STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Pickens County

Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WANDA JANE CRUMPTON,

APPELLANT

APPELLATE CASE NO. 2019-001246

INITIAL BRIEF OF APPELLANT

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2.

Whether the trial court erred where it admitted evidence that Robert Cowan of the Easley Police Department analyzed the substance possessed by Appellant and determined it was marijuana, where Cowan admitted the testing procedures that he used could not confirm whether the substance was marijuana or hemp, since the evidence was not reliable and was inadmissible under Rule 702, SCRE?

STATEMENT OF THE CASE

On July 16, 2019, a Pickens County Grand Jury indicted Appellant for the offenses of possession of marijuana with intent to distribute and distribution of marijuana within close proximity of a school or park. R. *(Indictments). Appellant was tried before the Honorable Robin B. Stilwell and a jury, from July 22 – 23, 2019. Tr. 1; Tr. 183. Daniel King represented Appellant. Tr. 1. Megan Owen represented the State. Tr. 1.

Appellant was convicted as indicted and she was sentenced to serve concurrent terms of imprisonment for forty-two months on each offense. Tr. 221, ll. 13-23; R. *(Sentence Sheets).

This appeal follows.

STATEMENT OF FACTS

Appellant, Wanda Jane Crumpton, was tried for the offenses of possession of marijuana with intent to distribute and distribution of marijuana within close proximity of a school or park from July 22 – 23, 2019. R. *(Indictments); Tr. 1; Tr. 183.

On March 21, 2017, pursuant to a search warrant, officers with the Easley Police Department went to Appellant's home to look for marijuana. Tr. 121, ll. 4-25. Appellant's home was near Hagood Park. Tr. 147, l. 25 – 147, l. 18. Appellant cooperated and led officers to a kitchen cabinet, where they found what appeared to be marijuana. Tr. 122, ll. 5-20. The substance weighed less than one ounce. R. *(State's Exhibit #7). A digital scale was found in another kitchen cabinet. Tr. 122, ll. 22-24. Appellant also showed officers a partially smoked joint in her recliner. Tr. 123, ll. 7-11. A drug dealer testified that he sold Appellant two ounces of marijuana daily over an eleven day period in the days immediately preceding the execution of the search warrant. Tr. 132, ll. 11-18.

The State offered Officer Robert Cowan of the Easley Police Department as an expert in marijuana analysis. Tr. 156, ll. 4-6. Cowan was, at one time, a certified marijuana analyst. Tr. 151, ll. 9-12. However, his certification had been revoked by the time he testified at Appellant's trial. Tr. 152, ll. 5-8. Cowan said he was originally certified in marijuana analysis by SLED in 2002 after completing SLED's class and renewing his certification every three years. Tr. 152, ll. 3-6. Cowan said the tests that he performed to determine if a substance was marijuana were a microscopic examination and a Duquenois-Levine chemical test. Tr. 152, ll. 18-21; Tr. 153, l. 22 – 154, l. 23.

Cowan admitted that SLED had "revoked all certifications about analyzing marijuana" the previous year. Tr. 152, ll. 5-8. On voir dire, Cowan said he was aware of SLED's December

14, 2018 announcement which revoked his certification. App. 157, ll. 9-13. Cowan agreed that the testing processes he performed were no longer considered to be accurate since the processes "cannot differentiate between industrial hemp and marijuana." Tr. 158, l. 18 – 159, l. 2. Cowan said that industrial hemp was legal "[a]s long as it does not have a percentage of THC[1] above .3 percent . . ." Tr. 159, ll. 8-13. However, Cowan admitted the tests he performed could only tell whether the substance contained THC, not whether the amount of THC exceeded 0.3 percent of the substance. Tr. 159, ll. 17-23.

SLED's announcement was entered into the record as Court's Exhibit #2. Tr. 160, ll. 20-21; R. *(Court's Exhibit #2). The announcement stated that all analysts certified under SLED's marijuana testing program should discontinue testing suspected marijuana because "microscopic analysis and Duquenois-Levine chemical spot test" "cannot differentiate between Industrial Hemp and Marijuana." R. *(Court's Exhibit #2). The announcement provided that "SLED's decision to discontinue the Program should not in any way be considered a change or alteration to the way that **probable cause** is determined in the State of South Carolina for any and all drug charges, including Marijuana." R. *(Court's Exhibit #2) (emphasis added). "However, in terms of confirmatory testing, in order to accurately analyze plant material and verify the THC level to distinguish between Industrial Hemp and Marijuana, cases will need to be submitted to the SLED Drug Analysis laboratory for quantitative analysis of THC." R. * (Court's Exhibit #2).

Court's Exhibit #3 was the defense's written objection to Cowan's qualification as an expert in marijuana analysis. R. *(Court's Exhibit #3). Defense counsel's written objection was based on the above-referenced announcement by SLED and argued that the would-be expert's

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[1] Tetrahydrocannabinol, more commonly known as THC, is the pharmacologically active component of marijuana. *State v. Horton*, 359 S.C. 555, 560–61, 598 S.E.2d 279, 282 (Ct. App. 2004).

qualification was improper under Rule 702, SCRE, and Rule 6, SCRCrimP. Defense counsel noted that in 2014, the General Assembly excluded industrial hemp from the definition of marijuana. R. *(Court's Exhibit #3 at 1). *See* 2014 Act No. 216 (S. 839), § 2, eff. June 2, 2014 (former § 46-55-30 was titled: Industrial hemp excluded from Section 44-53-110).

Defense counsel objected to Cowan's qualification as an expert and argued that the testing processes performed by Cowan were taught to him by SLED, and that SLED "has terminated that program and says that was bad science . . . So he has prior training and experience, but that training and experience is no longer valid because the science used in 2017 has been disproven." Tr. 162, ll. 5-18.

Confusingly, the solicitor argued that Cowan should be qualified because it was illegal to possess industrial hemp in 2017, when the substance was tested. Tr. 163, ll. 3-17. However, Appellant was not on trial for illegally possessing industrial hemp. Regardless, defense counsel responded, "Judge, respectfully that is incorrect. Industrial hemp was first passed in 2014. It was restricted at that time, but has been legal in South Carolina since 2014." Tr. 163, ll. 19-23.

The judge ruled that Cowan was qualified as an expert in marijuana analysis.

> Well, here's the deal: When I charge the jury as to the law, the question is going to be marijuana. Hemp is not part of the equation. Okay? And the State, it has to be proven beyond a reasonable doubt that she possessed marijuana with intent to distribute the same. Okay?
>
> **So with respect to his qualification as an expert witness, I will allow him to testify as an expert witness.**
>
> **Now, the reliability of the testing procedure is a matter to be determined by the jury**. They will weigh the credibility of the witness's testimony, and determine, in fact, whether it should be relied upon or not in their capacity as finders of fact.

Tr. 163, l. 24 – 164, l. 14 (emphasis added). The court then instructed the jury regarding expert testimony. Tr. 164, l. 15 – 165, l. 15.

Cowan went on to testify about how he tested the substance seized from Appellant's home. Tr. 165, l. 19 – 168, l. 13. The solicitor asked Cowan to identify State's Exhibit #7, the marijuana analysis form generated by Cowan, and asked Cowan to "tell the jury what you found." Tr. 168, ll. 14-21. Defense counsel objected and asked to have his written objection made part of the record. Tr. 168, l. 22 – 169, l. 2. Court's Exhibit #4 was the defense's written objection to the admission of Cowan's analysis. R. *(Court's Exhibit #4).

Defense counsel argued, "Your Honor, Rule 6 of the rules of criminal procedure require a proper test and a legally reliable test. In this case, we do not have a legally reliable test. Specifically, SLED has said that it is unreliable for the determination of marijuana, because it cannot determine the THC threshold of .3 percent. As a result, these tests are inadmissible." Tr. 169, ll. 9-17.

The solicitor responded that SLED's December 2018 announcement "doesn't say anything about any of the tests previously being unreliable or that they were to be thrown out . . . Yes, they are no longer using that test but it was still reliable at that time of the test, Your Honor." Tr. 169, l. 20 – 170, l. 8. However, this argument misled the trial court because, as seen, the SLED announcement said that the old tests should still be used for probable cause determinations, not confirmatory testing.

The court overruled defense counsel's objection and ruled that "it goes to the weight of the evidence. The jury can make a determination as to—whether based on the exceptions the defense takes to the test, whether the State has proven beyond a reasonable doubt that it was, in fact, marijuana . . ." Tr. 170, ll. 9-16.

Cowan went on to testify that he determined the substance found in Appellant's home was 0.66 ounces or 19 grams of marijuana. Tr. 170, l. 23 – 171, l. 20. State's Exhibit #7, the marijuana analysis form, was admitted over defense counsel's objection. Tr. 171, ll. 6-15; R. *(State's Exhibit #7).

In closing argument, the solicitor admitted the case against Appellant was circumstantial. "There is no direct evidence that we can present to you of someone buying marijuana from Miss Crumpton. What I have today is circumstantial evidence." Tr. 193, ll. 10-13.

Appellant was convicted as indicted and she was sentenced to serve concurrent terms of imprisonment for forty-two months on each offense. Tr. 221, ll. 13-23; R. *(Sentence Sheets).

ARGUMENT

1.

The trial court erred where it qualified Robert Cowan of the Easley Police Department as an expert in marijuana analysis and ruled the reliability of Cowan's procedures for analyzing suspected marijuana was a matter to be determined by the jury, where SLED had revoked Cowan's certification to analyze marijuana because the testing procedures used by Cowan could not determine whether a substance was marijuana or hemp, since Rule 702, SCRE requires the trial court to find proposed expert testimony meets a reliability threshold before it may be considered by the jury, and since Cowan's testimony was not reliable.

Standard of review

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).

Discussion

The trial court erred where it found that the reliability of expert testimony was a matter for the jury, since the trial judge is required, pursuant to Rule 702, SCRE, to perform a gatekeeping function as regards expert testimony and must find the subject of the testimony is reliable before it may be submitted to the jury. Here, the proposed expert testimony was not reliable since SLED had revoked Cowan's certification based on the inability of the testing procedures he employed to determine whether a substance was, in fact, marijuana.

The trial court improperly abandoned its gatekeeping role when it ruled the reliability of Cowan's testimony was a matter for the jury. "[A]ll expert testimony under Rule 702, SCRE, imposes on the trial courts an affirmative and meaningful gatekeeping duty." *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009). "All expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." *Id*.

"[O]nly **after** the trial court has found that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate." *Watson v. Ford Motor Co.*, 389 S.C. 434, 446-47, 699 S.E.2d 169, 175 (2010) (emphasis added). The trial court's abdication of its discretion in this regard (leaving the matter of reliability for the jury) was an abuse of discretion. "When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred." *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987).

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."

"[E]xpert testimony receives additional scrutiny relative to other evidentiary decisions. Specifically, in executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony." *Watson v. Ford Motor Co.*, 389 S.C. at 446, 699 S.E.2d at 175. "First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury." *Id.* "Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter." *Id.* "Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable." *Id*.

"Expert testimony is not admissible unless it satisfies all three requirements with respect to subject matter, expert qualifications, and reliability." *Id*. Here, because the substance of Cowan's testimony failed the reliability prong of *Watson*, it was inadmissible.

"Reliability is a central feature of Rule 702 admissibility, and our jurisprudence is in complete accord." *State v. White*, 382 S.C. at 270, 676 S.E.2d at 686. "[E]xpert testimony must pass a threshold reliability determination by the trial court prior to its admission in evidence." *Id*. at 273, 676 S.E.2d at 688. Here, the trial court's rulings that Cowan was qualified as an expert but "the reliability of the testing procedure is a matter to be determined by the jury" were fundamentally incompatible rulings. Tr. 163, l. 24 – 164, l. 14.

"Scientific evidence is admissible under Rule 702, SCRE, if the trial judge determines: (1) the evidence will assist the trier of fact; (2) the expert witness is qualified; (3) **the underlying science is reliable**, applying the factors found in *State v. Jones,* 273 S.C. 723, 259 S.E.2d 120 (1979); and (4) the probative value of the evidence outweighs its prejudicial effect." *State v. Jones*, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001) (citing *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999)) (emphasis added) (hereinafter the *Council* factors).

As to the third *Council* factor, *State v. Jones,* 273 S.C. 723, 259 S.E.2d 120 (1979) requires that: (1) the technique be published and peer-reviewed; (2) the method has been applied to this type evidence; and (3) the method be consistent with recognized scientific laws and proceedings. *State v. Jones*, 343 S.C. 562, 573, 541 S.E.2d 813, 819 (2001). "Once the evidence is admitted under these standards, the jury may give it such weight as it deems appropriate." *State v. Council*, 335 S.C. at 20-21, 515 S.E.2d at 518.

Had the court properly acted as gatekeeper, it should not have qualified Cowan as an expert in drug analysis because reliability is central to a proper analysis under Rule 702, SCRE, and Cowan's opinion was unreliable. SLED cancelled the program that certified Cowan precisely because the scientific techniques the program employed to analyze suspected marijuana were no longer reliable by the time Appellant stood trial. The methods Cowan used were no longer recognized within the scientific community as reliably able to determine whether a substance was marijuana, given the existence of industrial hemp in South Carolina. The evidence also had little probative value since Cowan's testing could not confirm the substance was marijuana, and it should have been excluded. *State v. Council,* 335 S.C. at 20, 515 S.E.2d at 518; *State v. Jones*, 343 S.C. at 573, 541 S.E.2d at 819.

When Cowan analyzed the substance in 2017, the tests he performed could not differentiate between hemp and marijuana, and the General Assembly had recognized that hemp was scientifically distinguishable from marijuana in South Carolina as early as 2014. *See* 2014 Act No. 216, § 1, findings, which provides as follows:

> SECTION 1. The General Assembly finds that: (1) Hemp is a fiber and oilseed crop with a wide variety of uses, including twine, rope, paper, construction materials, carpeting, and clothing, and has the potential for use as a cellulosic ethanol biofuel. (2) Hemp seeds have been used in making industrial oils, cosmetics, medicines, and food. (3) **Hemp and marijuana** are genetically different cultivars of the same plant species and **are scientifically distinguishable from each other**. (4) Hemp is grown for scientific, economic, and environmental uses while marijuana is grown for narcotic use. (5) Research and development related to hemp has the potential to provide a cash crop for South Carolina's farmers with broad commercial application that will enhance the economic diversity and stability of our state's agricultural industry.

S.C. Code Ann. tit. 46, Ch. 55, Refs & Annos (emphasis added).

Cowan admitted that the tests he performed on the substance recovered from Appellant's home could not reveal the level of THC the substance contained—the tests could only reveal the presence or absence of THC. Cowan also admitted that both hemp and marijuana contain THC—the difference is a matter of percentage, not one of presence. Therefore, Cowan's analysis could not reliably conclude the substance was marijuana, and the trial court's admission of the drug analysis evidence here was error. *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999); *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979).

It was undisputed that in 2018, SLED announced that its marijuana analysis program, under which Cowan was certified, was no longer reliable for assuring a substance was marijuana. The announcement stated that "SLED's decision to discontinue the Program should not in any way be considered a change or alteration to the way that **probable cause** is determined in the

State of South Carolina for any and all drug charges, including Marijuana." R. *(Court's Exhibit #2) (emphasis added). "However, in terms of **confirmatory testing**, in order to accurately analyze plant material and verify the THC level to distinguish between Industrial Hemp and Marijuana, cases will need to be submitted to the SLED Drug Analysis laboratory for quantitative analysis of THC." R. * (Court's Exhibit #2).

In other words, the tests Cowan performed were, in SLED's opinion, good enough for probable cause to arrest but not good enough for trial, as of December 2018. Appellant was tried in July of 2019. Court's Exhibit #2 plainly shows that at the time of Appellant's trial, SLED no longer considered the testing procedures used by Cowan able "accurately analyze" suspected marijuana. Here, Cowan's testimony was not reliable since his methods could not confirm whether a given substance was marijuana or hemp. Therefore, Cowan should not have been qualified as an expert witness.

The erroneous qualification of Cowan as an expert in marijuana analysis was not harmless. "As part of our harmless error analysis, we review the materiality and prejudicial character of the error in the context of the entire trial." *State v. Phillips*, Op. No. 27978 (S.C. Sup. Ct. filed June 3, 2020) (Shearouse Adv. Sh. No. 22 at 19) (internal quotations omitted). "Improper 'expert' evidence which goes to the heart of the case is not harmless." *State v. Tapp*, 398 S.C. 376, 393, 728 S.E.2d 468, 477 (2012) (Pleicones, J., dissenting). *See also State v. Ellis*, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001) (police officer's improper "expert" opinion which goes to the heart of the case is not harmless, particularly where the trial court's imprimatur of the witness as an expert was exploited by the solicitor).

Here, Cowan provided the only drug analysis evidence in the case, and the trial court's imprimatur of him as an expert allowed Cowan, unlike other witnesses, to render an opinion that

the substance recovered from Appellant's home was actually marijuana. The solicitor admitted in closing argument that the evidence against Appellant was circumstantial—the State presented no evidence that anyone bought marijuana from Appellant. An expert's opinion on whether the substance seized from Appellant's home was marijuana went to the heart of the case.

2.

The trial court erred where it admitted evidence that Robert Cowan of the Easley Police Department analyzed the substance possessed by Appellant and determined it was marijuana, where Cowan admitted the testing procedures that he used could not confirm whether the substance was marijuana or hemp, since the evidence was not reliable and was inadmissible under Rule 702, SCRE.

Standard of review

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). "A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion." *State v. White*, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009).

Discussion[2]

The science underpinning Cowan's drug analysis was no longer reliable by the time the State called Appellant's case to trial, which was two years after Appellant was arrested and the substance was seized. SLED had revoked Cowan's certification as a marijuana analyst and announced that the types of testing performed by Cowan were only suitable for probable cause determinations, not for final conclusions seven months before Appellant's trial was held.

[2] Appellant hereby incorporates the legal discussion section from Issue 1, *supra*, into Issue 2.

However, instead of taking SLED up on its offer to submit suspected drug evidence to SLED for confirmatory testing, the State chose to go forward with the Easley Police Department's unreliable analysis, and incorrectly convinced the trial judge that SLED's December 2018 announcement did not mean that prior tests were unreliable or unsuitable for admission at trial. Tr. 169, l. 20 – 170, l. 8.

"Scientific evidence is admissible under Rule 702, SCRE, if the trial judge determines: (1) the evidence will assist the trier of fact; (2) the expert witness is qualified; (3) the underlying science is reliable, applying the factors found in *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979); and (4) the probative value of the evidence outweighs its prejudicial effect." *State v. Jones*, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001) (citing *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999)) (hereinafter the *Council* factors).

As to the third *Council* factor, *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979) requires that: (1) the technique be published and peer-reviewed; (2) the method has been applied to this type evidence; and (3) the method be consistent with recognized scientific laws and proceedings. *State v. Jones*, 343 S.C. 562, 573, 541 S.E.2d 813, 819 (2001) (hereinafter the *Jones* factors).

Here, Cowan's drug analysis evidence (his testimony and his drug analysis report) should not have been admitted because this evidence could not satisfy the *Council* factors and *Jones* factors. While drug analysis evidence would undoubtedly (1) assist the trier of fact to know whether the substance at issue was marijuana, Cowan could not confirm it was marijuana; (2) as seen in Issue 1, *supra*, Cowan should not have been qualified as an expert witness; (3) the underlying scientific methods were no longer recognized within the scientific community as reliably able to determine whether a substance was marijuana, given the presence of hemp in

South Carolina; and (4) given the inability of Cowan's testing to determine whether the substance was marijuana, the probative value of Cowan's drug analysis did not outweigh the prejudicial effect of attaching an "expert" label to his unreliable opinion. *State v. Council,* 335 S.C. at 20, 515 S.E.2d at 518; *State v. Jones*, 343 S.C. at 573, 541 S.E.2d at 819.

Defense counsel properly objected to the admission of Cowan's opinion on whether the substance was marijuana and to his drug analysis report. Additionally, Rule 6, SCRCrimP, recognizes the importance of SLED's approval that the procedures employed in chemical analysis of suspected drugs "are legally reliable and that the material is or contains the substance or substances stated." Here, SLED had determined the microscopic and chemical analysis procedures such as were done by Cowan were unreliable.

As defense counsel correctly argued, because the General Assembly exempted hemp from the definition of marijuana in 2014, thereafter, a substance which might have appeared to be marijuana using the testing procedures employed by Cowan was no longer sure to be marijuana—it might be hemp. *See* 2014 Act No. 216 (S. 839), § 2, eff. June 2, 2014 (former § 46-55-30 was titled: Industrial hemp excluded from Section 44-53-110). S.C. Code Ann. § 44-53-110 is the provision which defines marijuana for purposes of the drug laws.

When Cowan analyzed the substance in 2017, the tests he performed could not differentiate between hemp and marijuana, and the legislature had recognized that hemp was scientifically distinguishable from marijuana in South Carolina as early as 2014. *See* 2014 Act No. 216, § 1, eff. June 2, 2014, findings, which provides as follows:

> SECTION 1. The General Assembly finds that: (1) Hemp is a fiber and oilseed crop with a wide variety of uses, including twine, rope, paper, construction materials, carpeting, and clothing, and has the potential for use as a cellulosic ethanol biofuel. (2) Hemp seeds have been used in making industrial oils, cosmetics, medicines, and food. (3) **Hemp and marijuana** are genetically different

> cultivars of the same plant species and **are scientifically distinguishable from each other**. (4) Hemp is grown for scientific, economic, and environmental uses while marijuana is grown for narcotic use. (5) Research and development related to hemp has the potential to provide a cash crop for South Carolina's farmers with broad commercial application that will enhance the economic diversity and stability of our state's agricultural industry.

S.C. Code Ann. tit. 46, Ch. 55, Refs & Annos (emphasis added).

Cowan admitted that the tests he performed could not reveal the level of THC in the substance tested—it could only reveal the presence or absence of THC. Cowan also admitted that both hemp and marijuana contain THC—the difference is a matter of percentage, not one of presence. Therefore, Cowan's analysis could not reliably confirm the substance was marijuana, and the trial court's admission of the drug analysis evidence here was error. *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999); *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979).

The erroneous admission of the drug analysis evidence here was not harmless. "As part of our harmless error analysis, we review the materiality and prejudicial character of the error in the context of the entire trial." *State v. Phillips*, Op. No. 27978 (S.C. Sup. Ct. filed June 3, 2020) (Shearouse Adv. Sh. No. 22 at 19) (internal quotations omitted). "Improper 'expert' evidence which goes to the heart of the case is not harmless." *State v. Tapp*, 398 S.C. 376, 393, 728 S.E.2d 468, 477 (2012) (Pleicones, J., dissenting). *See also State v. Ellis*, 345 S.C. 175, 178, 547 S.E.2d 490, 491 (2001) (police officer's improper "expert" opinion which goes to the heart of the case is not harmless, particularly where the trial court's imprimatur of of the witness as an expert was exploited by the solicitor).

Here, Cowan provided the only scientific testimony regarding the composition of the substance, and the trial court improperly granted Cowan the mantle of expert. The solicitor admitted in closing argument that the evidence against Appellant was circumstantial—the State

presented no evidence that anyone bought marijuana from Appellant. Evidence of whether the substance seized from Appellant's home was marijuana went to the heart of the case.

CONCLUSION

Based on the foregoing arguments, Appellant respectfully requests this Court reverse her convictions and sentences and remand for a new trial.

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 24th day of June, 2020.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Initial 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."

June 24, 2020.

s/ *Joanna K. Delany*

Joanna K. Delany
Appellate Defender

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ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
Jun 24 2020
SC Court of Appeals

Appeal from Pickens County

Robin B. Stilwell, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WANDA JANE CRUMPTON,

APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Wanda Jane Crumpton, 277111, at Graham Correctional Institution, 4450 Broad River Road, Columbia, SC 29210, this 24th day of June, 2020.

s/ *Joanna K. Delany*
Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT