

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Robert E. Hood, Circuit Court Judge

ORIGINAL

THE STATE,

RESPONDENT,

V.

MIMI JOE MARSHALL,

APPELLANT.

APPELLATE CASE NO. 2017-002329

FINAL REPLY BRIEF OF APPELLANT

RECEIVED

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SC Court of Appeals

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	1
TABLE OF AUTHORITIES.....	2
ARGUMENT IN REPLY	
Appellant's trial counsel adequately preserved for review objections to Timothy Lee's qualifications to testify to blood spatter analysis and the reliability of his opinion and to the reliability of Stan Richards' opinion.....	3
CONCLUSION.....	7

TABLE OF AUTHORITIES

CASES

<u>State v. Council</u> , 335 S.C. 1, 20-21, 515 S.E.2d 508, 518 (1999).....	3, 4, 5
<u>State v. Jones</u> , 273 S.C. 723, 259 S.E.2d 120 (1979).....	5
<u>State v. Tapp</u> , 398 S.C. 376, 388, 728 S.E.2d 468, 474-475 (2012).....	3
<u>State v. Whaley</u> , 305 S.C. 138, 142, 406 S.E.2d 369, 371 (1991).....	4
<u>State v. White</u> , 382 S.C. 265, 273-274, 676 S.E.2d 684, 688 (2009).....	4
<u>Watson v. Ford Motor Co.</u> , 389 S.C. 434, 446-447, 669 S.E.2d 169, 175 (2010).....	3

RULES

Rule 702 SCORE.....	4, 5
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ARGUMENT IN REPLY

Appellant's trial counsel adequately preserved for review objections to Timothy Lee's qualifications to testify to blood spatter analysis and the reliability of his opinion and to the reliability of Stan Richards' opinion.

Respondent argues that Appellant inadequately preserved objections to defects in the expert qualification rulings made by the trial court concerning Timothy Lee and Stan Richards. Initial Brief of Respondent at 24, *State v. Mimi Joe Marshall*, Case No. 2017-002329 (Ct. App. filed Nov. 26, 2018). Respondent's argument fundamentally mistakes the issue because it fails to recognize that a trial court's ruling on an expert witness's qualification is distinct from the requirement that it consider the reliability of the expert witness's testimony before ruling on the testimony's admissibility.

A trial court's ruling upon an expert witness's qualification is but one in a series of rulings made in the completion of a trial court's gatekeeping duty. See *State v. Council*, 335 S.C. 1, 20-21, 515 S.E.2d 508, 518 (1999). Specifically, the trial court must rule that the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable. *Id.* Any ruling by the trial court upon the threshold issue of either expert's qualification is distinct from the trial court's reliability determination. See *Watson v. Ford Motor Co.*, 389 S.C. 434, 446-447, 669 S.E.2d 169, 175 (2010) (citations omitted) (...only 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...).

Even though the reliability of a witness's testimony is not a pre-requisite to determining whether or not the witness is an expert, it is a pre-requisite to determining the admissibility of the witness's testimony. Compare *State v. Tapp*, 398 S.C. 376, 388, 728 S.E.2d 468, 474-475 (2012)

(finding reliability is not a pre-requisite to determining whether or not witness is an expert) with State v. White, 382 S.C. 265, 273-274, 676 S.E.2d 684, 688 (2009) (citations omitted) (finding expertise, reliability, and ability of the testimony to assist the trier of fact are threshold determinations necessarily made prior to the admission of expert testimony). Trial counsel adequately preserved objections to the qualification and reliability of Timothy Lee as a “crime scene analyst” and to the underlying reliability of Stan Richards’ testimony.

Timothy Lee

The Assistant Solicitor offered Timothy Lee only as an expert in crime scene processing. R. 178, ll. 9-25. However, Lee’s testimony crossed into the purview of a crime scene analyst, a distinctly different field. Notably, our Supreme Court has expressly designated blood spatter analysis as an example of scientific evidence, precisely the type of evidence which must be subjected to reliability inquiries under Council and Rule 702 SCRE. See State v. Whaley, 305 S.C. 138, 142, 406 S.E.2d 369, 371 (1991) and Council, 335 S.C. at 20-21, 515 S.E.2d at 518.

Lee was proffered as an expert for whom the State claimed they had no questions “about blood.” R. 171, ll. 13-14. As Lee began to opine on the location of the blood-lettings origin, defense counsel made a contemporaneous objection to both his qualification to offer opinion and to the underlying reliability of the methodology employed. R. 194, l. 16. Defense counsel timely objected to the lack of methodologically reliable processes underpinning any opinion testimony Lee could offer on what the blood spatter showed, an opinion squarely within the realm of crime scene analysis versus crime scene processing. R. 1709, ll. 17-21. Thus, defense counsel’s objection went to the heart of Lee’s qualification.

Further, defense counsel established that neither Lee nor anyone else “did a blood spatter analysis of the scene.” R. 168, ll. 2-5. Defense counsel established that no underlying tests had

been performed in fabricating Lee's opinion nor had the scene been documented properly. R. 169, l. 21 – R. 170, l. 3. Defense counsel asserted that Lee's opinion was not capable of meeting the reliability standard as informed by the factors stemming from State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979). R. 170, ll. 5-10. Specifically, Lee testified, "....And when you look over here, you see more staining that's heavier, so that gives us an indication that a blood-letting occurred within." Defense counsel then repeatedly clarified his objection stating that Lee's testimony was beyond the scope of his qualification and that the trial court had not yet determined whether or not Lee's opinion was reliably derived under Rule 702 SCRE. R. 194, l. 23 – R. 195, l. 4, R. 195, ll. 12-15, R. 198, ll. 16-25, R. 203, ll. 10-12, R. 203, ll. 24-25.

In response, the assistant solicitor offered evidence only of Lee's educational qualifications, failing to provide the trial court with the evidentiary touchstones of Lee's underlying methodology, something expressly required by the Supreme Court's holding in State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). The trial court then ruled the testimony admissible without conducting the requisite analysis of his expertise and methodology, and defense counsel again renewed his objection. R. 203, ll. 10-12, R. 203, ll. 24-25. Defense counsel never ceded this objection nor allowed Lee's testimony to go forward without repeated challenge. R. 194, l. 23 – R. 195, l. 4, R. 195, ll. 12-15, R. 198, ll. 16-25, R. 203, ll. 10-12, R. 203, ll. 24-25, R. 205, l. 18, R. 207, l. 18, R. 208, l. 7, R. 210, l. 8, R. 210, l. 12,

Stan Richards

Regarding Stan Richards, defense counsel highlighted the scope of his objection during an *in camera* hearing. R. 414, l. 17 – R. 415, l. Defense counsel noted that he objected to Richards' lack of adherence to the protocols he himself wrote, and to the reliability of his testimony. *Id.* The trial court overruled defense counsel's *in-camera* objections. R. 416, l. 23 – R. 417, l. 16. When

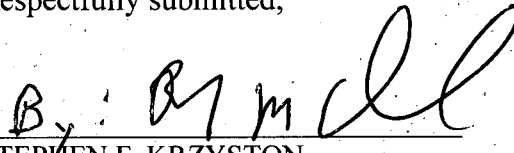
the assistant solicitor offered Stan Richards as an expert, defense counsel re-raised his objection.

R. 458, ll. 18-20. Thus, defense counsel never ceded his objection to the reliability of Richards' opinion.

CONCLUSION

As requested in his brief, and for the reasons provided in the initial brief and this reply, Appellant respectfully requests that this court reverse his conviction for murder and sentence of life imprisonment.

Respectfully submitted,



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This 31st day of January, 2019.