

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

JEROME KEITH WEST,

APPELLANT

APPELLATE CASE NO 2019-001002

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court failed in its gatekeeping function when it allowed Alyssa Rheingold to testify as an expert in criminal domestic dynamics where Rheingold's opinion was predicated on unreliable studies such that her testimony was inherently unreliable?

STATEMENT OF THE CASE

During the November 2017 term, the Charleston County Grand Jury indicted Appellant for domestic violence in the second degree. R. 252.

On June 11-12, 2019, Appellant proceeded to trial before the Honorable Deadra L. Jefferson, and a jury. Tr. 1. Brendan Daniels and Mary Ford represented Appellant. Id. Hannah P. Marsh and Richard Waring represented the state. Id.

The jury found Appellant guilty as charged. R. 229, l. 7 – 230, l. 2. Thereafter, the trial court found Appellant’s conviction constituted a willful violation of his probation. R 248, ll. 10 – 19. Appellant was sentenced to time served¹ and five years of his ten-year probationary sentence was revoked. R 248, l. 20 – 251, l. 25. Appellant was also sentenced to six months’ of “intensive probation.” Id.

This appeal follows.

¹ Appellant had 725 days of time served credit. R. 7, l. 1.

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).

ARGUMENT

The trial court failed in its gatekeeping function when it allowed Alyssa Rheingold to testify as an expert in criminal domestic dynamics where Rheingold's opinion was predicated on unreliable studies such that her testimony was inherently unreliable.

Relevant Facts

On June 17, 2017, Appellant allegedly struck Crystal Ragin in front of Appellant's sister's home. R. 8, ll. 2 – 21. Appellant and Ragin were cohabitating at the time. Id. Appellant's sister had two minor children that were in the home on the night of the incident and the state alleged that they were present for the altercation. Id.; R. 66, ll. 3 – 20.

Appellant's sister, Shanika West, called the police and officer Derek Conkey arrived at the house. R. 82, l. 9 – 85, l. 9. While Appellant was voluntarily leaving with Officer Conkey, he allegedly turned to Ragin and hit her. R. 71, l. 8 – 76, l. 1. Officer Conkey's body camera was operating during the incident and the video is on file with this Court. Id. Although the video is taken from behind Appellant and the viewer cannot clearly see Appellant strike Ragin, Officer Conkey testified that Appellant's movement at the end of the video was him hitting Ragin. Id.; R. 80, ll. 7 – 9.

Crystal Ragin, the alleged victim, stated that she was reluctant to testify against Appellant and had to be subpoenaed to trial. R. 24, l. 22 – 25, l. 15. She explained that she continued to see Appellant after the alleged incident. R. 33, l. 24 – 35, l. 16. She testified that she visited Appellant multiple times while he was incarcerated awaiting trial. Id. She also testified that Appellant apologized for the incident but minimized his involvement. Id. She stated that when she would visit Appellant in jail, she “wanted to just let it go, [and] forgive [him].” Id. Ragin

explained that she initially did not tell police “what really happened” and that she filed a “drop charge form.” Id.

The state sought to admit Alyssa Rheingold as an expert in domestic violence dynamics. R. 154, ll. 9 – 11. Trial counsel objected to her admission as an expert arguing that the studies and statistics Rheingold used for her testimony were inherently unreliable. R. 104, l. 18 – 111, l. 12. Specifically, trial counsel argued the studies Rheingold cited had a “broad definition” of domestic violence that included actions, such as stalking, that are not included under the statutory definition of domestic violence in this state. Id.; R 135, l. 9 – 138, l. 15; R. 160, ll. 6 – 12. That over-broad definition invariably skewed the statistics that Rheingold relied on for her testimony because she included individuals who did not suffer criminal domestic violence as defined under the statute. S.C. Code Ann. § 16-25-20.

Trial counsel also explained the studies Rheingold relied on had the subjects of the study self-report by phone call. R. 121, ll. 1 – 6; 122, l. 17 – 126, l. 21; R. 160, l. 13 – 161, l. 21. During proffered cross-examination Rheingold admitted that the subjects also reported anonymously, which left no way to corroborate that the anyone in those studies had actually been a victim of domestic violence. R. 137, ll. 15 – 24. Accordingly, since it was impossible to verify the findings of those self-reported, anonymous studies, Rheingold’s testimony on those studies was inherently unreliable. Id.

The court admitted Rheingold to testify as an expert in domestic violence dynamics, over defense counsel’s objection. R. 154, ll. 9 – 11. Rheingold testified about the definition of a domestic violence victim; the demeanor and behavior of domestic violence victims; the impact of trauma; how a “typical victim” reacts; the “conflicting emotions” experienced by victims; why a victim might forgive an abuser; why a victim might stay in the relationship; why it is not

unusual for a victim to fill out a drop charge form; and why it is not unusual for a victim to recant their allegation. R. 130, l. 25 – 136, l. 4; R. 155, l. 7 – 158, l. 7. That testimony lined up with Ragin’s actions in this case, and as a result Appellant was found guilty of criminal domestic violence in the second degree. R. 24, l. 22 – 25, l. 15; R. 33, l. 24 – 35, l. 16; R. 229, l. 7 – 230, l. 2.

Discussion

The trial court failed in its gatekeeping function when it admitted the inherently unreliable “expert” testimony from Alyssa Rheingold regarding domestic violence dynamics. Rheingold’s testimony was predicated on studies with an unverifiable methodology such that the “expert” opinion she testified to, based on those studies, was inherently unreliable under the rules of evidence. R. 122, l. 1 – 126, l. 21; R. 128, l. 24 – 129, l. 6; R. 142, l. 19 – 143, l. 25; SCRE 702.

The trial court serves a gatekeeping function to prohibit the admission of inherently unreliable expert testimony. Watson v. Ford Motor Co., 389 S.C. 434, 445–46, 699 S.E.2d 169, 174–75 (2010); Rule 702, SCRE. Nonscientific expert testimony must satisfy Rule 702, both in terms of expert qualifications and reliability of the subject matter. State v. White, 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009). As long as the trial court is satisfied the *expert's testimony consists of a reliable method*, faithfully and reliably applied, the gate of admissibility should be opened. State v. Warner, 842 S.E.2d 361, 366 (S.C. Ct. App. 2020), reh'g denied (May 28, 2020). (emphasis added)

In State v. Chavis, 412 S.C. 101, 771 S.E.2d 336 (2015), Chavis was convicted of one count of criminal sexual conduct with a minor (CSCM) in the first degree, two counts of CSCM in the second degree, one count of lewd act upon a child, and one count of contributing to the

delinquency of a minor. Chavis, at 104, 771 S.E.2d at 337. Two “experts” in child abuse assessment testified at Chavis’ trial, Mrs. Elliot and Mrs. Griggs. Id. at 105–106, 771 S.E.2d at 338.

Chavis argued on appeal that the “experts” should not have been qualified as expert witnesses in the field of child abuse assessment because there was not a sufficient showing of reliability or peer review of their work. Id. at 106–107, 771 S.E.2d at 338. Regarding Mrs. Elliot the state argued that the trial court did not abuse its discretion in qualifying her as an expert witness because “Mrs. Elliot’s training, education, knowledge of RATAAC² protocol, and evidence of her performing over 5000 interviews.” Id. at 107, 771 S.E.2d at 339. The state also argued that the RATAAC protocol is peer reviewed and reliable. Id.

During cross examination of Mrs. Elliot at trial she was asked if she could discern what her error rate was and she said, “no.” Id. at 108, 771 S.E.2d at 339. Elliot explained that the peer review of her work was one other interviewer who reviewed her work to ensure she was using RATAAC protocol. Id.

Our Supreme Court stated that the five-thousand interviews Elliot conducted did not ensure reliability “without some evidence demonstrating that the individual expert is able to draw reliable results from the procedures of which he or she consistently applies.” Id. Accordingly, the Court held the trial court abused its discretion when it admitted Elliot as an expert in child abuse assessment because there was “no evidence... as to Mrs. Elliot’s ability to draw reliable results from the RATAAC procedures she consistently follows, and thus [found] that the threshold reliability requirement of Rule 702 is not met.” Id.

² RATAAC stands for Rapport; Anatomy; Touch; Abuse Scenario; and Closure. Chavis, at 118, 771 S.E.2d at 345, footnote 3.

Regarding Griggs, the Court did not reach the issue as to whether her testimony was also inherently unreliable. Id. at 108–109, 771 S.E.2d at 340. Instead the Court held that, assuming Griggs was properly qualified, the trial court erred in allowing her testimony recommending Appellant not be around the victim for any reason because it improperly bolstered the victim’s credibility. Id. However, the Court held those errors by the trial court were harmless in light of the substantial evidence of guilt independent of the experts’ testimony. Id. at 109–110, 771 S.E.2d at 340–341.

In Jamison v. Morris, 385 S.C. 215, 684 S.E.2d 168 (2009), Rule 702 SCRE was analyzed in the civil context where the South Carolina Supreme Court held that an otherwise qualified expert may not testify as an expert on inherently unreliable data. Jamison, at 229, 684 S.E.2d at 175. In Jamison, the passenger of a car brought a personal injury action against a gas station, where an underage driver allegedly bought alcohol; the gasoline company; and the “jobber” that sold gas to the gas station, asserting that the gas station was negligent and that the company and the “jobber” were vicariously liable. Id. at 219–220, 684 S.E.2d at 170–171.

During the trial, the court determined that the results of blood-alcohol content (BAC) test of the driver of the car was inadmissible because the state could not demonstrate the chain of custody as far as practicable. Id. at 227–228, 684 S.E.2d at 173–174. However, the court allowed the expert testimony of Dr. Crane, “in reliance of the [BAC] test, but not as to the result itself.” Id.

The Court in Jamison held that the trial court erred in admitting the expert testimony from Dr. Crane because the failures in the chain of custody made the BAC test inherently unreliable. Id. at 228, 684 S.E.2d at 175. The Court stated, “Here, the trial judge performed this duty and held that the S.L.E.D. result was not reliable because he found that Jamison did not

prove a chain of custody insofar as practicable. Having made that finding, the judge erred in allowing Dr. Crane to give an opinion based on that result. *An expert cannot testify to an opinion predicated on an unreliable test.*” Id., at 228, 684 S.E.2d at 175. (emphasis added)

In the present case, Alyssa Rheingold’s opinion was predicated on unreliable studies. R. 104, l. 18 – 111, l. 12. Rheingold testified that her expertise was based in part on her experience with past patients. R. 135, l. 9 – 138, l. 15. However, she admitted during proffered cross examination that much of her testimony was predicated on studies she did not conduct. Id.; R. 161, l. 22 – 163, l. 2.

Trial counsel asked Rheingold about how the studies she did not control herself were conducted and she had to admit that the subjects used were anonymous. R. 137, ll. 15 – 24. Moreover, the subjects self-reported their domestic violence stories without any corroboration of their claims. R. 160, l. 13 – 161, l. 21. Due to the nature of the studies being self-reported and anonymous there was no way to verify the accuracy of the studies’ findings. Accordingly, Rheingold’s testimony was predicated on unreliable data and the trial court erred in admitting her testimony as an expert in domestic violence dynamics.

The trial court’s admission of testimony from an “expert” that relied on self-reported, anonymous studies was error given the court’s gatekeeping function on reliability. If the statistics in the anonymous, self-reported studies Rheingold relied on were fabricated, there would be no way for a peer-reviewer to discover it. Therefore, the peer-reviewer would believe that the study, and its conclusions, were legitimate without knowing it was not reliable.

Trial counsel pointed out another flaw in the methodology of the studies Rheingold used for her testimony. The definition of domestic violence in those studies was wider than the definition of domestic violence under South Carolina law. S.C. Code Ann. § 16-25-20; R. 135, l.

9 – 138, l. 15; R. 160, ll. 6 – 12. As a result, the behavioral statistics that Rheingold relied on to form her “expert” opinion included subjects who were not domestic violence victims under South Carolina law. Therefore, the findings of the studies could be easily skewed. Accordingly, the lower court erred when it admitted Rheingold as an expert in criminal domestic violence dynamics because her testimony was predicated on unreliable studies which rendered her expert opinion inherently unreliable.

Rheingold testified about the definition of a domestic violence victim; the demeanor and behavior of domestic violence victims; the “impact of trauma”; how a “typical victim” reacts; the “conflicting emotions” experienced by victims; why a victim might forgive an abuser; why a victim might stay in the relationship; why it is not unusual for a victim to fill out a “drop charge form”; and that it is not unusual for a victim to recant their allegation. R. 130, l. 25 – 136, l. 4; R. 155, l. 7 – 158, l. 7. As seen above, Rheingold’s testimony mirrored Ragin’s actions in this case. R. 24, l. 22 – 25, l. 15, R. 31, l. 16 – 32, l. 24; R. 33, l. 24 – 35, l. 16; R. 130, l. 25 – 136, l. 4; R. 155, l. 7 – 158, l. 7. Thus, the court’s erroneous admission of the “expert” testimony prejudiced Appellant because Rheingold’s inherently unreliable testimony suggested to the jury that Ragin was a victim of domestic violence and that Appellant was the perpetrator.

CONCLUSION

By reason of the foregoing arguments, Appellant's conviction should be reversed, and his case remanded to the Charleston County Court of Common Pleas for a new trial.



Victor R Seeger
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of October, 2020.

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Brief of Appellant complies to the best of my ability 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."

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Respectfully Submitted,



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This 14th day of October, 2020.