STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable R. Markley Dennis, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SIDNEY STCLAIR MOORER,

APPELLANT

APPELLATE CASE NO. 2019-001636

FINAL BRIEF OF APPELLANT

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II. Whether the trial court erred in denying Appellant's motion for a directed verdict, where no direct or substantial circumstantial evidence existed such that either the kidnapping or conspiracy to kidnap charges should have been submitted to the jury?

III. Whether the trial court erred in qualifying Grant Fredericks as an expert in forensic video analysis and allowing him to testify in front of the jury based on flawed conclusions, where he suggested that Appellant's truck was seen driving to and from Peachtree Landing, where he excluded all other vehicles based on the headlight pattern, and where his findings were refuted by Appellant's expert and shown to be unreliable?

STATEMENT OF THE CASE

In March 2014, Appellant was indicted by an Horry County grand jury for kidnapping. R. 1962. He proceeded to trial in 2016, but a mistrial was declared. He was then also indicted for conspiracy to kidnap. Sup. R. 2. He proceeded to trial on September 9, 2019 before the Honorable Markley Dennis. R. 1. Jarrett Bouchette and James Galmore represented Appellant; Nancy Livesay and Christopher Helms appeared on behalf of the state.

Appellant's trial lasted eight days. He was convicted of both charges. R. 1932, ll. 11 – 20. He was sentenced to thirty years on each offense, concurrent. R. 1945, ll. 18 – 24.

This appeal follows.

ARGUMENT

I. The trial court erred in reversing its decision to try Appellant's case in Georgetown County and instead transferred venue back to Horry County, where previously the trial court granted Appellant's motion to transfer venue to Georgetown County, where social media saturation pervaded the case involving Heather Elvis' disappearance and still remained such that Appellant could not receive a fair trial in Horry County, where jurors evidenced their ability and willingness to bypass impartiality determinations at trial, where the trial court erroneously concluded that the convenience of the witnesses outweighed Appellant's right to a fair trial, and where the clerk of court in Horry County was the aunt of Heather Elvis.

Standard of Review

Empaneling a jury pursuant to S.C. Code Ann. § 17-21-85 is similar in effect to a change of venue and is subject to the same scope of review. State v. Longworth, 313 S.C. 360, 438 S.E.2d 219 (1993). A motion to change venue is addressed to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. State v. Patterson, 324 S.C. 5, 482 S.C. 760 (1997).

Relevant facts

The disappearance of Heather Elvis made national news. In addition to a Dateline episode, her disappearance was the subject of a two-hour "true crime" show produced earlier this

year.[1] According to the announcement from an Horry County media outlet, the matter received unprecedented coverage:

> Anyone living in or near Horry County is familiar with the name Heather Elvis.
>
> Her disappearance and the subsequent investigation was front-page news for the last six-and-a-half years, and now, a true-crime show will chronicle the case from the very beginning and will try to answer the question that lingers for many today: What happened to Heather Elvis?

Id. The announcement noted that the case "took the national media by storm." Id.

Recognizing the need to escape Horry County in order to have a fair trial, counsel for Appellant filed a Motion to Change Venue, or in the Alternative, To Select Jury from a Different County, Based Upon Presumptive Prejudice From Pretrial Publicity on July 29, 2016. R. 134. The grounds for the motion were as follows: "Said motion is based upon the grounds that the publicity of this case has risen to the level of an extreme situation of inflammatory pretrial publicity that has saturated the community of Horry County. Id. Appellant had already been tried previously, in June 2016; the case resulted in a mistrial.

An Order Granting Change of Venue was signed on October 27, 2016 by the Honorable R. Markley Dennis, Jr. R. 135. Venue was moved to Georgetown County. Id. The trial court analyzed S.C. Code Ann. § 17-21-80 and examined whether jurors had fixed opinions that prevented them from impartially judging the guilt of the defendant. Id.

Based upon responses to juror questionnaires, the trial court "determined that due to the social media exposure the community as a whole has been saturated with the case." Id. Remarkably, the court found that a number of potential jurors had posted on Facebook that they

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[1] "Heather Elvis case to be featured in 2-hour true-crime show," *ABC News 15, WPDE* (https://wpde.com/news/local/heather-elvis-sidney-moorer-tammy-moorer-case-to-be-featured-in-2-hour-true-crime-show) (last accessed October 1, 2020).

"know how to get around the Judge by just saying that [they] can be unbiased." Id. The court explored the number of responses which appeared to have been tainted:

> Further, of the approximately 100 questionnaires that stated they could be unbiased and impartial, 35 use Facebook, 16 had learned about the trial on the internet or through discussions with other people, and 6 openly admit to viewing part of the trial. Additionally, approximately 10 [prospective] jurors would probably be excused for various other reasons, 4 know one or more of the attorneys involved, 2 know the family, and only 13 of the 100 or so [prospective] jurors said they knew nothing about the case.

Id. The court's ultimate conclusion was that Appellant would not receive a fair trial in Horry County:

> **The Court's primary concern is whether a fair and impartial trial may be had in this case. The Court finds that it cannot.** While pretrial publicity is a concern, it is not a paramount concern here. The Court's primary concern is that, due to social media saturation, a fair and impartial jury cannot be empaneled in Horry County. In considering logistical and expense concerns pursuant to S.C. Code Ann. § 17-21-85, this Court finds that Georgetown County is the proper venue in which to try this case.

Id. (emphasis added). Judge Dennis ordered that venue be moved to Georgetown County and that the jury be selected from Georgetown County. Id.

The state filed a Motion to Reconsider on November 10, 2016. R. 335. Two-and-a-half years later, the state filed a document simply entitled "Venue" on May 23, 2019. R. 139.

At a pre-trial hearing on June 21, 2019 before the Honorable R. Markley Dennis, Jr., the state brought up venue. R. 320, l. 25 – 332, l. 13. The state posited that because Judge Culbertson presided over Tammy Moorer's trial in October 2018, Appellant could receive a fair trial in Horry County. Unlike Appellant's case, a jury questionnaire was not done in that matter. R. 321, ll. 11 – 16.

Regarding Appellant's prior trial for obstruction of justice, counsel for Appellant consented to trying that charge in Horry County. R. 323, ll. 22 – 24. Counsel never waived the

right to challenge venue nor conceded that Appellant could receive a fair trial on the kidnapping and conspiracy to kidnap charges in Horry County. Notably, counsel consented to trying the obstruction case in Horry County because of the ruling that the kidnapping charge was going to be tried in Georgetown County. R. 323, l. 22 – R. 324, l. 2.

Judge Dennis indicated that following his decision to change venue to Georgetown County, he spoke with the clerk of court over there. R. 325, l. 2 – R. 326, l. 2. When he mentioned Appellant's name to the clerk, her response was "Who is Mr. Moorer?" Id. Judge Dennis pointed out how the solicitor controls the docket. R. 324, ll. 19 – 24. Because Appellant's case was not retried within half a year, Judge Dennis believed the social media saturation disappeared. Id. Regarding Tammy Moorer's trial, Judge Dennis remarked "I don't think there was anybody on there that was seated that had a bias or prejudice." R. 325, ll. 19 – 21.

Judge Dennis questioned where counsels' offices were and then stated that the witnesses are from Horry County. R. 326, l. 2 – 327, l. 14. When counsel pointed out the social media concerns, Judge Dennis stated "those concerns haven't diminished in me." R. 327, l. 23 – R. 328, l. 4. At the conclusion of the hearing, Judge Dennis granted the state's motion to reconsider the change of venue decision. R. 328, ll. 13 – 19.

A week later, counsel for Appellant filed a Motion to Reconsider Reversal of Order Changing Venue. R. 335. The motion was supported by nine exhibits and established two main points. Id. First, the social media saturation that gave Judge Dennis heartburn continued to exist. Secondly, the election of Renee Elvis as the Horry County of Clerk presented an unnecessary potential for a conflict of interest. Id. That motion was denied at trial. R. 482, l. 10 – R. 483, l. 10.

On September 9, 2019, Appellant also filed a Motion to Excuse Jury Pool and Continue Trial. R. 414. Through the written motion, Appellant sought to have the Clerk of Court recused and/or to have the venue returned to Georgetown County. This motion was also denied.

As trial began, defense counsel brought up the matter once more. R. 482, l. 10 – R. 483, l. 10. The trial judge again denied the motion. After the jury was selected, counsel renewed Appellant's motion to recuse the clerk of court based upon the familial relationship with Heather Elvis. R. 587, l. 1 – R. 590, l. 17. The Horry County Clerk of Court, elected after Appellant's first trial, was the aunt of Heather Elvis. Id. Appellant argued that "the clerk is, essentially, an extension of the court" and therefore there was a conflict which would affect the perception of impartiality. Id.

In denying the motion, Judge Dennis remarked that the clerk was "very much involved with this proceeding" and "in charge of the courthouse" but he asked her not to be in the courtroom. Id. Judge Dennis intentionally never said her name in front of the jury. Id. Nonetheless, her name appeared on the juror summons. Id.

Discussion

Multiple jurors indicated that they could not be fair and impartial at the outset of jury selection. Juror 460 indicated that she "[paid] close attention" and believed Appellant was guilty. R. 486, ll. 15 – 22. Juror 722 also stated that she believed Appellant was guilty, as she had "been watching it and seen it." R. 488, l. 16 – R. 489, l. 4. Juror 707 advised that he had "read too much about the case on the Internet" and therefore "[had] a predetermined position," namely that Appellant was guilty. R. 496, l. 21 – R. 497, l. 5.

Juror 438 advised the trial judge that he could not be impartial, "[g]iven how closely [he has] followed it in the media and discussions." R. 503, l. 16 – R. 504, l. 1. Juror 23 worked for

the cousin of Heather Elvis and had discussions about the case. R. 530, ll. 2 – 10. She admitted to having knowledge of the case and informed the judge that it would be difficult for her to set that aside. Id. Juror 114 admitted to hearing "stuff on the news." R. 531, ll. 9 – 23. Juror 131 knew Morgan Elvis, Heather's sister, and saw her multiple times a week at Starbucks. R. 531, ll. 5 – 22. Juror 131 suggested that knowing Morgan affected her "[a] little" and that she also saw Morgan three to four times a week for facials. Id.

Juror 220 told the trial judge that he had knowledge of the case which would affect his service as a juror. R. 533, ll. 3 – 6. When asked if he could make a commitment to be fair, he indicated that he could "do [his] best." R. 534, ll. 2 – 8. The judge pointed out a hesitation not reflected in the trial transcript and excused Juror 220. Id.

Juror 274 admitted to having "a lot of knowledge" about the case. R. 534, ll. 14 – 22. The trial judge did not dismiss her from serving as a potential juror. R. 534, l. 16 – R. 535, l. 5. Juror 329, who did not ask to be called to a bench conference with the judge, admitted to having knowledge of the case. R. 535, ll. 8 – 19. Similarly, Juror 409 did not know why he was asked to speak with the judge prior to trial. R. 537, ll. 11 – 24. The clerk saw on the questionnaire that Juror 409 had "quite a bit of knowledge" about the case. Id. When asked if that would influence him, Juror 409 remarked, "[y]eah, probably. I would think so. I mean, I seen a documentary on it and my fiancée would love to be on the jury, just so you know." Id. Juror 409 was excused. Id.

Juror 688 was also unsure why he was asked to speak with the judge. R. 539, ll. 8 – 25. He had "read and seen several things over the years." Id. He admitted that it would be "hard for [him] to distinguish what [he] already [knew] and heard versus facts." Id. He was unsure whether he could separate the two. Id. Juror 370 knew one of the witnesses and did not feel

comfortable serving as a juror. R. 536, ll. 16 – 24. Juror 723 also admitted to having knowledge of the case. R. 540, ll. 5 – 25. That knowledge notwithstanding, Juror 723 was allowed to remain. Id.

Many of the jurors also knew witnesses in the case. Juror 637 knew Appellant and was therefore excused. R. 544, ll. 6 – 19. Juror 181 was "close personal friends" with Casey Canterbury and indicated that she would "[a]bsolutely" be affected such that there was "[n]ot a chance she would be able to consider testimony of other witnesses the same." R. 548, l. 23 – R. 549, l. 7. Juror 723, who previously admitted to having knowledge of the case, indicated that he knew Morgan Elvis and "went to school with her pretty much from kindergarten through graduation." R. 551, ll. 11 – 23. When asked if that would affect him, Juror 723 answered in the negative. Id.

Juror 65 previously competed in pageants with Morgan Elvis but suggested that she could base her decision on the evidence and the law. R. 552, ll. 3 – 19. She remained in the jury pool. Juror 406 was excused after admitting that growing up near where a witness lived would affect him. R. 555, ll. 10 – 17. Even though she was new to South Carolina, Juror 48 had heard about the case from her hairdresser and her neighbor, who both "offered [her] different opinions." R. 555, l. 19 – R. 556, l. 16. She was excused. Id. Juror 385 admitted to having a conversation with a friend after filling out the juror questionnaire. R. 556, l. 19 – R. 557, l. 12. The conversation affected Juror 385 "a lot" such that concern existed about the ability to serve as a fair and impartial juror.

Juror 448 worked at Broadway at the Beach and had a lot of mutual friends as some of the witnesses. R. 557, ll. 15 – 21. Juror 51 knew Heather Elvis and worked with her previously.

R. 557, l. 22 – R. 558, l. 2. Juror 640 indicated that her husband was "actually really good friends with Heather." R. 558, ll. 5 – 11.

One of the state's witnesses, Jessica Cooke, was the front of the house manager at Tilted Kilt. R. 635, l. 18 – R. 636, l. 8. Heather Elvis also worked at Tilted Kilt. Id. On cross-examination, Cooke agreed that it was "safe to say that the disappearance of Heather and the investigation going on was highly publicized." R. 665, ll. 15 – 24.

Circuit judges in South Carolina have the power to change venue in criminal cases. S.C. Code Ann. § 17-21-80. Following a motion by one of the parties with supporting evidence that a fair and impartial cannot be had in the original county, a circuit court judge may order that the case be removed to another county in the same circuit. Id. In a case where the circuit court judge determines that an unbiased jury cannot be selected from the county where venue currently lies, the judge may instead order that jury selection go forward in some other county. S.C. Code Ann. § 17-21-85. "Transfer of a jury pursuant to § 17-21-85 is similar in effect to a change of venue." State v. Longworth, 313 S.C. 360, 438 S.E.2d 219 (1993). There are multiple considerations at play for when jury selection in a criminal case is conducted in another county:

> In making a determination whether to proceed as allowed by this section or to order a change of venue for a trial, the court shall consider all the logistical and expense elements and, consistent with the demands of justice, choose the method that results in the least expense and greatest convenience for all parties involves in the case.

Id. In Appellant's case, the original Order Granting Change of Venue made the proper considerations under S.C. Code Ann. § 17-21-85, but the ultimate ruling to change venue to Georgetown County was under S.C. Code Ann. § 17-21-80.

In a death penalty appeal approximately seven years ago, the South Carolina Supreme Court held that a defendant failed to show actual juror prejudice as a result of pretrial publicity

and was therefore not entitled to a change of venue. State v. Stanko, 402 S.C. 252, 741 S.E.2d 708 (2013), overruled on other grounds by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). The Court examined both the number of jurors who knew about the case as well as the extent of their knowledge. Id. at 278, 741 S.E.2d at 721. The trial court in Stanko concluded that the vast majority of jurors knew nothing about the case:

> A few of them know [Appellant's] name. That's on the questionnaire they were given… It's no kind of pretrial publicity of any kind. And the one person that said they had some kind of information, again, without equivocation of any kind, indicated that they could set it aside.

Id. Contrast that with the matter *sub judice* where multiple jurors stated that they had already formed beliefs as to Appellant's guilt. In affirming his conviction, the Court in Stanko held that he failed to prove prejudice: "In the instant case, Appellant fails to present even one juror who stated he or she could not ignore exposure to pretrial publicity prior to serving as a juror." Id. at 278, 741 S.E.2d at 721-22. At least half a dozen jurors in the matter at bar outright confessed to their inability to be fair. Some professed an inability to separate facts gleaned from the news from testimony elicited at trial while others admitted to having already formed an opinion as to Appellant's guilt. The jury pool in Horry County was tainted with years of exposure to this case which manifested in countless

More recently, in United States v. Tsarnaev, the United States Court of Appeals, First Circuit, vacated the death sentences of Dzhokhar Tsarnaev, one of individuals charged in connection with the Boston Marathon bombings. 968 F.3d 24 (1st Cir. 2020). The opinion listed seven highlights following coverage of the incident via traditional press and social media platforms, including 1) how the reporting misstated some of the facts; 2) Tsarnaev's non-Miranda-ized statements to law enforcement at the hospital which were not introduced at trial; and 3) exploration of the decedents' lives and badly injured survivors. Id. at 43. A footnote

even referenced the number of views on videos uploaded to Youtube on the *Boston Globe* account. Id. n. 13.

Tsarnaev hired an expert who collected polling data which showed that potential jurors in the court's Eastern Division were more likely to consider him guilty than those in other divisions. Id. at 43. Tsarnaev's counsel moved for a change of venue, arguing that the circumstances triggered a presumption of prejudice in the District of Massachusetts. Id. The judge denied the motion, finding that neither the neither the defense's expert nor his newspaper analysis "persuasively show[ed] that the media coverage has contained blatantly prejudicial information that prospective jurors could not reasonable be expected to cabin or ignore." Id. at 44. The judge also concluded that the "decibel level of media attention" had "diminished somewhat." Id. Additional change-of-venue motions were filed and similarly rejected. Id. at 44 – 54. In a lengthy opinion, the First Circuit held "the [trial] judge qualified jurors who had already formed an opinion that Dzhokhar was guilty—and he did so in large part because they answered "yes" to the question whether they could decide this high-profile case based on the evidence." Id. at 58-9. Notably, the court held:

> Yet by not having the jurors identify what it was they already thought they knew about the case, the judge made it too difficult for himself and the parties to determine both the nature of any taint (*e.g.* whether the juror knew something prejudicial not to be conceded at trial) and the possible remedies for the taint. This was an error of law and so an abuse of discretion.

Id. (internal citations omitted).

Likewise, it was an abuse of discretion for this case to be tried in Horry County. In the original Order Granting Change of Venue, Judge Dennis referenced Facebook posts from potential jurors that they "know how to get around the Judge by saying that the[y] can be unbiased." The state presented no evidence that such taint disappeared.

Knowledge of this case pervaded Horry County, and multiple jurors were allowed in the pool who had knowledge of the case. An analysis of internet searches over the past five year via Google Trends shows that the interest in Heather Elvis' case reached near peak interest levels in October 2018 around the time of Tammy Moorer's trial.[2]

Google Trends indexes data on a scale of 0 to 100, with 100 representing the maximum interest in a search over time.[3] Jason G. Dykstra, Keeping Up with A Kardashian: Shedding Legal Educations' Vestigial Trade School Anxiety and Replacing the Dated Casebook Method with Modern Case-Based Learning, 48 Hofstra L. Rev. 81, 105 (2019)

Although Charleston and Columbia internet users were part of the groups displaying interest, the overwhelming majority of interest stemmed from Myrtle Beach.[4] As such, the media saturation never disappeared. People in the area were not only searching for information about the case but undoubtedly reading materials as a result. As seen in *voir dire*, numerous jurors had knowledge of the case. Those truthful enough to divulge their existing familiarity with the matter were sometimes excused, but not always.

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[2] By indexing the relative frequency of search terms used on Google, Google Trends provides access to a largely unfiltered sample of actual search requests made to Google. It is anonymized, categorized, and aggregated. These data are properly the subject of judicial notice because the accuracy of Google's record of searches conducted on its own website cannot reasonably be questioned. See SCRE 201(b); Pahls v. Thomas, 718 F.3d 1210, 1216 n.1 (10th Cir. 2013) (taking judicial notice of information from Google Maps). In conducting an inquiry into this information, a user can manipulate the following parameters: geographical location, date range, category, and type of search.

[3] "FAQ About Google Trends Data," Google Support (*available at* https://support.google.com/trends/answer/4365533?hl=en&ref_topic=6248052) (last visited Oct. 1, 2020).

[4] "Heather Elvis," Google Trends (reflecting frequency of search terms) (*available at* https://trends.google.com/trends/explore?date=today%205-y&geo=US-SC&q=heather%20elvis) (last accessed October 1, 2020).

As referenced in the Defense Motion to Excuse Jury Pool and Continue Trial, an opinion from the South Carolina Attorney General in 2002 concluded that "a potential conflict existed when the Clerk of Court for the Town of Westminster also served as the victim's advocate." R. 414. The Opinion set forth that "[o]ur Supreme Court has recognized that "every public officer is bound to perform the duties of his office honestly, faithfully and to the best of his ability, in a manner so as to be above suspicion of irregularity, and to act primarily for the benefit of the public." Op. Atty. Gen., July 25, 2002, citing O'Shields v. Caldwell, 207 S.C. 194, 35 S.E.2d 184 (1945). "Public employees must be above reproach and avoid even the appearance of a conflict of interest in carrying out their duties." Id. Assistant Deputy Attorney General Robert D. Cook wrote that there would be "at least the appearance of a conflict of interest" in a situation where the municipal court clerk also serves as the victims' advocate for the Town of Westminster.

> Where the Clerk of Court of Westminster, whose duties relate almost exclusively to the administration of the municipal court, also performs the duties of Victims' Advocate, it could be alleged that an inherent conflict of interest exists in such a relationship.

Id. Cook advised against the same individual performing both functions.[5] Id.

This case should have been tried in Georgetown County for the reasons listed above but also because Heather Elvis' aunt was the clerk of court in Horry County. In State v. Sullivan, the sheriff of Greenville, Perry D. Gilreath, was the half-brother of the decedent in a murder trial. 39 S.C. 400, 17 S.E.2d 865 (1893). Gilreath "had acted as a member of the board of jury commissioners for [Greenville] county" and summoned each juror for attendance. Id. Much like the matter at hand, "[c]are was taken to inform the court that no reflection upon the high

[5] As with all opinions from this office, a disclaimer paragraph suggested that this was an informal opinion only.

character of the sheriff was intended, all his actions officially were statutory; and we may add, in passing, that such care was observed by all the counsel in this court." Id. However, the panel of jurors summoned by Gilreath was quashed and venue was transferred to Anderson County. Id. In a concurring opinion, former Chief Justice McIver noted that "jurors [that] had been drawn and summoned by officers who, by reason of their relationship to the deceased, could not lawfully be regarded as impartial and disinterested officers," so therefore the change of venue was proper. Id.

Appellant's motions regarding the clerk of court in the case at hand set forth that "[a] clerk of court, when performing the duties of clerk, is an arm of the court itself." R. 414; See Thornton v. Atlantic Coast Line R. Co, 196 S.C. 316, 13 S.E.2d 442, 446 (1941), quoting Chafee & Co. v. Rainey, 21 S.C. 11 (1884) ("The clerk is the officer of the court, and any mere ministerial act which he does by the order of the court is the act of the court itself."). The court is constitutionally required to remain "neutral and detached" in the performance of its exclusively criminal functions, such as the issuance of warrants. See Shadwick v. City of Tampa, 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 738 (1972). The motion pointed out that "[t]he potential for an inherent conflict of interest exists in circumstances where [the] Clerk of Court is so closely associated with a victim as to potentially affect the neutrality, or even perceived neutrality, of the office." R. 414.

The Seventh Circuit addressed clerk involvement in United States v. Kraus, 137 F.3d 447 (1998) as if the actions came from the judge. In Kraus, the district judge rejected a proposed plea agreement in open court and, according to the Seventh Circuit, tread too closely to the line prohibiting her from involving herself in plea negotiations. Kraus, 137 F.3d at 449-50, 454-55.

The district judge told the parties that she believed the sentencing range of 121 months was too low. Id. The parties left the hearing and continued negotiating. Id.

Unfortunately for the district judge, and unbeknownst to her, the "room clerk" told the prosecutor during a telephone call that she believed the parties' proposed new sentence of 151 months had "credence," but advised "that there was no guarantee as to what the court would do." Id. at 450-51. The prosecutor told this to the defense attorney who then told his client that a third party connected to the court said the judge would not accept a cap of less than 151 months. Id. at 451. After pleading guilty, the defendant appealed on the basis that his plea had been "tainted." Id. at 451-52.

On appeal, the Seventh Circuit analyzed both the judge's comments and the clerk's comments under the federal rule for harmless error and reversed. Id. at 456-58. The clerk's comments were the decisive factor in the court's decision to reverse. Id. The court wrote, "Judicial employees, whether they be law clerks, secretaries, or courtroom deputy clerks, enjoy access to a judge's innermost thoughts; they consequently bear a duty of loyalty and confidentiality that precludes them from opining how the judge will rule." Id. at 456.

> **The conflicts and missteps of a judge's staff are not lightly imputed to the judge herself.** We reiterate that there is no evidence that the district judge herself was even aware of, let alone endorsed, the room clerk's remark that the 151-month cap had "credence." On the contrary, the clerk to her credit admonished the prosecutor that she could not predict what the judge would have to say about that new cap. Nor do we for a moment think that the clerk's own opinion as to the new cap had any impact upon the judge's subsequent evaluation and approval of the plea agreement. **Even so, coming from an employee of the court who occupies a position of enormous trust, any opinion voiced by the clerk was bound to carry far greater weight than the opinion of a mere bystander. Accurately or not, a party and its counsel are quite likely to perceive that the clerk's opinion as to a matter pending before the court is founded in some measure on the clerk's knowledge of and insight into the judge's thoughts.** Had she lacked the status of an "insider," the clerk's thoughts as to the "credence" of the new sentencing cap would not have merited disclosure to defense counsel and again to the defendant.

Id. at 456, n.9 (internal citations omitted) (emphasis added).

The Seventh Circuit properly focused its inquiry on the perception of the defendant and his reaction to the clerk's statement. Id. at 456-57. The court said that had the judge made the same remark the clerk made, it would have undoubtedly been improper. Id. "From the defendant's point of view, however, there is little practical difference." Id. "A court and an attorney can appreciate the distinction, but the undisputed facts suggest that it appeared to Kraus (and for that matter, to his attorney), that the court itself had given its blessing to the 151-month proposal." Id. "We cannot say with any degree of confidence that Kraus' perception was unreasonable." Id. at 457.

In Appellant's case, the clerk's last name and familial status created the appearance of a conflict. Venue should have stayed in Georgetown County. Renee Elvis was not a "room clerk." She was the clerk of court for the entire county.

According to the Clerk of Court Manual in South Carolina:

> The Clerk of Court is responsible for notifying (or summoning) prospective jurors when they have been selected for jury duty in either the Circuit or Probate Court. As required by law, a juror must be notified of selection for service fifteen days prior to the start of the term for which he/she has been summoned.

Clerk of Court Manual (Section 4.4 Juror Summoning) (internal citations omitted).[6] Form SCCA 235 is a template for "Juror Summons for Circuit Court." The top of the form contains a line indicating that the summons was sent from the clerk of court. Similar to the situation in Sullivan, supra, the clerk of court's involvement in the case should have resulted in transfer of venue to Georgetown County.

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6 "Clerk of Court Manual" (Chapter 4 Jury Management) (https://www.sccourts.org/clerkOfCourtManual/displaychapter.cfm?chapter=4#4.4) (last accessed October 1, 2020).

The certificate of the court reporter, at the end of a trial transcript, contains a certification that the court reporter is "neither of kin, counsel, nor interest to any party hereto." R. 1947. The clerk of court should be subject to the same standard. Every stage of an individual's trial should be safeguarded from both improper influence *and* the appearance of a conflict of interest.

The social media saturation in Horry County never dissipated. People did not forget about this case. Pretrial publicity was not found to be a paramount concern here, so the line of cases in that arena are largely inapplicable. R. 135 ("While pretrial publicity is a concern, it is not a paramount concern here."). Social media saturation, unlike pretrial publicity, comes from people in an area posting about something. The very pool from which the jury is drawn was actively discussing this case based on snippets, documentaries, and gossip. That did not magically disappear. Appellant was unable to receive a fair trial in Horry County, and the trial judge erred in bringing venue away from Georgetown County.

II. The trial court erred in denying Appellant's motion for a directed verdict, where no direct or substantial circumstantial evidence existed such that either the kidnapping or conspiracy to kidnap charges should have been submitted to the jury.

Standard of Review

On appeal from the denial of a defendant's motion for directed verdict, an appellate court must view the evidence in the light most favorable to the state. The trial judge must submit a case to the jury if there is any evidence, direct or circumstantial, which reasonably tends to prove the guilt of the accused, or from which guilt may be fairly and logically deduced. State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984). When the state undertakes to prove a crime by circumstantial evidence, the proof must point conclusively to the guilt of the accused and must

be absolutely inconsistent with any other reasonable hypothesis. That is, the evidence must produce a reasonable and moral certainty that the accused, and no one else, committed the Id.; see also State v. Miller, 287 S.C. 280, 337 S.E.2d 883 (1985).

Relevant facts

At the conclusion of the state's case-in-chief, Appellant moved for a directed verdict based on the purely circumstantial nature of the state's case:

> What we have here is a situation where - - obviously, I don't think it is in dispute that it is a circumstantial case that we're looking at, where the State is obligated to find that someone has seized, confined, inveigled, decoyed, kidnapped, abduct[ed] or carried away any other person by any means, whatsoever. Your Honor, in order to do that, in order to satisfy any of those elements, you would have to be - - at least have some evidence in the record indicating at what point these two individuals crossed paths. Every witness - - which is why we come back to it consistently - - every witness has said nowhere in the evidence that the State has produced, shows Mr. Moorer in the same vicinity as Ms. Elvis during the night she goes missing. There is a lot of innuendos, a lot of implication, a lot of guesswork, but, ultimately, what it comes down to after all the witnesses we've heard, and everything we've seen, we never see Mr. Moorer at any point get to Ms. Elvis' residence that night. There is never any evidence that she's at the Moorer residence, and there is no direct evidence that they have ever crossed paths at Peachtree landing.
>
> So as to the kidnapping charge, it is not the weight of the evidence, because there simply is no evidence on that point. Typical question is when, where and how? When did they come into contact? How were any of these things achieved? I submit to the Court that without showing at least some evidence as to begin in the same proximity, I don't see how we can allow it to go forward, because there is just not any evidence to support the charges at this point.

R. 1728, l. 22 - 1730, l. 3.

In response, the state suggested that the payphone call was "an act of decoy and inveigle." R. 1730, ll. 6 - 14. The trial court ruled that there was "substantial circumstantial" evidence and denied the motion. R. 1731, l. 15 - 1734, l. 1. Although no evidence was presented that Heather Elvis ever got into Appellant's truck, the trial judge indicated that the most

compelling circumstantial evidence was Ms. Elvis "wouldn't methodically get out of [her] car, take [her] keys, take [her] cell phone and get into another vehicle unless [she] knew the person." Id. The trial judge stated that Appellant and his wife were "the only persons that could possibly fit the bill." Id.

The other evidence the trial judge found compelling was the cleaning of the truck. The judge described it as "probably the most incredible evidence that I've heard, that a brand new truck, pressure wash it ten days after you get it?" Id. He suggested that "a reasonable conclusion is, well, obviously it may contain blood, DNA, anything." Id.

The trial judge concluded that those circumstances, as well as the replacing of the security system, "not just substantially, but overwhelmingly - - points to the guilt of Mr. Moorer." Id.

Appellant also moved for a directed verdict as to the conspiracy to commit kidnapping charge. R. 1734, l. 3 – R. 1735, l. 4. Based on the evidence that "Mr. Moorer was not free to move without Mrs. Moorer being around him," the trial judge denied this motion as well. R. 1735, ll. 5 - 20. All motions, including the motions for directed verdict on both charges, were properly renewed. R. 1851, ll. 14 - 15.

Testimony regarding Appellant and his wife cleaning his truck came in through Peter Cestare, an officer with the Horry County Police Department. He obtained footage from the security cameras at Appellant's home which showed cleaning of the truck and subsequent burning of the rags which were used to clean the truck. R. 1565, l. 11 – R. 1567, l. 12; R. 1571, l. 13 – R. 1757, l. 8. Cestare indicated that he thought it was suspicious that Appellant was burning the rags, but he found nothing probative to the case when he previously searched Appellant's home. Id.

Discussion

> Kidnapping is defined by statute in South Carolina:
>
> > Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away any other person by any means whatsoever without authority of law, except when a minor is seized or taken by his parent, is guilty of a felony and, upon conviction, must be imprisoned for a period not to exceed thirty years
>
> S.C. Code Ann. § 16-3-910

Kidnapping is a continuous offense which "commences when one is wrongfully deprived of freedom and continues until freedom is restored." State v. Tucker, 334 S.C. 1, 13, 512 S.E.2d 99, 105 (1999). South Carolina's kidnapping statute requires proof of an unlawful act taking one of several alternative forms, including seizure, confinement, inveiglement, decoy, kidnapping, abduction, or carrying away. See State v. Owens, 291 S.C. 116, 352 S.E.2d 474 (1987). The *mens rea* required for the crime of kidnapping is knowledge. Hinton v. South Carolina Dept. of Probation, Parole and Pardon Services 357 S.C. 327, 592 S.E.2d 335 (Ct. App. 2004).

In State v. Asbury, the South Carolina Supreme Court held that Asbury was not entitled to a directed verdict on a kidnapping charge. 328 S.C. 187, 493 S.E.2d 349 (1997). In that case, there was significantly more evidence than in the matter at hand:

> Here, Asbury's fingerprints were found at the victim's residence. There was testimony electrical cords which bound the victim's hands and ankles had been cut by a pair of scissors found in Asbury's home. Moreover, there was evidence the same severed electrical cords had at one time been attached to an electric blanket found in Asbury's residence. This is substantial circumstantial evidence which reasonably tends to prove Asbury's guilt.

Id. at 194, 493 S.E.2d at 353.

In Appellant's case, the state failed to offer any evidence of a struggle at Peachtree Landing. There was no testimony or evidence that Heather Elvis was ever in Appellant's truck. As mentioned multiple times by numerous witnesses, this was a missing person case. Law

enforcement never found evidence of a kidnapping—Heather Elvis went missing, but Appellant was not shown to be a part of her disappearance. The plain circumstantial evidence in this case merely raises a suspicion that Appellant was in communication with Heather Elvis, not that he was involved in her disappearance. The kidnapping charge should not have survived directed verdict.

Similarly, the trial judge should have granted a directed verdict on the conspiracy to kidnap offense as well. Like kidnapping, conspiracy to kidnap is defined statutorily:

> If two or more persons enter into an agreement, confederation, or conspiracy to violate the provisions of Section 16-3-910 and any such persons do any overt act towards carrying out such unlawful agreement, confederation, or conspiracy each such person shall be guilty of a felony.

S.C. Code Ann. § 16-3-920.

There are only two reported cases referencing this statute in South Carolina: State v. Asbury, supra, and State v. Jacobs, 119 S.E.2d 735, 238 S.C. 234 (1961). Asbury contains no mention of a conspiracy. In Jacobs, the defendant seemingly conspired with an individual named Lewis Young who alerted law enforcement to the plan:

> The evidence is susceptible to the conclusion that Thomas D. Jacobs came to the home of one Lewis A. Young at about 11:30 p.m. on February 14, 1957, and proposed to the said Lewis A. Young the making of some easy money by kidnapping a boy four or five years old. It appears that Jacobs stayed in the home of Young until sometime on the afternoon of February 15, 1957. After Jacobs left, Young had one Watts Davis, a groceryman living in the community, to telephone the sheriff of Laurens County.

Id. at 238, 119 S.E.2d at 737. The evidence in Appellant's case does not rise near the level of that in Jacobs. No evidence was offered to suggest that there was an agreement or plan to kidnap Heather Elvis.

Appellant was entitled to a directed verdict on both charges, and the trial judge erred in denying the motions. There existed no substantial circumstantial evidence that Appellant either kidnapped Heather Elvis or conspired to kidnap her.

III. The trial court erred in qualifying Grant Fredericks as an expert in forensic video analysis and allowing him to testify in front of the jury based on flawed conclusions, where he suggested that Appellant's truck was seen driving to and from Peachtree Landing, where he excluded all other vehicles based on the headlight pattern, and where his findings were refuted by Appellant's expert and shown to be unreliable.

Standard of Review

A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). "The trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion." Id. An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions. State v. Douglas, 369 S.C. 424, 429–30, 632 S.E.2d 845, 848 (2006).

Relevant facts

At a hearing on April 18, 2016, Judge Dennis heard Appellant's motion to suppress testimony of Grant Fredericks. Fredericks began his testimony by offering some background as to his qualifications. R. 10, l. 8 – 31, l. 12. He indicated that he was a former police officer from Canada and now worked as a forensic video analyst. He received a bachelor's degree in communications and then worked as a television reporter and producer. R. 27, ll. 6 – 11. He never received a master's degree. R. 28, l. 24 – 29, l. 9. The state offered him as an expert in forensic video analysis. R. 26, ll. 17 – 19.

For purposes of Appellant's case, Fredericks was hired to testify about reverse projection. He described this concept as "the process of overlaying contemporary images of a scene with

historic images of a scene in order to make observations … or obtain measurements." R. 31, l. 23 – 32, l. 11. In particular, Fredericks undertook an examination into the "headlight spread pattern analysis." R. 33, l. 10 – 34, l. 14. Fredericks indicated that he considered himself "an expert in the examination and comparison of how light reflects off of a roadway." R. 34, ll. 21 – 24.

Fredericks was allowed to render his expert opinions at the pre-trial hearing. R. 41, ll. 7 – 21. He testified at length based upon surveillance videos gathered from Highway 814 and D&S Siteworks. R. 41, l. 23 – 42, l. 4. He described the procedures he utilized in order to determine the class and characteristics of the vehicle shown in the videos. R. 44, l. 23 – 46, l. 8. Fredericks testified that he was able to determine that this was a four-door truck. R. 51, ll. 2 – 4. He also concluded that the truck had HID headlights. R. 51, ll. 17 – 24. He suggested that his methods could be replicated. R. 53, ll. 13 – 23.

Forensic video analysts employ a methodology referred to as ACE-V, which is also used by fingerprint, footwear, and DNA analysts and other identification-based analysts. R. 54, ll. 2-5. It stands for analyze, compare, evaluate, and verify. Forensic video analysts add an R for report (ACE-VR) because a visual report is necessary in their field for peer review. R. 54, ll. 5-12. Verification is the aspect that covers quality control to ensure the reliability of their testing. R. 54, ll. 13-16.

During the pretrial hearing, before hearing any argument, Judge Dennis found the subject of Fredericks' testimony is "beyond ordinary knowledge" and that Fredericks "demonstrated a knowledge of training, background, and experience sufficient to render an opinion." R. 41, ll. 8-14. However, Judge Dennis withheld ruling on the extent of the opinion Fredericks would be permitted to render until he heard further testimony. R. 41, ll. 14-21.

Fredericks ultimately opined during the pretrial hearing that the vehicle seen on the surveillance footage from the residence on Highway 814 and D&S Siteworks during the early morning hours of December 18, 2013 was the 2013 Limited Edition Ford F-150 that belonged to Sidney and Tammy Moorer, "eliminating all others of the same class." R. 75, ll. 1-19.

Fredericks said his report was "peer reviewed" by George Reis, who is certified as a forensic video examiner by the International Association for Identification (IAI). R. 65, ll. 2-23. Reis "agreed with the methodology that was employed and with the results." R. 67, ll. 15-18. He found Fredericks' headlight spread pattern analysis was "an appropriate process." R. 67, ll. 19-21. Reis emailed his findings to Fredericks the night before the pretrial hearing. R. 71, ll. 6-23; Sup. R. 1. The email specifically stated, "The premise of the uniqueness of headlight spread patterns is well stated and illustrated." Sup. R. 1.

Following Fredericks' testimony, Appellant called Bruce Koenig to rebut the reliability of Fredericks' findings and conclusions. Koenig received his undergraduate degree in physics and mathematics from the University of Maryland. R. 82, ll. 7 – 17. He obtained a master's degree in forensic science from George Washington University. Id. He also completed courses at DeVry University, George Mason University, University of Utah, University of Colorado Denver, and Massachusetts Institute of Technology. Id. He had previously been qualified approximately 390 times in the area of audio/video technology and still image analysis. R. 83, ll. 14 – 19.

Appellant sought to offer Koenig as an expert in the area of video forensic analysis. R. 85, ll. 22 – 23. The trial judge allowed him to testify accordingly. R. 107, ll. 3 – 7. Based on Koenig's expertise, he disputed Fredericks' findings with regard to specificity and uniqueness. Koenig indicated that reverse projection is "an excellent technique when you have a stable

camera position." R. 107, ll. 12 – 19. He noted that the FBI has used the test for "a long time." Id. Regarding the most recent 2013 FBI Laboratory Handbook of Forensic Services, however, no *headlight pattern analysis* examinations were listed. R. 107, ll. 20 – 25.

Koenig did not dispute all of Fredericks' findings. His main contention was that Fredericks could not have excluded every other vehicle in the world. R. 110, ll. 2 – 11. He outright decried one finding from Fredericks' report, that "[n]o two vehicles share the same headlight pattern." R. 110, ll. 7 – 11. Koenig plainly stated that this was not a scientific principle. Id. He denounced Fredericks' finding regarding the uniqueness of headlight spread pattern as "not a statement of fact." R. 117, ll. 4 – 13.

Koenig suggested that Fredericks was a good writer and ought to publish some of his work, but he ultimately testified that the conclusion that the only possible vehicle that was shown in the surveillance videos was Appellant's was unreliable:

> Q: So, based upon your experience and education as a scientist, and based upon looking for and finding no research, and based upon finding no peer review articles, would you consider headlight spread pattern analysis to be a[n] accepted scientific method?
>
> A: **Not for uniqueness**; I think for class characteristics, it's fine, it's like any other characteristic.

R. 117, ll. 14 – 23 (emphasis added). Koenig reiterated that there was no research or peer-reviewed articles on this matter as to uniqueness. R. 118, ll. 22 – 25. The state questioned Koenig on cross-examination but did not get into detailed specifics regarding his testimony.

At the conclusion of the pre-trial hearing, the court heard argument from counsel for Appellant:

> And what I've done is focused on headlight spread pattern analysis, and I think that we have shown that there has been no published peer-reviewed publications on that issue. The premise set forth based on his experience, not science, is that every, every single vehicle has a unique spread pattern of lights, just like a

> fingerprint to a person, every single vehicle has that, that is what he has said. That is a principle that is not based on science. It's never been researched, never been tested, and it's never been peer reviewed.

R. 126, l. 22 – 127, l. 4. Appellant asked the court to limit the testimony at trial. R. 127, ll. 18 – 19. The court indicated its intent to allow the testimony at trial. R. 130, l. 5 – 131, l. 12.

At trial, Appellant sought a continuing objection as to Fredericks' testimony. R. 1406, l. 22 – 1407, l. 5. Appellant again objected when Fredericks was asked on direct about his determinations. R. 1438, ll. 1 – 5. The objection was overruled, the Fredericks testified similarly to the 2016 hearing that the vehicle seen on the surveillance videos belonged to Appellant. R. 1442, ll. 12 – 15.

Discussion

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. Rule 702 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.

Rule 702, SCRE.

In State v. Phillips, the South Carolina Supreme Court held that the trial court abused its discretion in admitting the state's DNA analyst's expert testimony. 430 S.C. 319, 844 S.E.2d 651 (2020). The state relied on a SLED forensic analyst, Lilly Gallman, who drew comparisons between DNA standards and touch DNA taken from the scene of the crime. Id. at 324, 844 S.E.2d at 653. The Court remarked that "[t]he proponent of scientific evidence has a … responsibility to provide the trial court the factual and scientific information the court needs to

carry out its gatekeeping duty." Id. at 334, 844 S.E.2d at 659. In that case, as in this one, "the State did not give the trial court the factual and scientific basis the court needed to meaningfully exercise [its] discretion." Id. at 340, 844 S.E.2d at 662.

Similarly, Fredericks based his conclusions on his experience, rather than factual and scientific information. As noted by Koenig both pre-trial and at trial, Fredericks' conclusion as to uniqueness was unsupported by science.

"Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge. Stated differently, expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge." Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010).

"[I]n 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." Id. 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. (citing State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009)). "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. (citing Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997)). "Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable." Id. (citing State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999)).

"Expert testimony is not admissible unless it satisfies *all* three requirements with respect to subject matter, expert qualifications, and reliability." Id. (emphasis added). "Thus, 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 and permit the jury to assign it such weight as it deems appropriate." Id. at 446-447, 699 S.E.2d at 175 (citing State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009)).

Fredericks' conclusions were unreliable, and the trial judge erred in denying Appellant's motion to suppress his testimony regarding uniqueness. Koenig's testimony set forth how Fredericks' findings were not based in scientific principles, meaning the testimony was improper.

CONCLUSION

Based on the foregoing, Appellant respectfully requests this Court direct a verdict of acquittal on both charges. In the alternative, Appellant respectfully requests that this Court reverse his convictions and remand for a new trial in Georgetown County.

s/ Taylor D. Gilliam
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Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of April, 2021.

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SC Court of Appeals

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."

Respectfully Submitted,

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This 13th day of April, 2021.