STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JERMASHA NELSON,

APPELLANT

APPELLATE CASE NO 2019-000641

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the trial judge erred in allowing the state to use a computer animation of the car accident prepared by one of the state's experts which purported to show the accident as he believed it happened where the computer animation did not take into account the lighting conditions or Appellant's version of events and therefore was misleading to the jury?

2.

Whether the trial judge erred in allowing the physician's assistant who treated Appellant at the hospital to opine that Appellant was under the influence of alcohol where the physician's assistant did not have any independent personal knowledge of whether Appellant was under the influence and her opinion was based solely on a review of Appellant's medical records which included the results of a blood draw which the assistant solicitor conceded were not admissible because he could not establish the chain of custody?

STATEMENT OF THE CASE

Appellant was indicted by the Beaufort County grand jury for felony DUI resulting in death. R. 428-433. Appellant's trial was held before the Honorable Carmen T. Mullen and a jury from April 8 – 10, 2019. R. 1. Appellant was represented by Jared Newman and the state was represented by Dustin Whetsel and Jesse Glenn. R. 2.

The jury found Appellant guilty as charged. R. 359. The judge sentenced Appellant to fourteen years imprisonment. R. 388.

This appeal follows.

STANDARD OF REVIEW

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial judge has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion. State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012); State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Whitner, 399 S.C. at 557, 732 S.E.2d at 866.

STATEMENT OF FACTS

In the early morning hours of September 5, 2016, Misty Shipley awakened to the sound of a car accident outside of her home and called 911. R. 100, l. 25 – 102, l. 14. When Shipley went outside to see what happened, she observed that the accident involved one car and one moped. R. 106, ll. 2 – 11; 109, ll. 20 – 25. Shipley approached Appellant, the driver of the car, and said that she smelled a "very strong" odor of alcohol. R. 107, ll. 1 – 16. Shipley further opined that Appellant was under the influence of alcohol because she seemed like she was unstable on her feet. R. 107, ll. 17 – 22. However, Appellant was transported to the hospital with an apparent leg injury. R. 168, ll. 5 – 18. Shipley's husband, Sean, discovered the driver of the moped in the median of the roadway, who was already deceased. R. 121, l. 6 – 122, l. 6.

Michael Bucciantini, a trooper with South Carolina Highway Patrol, responded to the scene of the collision around 6:00 a.m. and became the lead investigator on the case. R. 126, l. 14 – 129, l. 18. When Bucciantini arrived, he confirmed that there was a fatality[1] involved and determined that MAIT[2] would need to be involved in the investigation as well. R. 130, ll. 8 – 24. Bucciantini identified Appellant as the driver of the car that struck the moped. R. 143, ll. 19 – 25. Appellant had already been transported to the local hospital so Bucciantini responded to the hospital in order to speak with her. R. 144, ll. 1 – 15.

Bucciantini stated that when he spoke to Appellant at the hospital, she said that she was traveling from her brother's birthday party to her boyfriend's house when a moped pulled out in front of her and she struck it. R. 145, ll. 1 – 16. Bucciantini claimed that the smell of alcohol

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1 The deceased driver of the moped was identified as Gordon Ward. R. 138, ll. 10 – 14.

2 MAIT stands for Multi-disciplinary Accident Investigation Team and is a division of the South Carolina Highway Patrol that specializes in collision investigation. R. 130, l. 25 – 131, l. 6.

coming from Appellant's breath and person was "overpowering," and that her speech was slurred, and her eyes were bloodshot and glassy. R. 145, l. 22 – 146, l. 5. According to Bucciantini, Appellant stated that she drank two beers. R. 146, ll. 7 – 11. Bucciantini opined that Appellant was under the influence of alcohol when he interviewed her.[3] R. 147, ll. 2 – 7.

Todd Proctor with the Highway Patrol's MAIT Team was qualified as an expert in "general reconstruction," "crash data retrieval analysis," and "lamp examination." R. 189, l. 14 – 200, l. 24. Proctor testified that he conducted crash data retrieval on the electronic data box from Appellant's vehicle and was able to determine Appellant's speed immediately prior to the crash. R. 202, l. 9 – 208, l. 13. Proctor gave the following speeds of Appellant's vehicle: (1) 4.8 seconds prior to impact, 106.3 miles per hour; (2) 3.8 seconds prior to impact, 106.9 miles per hour; (3) 2.8 seconds prior to impact, 108.1 miles per hour; (4) 2.3 seconds prior to impact, 108.7 miles per hour; (5) 1.3 seconds prior to impact, 110 miles per hour; and (6) .8 seconds prior to impact, 105 miles per hour. R. 208, l. 14 – 211, l. 3.

3 Doug Tisdale, the paramedic who responded to the collision and transported Appellant to the hospital also testified that he believed Appellant had been drinking alcohol because he smelled it on her. R. 166, l. 1 – 168, l. 9. Dan Duhamel with the Beaufort County Sheriff's Office was also present in the hospital room with Appellant. R. 182, l. 14 – 223, l. 24. Duhamel opined that Appellant was "heavily intoxicated" because he smelled alcohol on her person, had bloodshot and glassy eyes, and because she had slurred speech. R. 184, l. 10 – 185, l. 18.

ARGUMENTS

1.

The trial judge erred in allowing the state to use a computer animation of the car accident prepared by one of the state's experts which purported to show the accident as he believed it happened because the computer animation did not take into account the lighting conditions or Appellant's version of events and therefore was misleading to the jury.

Relevant Facts

James Booker, a member of the Highway Patrol's MAIT Team, was qualified as an expert in "collision reconstruction." R. 221, l. 6 – 224, l. 20. Booker produced a computer animation of what he believed happened prior to and immediately after the car accident. R. 236, l. 3 – 237, l. 13. The assistant solicitor sought to introduce the computer animation as a Court's Exhibit and have Booker use it as a demonstrative exhibit. R. 237, ll. 5 – 17.

Defense counsel objected to the computer animation being shown to the jury as a demonstrative exhibit. R. 237, ll. 19 – 25. Counsel objected to the animation on the basis that it was misleading. R. 241, ll. 9 – 13. Specifically, counsel pointed out that the animation showed the accident happening in daylight even though the accident occurred before sunrise and that the animation did not take into account Appellant's statements regarding what happened. R. 240, l. 22 – 241, l. 8.

The assistant solicitor responded that the animation was Booker's opinion based on the data that he collected and analyzed, and that defense counsel could cross-examine Booker on any alternative theories as to what happened. R. 241, l. 15 – 242, l. 8. The judge ruled that the animation could be shown to the jury as a demonstrative exhibit because it was not "unduly anything." R. 242, ll. 9 – 19.

The computer animation was played for the jury during Booker's testimony. R. 243, ll. 9 – 20; Court's Ex. 10 (computer animation of collision reconstruction on file with this Court). The judge did not give the jury a limiting instruction on the exhibit.

Discussion

Rule 403, SCRE, permits relevant evidence to be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." State v. Spears, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013).

The computer animation prepared by Booker was highly misleading. Booker admitted that the animation was shown in daylight because when he attempted to create the animation in a nighttime setting, the vehicles were not visible. R. 251, ll. 1 – 5. Creating the animation in the daylight was an inaccurate and misleading attempt at portraying the accident since it happened at night on a dark stretch of highway with no street lights. R. 251, ll. 6 – 13.

Furthermore, Appellant was the only eye witness to the accident and her statements to Bucciantini while she was at the hospital were not taken into account in Booker's animation. Specifically, Appellant told Bucciantini that she was traveling in the left lane and a moped pulled out in front of her. R. 145, ll. 1 – 16. However, Booker's computer animation clearly shows both Appellant's vehicle and the moped driving in the right lane prior to the accident. See Court's Ex. 10. The animation further shows Appellant swerve slightly to the left immediately prior to impact but shows the moped maintaining a straight line. Booker did not consider Appellant's version of events when creating the computer animation which resulted in the animation being misleading because she was the only eye witness to the accident. R. 245, ll. 6 – 14.

Finally, the animation prepared by Booker shows the driver of the moped doing several backflips off the hood of Appellant's car and flying through the air before sliding on the ground in the median of the road. This aspect of the animation does not appear to be based on any concrete scientific evidence and is a misleading portrayal of the accident.

In Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000), the Supreme Court dealt with the admissibility of a videotaped animation of a car accident in a civil case that was sought to be used as demonstrative evidence by the defendant. The trial judge refused to admit Cantrell's videotaped animation of the accident which she sought to admit through her expert witness. Specifically, the plaintiffs objected to the video arguing that it did not accurately reflect the witness testimony. The trial court agreed and determined that the inaccuracies in the video would mislead and confuse the jury. Id. at 382, 529 S.E.2d at 535.

In analyzing this issue, the Cantrell Court noted:

> Computer animation allows attorneys to convert witnesses' verbal testimony into dynamic, visual demonstrations capable of mentally transporting jurors to the scene. . . . *However, a computer animation can mislead a jury just as easily as it can educate them. An animation is only as good as the underlying testimony, physical data, and engineering assumptions that drive its images*. The computer maxim "garbage in, garbage out" applies to computer animations.

Id. at 383-384, 529 S.E.2d at 536 quoting G. Ross Anderson, Jr., *Computer Animation; Admissibility and Uses*, South Carolina Trial Lawyer Bulletin 9 (Fall 1995) (emphasis added). The Court continued:

> The extreme vividness and persuasiveness of motion pictures . . . is a two-edged sword. *If the film does not portray original facts in controversy, but rather represents a staged reproduction of one party's version of those facts, the danger that the jury may confuse art with reality is particularly great*. Further, the vivid impressions on the trier of fact created by the viewing of the motion pictures will be particularly difficult to limit or, if the film

> is subsequently deemed to be inadmissible, to expunge by judicial instruction.

Id., at 369, 384, 529 S.E.2d at 536 quoting State v. Trahan, 576 So.2d 1, 8 (1990) (emphasis added).

In this case, the animation was not clearly based on Booker's underlying testimony because he did not explain his calculations or any engineering assumptions that were used to create the animation. Instead, Booker merely stated that he used something called "total station," which was a CAD program that he used to create the animation. R. 235, l. 21 – 236, l. 24. As was pointed out in Cantrell: "An animation is only as good as the underlying testimony, physical data, and engineering assumptions that drive its images." Id. at 383-384, 529 S.E.2d at 536.

The Cantrell Court affirmed the trial judge's refusal to admit the evidence and noted potential problems with computer animations: "[T]he potential to mislead by an inaccurate portrayal of the facts, the potential to create lasting impressions that unduly override other testimony or evidence . . ." Id. at 384, 529 S.E.2d at 536. The Court then established a new rule regarding the admissibility of computer animations:

> We hold that a computer-generated video animation is admissible as demonstrative evidence when the proponent shows that the animation is (1) authentic under Rule 901, SCRE; (2) relevant under Rules 401 and 402, SCRE; (3) a fair and accurate representation of the evidence to which it relates, and (4) its probative value substantially outweighs the danger of unfair prejudice, confusing the issues, or misleading the jury under Rule 403, SCRE.

Id. The Court also urged trial judges to give a limiting instruction that "the animation represents only a re-creation of the proponent's version of the event; it should in no way be viewed as the absolute truth." Id. at 387, 529 S.E.2d at 537.

Like in Cantrell, the computer animation prepared by Booker was inconsistent with the account given by Appellant and merely assumed that the driver of the moped maintained a straight line of travel as opposed to pulling in front of Appellant. The animation also showed the event happening in daylight which is wholly inconsistent with the facts. The computer animation created by Booker was not a fair and accurate representation of the evidence and carried with it a high probability that it would mislead the jury. Therefore, the judge erred in allowing the computer animation prepared by Booker to be used as a demonstrative exhibit in front of the jury. See Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000).

2.

The trial judge erred in allowing the physician's assistant who treated Appellant at the hospital to opine that Appellant was under the influence of alcohol because the physician's assistant did not have any independent personal knowledge of whether Appellant was under the influence and her opinion was based solely on a review of Appellant's medical records which included the results of a blood draw which the assistant solicitor conceded were not admissible because he could not establish the chain of custody.

Relevant Facts

Prior to calling the physician's assistant who treated Appellant at the hospital, the assistant solicitor informed the judge that he was going to seek to elicit an opinion from the witness as to whether Appellant was under the influence of alcohol based on her review of Appellant's medical records. R. 270, ll. 9 – 23. The judge asked the assistant solicitor to proffer the physician's assistant's testimony. R. 272, ll. 2 – 16.

Kate D'Orazio, the physician's assistant who treated Appellant, testified that Appellant had swelling and abrasions to her lower lip and left leg. D'Orazio further stated that, based upon her notes, Appellant was "alert" and "oriented." R. 276, ll. 7 – 19. D'Orazio acknowledged that Appellant had been given four milligrams of morphine through her IV as well. R. 277, l. 25 – 278, l. 4.

At this point the assistant solicitor stopped his proffer of D'Orazio and informed the court that a blood test was performed on Appellant and the ethanol rating listed in Appellant's medical records was .215. R. 279, ll. 13 – 18. The assistant solicitor stated that he wanted to ask D'Orazio if she had an opinion as to whether Appellant was under the influence of alcohol based on her review of Appellant's medical records. R. 279, ll. 18 – 22. D'Orazio admitted that she

did not have any independent personal knowledge of Appellant's supposed intoxication. R. 280, ll. 13 – 19. The assistant solicitor also admitted that he could not establish chain of custody for the blood draw and therefore could not get it into evidence. R. 280, ll. 9 – 12.

The assistant solicitor argued that D'Orazio, as an expert witness, should be allowed to render this opinion based on Rules 702, 703, and 704, SCRE, and State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). R. 280, l. 22 – 282, l. 13. Defense counsel objected that there was no chain of custody and the trial judge stated that she would not let D'Orazio testify as to the specific results of the blood alcohol test but would allow her to testify that she believed Appellant was under the influence of alcohol based on her review of Appellant's medical records. R. 284, ll. 2 – 24. The judge further warned defense counsel to "be careful" on cross-examination of D'Orazio so as not to open the door to the actual blood test results. R. 284, l. 25 – 285, l. 10. Defense counsel again noted his objection. R. 286, ll. 8 – 10.

The jury was brought back in and D'Orazio was qualified as an expert in emergency medicine. R. 287, l. 6 – 289, l. 15. D'Orazio testified that based on her review of Appellant's medical records, she determined that Appellant was under the influence of alcohol. R. 294, l. 20 – 295, l. 1. The judge then asked D'Orazio whether her opinion was "within a reasonable degree of medical certainty" and D'Orazio responded: "Based upon her chart that I have here and the labs that were drawn, yes." R. 295, ll. 6 – 10.

Discussion

Rule 703, SCRE allows an expert to rely on inadmissible evidence in giving an opinion in court if the inadmissible evidence is reasonably relied upon in the field of expertise. An expert witness is also permitted to give an opinion "based on facts not within his or her firsthand knowledge." In re Manigo, 389 S.C. 96, 106, 697 S.E.2d 629, 634 (Ct. App. 2010). "Experts

may testify regarding facts or data, not as substantive proof of the facts so stated, but rather as information upon which they have relied in reaching their professional opinions." Todd v. Joyner, 385 S.C. 509, 519, 685 S.E.2d 613, 618-619 (Ct. App. 2008).

However, in Jamison v. Morris, 385 S.C. 215, 226, 684 S.E.2d 168, 173-174 (2009), the Supreme Court held that the plaintiff's failure to establish a chain of custody for a blood test done on the driver's blood precluded the plaintiff's expert witness from giving an opinion as to the driver's blood alcohol level (BAL). Jamison was a civil car accident case in which the plaintiff was the passenger in the defendant's car. Id. at 220, 684 S.E.2d at 170. At trial, the plaintiff sought to elicit testimony from an expert that the driver had a BAL of .193 at the time of the accident based on a SLED test performed on the blood which showed a BAL of .168.[4] Jamison held that the trial judge erred in allowing the plaintiff's expert to give an opinion regarding the driver's BAL when that opinion was based on a SLED test with an unestablished chain of custody. Id. at 228, 684 S.E.2d at 175.

The Jamison Court relied on Ex parte DHEC, 350 S.C. 243, 565 S.E.2d 293 (2002) to suggest that "unless a test is conducted for medical purposes, the result of that test is not reliable unless the proponent can demonstrate a chain of custody." Jamison at 228, 684 S.E.2d at 175. Ex parte DHEC dealt with a criminal case in which the state believed it needed to establish a chain of custody to introduce the defendant's medical records in a prosecution for his allegedly having willfully infected another person with HIV. Ex parte DHEC at 246, 565 S.E.2d at 295. Because the state believed it needed to establish a chain of custody to introduce the defendant's HIV positive status, it sought to compel certain records from DHEC to achieve this goal. Id.

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4 The SLED test was done on a blood sample taken almost two hours after the accident. The blood was taken by the hospital for the purpose of determining the driver's blood type, but because the driver died, the hospital did not do any testing on the blood. Jamison at 226, 684 S.E.2d at 174.

After the circuit judge ordered DHEC to turn over these records, DHEC appealed. Id. DHEC argued that the state did not need to establish chain of custody because the defendant's medical records showing his HIV positive status were admissible as a business record under Rule 803(6), SCRE. Id. at 247, 565 S.E.2d at 295.

The Ex parte DHEC Court agreed, finding that the defendant's medical records showing his HIV positive status met all the requirements for the business records exception to the hearsay rule and were admissible without a showing of chain of custody. Id. at 249-250, 565 S.E.2d at 297. The Court reasoned that the defendant was not tested for purposes of the criminal litigation but only for the purposes of medical diagnosis. Furthermore, the defendant had been tested voluntarily before any charges were pending against him. Id. The Court continued:

> Further, Doe could be retested at any time to refute the evidence presented against him at trial. If Doe tested negative at the time of trial, the DHEC test results could be ruled out as a false positive as HIV is a permanent condition. *A person charged with DUI based on a blood alcohol test taken at the time of his arrest has no such protection and, therefore, needs the indicia of reliability provided by a chain of custody*.

Id. (emphasis added). The Ex parte DHEC Court cited to, and explicitly distinguished, State v. Cribb, 310 S.C. 518, 426 S.E.2d 306 (1992) which was a DUI case. The Court stated: "Although the blood drawn from Cribb was not drawn initially for prosecutorial purposes, it was used for those purposes ultimately, and, therefore, required a chain of custody because Cribb could not re-test his blood alcohol level later and get an accurate result." Ex parte DHEC, 350 S.C. at 249, 565 S.E.2d at 296.

Here, the assistant solicitor candidly admitted that the results of Appellant's blood test were not admissible because he could not establish the chain of custody. R. 280, ll. 9 – 12. However, the trial judge still permitted the physician's assistant to opine that Appellant was

under the influence of alcohol. The physician's assistant admitted that this opinion was based solely on her review of Appellant's medical records, which were concededly inadmissible because of the state's inability to establish the chain of custody. If an expert is going to give an opinion that a person was under the influence of alcohol based only on her review of Appellant's medical records which show results of a blood test, that blood test must have an established chain of custody to ensure that the indicia of reliability. Ex parte DHEC, 350 S.C. at 249, 565 S.E.2d at 296.

As the Court pointed out in Ex parte DHEC, the results of a blood test for HIV are distinguishable from the results of a blood test in a DUI case because HIV positive is a permanent condition whereas being under the influence of alcohol is not. There was no way that Appellant could have gotten a blood test at a later date in order to dispute the blood test done by the hospital. This is why it was necessary that the state be able to establish chain of custody for the blood test before its expert could base her opinion on it.

Appellant was prejudiced by the physician's assistant stating that her opinion was that Appellant was under the influence of alcohol. As the Supreme Court noted in State v. Kromah, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013): "[A]lthough an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts."

Here, the physician's assistant was the only expert witness to opine that Appellant was under the influence of alcohol. Furthermore, she stated that her opinion was "within a reasonable degree of medical certainty" and "based upon [Appellant's] chart . . . and the labs that were drawn." R. 295, ll. 6 – 10. This gave her opinion significantly more weight than the opinion of the lay witnesses who testified to their belief that Appellant was under the influence.

R. 295, ll. 6 – 10. This is especially true because she testified that her opinion was based on her review of Appellant's "labs." There was no other way for a jury to interpret this comment other than that a blood test, or its equivalent, was conducted, which showed an alcohol level sufficient to indicate impairment.

The trial judge erred in allowing the physician's assistant to render an opinion that Appellant was under the influence of alcohol because that opinion was based solely on the results of a blood test, which was inadmissible due to the state not being able to establish the chain of custody. The lack of a chain of custody rendered the test unreliable because the state was unable to show that the results of the blood test were in fact from Appellant's blood. Appellant was prejudiced because the physician's assistant testified with a heightened degree of significance because she carried with her the label of an "expert." Appellant's conviction should be reversed. See Jamison v. Morris, 385 S.C. 215, 684 S.E.2d 168 (2009); Ex parte DHEC, 350 S.C. 243, 565 S.E.2d 293 (2002); State v. Cribb, 310 S.C. 518, 426 S.E.2d 306 (1992).

CONCLUSION

By reason of the foregoing argument, Appellant's convictions should be reversed, and this case remanded to the Beaufort County Court of General Sessions for a new trial.

s/Adam Ruffin
Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of July, 2020.

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 16, 2020

s/Adam Ruffin
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