should now take the opportunity to hold such junk science testimony inadmissible.

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[1] Curiously, the State avers that LaRosa did not testify to the jury about the different types of child molesters or about delayed sexual gratification. Resp't. Br. 18, n. 8. A simple review of the record reveals that the State elicited testimony from LaRosa about the characteristics of the typical violent child molester, "including both of a preferential child sex abuser and also a situational [abuser], ***which this case is a situational abuser***. But yes, from ***sex [sadistic] qualities like this*** all the way to gentle family affair." R. 471, ll. 2 – R. 472, ll. 7 (*emphasis added*).

II.

While not identifying Appellant by name, the obvious implication from LaRosa's testimony was that Appellant was guilty because he fit LaRosa's "offender profile"; such testimony should be inadmissible as it usurps the jury's role, is offered only to advance "expert" opinion concerning the ultimate question of guilt or innocence, and amounts to impermissible, speculative propensity evidence.

The State posits that all twenty-one cases cited to in Appellant's brief as holding criminal profile testimony inadmissible are distinguishable from the present case. Resp't. Br. p. 17. In support of this sweeping statement, the State highlights two cases: *State v. Clements*, 770 P.2d. 447 (1989), and *People v. Robbie*, 92 Cal, App. 4th 1075 (2001). However, the threshold question answered by the cases cited in Appellant's brief and the question before this Court in the present case is the same, very simple evidentiary question: what is the evidence being offered to prove?

The only possible reason for LaRosa's testimony was to implant in the minds of the jurors a single thought: Appellant matches the State's profile of the kind of person who would commit the crime in question, thus Appellant is a pedophile and must be guilty. *Robbie*, at 1084 (a profile is a collection of conduct and characteristics commonly displayed by those that commit a certain crime).

This is impermissible in our adversarial system of justice, where "***[a] necessary corollary to the presumption of innocence is that a defendant must be tried for what he did, not for who he is***." *State v. Nelson*, 331 S.C. 1, 15, 501 S.E.2d 716, 723 (1998) (*citing State v. Melcher*, 678 A.2d 146 ,151 (N.H. 1996) ("[u]nlike the era of the Star Chamber, when defendants could be found guilty merely because their character was suspect. . . [w]e presume a person innocent until the State proves guilt beyond a reasonable doubt")) (*emphasis added*).

In *Robbie* the State put forward an expert who answered a series of "hypothetical questions assuming certain behavior that had been attributed to the defendant and was allowed to opine that

[such behavior] was the most prevalent kind of sex offender conduct." *Id.* The issue in *Robbie* was whether or not the sexual encounter was consensual and the State sought to use the profile testimony to show that defendant's non-violent behavior was consistent with the behavior of a "certain kind of rapist." *Id.* at 1085. In holding such testimony inadmissible, the *Robbie* court noted that the expert was "never directly asked to opine on whether defendant was a sex offender," but "the jury was invited to conclude that if defendant engaged in the conduct described, he was indeed a sex offender." *Id.* at 1086.

In Appellant's case the "criminal profile" consists of the characteristics of a hypothetical person of interest had Minor been "found on the side of the road." R. 478, ll. 9-12. Appellant's characteristics – male, between the ages of 22-44, with access to the child, mirror the characteristics of LaRosa's profile – fit that of the hypothetical profile. In both cases the "jury is improperly invited to conclude that, because the defendant manifested some characteristics [of the profile], he committed the crime." *Robbie*, at 1085.

In *Clements*, the prosecution called an expert in the field of child abuse to testify on the "treatability and psychology" of pedophiles, specifically fixated sexual offenders. 770 P.2d. 447, 451-453. As in the present case and *Robbie*, the *Clements'* expert did not meet or interview the accused and did not explicitly testify that the accused was a fixated pedophile. *Id.*

Like in Appellant's case, the prosecutor's closing argument in *Clements* connected the expert's testimony on the characteristics of the typical fixated sexual offender to Appellant. *Id.*; *see* R. 624, ll. 3 – R. 625, ll. 16. The Kansas Supreme Court held "the only inference which the jury

could have drawn from [the closing] argument and [the expert's testimony] was that defendant fit the profile of the typical fixated child molester and was therefore guilty."[2] *Id.* at 454.

"Criminal profile" testimony is an insidious form of propensity evidence. Normally, character evidence is not admissible "for purposes of proving that the accused possesses a criminal character or has a propensity to commit the crime with which he is charged." *State v. Peake,* 302 S.C. 378, 380, 396 S.E.2d 362, 363 (1990). In this respect, "criminal profile" testimony is even more offensive than propensity evidence as all limitations on relevancy are substituted for any fact or circumstance that the "victimologist" deems relevant. *See Nelson*, 331 S.C. at 7, 501 S.E.2d at 719-720 (children's books and toys owned by defendant purporting to show 'context' of the crime were ***inadmissible when the assumption is made that defendant was acting in conformity with the character traits of a pedophile***) (*emphasis added*).

The question a jury has to answer in a criminal trial is: did the state prove the accused committed the crime charged? Testimony on the theoretical profile or on what type of person is statistically likely to have committed a crime is irrelevant to proving whether the accused committed the crime in question. *Clements*, 770 P.2d. at 454.

Due process protections and sound limitations on the admission of evidence are imperative in cases like Appellant's where there is often a mytilenian demand from society to punish those accused of committing crimes against children. *See Tapp* at 391, 728 S.E.2d at 476

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[2] The *Clements* opinion approvingly cites: *Hall v. State*, 692 S.W.2d 769 (Ark. Ct. App. 1985) (expert testimony that in child abuse cases 75-80% of abusers are known to the child, are a relative or friend, or have authority over the child was impermissible because it improperly focused the jury's attention upon whether the evidence against defendant matched evidence in the usual case involving sexual abuse of a young child. Such testimony is used solely to prove that the circumstances and details found in the present case matched the circumstances and details usually found in child abuse cases).

(Pleicones, J., dissenting) (criminal profiler's testimony not harmless error as it identified defendant as likely perpetrator in light of admission that he had been in victim's apartment, as well as testimony from witnesses that the victim was familiar with respondent).

LaRosa's testimony did not help the jury objectively evaluate evidence, but instead demanded the jury conclude the defendant was guilty because he fit the profile LaRosa created only after Appellant was arrested. Accordingly this Court should take the opportunity to definitively rule that expert "criminal profile" or "offender behavior" testimony is *per se* inadmissible in South Carolina courts.

III.

The State argues, as a pseudo-additional sustaining ground, that LaRosa's testimony was admissible non-scientific expert testimony; whether categorized as scientific or non-scientific expert testimony, the State failed to establish that "criminal profiling" is based on sufficiently reliable methodology.

Reliability is a central feature of Rule 702 admissibility. *State v. Jones*, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001) (error for trial court's to admit "unreliable" expert evidence). While *Jones* provides the factors trial courts must use to determine the reliability of scientific expert testimony, the foundational requirement of reliability applies with equal force to non-scientific expert testimony:

> [T]he trial courts of this state have a gatekeeping role with respect to ***all evidence*** sought to be admitted under Rule 702, ***whether the evidence is scientific or nonscientific***. In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact. ***The familiar evidentiary mantra that a challenge to evidence goes to "weight, not admissibility" may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.***

State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 89 (2009)[3]; *see also State v. Kromah,* 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013) ("it is "an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts").

The State argues for the first time that "criminal profiling" testimony is non-scientific expert testimony, therefore the *Jones* factors do not apply and all the State is required to prove is that LaRosa's testimony was reliable. Resp't. Br. p. 23 – p. 27. This contention seems odd given that, at trial and on appeal the State cited to LaRosa's claim that his work was peer reviewed and that he followed generally accepted methods of profiling. *Id.*; R. 439, ll. 11 – R. 440, ll. 7. Both of which are factors in the *Jones* analysis. 273 S.C. at 731-732, 259 S.E.2d at 124-125. From a practical standpoint, the State is attempting to define down the reliability requirements for non-scientific expert testimony.

Whether categorized as scientific or non-scientific expert testimony, the State failed to establish that the methodology of "criminal profiling" is sufficiently reliable to be admissible expert testimony. First, LaRosa lacked trial experience demonstrating the reliability of his methods. Second, his testimony was deeply compromised by the fact that he already knew Appellant was incarcerated for the crime in question when he generated his "offender profile". R. 429, ll. 16-21.

Before Appellant's case, LaRosa had never testified at trial as an expert "criminal profiler" in a sexual abuse case. R. 447, ll. 6-13. In fact, he had previously only testified once on "offender behavior". R. 434, ll. 7-9. Thus, the State could not establish LaRosa's reliability based on his past

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[3] Dog tracking evidence was sufficiently reliable when: (1) the evidence shows the dog handler satisfies the qualifications of an expert under Rule 702; (2) the evidence shows the dog is of a breed characterized by an acute power of scent; (3) the dog has been trained to follow a trail by scent; (4) ***by experience the dog is found to be reliable***; (5) the dog was placed on the trail where the suspect was known to have been within a reasonable time; and (6) the trail was ***not otherwise contaminated.*** *White*, 382 S.C. at 265, 676 S.E.2d at 687 (*emphasis added*).

experience. Nor did the State cite to cases in other jurisdictions supporting the reliability and admissibility of criminal profilers more generally. *White*, 382 S.C. at 272, 676 S.E.2d at 687 (relying in part on out-of-state authority approving the admissibility of dog tracking evidence).

Curiously, LaRosa summarily claimed that his method of "criminal profiling" could achieve a zero rate of error by crafting an intentionally vague profile. R. 444, ll. 7 – R. 445, ll. 10; R. 454, ll. 4-18. The incongruity in this assertion of infallibility should have raised serious doubts about the reliability of his methodology. Claiming to achieve an extremely high degree of accuracy by deliberately decreasing precision is disingenuous coming from a purported expert.

LaRosa attempted to augment the appearance of reliability by claiming that his work was peer reviewed. R. 472, ll. 23-25. He never identified who reviewed his work, preferring simply to aver that others had approved of his profile. R. 439, ll. 2-7; *see State v. Chavis*, 412 S.C. 101, 107-108, 771 S.E.2d. 336, 339 (2015) (training in RATAC protocol and peer review of expert's use of RATAC protocol was insufficient to prove accuracy and reliability of forensic interviewer's testimony). LaRosa claimed his "offender profile" was based on an FBI criminal profile database and on proven profiling methods. R. 435, ll. 13-21. He did not name the database or cite to any specific method. *Id.* LaRosa also never referenced any psychological or psychiatric treatises he relied on or offer any other documentation supporting his claim. R. 439, ll. 11 – R. 440, ll. 7.

LaRosa only became involved in the investigation after Appellant was arrested. R. 478, ll. 9-18. Nonetheless, he purported to craft his "offender profile" – and presented it to the jurors – under the erroneous premise that it was developed before law enforcement had a suspect in custody. *Id.* This would be as if the K-9 officer in *White* had already known the location of the defendant and simply walked the dog from the convenience store to the defendant's location. 382 S.C. at 268-269, 676 S.E.2d at 685-686; *Cf. State v. Brown,* 103 S.C. 437, 88 S.E. 21, 23 (1916)

(dog tracking evidence inadmissible where the dog tracking took place beyond the "period of efficiency" and the handlers interfered with the dogs' tracking).

The State presented LaRosa with a test where the correct answer was already known and where any piece of evidence or even the absence of evidence could be rationalized to the jury as an important factor contributing to the "offender profile". For example, the absence of Appellant's semen or any DNA on Minor was not indicative of the absence of sexual abuse. Instead, LaRosa imagined that it indicated the culprit likely reimagined the abuse for sexual gratification at a later time. R. 431, ll. 17 – R. 433, ll. 8.

As LaRosa's testimony makes clear that there are simply too many variables in technique and too few recognized standards to determine the reliability of criminal profiling. R. 428, ll. 12 – R. 438, ll. 9. There is no criterion for evaluating the weight and relevance of certain evidence; no floor for how specific a profile must be before it can be declared a "success"; and no defined method of crafting a profile that is capable of replication by others to insure accuracy. R. 554, ll. 14 – R. 555, ll. 8; *Cf: Chavis*, 412 S.C. at 107-108, 771 S.E.2d at 339-340 (procedural consistency does not ensure reliability without evidence demonstrating that expert is able to draw reliable results from the consistently applied procedures).

Accordingly, even if this Court determines that the State has presented an additional sustaining ground[4], the trial court still committed reversible error in holding that criminal profiling

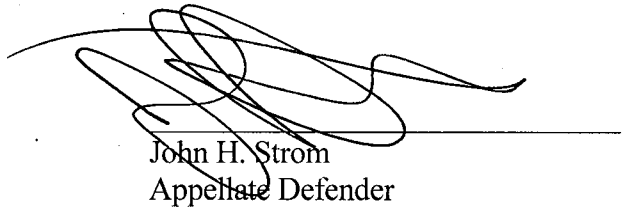
[4] LaRosa's vague, self-serving testimony does not provide a sufficient basis in the evidence to constitute an additional sustaining ground. The issue on appeal is whether the trial court exercised sound discretion in admitting the evidence on the predicate submitted to it. The State should be permitted not speculate on appeal with a novel theory of admissibility that was never advanced to the trial court. *See I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000) (it is "unfair to resolve a case on a ground never raised by respondent prior to appeal. . . respondent may raise additional sustaining ground not presented to the lower court, but the appellate court is likely to ignore it").

was a proper field for expert testimony as the State failed to establish that the methodology of "criminal profiling" was sufficiently reliable pursuant to Rule 702, SCRE.

CONCLUSION

By reason of the foregoing additional arguments, Appellant's conviction should be reversed and this case remanded to the Marlboro County Court of General Sessions for a new trial.

Respectfully submitted,



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This 13th day of August, 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."

August 13th, 2015

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