STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Charleston County
Larry B. Hyman, Jr., Circuit Court Judge

App. Case No.: 2015-002164

Daniel Hamrick, Petitioner,

V.

State of South Carolina, Respondent.

PETITION FOR REHEARING

On May 15, 2019, this Court reversed and remanded for a new trial, finding the trial court erred in admitting testimony from Officer Harris as a lay witness, but also finding even with his extensive training in accident reconstruction he was not qualified to testify as an expert witness, so the error was not harmless. This Court misapprehended or overlooked long-standing case law regarding the requirements to be admitted as an expert or overlooked the extensive training obtained by Officer Harris as detailed in the record. Additionally, this Court either misapprehended or overlooked the testimony in the record demonstrating any error was entirely harmless. Accordingly, pursuant to Rule 221(a), SCACR, the Court should grant the petition for rehearing, find the error in admitting the testimony as lay testimony was harmless because Officer Harris qualified to testify as an expert in accident reconstruction, affirm the remaining decisions of the trial court, and affirm Petitioner's conviction and sentence.

Pursuant to Rule 702, SCRE: "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." This Court has noted that its cases related to Rule 702 have equal application to all criminal and civil cases. See McMillan v. Durant, 312 S.C. 200, 204, 439 S.E.2d 829, 831 (1993). As this Court has repeatedly explained: "To be competent to testify as an expert, a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is **better qualified than the jury** to form an opinion on the particular subject of his testimony." Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252–53, 487 S.E.2d 596, 598 (1997) (internal quotation marks omitted and emphasis added); see also, State v. Baker, 411 S.C. 583, 599, 769 S.E.2d 860, 869 (2015) (same); Wilson v. Rivers, 357 S.C. 447, 452, 593 S.E.2d 603, 605 (2004) (same); Mizell v. Glover, 351 S.C. 392, 406, 570 S.E.2d 176, 183 (2002) (same); Huggins v. Broom, 189 S.C. 15, 199 S.E. 903, 904 (1938) (witness may be qualified as an expert when he has had "training or experience different from Mr. Average Citizen").

"Rule 702 does not contain a set of mandatory qualifications that a witness must meet in order to be qualified as an expert." Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 556, 658 S.E.2d 80, 86 (2008). "The fact, however, that the witness is not a specialist in the particular branch of the profession involved may be considered as affecting the **weight** of his testimony, but this is no ground for completely rejecting it." Hill v. Carolina Power & Light Co., 204 S.C. 83, 28 S.E.2d 545, 555 (1943) (emphasis added). "[A]n expert is not limited to any class of persons acting professionally." Gooding, 326 S.C. at 253, 487 S.E.2d at 598 (quoting Botehlo v. Bycura, 282 S.C. 578, 586, 320 S.E.2d 59, 64 (Ct. App. 1984)).

Additionally, in both civil and criminal cases, this Court has repeatedly held that defects in the education, experience, or training of the expert go to the weight of the testimony to be determined by the jury and not the admissibility of the testimony. Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 41, 691 S.E.2d 135, 145 (2010); see also, Peterson v. Nat'l R.R. Passenger Corp., 365 S.C. 391, 399, 618 S.E.2d 903, 907 (2005) ("Defects in an expert witness' education and experience go to the weight, not the admissibility, of the expert's testimony."); Creed v. City of Columbia, 310 S.C. 342, 426 S.E.2d 785 (1993) (allowing a general practitioner to testify as an expert witness on the mental and emotional damages suffered by a tort victim over objection the expert was not a neurologist or psychologist and specifically holding: "a physician is not incompetent to testify merely because he is not a specialist in the particular branch of his profession involved. . . . The fact that he is not a specialist goes to the weight of his testimony, not its admissibility."); State v. Myers, 301 S.C. 251, 256, 391 S.E.2d 551, 554 (1990) ("However, we have made it clear that, generally, defects in the amount and quality of education or experience go to the weight to be accorded the expert's testimony and not its admissibility."); State v. Moorer, 241 S.C. 487, 496, 129 S.E.2d 330, 334–35 (1963), overruled on other grounds (expert's "educ[a]tion and experience or lack of such goes to the weight to be accorded his testimony and not to its admissibility.").

Additionally, the appellate courts of this State have long applied the reasoning and analysis of the above cases in reaching decisions regarding the qualification of an expert. See State v. Peer, 320 S.C. 546, 554, 466 S.E.2d 375, 380 (Ct. App. 1996) (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).[1]

In the instant case, Officer Harris had significant education and training beyond the average juror. He indicated he was in the traffic division and part of his duties included collision reconstruction. (App.392). He further explained he took an 80-hour two week course in at-scene collision reconstruction. He had an 80-hour two week course in technical collision investigation. Officer Harris had an 80-hour two week course in collision reconstruction. Further, he took advanced classes. He took a course on motorcycle collision reconstruction for 40 hours. The other advance course was 40 hours in automobile pedestrian/bicycle accident reconstruction, the exact subject matter he was asked to testify about at trial. (App.395; 449-450). As a member of his team he was always on call whenever there was "a serious collision that may need advanced investigation." (App.395).

This Court overlooked or misapprehended the significance of the training received by Officer Harris. This Court describes his training as "a few courses over a period of several years." However, the courses he took were a progressive training in overall accident or collision reconstruction which accounted for 240 hours of study. This is more hours of study specifically on accident reconstruction than the average lawyer receives in criminal law and constitutional

[1] Goode is particularly instructive since it involves a trained law enforcement officer testifying about lane of impact, which is essentially the same issue in the current appeal.

law combined in law school.[2] Additionally, he received 40 hours of training on the exact subject of his testimony, automobile pedestrian reconstruction. In other words he had more training in the subject of his testimony than the average law student receives in evidence law.

This Court found accident reconstruction to be "a highly technical and specialized field in which experts employ principles of engineering, physics, and other knowledge to formulate opinions as to the movements and interactions of vehicles and people, under circumstances lay people – even trained officers – simply cannot understand." The State would agree completely that the average juror would not understand, which is why someone with 320 hours of training on the issue is able to provide the jury with the benefit of his training and education. This Court then goes on to state: "A law enforcement officer who attended several classes on the subject does not possess the necessary qualifications to satisfy the 'qualified as an expert' element of Rule 702." The Court has clearly overlooked its long-standing precedent which acknowledges a person does not need to be a specialist to be qualified as an expert. It has also overlooked the significant precedent explaining that defects in the education or training go to the weight of the evidence not the admissibility. It is without question that Officer Harris had more training and education than the average juror, even if he only had one of the five classes that he actually took. Further, he testified he was part of a team involved in advanced investigations of automobile accidents with ten years of experience as a law enforcement officer. This Court clearly overlooked these facts or misapplied its prior precedent to the qualifications of Officer Harris.

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[2] According to the University of South Carolina Registrar, a three-credit hour course results in 150 minutes of instruction per week for 14 weeks. See https://www.sc.edu/about/offices_and_divisions/registrar/toolbox/scheduling/standard_meeting_times/index.php (last visited May 30, 2019). This results in a total instruction time of 35 hours of instruction per three hour course. Law students generally receive 3-6 credit hours in criminal law and 4 hours in constitutional law. The total instruction time would typically be between 80 and 120 hours of study. See http://bulletin.law.sc.edu/content.php?catoid=98&navoid=2863 (last visited May 30, 2019).

Further, this Court seems to imply there is no issue with regard to Mr. Poplin's qualifications as an expert in accident reconstruction. He testified he had several degrees in civil and mechanical engineering. However, when asked about accident reconstruction specifically, he indicated he had "been to seminars, courses, various aspects in my professional career associated with accident reconstruction." (App.657). It is quite likely Officer Harris has had more hours of direct study regarding accident reconstruction since Poplin did not provide any specifics on how many or what type of courses or seminars or other "aspects" he had attended. Instead, this Court seems to completely discount the training received by Officer Harris solely on the basis that he received it while in law enforcement. As this Court has explained, the fact a witness has less training and education than another witness "is relevant to his credibility as a witness and **affects the weight, not the admissibility** of his testimony." Gooding, 326 S.C. at 253–54, 487 S.E.2d at 598.

This opinion will have far reaching impact beyond this particular criminal case. The analysis used, including the disregard of prior precedent on how to apply Rule 702 in general, will impact every criminal, civil, and family court case in which an expert testifies. The opinion raises questions regarding the quantity of qualifications a person must have to testify and whether the subject may be one too "technical" or "specialized" for someone without specific advanced degrees or training. Further, it establishes an arbitrary line as opposed to an identifiable threshold for the level of expertise required. Can a social worker no longer testify regarding behavior and PTSD, or will it require a psychologist or psychiatrist? See e.g., State v. Weaverling, 337 S.C. 460, 473, 523 S.E.2d 787, 794 (Ct. App. 1999) (social worker qualified to testify to behavior rape trauma evidence); Honea v. Prior, 295 S.C. 526, 531, 369 S.E.2d 846, 849 (Ct. App. 1988) (qualifying social worker to testify regarding abuse victim's mental

condition). Can one type of doctor no longer testify regarding procedures or practices in another field of medicine or a related field? See e.g., Wilson v. Rivers, 357 S.C. 447, 452, 593 S.E.2d 603, 605 (2004) (finding trial court erred in failing to qualify a medical doctor as an expert in the field of biomechanics because he was better qualified than the jury to evaluate the force of a moving vehicle on a human body); Lee v. Suess, 318 S.C. 283, 457 S.E.2d 344 (1995) (finding trial court erred by finding plastic reconstructive surgeon unqualified to give expert opinion in field of family practice because limited exposure of surgeon to field of family practice merely goes to weight of testimony and not its admissibility); Daniels v. Bernard, 270 S.C. 51, 240 S.E.2d 518 (1978) (in a personal injury action, a chiropractor was competent to testify as a medical expert to the extent of his knowledge and experience). These are some of the cases that are called into question by this Court's opinion because the analysis used by the Court in this case is markedly different than the analysis used by this Court and the Court of Appeals before.

The State asks this Court to reconsider its opinion, consider the relevant facts regarding Officer Harris' significant training on accident reconstruction, and to review and apply long-standing precedent to the facts of this case. Properly applied, this Court should find Officer Harris qualified as an expert in accident reconstruction and any defects in his education or training inure to the weight of the evidence and not its admissibility. Once properly considered, this Court should find, even if the trial court erred in admitting Officer Harris' testimony as lay testimony, it was entirely harmless because he should have been properly qualified as an expert witness.[3]

Additionally, even if the testimony could not be admitted, it was entirely harmless because the State presented several eye witnesses who testified the vehicle entered the construction lane, which was the sole reason for Harris' testimony as an accident reconstruction

[3] The State further relies on and incorporates its Brief of Respondent.

expert. For example, Neva Newman, an inspector assigned to the construction site, testified immediately after the crash she witnessed Petitioner's vehicle "jerking" back into the open lane of traffic. (App.201). She specifically indicated she saw half of Petitioner's vehicle in the closed lane of traffic. (App.207). Henry Ford, one of the employees on the construction site, specifically testified "the car was in the work zone" and indicated he witnessed the vehicle strike the victim. (App.230). He explained the car past him in the work zone, hit the victim, and then "come back out the work zone and going around the paver." (App.230). He testified the victim was inside the work zone at the time of the collision. (App.231). A third witness testified he was near Newman when the collision happened. He explained he heard the crash, saw a car in the "dead zone" and then the car nearly hit him and Newman as it exited the work zone. (App.250). A fourth employee, Brian Sessions, testified he did not see the collision with the victim, but nearly was hit by Petitioner's passenger mirror as Petitioner exited the work zone. (App.286-287). James Faulkner, the fifth eyewitness to testify, explained Petitioner's vehicle was in the work zone. Someone yelled, and the victim turned as he was hit by Petitioner. (App.295). As a result, at least five eye witnesses either saw the victim be struck in the work zone or saw Petitioner's vehicle exiting the work zone after hearing the collision with the victim. The testimony by Officer Harris was merely cumulative and certainly not the "critical" testimony supporting the State's version of events. Accordingly, the admission of that testimony was entirely harmless if in error.

CONCLUSION

For all of the foregoing reasons, the State requests the panel grant the petition for rehearing, find, even if the trial court improperly allowed Officer Harris' testimony as a lay witness, he would have been properly qualified as an expert so any error is harmless.

Additionally, this Court should affirm the trial court's remaining holdings and affirm Petitioner's conviction and sentence.

Respectfully submitted,

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PROOF OF SERVICE

I, William M. Blitch, Jr., certify that I have served the within Petition for Rehearing by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 30th day of May, 2019.

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