

RECEIVED

Jul 14 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Aiken County

Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RUSSEL STUART KENDRICK,

APPELLANT

APPELLATE CASE NO. 2020-001561

ANDERS BRIEF OF APPELLANT

ADAM SINCLAIR RUFFIN
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW3

STATEMENT OF FACTS4

ARGUMENT

The trial judge erred in allowing the victim to opine as to the value of the jewelry that was stolen from her house because she was not qualified as an expert and therefore should not have been permitted to give her improper lay opinion as to the value of the jewelry.....7

CONCLUSION.....11

PETITION TO BE RELIEVED AS COUNSEL12

TABLE OF AUTHORITIES

Cases

Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967) 12

Hamrick v. State, 426 S.C. 638, 828 S.E.2d 596 (2019) 8

Kranchick v. State, 418 S.C. 435, 793 S.E.2d 314 (Ct. App. 2016) 9

State v. Clasby, 385 S.C. 148, 682 S.E.2d 892 (2009) 3

State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009) 8

State v. Westmoreland, 421 S.C. 410, 807 S.E.2d 701 (Ct. App. 2017) 9, 10

State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (2012) 3

Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010) 7

Rules

Rule 211(b), SCACR 14

Rule 701, SCRE 7

Rule 704, SCRE 8

STATEMENT OF ISSUE ON APPEAL

Whether the trial judge erred in allowing the victim to opine as to the value of the jewelry that was stolen from her house where she was not qualified as an expert and therefore should not have been permitted to give her improper lay opinion as to the value of the jewelry?

STATEMENT OF THE CASE

Appellant was indicted by the Aiken County Grand Jury for burglary second-degree, non-violent, and grand larceny over \$10,000. R. 456-459. Appellant's trial was held before the Honorable Clifton Newman and a jury from November 9 – 12, 2020. Appellant was represented by William McKellar and Barry Thompson. The state was represented by Jacqueline Charbonneau and Ashley Hammack. R. 1.

The jury found Appellant guilty as charged. R. 410, ll. 3 – 14. The judge sentenced Appellant to consecutive ten-year prison sentences on each charge. R. 428, ll. 2 – 12.

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

Melissa Ferron and her husband took their son on an overnight trip to Lake Murray from Saturday, June 13, 2015 to Sunday June 14, 2015. R. 144, ll. 4 – 9. They returned home at approximately four o'clock on Sunday afternoon and recalled a strong smell of burnt rubber in their house. R. 146, l. 22 – 147, l. 5. Ferron said that there was glass shattered in her back hallway and that the bottom windowpane of her back door had been broken. Ferron also said she observed her bedroom door kicked in and her safe had been cut open and there was blood on her bedroom floor. R. 147, ll. 6 – 25.

Ferron described her bedroom as having been “tossed,” but said that no other room in the house was “tossed” except for a drawer and cabinet being open in her kitchen. R. 148, ll. 3 – 14. According to Ferron, the safe in her bedroom was “cleaned out,” which included coins, paper money, and her mother’s jewelry. Ferron also claimed that a gun was stolen from underneath her bed. R. 148, l. 25 – 149, l. 23.

Ferron and Appellant had previously dated for twelve or thirteen years but Ferron had ended the relationship two years prior to the burglary. R. 142, l. 22 – 143, l. 5. Ferron testified that she and Appellant had lived together at the house that was broken into and that Appellant was unhappy about her ending their relationship. R. 143, ll. 14 – 25. After her home was broken into, Ferron told the police that she suspected Appellant was responsible based on the locations within her house that were “messed with.” R. 186, ll. 1 – 8. Ferron claimed she suspected Appellant because he knew the locations where she kept her jewelry from when he had lived with her and that those were the only areas that had been rummaged through by the perpetrator. R. 151, l. 2 – 153, l. 18.

The officers who responded to Ferron's house took two DNA swabs from the blood in her bedroom which were ultimately matched to the DNA of Lazaro Diaz. R. 209, ll. 12 – 23; R. 243, ll. 4 – 12; R. 259, l. 22 – 261, l. 3. An investigator showed Ferron a photo line-up containing a picture of Diaz, but Ferron was unable to identify him. Ferron did however tell the investigator that she recognized Diaz's name as someone who used to work with Appellant. R. 243, ll. 13 – 21. Diaz gave a statement to the investigator implicating both himself and Appellant and they were both arrested. R. 245, l. 14 – 248, l. 5.

At Appellant's trial, Diaz testified against him. Diaz said that he met Appellant because they worked together and became friends. R. 266, l. 11 – 267, l. 6. Diaz claimed that it was Appellant's idea to break into Ferron's house to steal the money and jewelry out of her safe. R. 269, l. 10 – 271, l. 13. According to Diaz, Appellant picked him up and they drove to Ferron's house because Appellant knew they were at the lake that day. Diaz said that he told Appellant that he wanted to be the person to go into the house and steal the items from the safe. R. 274, l. 20 – 275, l. 24.

Diaz admitted that he broke into Ferron's house alone and that he brought a grinder and numerous cutting wheels with him so that he could cut into the safe. R. 275, l. 25 – 277, l. 11. When Diaz broke the window out of the back door to get inside Ferron's house, he cut his wrist which caused him to bleed in the house. R. 279, l. 21 – 281, l. 21. Once he got inside the house, Diaz went to the kitchen and got a trash bag that he wrapped around his wrist to try to slow the bleeding. R. 282, ll. 1 – 20.

Diaz claimed that Appellant told him where the safe was in Ferron's bedroom, so he was able to find the safe and cut it open with his grinder. R. 282, l. 25 – 283, l. 25. It took Diaz "about an hour and a half" and twelve or fourteen cutting wheels to get the safe cut open. R.

285, ll. 4 – 17. Diaz admitted to stealing jewelry, money, and “three bags of pills” from the safe.

R. 287, ll. 17 – 22. Diaz denied stealing a gun from the house. R. 305, ll. 6 – 10.

After Diaz stole the items from the house, he said that Appellant picked him back up and they went back to Diaz’s house to split the money. According to Diaz, there was approximately fifteen thousand dollars in cash which they split in addition to the jewelry. R. 292, l. 9 – 294, l. 14.

ARGUMENT

The trial judge erred in allowing the victim to opine as to the value of the jewelry that was stolen from her house because she was not qualified as an expert and therefore should not have been permitted to give her improper lay opinion as to the value of the jewelry.

Relevant Facts

The state sought to introduce Ferron's receipts from the jewelry that she alleged was stolen from her safe. R. 430-455. Ferron said she had kept the receipts for insurance purposes. R. 161, l. 14 – 162, l. 9. Defense counsel objected because the value of the jewelry was the subject of expert opinion and Ferron could not offer her opinion as to the value since she was not an expert. R. 162, ll. 13 – 20. The trial judge overruled the objection and stated that Ferron could give her opinion as to the value of the jewelry. R. 163, l. 23 – 164, l. 6. Ferron then testified that she paid \$14,000 for the jewelry that was stolen and that was what she believed the value of the jewelry to be. R. 164, ll. 7 – 13.

Discussion

Pursuant to Rule 701, SCRE:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

“[A] lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training.”

Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010).

“Lay witnesses are permitted to offer testimony in the form of opinions or inferences if the opinions or inferences are rationally based on the witness' perception, and will aid the jury in

understanding testimony, and do not require special knowledge.” State v. Douglas, 380 S.C. 499, 502, 671 S.E.2d 606, 608 (2009). Finally, “[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” Rule 704, SCRE.

In Hamrick v. State, 426 S.C. 638, 643, 828 S.E.2d 596, 598 (2019), the defendant was charged with felony DUI resulting in great bodily injury after striking a road construction worker on the highway. The state sought to prove that the defendant struck the road worker “outside the designated lane of travel” as one way to establish the traffic violation element of felony DUI. Id. at 646, 828 S.E.2d at 600. The state did this by having the arresting officer testify that, based on his “investigation and documentation of the scene,” he was able to opine that “the impact did not occur in the designated lane of travel, but occurred behind the cones in the construction zone.” Id. 646-648, 828 S.E.2d at 600-601.

The Hamrick Court found that the trial judge erred in concluding that the officer’s testimony was “lay opinion” because the officer was testifying about accident reconstruction which “requires expertise.” Id. at 648, 828 S.E.2d at 601. The Hamrick Court further found that the arresting officer did not have the requisite training or experience to give an opinion on accident reconstruction. Id. at 649, 828 S.E.2d at 602.

Here, Ferron’s testimony that she believed the value of her jewelry was \$14,000 was improper lay opinion testimony. Ferron was not qualified by the state as an expert in jewelry appraisal and should not have been allowed to give her opinion on this subject. Jewelry appraisal is a complex field which requires expertise to accurately determine value.

In Kranchick v. State, 418 S.C. 435, 438-439, 793 S.E.2d 314, 316-317 (Ct. App. 2016), this Court held that defense counsel was deficient in failing to object to a forensic toxicologist’s

testimony regarding “the mental or physical effects of drugs on a person.” In Kranchick, the witness whose testimony was in question had been qualified as an expert in forensic toxicology but had not testified regarding his “education, experience, or knowledge relating to the physical or mental effects of drugs on the human body.” Id. at 439, 793 S.E.2d at 317. Therefore, this Court found that trial counsel’s failure to object to the toxicologist’s testimony regarding the effects of marijuana, cough suppressant, and antihistamine found in the defendant’s system fell below an objective standard of reasonableness. Id. at 439-440, 793 S.E.2d at 317.

Finally, this Court considered whether a coroner could opine that the manner of death in a murder trial was a “homicide” in State v. Westmoreland, 421 S.C. 410, 418, 807 S.E.2d 701, 705 (Ct. App. 2017). The defendant in Westmoreland was accused of intentionally running over the victim with his car and then leaving the scene where the victim died. Id. at 413-414, 807 S.E.2d at 703. The defense was that the defendant struck the victim by accident. Id. at 415, 807 S.E.2d at 704.

The county coroner, who was not qualified as an expert, testified over defense counsel’s objection that the manner of death was homicide which meant the killing was intentional. Id. at 415-416, 807 S.E.2d at 704. This Court held that the coroner’s testimony was improper lay opinion because the coroner’s opinion was not based on his own perceptions but rather the perceptions of others. Id. at 419-420, 807 S.E.2d at 706. This Court further held that, because the main issue at trial was whether the defendant had struck the victim intentionally or accidentally, the defendant was prejudiced by the improper lay opinion claiming the death was a homicide, which the lay witness had defined as an intentional act. Id. at 421-422, 807 S.E.2d at 707-708.

Here, Appellant was prejudiced by Ferron's improper lay opinion testimony as to the alleged value of the jewelry because the state had to prove that the value of the items stolen was greater than \$10,000. Because Ferron was not qualified as an expert in jewelry appraisal, she was not qualified to give an opinion as to the value of the items. The trial judge erred in allowing Ferron to give her opinion as to the value of the jewelry and Appellant's convictions should be reversed.

CONCLUSION

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



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of July, 2021.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
Jul 14 2021
SC Court of Appeals

Appeal from Aiken County

Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RUSSEL STUART KENDRICK,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Russel Stuart Kendrick states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Clifton Newman, which was held on November 9-12, 2020, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Russel Stuart Kendrick.

Respectfully Submitted,



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of July, 2021.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
Jul 14 2021
SC Court of Appeals

Appeal from Aiken County

Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RUSSEL STUART KENDRICK,

APPELLANT

**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictment(s);
- (2) Entire trial transcript;
- (3) State's Exhibit 30 (Receipts).

I certify that this designation contains no matter which is irrelevant to this appeal.



Adam Sinclair Ruffin
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

July 14, 2021

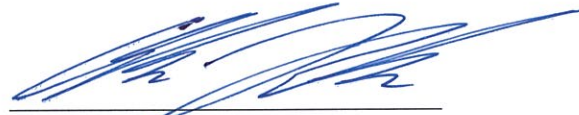
RECEIVED

Jul 14 2021

SC Court of Appeals

CERTIFICATE OF COUNSEL

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



Adam Sinclair Ruffin
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

July 14, 2021.