ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Jasper County

Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ANEISHA SHAIRE YOUNG,

APPELLANT

APPELLATE CASE NO. 2018-000525

FINAL BRIEF OF APPELLANT

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2.

Whether the court erred by allowing the text messages to be introduced into evidence through the business custodian where defense counsel correctly argued they were not trustworthy to be admissible under Rule 803 (6),SCRE, that they were unduly prejudicial and confusing, and where the court incorrectly reasoned the jury could "infer what they want" from text messages because the court believed appellant wrote them but where the texts admittedly could have multiple meanings and some of them were undoubtedly vulgar?

3.

Whether the court erred by qualifying SLED agent Eric Grabski as an expert in cell phone location data analysis where he admitted the program and method of his cell phone analysis had never been peer reviewed, and that he had never been qualified as an expert in state court in this area before, and where the erroneous qualification of Grabski allowed him to allege that appellant's cell phone was, in context, suspiciously "on the move" on the night of the murder?

STATEMENT OF THE CASE

Appellant was indicted by the Jasper County Grand Jury for the offenses of murder, attempted murder, and possession of a weapon during a violent crime. R. 576 – 581. Her case was called to trial on March 12, 2018, before the Honorable Carmen T. Mullen, and a jury. Stephen T. Plexico represented appellant. Brian Hollen, Patrick Hall, and Lynnor Musser were the assistant solicitors. R. 1 – 2.

On March 15, 2018, appellant was found guilty on all three counts. R. 512, ll. 2-10. Judge Mullen sentenced appellant for thirty years imprisonment for murder, ten years consecutive for attempted murder, and five years concurrent for possession of a weapon during a violent crime. R. 513, ll. 5-20.

This appeal follows.

STANDARD OF REVIEW

Discovery violation – non-Brady

The appellate court analyzes "the circuit court's ruling under an abuse of discretion standard." State v. Lawton, 382 S.C. 122, 127, 675 S.E.2d 454, 457 (2009). "A violation of Rule 5 is not reversible unless prejudice is shown." State v. Landon, 370 S.C. 103, 108, 634 S.E.2d 660, 663 (2006). "Admission of evidence falls within the trial court's discretion and will not be disturbed on appeal absent abuse of that discretion." State v. Colf, 337 S.C. 622, 625, 525 S.E.2d 246, 247 (2000)).

Evidentiary issues

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

Expert testimony

The decision of whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (citations omitted). The circuit court's decision to admit expert testimony will not be reversed on appeal absent "a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006) (citations omitted). An abuse of discretion occurs when the circuit court's conclusions "either lack evidentiary support or are controlled by an error of law." State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 495

(2013) (quoting Douglas, 369 S.C. at 429–30, 632 S.E.2d at 848) (internal quotation marks omitted). "A [circuit] court's ruling on the admissibility of an expert's testimony constitutes an abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." State v. Grubbs, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003) (citing Means v. Gates, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct.App.2001)). To show prejudice, the appellant must prove "that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citing Means, 348 S.C. at 166, 558 S.E.2d at 924).

ARGUMENT

1.

Appellant was deprived of her right to due process, where the defense was suddenly notified on the third day of trial that Debbie Spann would testify as a jailhouse snitch that appellant admitted her guilt to Spann in prison, since the solicitor not informing appellant of the basic content -- a synopsis -- of the testimony of this state's witness was outside the established course of discovery conduct, and constituted "trial by ambush" in violation of due process notice.

Introduction

Defense counsel Plexico objected on the third day of trial when the prosecution suddenly announced, without any prior notice, that it was going to have Debbie Spann testify Appellant Young allegedly confessed to her in jail that she committed the murder. Plexico would argue this "trial by ambush" violated due process, and all of the tenents of fundamental notice fairness that the solicitor's office and the defense attorneys operated under in that judicial circuit. R. 243, l. 9 – 250, l. 11.

Counsel Plexico filed his Motion for Discovery and Disclosure of Evidence and Brady Motion and Criminal Procedure Rule 5 and 6 Edwards Notice on May 26, 2016 – ten months prior to trial – but Plexico's trial argument made clear that the defense understood an "open file policy" existed or at least an understanding or course of dealings that at least the bare bones of such an inculpatory statement made by the defendant to a state's witness would not be hidden from the defense for any alleged technical discovery reason. Supp. R. 1 – 4.

During general *voir dire*, the trial judge listed as witnesses, among many others: "Marie Powell of Ridgeland, South Carolina. Debbie Spann of Ridgeland, South Carolina." R. 3, l. 22 – 4, l. 6. As will be seen infra, Debbie Spann would later testify, over objection, that appellant

admitted her guilt, while they were in the detention center together, in the murder of the decedent. The trial judge would also later note that she had called out Spann's name during voir dire. One logical and rational interpretation of the fact that Spann was on the state's witnesses list was that there was no reason to think the solicitor did not know, at least generally, what he thought Spann were going to say when called as a witness: That appellant confessed to murder.

Trial Evidence

Matthew Fraleigh worked for the Jasper County Communications Center. Matthew remembered a 911 call where a man said somebody was shooting at them but did not identify the shooter. [1] R. 32, l. 20 – 33, l. 7.

EMS employee Rusty Wells was also working as a reserve police officer for the Ridgeland Police Department on April 30, 2016. He recalled a scene behind the Kentucky Fried Chicken in Ridgeland where, "I found two individuals sitting on the ground. One was holding another individual." The wounded man was Wrenshad Anderson. Devonte Freeman was lying next to Anderson and he had a gunshot wound in the back of his head. Devonte Freeman would later die. R. 35, l. 1 – 37, l. 17.

Anderson told Officer Wells that "Peanut [Eric Darien] and Dre [Keandre Frazier]" were the shooters and that they were dressed in all black. R. 38, l. 11 – 39, l. 13. Wells said Anderson told him he had "contact numbers for Peanut and Dre in his cell phone, and then, he also identified Aneisha --" R. 40, l. 23 – 41, l. 5. Wells read from his "narrative" which stated, "Anderson, at some point in time during his excited state, indicated that he had in his cell phone the contact numbers for Peanut and Dre. He also included a third name of Aneisha. He further

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[1] The 911 call, State's Exhibit 1, is on file with this Court.

indicated several times that Peanut and Dre were suspects. Anderson also indicated that Freeman [the decedent] and Peanut [Eric Darien] had a beef all day."

Wells admitted he did not know who Aneisha was at the time. R. 49, ll. 2-22. Wells also acknowledged that Anderson "never said Aneisha was the shooter." R. 50, ll. 21-23. R. 58, ll. 2-22. Part of Anderson's statement was read to the jury without objection:

> We just left the Siesta [Motel] Weekly rentals. Talking to Mr. Horton [the owner]. And we was walking to Econo Lodge. When we got close to KFC path, that's when we heard shots.
>
> I'm sorry. I'm trying to decipher this.
>
> Vonte got into it with peanut earlier today, and we saw Neisha and her friend. That's when we was ordered to leave. That's when we left walking, and they sneak up behind us and started shooting.
>
> Q: Does that statement say Aneisha?
>
> A: Yes, sir.
>
> Q: Okay. So you were given that name Aneisha by Mr. Anderson less than 45 minutes after the shooting. Is that right?
>
> A: Somewhere around there, yes, sir.

R. 61, ll. 13 – 62, l. 3.

As will be seen infra, Anderson repeatedly said he was "delirious" at the time, and disclaimed responsibility for the accuracy of anything he asserted.

Alex Inniss was a paramedic with the Jasper County Fire and Rescue crew. He remembered finding the decedent with a gunshot wound to his head lying on his back. The decedent was not responsive although he was breathing and had a pulse. The decedent never regained consciousness while being airlifted to a hospital in Savannah. R. 72, l. 3 – 75, l. 4.

Lieutenant Joey Ginn testified that on April 30, 2016, he responded to a shooting behind the Kentucky Fried Chicken in Jasper County. R. 79, ll. 12-23. He later spoke with Keith

Horton, the owner of the Siesta Hotel. R. 79, l. 24 – 80, l. 23. Lieutenant Ginn remembered that Anderson was very confused and excited after his decedent brother was shot. Ginn did his best to calm Anderson down. R. 81, l. 18 – 83, l. 12.

Lieutenant Ginn said he was later told by Officer Wells that there were two unknown suspects dressed in all black. "They could have been Asian, they could have been Hispanic, they could have been white, they could have been black." R. 93, ll. 10-17.

Demitria Williams was pregnant with the decedent's child at the time he was killed. Williams had gone to school with appellant and knew her from there. R. 102, l. 4 – 104, l. 4. Williams testified a week before the decedent was shot and killed that appellant allegedly came to her house and "she knocked on my door when me and Davonte Freeman was living together at [the] Siesta. Williams said that appellant burst her way inside and fought with the decedent in front of her. Williams claimed that appellant threatened to kill the decedent and was cursing at him. Williams also maintained that appellant "tried going through his pants pockets -- on the floor by the bed," saying, "that N has some of her money." R. 104, l. 10 – 105, l. 14.

Williams testified that the police never came and talked to her or the decedent about alleged stealing from appellant. R. 106, ll. 9-14.

Bernard Seabrooks was living at the Siesta Hotel on April 29 – 30, 2016, the night the decedent was killed. He was playing cards and he remembered seeing Wrenshad Anderson, "Kwame." Again, Kwame was the decedent's brother. R. 114, l. 25 – 115, l. 25. Seabrooks remembered seeing Horton, the owner of the Siesta Hotel, talking to the decedent and Peanut [Eric Darien] that night. R. 116, l. 3 – 119, l. 15.

Keith Horton testified that the decedent rented from him at various times at the Siesta, but he was on trespass notice at the time of the shooting. R. 120, l. 21 – 121, l. 23. Horton said he

was not angry with the decedent for being in violation of the trespass notice because "Davonte was always very polite." The decedent was a drifter and apparently homeless during some hard times. R. 122, l. 2 – 125, l. 7.

Horton remembered the decedent and his brother Wrenshad Anderson leaving together in a car that evening with appellant. Horton said he heard later "that somebody had been shot behind the KFC and everything, and I went and hung out. I was still on site whenever we got the call from the police. I think the police department came back over there." R. 126, l. 5 – 127, l. 22.

Wrenshad Anderson testified about the events at the Siesta Hotel before the shooting. Anderson remembered talking with appellant in Seabrooks' room that evening. Anderson maintained it was "funny" to see appellant at the Siesta Hotel because she "wasn't supposed to be there." R. 156, l. 4 – 157, l. 23.

Anderson claimed appellant was wearing all black that evening. He further maintained that he knew his decedent brother and appellant had "got into it." R. 158, l. 17 – 159, l. 9.

Anderson remembered walking through the brush with his decedent brother when they heard loud gunshots. The decedent was hit and he fell to the ground. R. 160, l. 17 – 167, l. 3.

Anderson admitted he told the police that Peanut [Eric Darien] and Dre [Keandre Frazier] were the shooters but repeatedly now claimed: "I was delusional. Something like that happened to you and you almost got your life taken from you, and these people shooting at you -- you don't know what's happening with your brother. You just know they haul him off somewhere, and yeah, I was a little delusional. Like, yeah, I was delusional . . ." R. 166, l. 8 – 167, l. 13.

Anderson said that he knew the decedent and appellant "had problems" a few weeks before the decedent was killed. Anderson claimed appellant said she was going to kill the

decedent and he speculated that appellant "was behind" the decedent being shot at on a prior occasion. R. 181, l. 1 – 182, l. 20. Finally, Anderson admitted at an earlier time that he had stolen a pistol from Peanut [Eric Darien] "that started the beef." R. 188, l. 17 – 189, l. 22.

Lieutenant Daniel Litchfield testified that based on his talks with others in law enforcement, he developed "Eric Darien, who is Peanut; Aneisha; and I was looking at Dre, Keandre Frazier, as being involved in it." R. 229, ll. 18-25.

The interview with appellant was then played for the jury. R. 229, l. 18 – 233, l. 19. This interview, State's Exhibit 29, is on file with this court. During the interview or interrogation, appellant repeatedly denies having anything to do with the death of the decedent.

Appellant also told the police during the interrogation that she had an alibi -- Deshonda Washington. Lieutenant Litchfield maintained he reached out to Deshonda Washington, but he said she did not come in for an interview. He was even unsure Washington was the woman who answered the phone when he called about wanting to interview her. Suffice it to say Lieutenant Litchfield did not pursue the alibi any further. R. 236, l. 6 – 238, l. 17.

At the end of Litchfield's testimony, he said a female inmate in the detention center, Marie Powell, had asked that Litchfield come and speak with her. R. 239, l. 2 – 243, l. 7. The court was then recessed for the day.

Proposed testimony of Debbie Spann

The following morning, the trial judge noted the attorneys had talked in chambers about Debbie Spann. The judge said she understood Spann was housed in the detention center with appellant. The solicitor now proposed that Spann was going to testify that appellant admitted to killing the decedent to her while they were in jail together. R. 243, l. 20 – 244, l. 3.

The judge observed, "I am slightly concerned about the late hour in finding her. You put her on the witness list. *You obviously knew she had information from Ms. Young*, because you knew she was housed with her . . ." R. 243, l. 9 – 244, l. 16. (emphasis added). The judge cited Rule 5, SCRCrimP, on a defendant giving a statement against her interest but the judge said she understood because the statement was not written or recorded and that the state therefore maintained "there was nothing to turn over." R. 244, ll. 17-23.

The judge told defense counsel Plexico that she did not see anything in the rule that prohibited the witness from testifying. Plexico countered that they had selected a jury on Monday and it was now Wednesday morning and he was caught completely by surprise. Plexico said he had no indication what "this witness was going to say. So if they're going to call a witness, *they're supposed to give me witness statements.*" R. 245, ll. 8-23. (emphasis added).

The judge said there were not any witness statements and that the only statement was a statement against interest by appellant to a jailhouse snitch, Debbie Spann. Plexico responded that he had asked "*for a synopsis of any statement* they're going to use against my client," and Plexico said the state's failure to provide that synopsis should bar Spann from testifying. R. 245, l. 8 – 246, l. 11. (emphasis added).

The solicitor then asserted the rule only required him to turn over a copy of the witness statement under Rule 5, SCRCrimP, after the witness had testified. The solicitor said he did not have any statement from Spann. The solicitor claimed he was not happy that he was telling Counsel Plexico of the alleged confession at this late date, but said he had no other responsibility under the rule. The judge then ruled because Spann was not a prosecution agent but a jailhouse snitch that the state technically complied with the rule and "I think it comes in." R. 245, l. 8 –

249, l. 24. Defense counsel Plexico responded that was "trial by ambush" and the judge only urged that defense counsel talk with Spann "to see if that might cure it." R. 249, l. 19 – 250, l. 6.

Debbie Spann testified that she did not know the police had been looking for her. Spann said she did not like talking to law enforcement but said she met appellant "in jail when she admitted that she killed my cousin Davonte Freeman." R. 427, l. 12 – 428, l. 18. On cross-examination, Spann said appellant "admitted to murdering Davonte Freeman, and she wanted to take Kwame Freeman off the streets cause he was a witness to the case." R. 432, l. 23 – 433, l. 6.

Other evidence - Marie Powell

Earlier in the trial, Marie Powell testified she was in jail with appellant. Powell claimed that appellant told her that Eric Darien possessed the .9 millimeter handgun. R. 394, l. 2 – 395, l. 22. Powell claimed that appellant asked her how much her friend Anthony Austin would charge to "take out Kwame, because he was the only eyewitness." Powell said she interpreted this as appellant wanted Anthony Austin to kill Kwame. R. 396, l. 9 – 397, l. 21.

Powell also said she was aware that appellant at some point possessed the .22 caliber gun that allegedly was the murder weapon. R. 398, l. 6 – 399, l. 11. Powell also claimed that appellant told her that she planned to talk to law enforcement about Eric Darien's "role in the murder." R. 403, l. 19 – 404, l. 13. Powell admitted her long criminal record but stated she was testifying to get "justice" for the decedent who "had a baby on the way." R. 405, l. 1 – 406, l. 9.

Discussion

Defense counsel Plexico told the judge that he expected, as usual, a synopsis of the contents of any inculpatory statements that his client had made to any witness for the state. Defense had filed and served its discovery motion requesting these statements, and it was in the

ordinary course of business that defense counsel expected to be told of any inculpatory statement his client made. "Hiding behind" the technicalities of Rule 5, SCRCrimP, was not the course of dealings in Jasper County or that judicial circuit. Supp. R. 1 – 4. As this Court is well aware some counties or judicial circuits have an "open file policy," or an understanding on disclosure – a course of daily dealings – that goes beyond Rule 5, SCRCrimP.

Defense counsel was correct that it was "trial by ambush" to tell defense counsel, for the first time, on the morning of the third day of trial, that witness Debbie Spann was going to testify that appellant allegedly admitted to killing the decedent to Spann while they were in jail together.

As to Rule 5(a)(1)(A), SCRCrimP, "the rule, of course, is intended to enable a defendant to obtain prior to trial **any of his own statements** relevant to the crime charged against him so he will be able to prepare properly to face the evidence that may be introduced against him at trial." United States v. Gleason, 616 F.2d 2, 24 (1979). (discussing the underlying purpose of the similar federal rule). Early v. State, 418 S.C. 255, 266, 792 S.E.2d 226, 233 (2016).

"Where a party fails to comply with Rule 5, the court may order the noncomplying party to permit inspection, grant a continuance, prohibit introduction of the undisclosed evidence, or enter such order as it deems just under the circumstances." State v. Kerr, 330 S.C. 132, 150, 498 S.E.2d 212, 221 (Ct. App. 1998). "Sanctions for noncompliance with disclosure rules are within the discretion of the trial court and will not be disturbed absent an abuse of discretion." State v. Davis, 309 S.C. 56, 63, 419 S.E.2d 820, 825 (Ct. App. 1992). "Moreover, trial court also has a prerogative to waive the disclosure requirements 'for good cause shown.'" Rule 5(g), SCRCrimP. "The court may, for good cause shown, waive the requirements of this rule." Early v. State, 418 S.C. 255, 267, 792 S.E.2d 226, 232 (2016).

Defense counsel protested that the solicitor was, by not disclosing a synopsis or any other notice of Debbie Spann's assertion that appellant confessed to the murder conducting "trial by ambush" in violation of due process and fundamental fairness. It was a breach of the course of dealings in that circuit. While Rule 5 requirements and their violations can lead to reversal on appeal, so too many judicial circuits have "open file policies" and the course of dealings that lead the prosecution and the defense to deal in good faith with one another regarding the disclosure of witness statements in advance. See State v. Lawton, 382 S.C. 122, 675 S.E.2d 454 (Ct. App. 2009) (A letter written by the defendant regarding his dishonesty pertaining to the underlying incident should have been disclosed by the state in response to the discovery motion and defendant was entitled to a new trial).

While the testimony of Marie Powell was intended to have the jury conclude that appellant made inculpatory statements about knowledge of the murder and wanting to cover-up information about the murder the testimony of jailhouse snitch Debbie Spann unequivocally asserted that appellant confessed to murdering the victim. While the judge was bothered by that lack of notice of the alleged confession to the defense – given the course of dealings between the solicitor's office and defense attorneys in that circuit -- the judge did not bar Spann from testifying as a sanction. That was an abuse of discretion because this was a fundamentally unfair, indeed egregious discovery violation that denied appellant her right to due process and a fundamentally fair trial. See Early v. State, 418 S.C. 255, 267, 792 S.E.2d 226, 232 (2016); State v. Davis, 309 S.C. 56, 63, 419 S.E.2d 820, 825 (Ct. App. 1992). Appellant should be granted a new trial.

2.

The court erred by allowing the text messages to be introduced into evidence through the business custodian where defense counsel correctly argued they were not trustworthy to be admissible under Rule 803 (6),SCRE, that they were unduly prejudicial and confusing, and where the court incorrectly reasoned the jury could "infer what they want" from text messages because the court believed appellant wrote them but where the texts admittedly could have multiple meanings and some of them were undoubtedly vulgar.

Relevant Facts

During the testimony of Agent Grabski, defense counsel Plexico asked for a ruling on the admissibility of the text messages. The solicitor said that Grabski would not be testifying about the text messages, that witness Karen Milbrodt would testify regarding the text messages, and that Milbrodt "can't say that this was her [appellant's] phone or the number that she's texting was Eric Darien's phone." At that point, the solicitor claimed Milbrodt would just testify as to the number from which the text message was sent, seemingly only to show that appellant knew Eric Darien, which allegedly conflicted with her statement to the police. R. 270, l. 9 – 272, l. 17. See State's exhibit 29 (Appellant's interview is on file with this Court).

Karen Milbrodt was later called as a witness. She was a record custodian for Verizon Wireless. R. 313, l. 18 – 314, l. 4. When the solicitor offered State's Exhibit 28, a call log, the judge noted defense counsel's prior objection. R. 316, l. 13 – 317, l. 12. Those records are also before this Court to review. R. 514 – 555.

When the content of the text messages themselves became an issue, the judge sent the jury out so the attorneys could argue the matter. Defense counsel objected to the undue prejudice of these text messages. R. 322, l. 1 – 324, l. 14.

The judge stated her initial view that the text messages were "her words. So, it's an admission by a defendant. The question then becomes the other text messages that are coming and going back and forth." R. 323, l. 25 – 324, l. 8. The judge, solicitor, and defense counsel then discussed the various text messages, including "*I see you hitting niggas what that fire.* Is that fire?" and "*Welcome to the family fool.*" "*The next bus leaves at 5:50 a.m. on 5/1; get it now.*" R. 325, l. 6 – 328, l. 5. (emphasis in original).

Also included were the solicitor's claim that text messages between appellant and Eric Darien said, "*Talking bout u told her I did that s/h/i/t* . . . smh means shaking my head." R. 328, l. 6. – 335, l. 12. (emphasis in original). Defense counsel argued the text messages and documents were absolutely not trustworthy under Rule 803(6), SCRE, and that there was no legitimate purpose for the admission of text messages such as "*I see you hitting N's what with that fire welcome to the family fool*" as far as relevance and undue prejudice were concerned. R. 334, l. 10 – 336, l. 5. (emphasis in original). Counsel also noted appellant asserted to the investigator her interview that she had misplaced or lost her phone, and that she broke it later. Counsel again noted the untrustworthiness of the text messages and the bizarre nature of them. R. 334, l. 15 – 336, l. 5.

The judge finally noted that the jury could hear the text messages including those which were racially provocative, and vulgar. "I think they [the jury] can infer what they want from that. She could have absolutely said they're lying on me. And it isn't that it's not admissible because it's evidence of flight; it's her statement. Whatever she said as her statement's coming in. I mean, that's an admission by a defendant. **Anything she says is coming in.** So I think for the whole thing in context *for what the jury wants to surmise from it, they can.*" R. 336, l. 6 – 337, l. 23. (emphasis added).

The judge then said that Milbrodt would be able to read the text messages to the jury. R. 338, ll. 13-16. Milbrodt then read the jury a text message that said, "*I see you hitting niggas what -- what the fire welcome to the family fool.*" R. 343, ll. 5-7. (emphasis in original). Another text message said, "*Mimi just hmu talking bout u told her I did that shit . . . smh.*" R. 344, ll. 7-9 (emphasis in original). Another said, "*Chillout for uh minute.*" Another said, "*Mane I aint gone lie bruh I been hiding out they tryna pin me to this "M" delete this.*" R. 345, l. 20 – 346, l. 5. (emphasis in original). Milbrodt identified appellant's Gmail address and told the solicitor she did not know who had the phone when the text messages were sent. R. 346, ll. 15-22.

On cross-examination by defense counsel, Milbrodt admitted many of the text messages could have multiple meanings. R. 348, ll. 9-21. The text messages themselves were introduced as an exhibit, State's Exhibit 30, in addition to them being read to the jury by Milbrodt. R. 556 – 573.

Discussion

The court incorrectly reasoned that the text messages were admissible against appellant merely because the court believed that she wrote them. The court also erred by ruling that the jury could infer whatever it desired from the text messages, since the court believed appellant wrote them or "said it." The solicitor initially asserted that the text messages would only show that appellant knew Eric Darien which contradicted appellant's statements to the investigator in the state's estimation. Again, appellant's statement during interrogation is before this Court for viewing. See State's Exhibit 29.

As seen, the state's witness Milbrodt admitted that the text messages could have multiple meanings. It was undisputed that they contained racially offensive language and that they were

vulgar at times. It should be undisputed that the text messages cast appellant in an overall very bad light. Defense counsel was correct in urging that any probative value the text messages had was outweighed by their undue prejudice or unduly prejudicial effect. See Rule 403, SCRE. ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues . . ."). See State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991).

The text messages showed appellant speaking in some slang language, which a reasonable juror would conclude was attempting to hide illegal or socially unacceptable behavior from a law-abiding citizen and reader.

In State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017), the Supreme Court held that the judge abused his discretion in admitting fifteen minutes of jail calls from King without listening to them first. The Supreme Court also found the jail calls should not have been admitted against King because of their limited probative value being outweighed by their undue prejudice. The jail calls were riddled with racial slurs and profanity. In this case also, the text messages contained racial slurs and profanity.

The text messages, as with the jail calls in King, had the undue tendency to suggest a verdict on an improper basis, here, that appellant was an uncouth lowlife not deserving of the benefit of the doubt.

The text messages in this case went far beyond allegedly showing that appellant knew Eric Darien. The judge's reasoning that because she believed appellant wrote the text messages automatically making the text messages admissible flies in the face of the judge's duty to weigh any probative value of the text messages against their unfair prejudice. See Rule 403, SCRE. It was an acquiescence of discretionary authority which in and of itself was an error of law. See

State v. King, supra, *citing* State v. Smith, 376 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) ("It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.") Just as the judge in King abused his discretion by refusing to listen to jail tapes before admitting them, the judge here abused her discretion by reasoning and ruling that because she believed appellant wrote the text messages that they were automatically admissible since appellant "wrote it," or "said it," ending the need for any probative value versus undue prejudice analysis. Rule 403, SCRE.

The text messages were confusing, had multiple meanings, and the judge abused her discretion by ruling the jury could infer whatever it wanted from the text messages. Such an unchanneled admission of evidence is the antithesis of trustworthy evidence likely to aid the jury in reaching a correct result. State v. King, supra. Appellant should be granted a new trial.

3.

The court erred by qualifying SLED agent Eric Grabski as an expert in cell phone location data analysis where he admitted the program and method of his cell phone analysis had never been peer reviewed, and that he had never been qualified as an expert in state court in this area before, and where the erroneous qualification of Grabski allowed him to allege that appellant's cell phone was, in context, suspiciously "on the move" on the night of the murder.

Relevant Facts

SLED agent Eric Grabski had worked at SLED for less than two years at the time of appellant's trial. R. 350, l. 25 – 351, l. 8. Grabski said he had "special training or experience in cell phone records and location data." R. 352, ll. 1-5. Grabski said for purposes of his proposed testimony: "I use an application called CAST Viz. It was created by the FBI, and it was actually created by their CAST team, which is an acronym for their Cellular Analysis Survey Team. I attended a sixteen-hour training class where they tell us how to map records within their program that will basically analyze the tower cell site listing, as well as the call detail records of the target device, and put it more cleanly out into a -- into a map. It helps me from doing that by hand." Grabski said he also attended training put on by PenLink. Grabski said PenLink was where they "run a pen register track and trace software." He also attended a two-week training by a company called ETS, which was "a basic foundation and the theory behind how, you know, the technology of cell phones." R. 352, ll. 18-24.

Grabski said he had used cell tower information about two hundred times to map cell phone data. However, Grabski had never testified in state court before as an expert in this area. R. 353, l. 14 – 354, l. 8.

Defense counsel Plexico then conducted voir dire of Grabski on his qualifications as a proposed expert. Grabski said the program was developed by the FBI and he did not know who created the program and he could not say if it had ever been peer-reviewed. When asked whether the program had been scrutinized by the scientific community to validate it, Grabski said, "It's not a scientific application." R. 354, l. 18 – 355, l. 16. Grabski also said he did not know how his doctorate degree in engineering pertained would assist him in his proposed testimony as "an expert" that day. R. 356, ll. 1-11.

Grabski also admitted that computers do get "bugs and have problems" but asserted "I'm not sure how this pertains to call record analysis." Grabski also acknowledged he was uncritically relying on what the computer provided to him as being reliable information. R. 357, l. 9 – 358, l. 3. Defense counsel Plexico objected to Grabski being qualified as an expert, and the judge admitted Grabski as an expert in the area of cell phone location data analysis over appellant's objection. R. 358, ll. 2-11.

Once qualified, Grabski said he was able to pinpoint the cell phone calls to a general area. R. 361, ll. 19-23. Grabski said the location of interest to him was "8146 East Main Street," which was the dumpster behind the Kentucky Fried Chicken. R. 362, ll. 18-23. This was the area where the decedent was shot and killed. The solicitor then used a slide presentation to describe the movement of appellant's cell phone that evening with the analysis beginning at 9:54 PM on April 29, 2016. R. 363, l. 24 – 378, l. 17.

In his closing argument, the solicitor told the jury what SLED Agent Grabski had told the jury about the movement of the cell phone: "There's a twenty-minute window, 12:34 to 12:54, *seven minutes after Wrenshad [Anderson] makes his phone call to 911, seven minutes, she [appellant] starts moving. That phone starts moving.* . . . What is she doing with that twenty

minutes? *She's sitting in the woods, waiting on Wrenshad Anderson and Davonte Freeman with Eric Darien. That's where she is. She's not calling anybody. They're waiting.* That's where they are. And then -- and guys, again, I was gone at 10:30. That's a lie. That's a lie. *And eventually, we get back to Hilton Head, and that phone doesn't leave or doesn't seem to move from that tower for some time after 2:30 in the morning until 4:30 the next day.*" R. 456, l. 23 – 457, l. 10. (emphasis added).

The solicitor also argued the text messages saying "*Shawty trippin.what's the move?*" meant, "The move is to go kill Davonte Freeman, and to try to kill Wrenshad Anderson. That's the move. Oh, it's not her phone, I'm sorry. May 2nd, 9:53, what's your email? aneishay@gmail.com. But it's not her phone; it's not her number anymore; it broke." R. 458, l. 19 – 459, l. 3.

Discussion

The solicitor used the cell phone evidence after SLED agent Grabski was qualified as an expert to argue that it proved appellant was on the move on the night she participated in the murder of the decedent. Grabski had never testified as an expert in cell phone analysis before. That is telling, although appellant understands it always opens the door to the assertion, "There has to be a first time." However, defense counsel correctly argued the voir dire of Grabski did not show he was sufficiently familiar with the science, and he merely accepted what the computer told him. That was true while he admitted that computers had "bugs" and flaws.

In State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009), our Supreme Court held that the trial judge has the gatekeeping function to ensure the reliability of expert testimony. This gatekeeping function also applied to nonscientific evidence.

Rule 702, SCRE, provides, "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." Here, the question was whether SLED agent Grabski was qualified as an expert to opine and interpret the cell phone tower evidence.

To the contrary of State v. White, the qualifications of the proposed expert witness was the key matter in contention. In this case, again, SLED agent Grabski had never testified as an expert in state court in cell phone analysis. The jury -- in the area of cell phone analysis -- is at the mercy of the "expert" as far as his or her interpretation of the pinging of the cell phone off of the cell phone towers interpretations provided by the "expert." This testimony is far beyond the ken of the average juror.

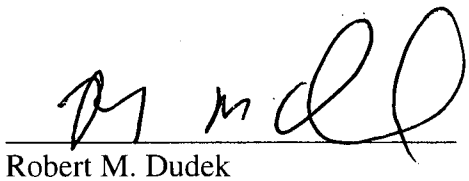
While the publication and peer review of the technique often goes to the admissibility of the scientific evidence under the State v. Jones, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979), standard, it is also applicable to the qualification of the witness regarding his knowledge of any flaws within the program or science. Here, agent Grabski admitted computers and programs have "bugs" or flaws but he was unable to elaborate, or to recognize them when they occurred given that he did not have any knowledge of any peer review of the program or the technique.

The solicitor used the cell phone testimony of Grabski in his closing argument to urge that evidence showed appellant's suspicious movements on the night of the murder. This was a slim case against appellant where the state had to resort to the last-second alleged surprise testimony of jailhouse snitch Debbie Spann, coupled with vague and difficult to understand unfairly prejudicial text message evidence in addition to this cell phone testimony. The judge abused her discretion and abdicated her gatekeeping function as to the qualifications of SLED

agent Grabski by admitting him as an expert witness under Rule 702, SCRE in cell phone analysis. See State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). As seen above, the solicitor used his "scientific" testimony as a great asset in urging a guilty verdict. Appellant should be granted a new trial.

CONCLUSION

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



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 18th day of July, 2019.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the 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."

July 18, 2019.

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