STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Laurens County

Honorable Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DESHANNDON MARKELLE FRANKS,

APPELLANT

APPELLATE CASE NO. 2016-002244

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1.

Whether the court abused its discretion by qualifying Greenville County Sherriff's officer Dan Kelley as an expert to testify regarding where the contents of appellant's iPhone where the data allegedly showed the locations appellant was at on the night of the murder at different times, since Kelley deferred to Verizon, and Verizon engineers, regarding the accuracy of the data, because the court erroneously abdicated its gatekeeping function on reliability of this Rule 702, SCRE evidence?

2.

Whether the court erred by charging the jury the *Belcher* instruction that "inferred malice may arise when the deed is done with a deadly weapon," since this was a purely circumstantial evidence case as to who the shooter was, the state admitted it had no theory of a motive for appellant to shoot the victims, and where the defense sought to show that a third-party more likely was actually the shooter, since the court improperly reasoned the instruction was proper because there were no lesser-included offense involved, but there was evidence in this case which "mitigated" against a verdict of murder?

STATEMENT OF THE CASE

Appellant Deshanndon Franks was indicted by the Laurens County Grand Jury for two counts of murder, and possession of a weapon during the commission of a violent crime. R. 452 – 457. Co-defendant Tevin Hill was arrested on the same charges. Appellant had no prior criminal record, and Hill would testify against appellant in exchange for the charges being dropped. R. 254, ll. 7-25.

Appellant's case was called to trial on August 24, 2016, before the Honorable Frank R. Addy, Jr., and a jury. J. Falkner Wilkes represented appellant. Assistant solicitors Warren Mowry and Lance Sheek were the prosecutors. R. 1.

On August 28, 2016, the jury found appellant guilty on all three counts. R. 446, ll. 12-22. Judge Addy sentenced appellant to forty-five years imprisonment, concurrent. R. 450, ll. 11-14.

This appeal follows.

ARGUMENT

1.

The court abused its discretion by qualifying Greenville County Sherriff's officer Dan Kelley as an expert to testify regarding where the contents of appellant's iPhone where the data allegedly showed the locations appellant was at on the night of the murder at different times, since Kelley deferred to Verizon, and Verizon engineers, regarding the accuracy of the data, because the court further erroneously abdicated its gatekeeping function on reliability of this Rule 702, SCRE evidence

Suppression hearing

Prior to trial, defense counsel Wilkes moved to suppress evidence resulting from the search of appellant's cell phone. The victims, Nikesha James and Sammie Leake, were both killed in the late night or early morning hours of January 31, 2014. R. 7, l. 1 – 9, l. 17. Both victims had been shot. At the pre-trial hearing, Laurens County Sherriff's investigator Ben Blakmon said appellant was not a suspect when the police first talked to him and Tevin Hill. R. 6, l. 12 – 11, l. 24.

Laurens County Sherriff's Deputy Rakeisha Hill Mobley was a cousin of both appellant and Tevin Hill. R. 44, l. 7 – 45, l. 5. Given that they were related, law enforcement had Deputy Hill ask appellant and Tevin Hill "if they would voluntarily hand over their cell phones." R. 47, ll. 12-23. Deputy Hill continuously said neither appellant nor Hill were suspects at the time. R. 47, l. 24 – 48, l. 14. Deputy Hill said she explained that although appellant and Tevin Hill were not suspects, they were the last two people known to be with the victims on the night of the shooting, and the police allegedly wanted to help them "clear their name." R. 47, l. 19 – 50, l.

18. Deputy Hill said she never told appellant or Hill that they could have their cell phones back. R. 50, ll. 6-18.

Investigator Keith McIntosh testified that appellant and Tevin Hill were not suspects at the time their cell phones were taken, but he acknowledged the police wanted the cell phones to "gather enough information [where] you can tell cell phone texts or calls that were made or GPS coordinates of where the phone was at. If they made a phone call any time during the evening hours, morning hours." McIntosh said the police already had the cell phone from the victim, Nikesha James. R. 52, l. 20 – 53, l. 20.

McIntosh said although appellant was not a suspect, they were going to do a cell phone "dump" on the phone "to obtain that information from the cell phone." McIntosh said he went to the home of Magistrate Tucker on Saturday, February 1, 2014, to get her signature on a search warrant. R. 54, ll. 8-12. However McIntosh admitted that a search warrant was never served on Verizon, and he cited "exigent circumstances" for the "business records" of Verizon as to appellant even though the victims were dead and not missing. R. 65, l. 5 – 67, l. 7.

Defense counsel Wilkes argued that appellant was clearly a suspect and his cousin, Deputy Hill, telling him she wanted to help "clear their name" was a lie, and that appellant's cell phone was seized. R. 69, l. 19 – 71, l. 6. Wilkes further argued that although the police obtained a photograph off of appellant's cell phone they wanted to use against him that the Verizon materials "would be the basis of their expert testimony . . . The expert testimony, if I'm not mistaken, comes from the Verizon records. Those records were obtained without a search warrant. They were obtained by just asking for them." R. 71, ll. 17-25.

Counsel acknowledged that McIntosh said he got a search warrant "to go ahead and dump the information" from appellant's cell phone, but the solicitor maintained the Verizon

records were merely "business record." Defense counsel Wilkes took strong exception to "Business records is not a magical term. Hospital records are business records. You have privacy interest in those." Counsel argued that appellant was indeed a suspect at the time he was tricked into turning over his cell phone to his cousin, Deputy Hill. R. 74, ll. 9-25.

The judge observed that he was not sure a search warrant was even necessary, given that the phone was turned over by appellant. The judge said he considered this "more as a consent search type" and he denied defense counsel's motion to suppress the contents of appellant's cell phone. R. 75, l. 1 – 77, l. 1.

As will be seen infra, defense counsel would vehemently object to Greenville Sherriff's Investigator Dan Kelley being ruled to be an expert to give testimony about appellant's Verizon cell phone in the absence of any Verizon witness or expert, particularly where Kelley admitted a Verizon expert or Verizon engineer was necessary to answer defense questions about the cell phone data that the solicitor would argue in closing was critical corroborating evidence of appellant's whereabouts on the night of the shooting.

The solicitor, in his opening argument, said that Nikesha James was the niece of Sammie Leake, who was also called "Darryl." James and Leake were sharing a mobile home in the Cross Hill area of Laurens County on January 31, 2014. The solicitor said the police concluded appellant shot both of them, although the solicitor said the state did not have any idea why appellant would have shot them. R. 81, l. 13 – 82, l. 6. The solicitor also maintained that appellant tried to have co-defendant Tevin Hill set up a false alibi that they were "at the victim's trailer earlier on, but he had gone to Greenville and was drinking in Greenville." R. 87, l. 14 – 88, l. 10.

Atrayel Williams testified that James was one of her best friends. She knew Leake, and she called him "Dab." Williams said she spoke with James on the phone all the time and went to her mobile home. "We was always together basically." She last talked to James on January 30, 2014 at about nine p.m. R. 93, l. 11 – 94, l. 18.

Williams went by the home where James and Leake lived at about 10:30 a.m. on the morning of January 31, 2014. She went with her friend Laquesha Currenton. Williams recalled Currenton knocked on the door but the door was unlocked and Currenton went inside. "But Darryl's body was right there, you know. She couldn't -- I don't think she could open enough to get in." Williams called 911. R. 97, ll. 2-19. The bodies of both James and Leake were found inside the house, shot to death. R. 98, l. 4 – 100, l. 21.

On cross-examination, Williams said she talked to James every day, and she said James did not have a boyfriend at the time of the shooting. R. 101, ll. 5-16.

However, Laquesha Currenton testified James "was talking to a guy from Laurens" and she believed that James was in an intimate relationship with this person. She did not know if James was involved with any other men. R. 108, ll. 3-19. Currenton said she would not describe the man in the relationship or the men as "a boyfriend." R. 108, ll. 3-5. Although the defense was later prohibited from pursuing a third party guilt defense during the state's case, it labelled James Morgan Hill as the obsessive stalker of James who should have been investigated in this shooting.

SLED agent Mindy Corley testified there was a sign of a struggle inside the mobile home and that a drug pipe was found. R. 124, l. 1 – 131, l. 1.[1]

Lavashtia Pulley testified she saw appellant on the night of the shooting at Washes Club, or "liquor house," as it was later described, at about ten o'clock on the night of the shooting. R. 182, l. 2 – 183, l. 7. She described appellant as being "pumped, amped, whatever." R. 183, ll. 8-12.

Pulley said appellant was wearing a tan hunting suit and that he was carrying a gun. Pulley claimed appellant said "you ain't got to worry. It's a Ruger. It's on safety . . ." R. 183, l. 22 – 184, l. 13; R. 184, l. 18 – 185, l. 14.

Milton Grant lived three mobile homes down from James and Leake. Grant testified on January 31, 2014, he was awakened by the sound of a brown Ford whose bright lights flashed into his mobile home. Grant said about three a.m. he heard gunshots. He looked outside, and hes saw somebody come to the front door of James' mobile home, turn the porch light off, and close the door. Grant said this person "had something brown on." R. 204, l. 16 – 207, l. 16. Grant said he did not think he could recognize the clothing if he saw it again because "*they was too far off.*" R. 207, ll. 17-21. (emphasis added).

Tevin Hill testified against appellant. He admitted the charges against him would be dropped if the prosecution believed he told "the truth." Hill testified that he and appellant, about eight o'clock on January 30, 2014, went to the Washes Liquor House in Mountville. R. 212, ll. 11-24. Hill said appellant was wearing "a brown jumpsuit, overalls." R. 214, ll. 21-22.

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[1] The pathologist, Dr. James Fulcher, testified that James died as a result of a gunshot to the chest and Leake died from two gunshots to the head. The gun was never recovered, and the state speculated that the murder weapon was a nine millimeter handgun. R. 151, l. 14 – 155, l. 21; R. 163, l. 10 – 164, l. 9. Ira Parnell, the SLED firearms expert said although a gun was never found, he determined from the cartridges that they were fired by the same gun. R. 164, ll. 1-9.

They then went to the mobile home where James lived because "It's just a hangout where people be at." R. 215, ll. 20-23. Hill said that James, Leake, and Tamia Kinard and her baby were present when they arrived. Hill maintained that he gave Kinard and her baby a ride home eventually that early morning in his car. R. 216, l. 1 – 219, l. 12.

Hill's story was he then went to his grandmother's house after dropping off Kinard, watched television, and fixed himself something to eat at his grandmother's house. R. 219, l. 4 – 220, l. 9.

Hill claimed that appellant called him about two or three o'clock in the morning, and asked him to come outside. Hill maintained appellant was walking up the road from James' trailer when he stepped outside, and Hill claimed: "He [appellant] was just like shaky a little bit, you know. Not normal though." Hill maintained appellant told him "stuff went bad -- it went bad. He said like it went bad." R. 221, l. 13 – 222, l. 7.

Hill maintained appellant never told him what happened, and alleged that appellant said he "had some females up the road like in Greenville." Hill said as he drove, and when they were "[a]lmost to Fountain Inn he said we're going to Dreek Scurry's house [in Fountain Inn]." R. 222, ll. 19-25.

Scurry was Hill's cousin, and Hill thought he tried to call Scurry that morning but he was not sure. Hill said he and appellant slept at Scurry's house that night, and when they got up the next morning, Scurry had already gone to work. The men went back to Cross Hill, and Hill said he went to sleep. He awoke when he heard police sirens, and saw law enforcement going to the James mobile home. R. 222, l. 8 – 226, l. 20. Hill went outside and he said he called his brother from there. His brother allegedly told him he "needed to just tell the police that I was down there that night and when I left they was well and healthy." R. 227, ll. 13-24.

Hill acknowledged his cousin, Deputy Rakeisha Hill, telephoned him and told him to contact appellant so he would come to the crime scene. Hill claimed appellant wanted him to tell a "story" that after Hill dropped Kinard off that night he drove appellant out of the Cross Hill area. R. 230, ll. 5-16. The following occurred between the solicitor and Hill:

> Q. So he's wanting you to tell the police that you had dropped Mia off. He stopped you. Y'all went directly to Greenville and stayed up there until you came back to Rodrigus Scurry's house. Is that right?
>
> A. No. He want to tell when we got to -- we went to Dreek Scurry's house, stayed there, and came back down to Cross Hill in the morning.
>
> Q. But he wanted you to tell the police that you had gone to Greenville; is that correct?
>
> A. Yeah.
>
> Q. Was that true?
>
> A. No. No, sir.

R. 230, l. 17 – 231, l. 3.

Hill admitted he was charged with two counts of murder, attempted armed robbery, but that his cooperation with the state would allow the charges to "come off my record." R. 234, ll. 7-25.

The Cell Phone Dump and Verizon Data

Laurens County Sherriff's Investigator Bryant Cheek used to coach Tevin Hill in AAU basketball. R. 249, l. 16 – 252, l. 24. Cheek said he joked with Hill that it was good to see him when they were at the crime scene the day after the shooting, and "I said I hope you didn't have anything to do with this situation down here, and I remember that." R. 252, ll. 18-24.

Deputy Rakeisha Hill testified that her cousins, appellant and Tavin Hill, both gave her their cell phones. R. 278, l. 19 – 279, l. 19. Hill said she immediately gave the cell phones to Lieutenant McIntosh. R. 280, ll. 10-17.

Keith McIntosh then testified that he was a lieutenant with the criminal investigation division in Laurens County. McIntosh got the cell phones from Deputy Rakeisha Hill Mobley. Defense counsel renewed his objection when the state went to introduce the cell phones, which were admitted over his objection. R. 303, l. 1 – 304, l. 6.

McIntosh said the police obtained a search warrant the following morning, a Saturday, when they went to Judge Tucker's house. McIntosh said they planned to do "a phone dump" at SLED. This meant they would plug the cell phone into their equipment "and they can extract **all the information from that cell phone. Whether it's been deleted or not deleted. All incoming and outgoing calls, text messages, images, even videos or things like that. All that.**" (emphasis added).

McIntosh noted that the cell phone provider for appellant was Verizon. McIntosh stated that he was looking for cell phone tower locations where a call was made, what cell tower it hit off of, and this type of information. McIntosh confirmed that the cell phone carrier, here Verizon Wireless, was the only one that could provide this information. When the state went to introduce the Verizon records, State's Exhibit 34, defense counsel renewed his objection. The objection was again overruled. R. 306, l. 11 – 307, l. 2.

McIntosh related that the police transferred the Verizon records onto a CD-ROM disc. R. 306, ll. 2-15. The police wanted to "plot locations of the cell phone." R. 308, ll. 5-17.[2]

The following day, Bryant Cheek was recalled to testify about the cell phone records. Bryant testified that a search warrant for appellant's cell phone was obtained February 1, 2014, and that the "cell phone dump" occurred that same day. Cheek said in appellant's statement to the police "he claimed he was in Greenville" on part of the night. R. 322, l. 8 – 323, l. 10. As far as the police not investigating James Morgan Hill in the manner they did appellant, the solicitor blurted out before the jury that James Hill did not have a cell phone to give the police. Appellant's subsequent mistrial motion for the solicitor blurting out this alleged fact was denied. R. 325, ll. 1-6. Appellant later was allowed to question a state's witness again about the lack of investigation of James Morgan Hill.

The alleged expert

Greenville County investigator Dan Kelley testified that while working in law enforcement he noticed law enforcement was having to investigate more cell phone calls. Kelley testified he became interested in Geoime software, and that he had worked on about fifty cases involving it. He had been declared an expert in this technology and call records translations in that same circuit as this case on a prior occasion. R. 353, l. 15 – 354, l. 23. When Kelley was asked about the reliability of the Geoime software, he dodged the question, stating only: "I can testify of the use of the software and the data that it translates." R. 356, ll. 10-16. The solicitor

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[2] An issue arose about the information involved in statements of James Hill and Sonny Hill. Defense counsel Wilkes argued unsuccessfully that this was admissible evidence of **third party guilt of James Morgan Hill,** because it showed he was a stalker of James and he had reason to kill her. R. 315, l. 15 – 320, l. 5. The judge noted there were hearsay problems in what the decedent James said about James Morgan Hill being "a stalker." The judge said that he would deal further with the situation if James Morgan Hill testified. Hill did not testify. R. 319, l. 17 – 320, l. 5. The jury later heard a limited version about James Morgan Hill being in James' life.

asked the judge to declare Kelley an expert "in this area." Defense counsel Wilkes wanted to *voir dire* Kelley on the reliability of the evidence under Rule 702 before any decision was made. R. 358, ll. 20-24.

On questioning by the defense, Kelley said the solicitor's office gave him the Verizon records on a CD "and it came in as an Excel document." R. 359, ll. 9-25. Keley described the data as "the ping is showing basically **their best estimate of where the handset is at** the time that phone was talking in communication with the tower" R. 360, ll. 12-25. (emphasis added).

Kelley said he was not testifying on behalf of the phone company or Verizon. The following occurred on cross-examination of Kelley:

Q. How do you know what accuracy that data represents?

A. *It's up to the phone company.* They're the ones that -- *the engineers can testify to that.* But they have that information in a high confidence, a medium confidence or a low confidence. That's one of the columns that they give you.

Q. But as you say, that's -- *the reliability of that data* as far as how accurately it's retrieved, stored, translated, maintained, sent to you, that's something for an expert from Verizon to testify to, correct?

A. *Only to the accuracy of the tower and the data there.* The data is from their billing, and then anybody that has a cell phone knows they're very accurate about their billing.

Q. Well, you agree that RTT data that you're relying on in part here is not specifically location data according to Verizon? It's billing data?

A. **But it does have location data in there as far as where the handset is at the time the call was made.**

Q. But you can't testify to the accuracy of it?

A. No, sir.

Mr. Wilkes: That's all I have, Your Honor.

R. 361, ll. 5-25.

The judge asked Kelley how he became educated in GeoTime. Kelley told the judge he was on a trip to San Diego for the sheriff's department, and the company had a booth at a conference. He said he talked to some people about GeoTime and "watched some of their seminars." R. 362, l. 24 – 363, l. 25.

Defense counsel Wilkes told the judge his argument was not as much with Geoime as it was with the data that is fed into Geoime. He noted it was clear that the record needed "the testimony of Verizon's expert as to how accurate it is." The court needed to know the peer review of this data, how it was collected, stored, and transferred to the solicitor's office so that it could be determined whether it was credible and accurate. Wilkes argued the state had the burden of establishing reliability under present law, and that there was not a Verizon expert to testify as to its accuracy.

The judge observed that he was inclined, given the objection, to qualify Kelley as an expert "in the field of using this technology, as well as call records and translation tools. So I will qualify him as an expert in this particular field." The judge told defense counsel Wilkes that his objection "goes to the weight as opposed to the admissibility of testimony." Defense counsel immediately noted there was a case holding that was not acceptable any longer to invoke that phrase "goes to the weight and not the admissibility" to justify the admission of evidence that was not proven reliable. The judge immediately understood this further objection, he told counsel he was citing State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009), and Rule 702, SCRE on the reliability of the evidence. Defense counsel stated his continuing objection to Kelley being qualified as an expert, and his opinion evidence on reliability grounds. R. 365, l. 10 – 367,

l. 18. The judge overruled the objection, and Kelley then claimed to the jury that the information was "reliable." R. 368, ll. 15-18.

Kelley said on direct examination that the evidence revealed appellant's cell phone was in Cross Hill and Fountain Inn, but it was never in Greenville on the night in question. R. 374, l. 8 – 377, l. 5.

On cross-examination, Kelley admitted that the points on the map he was saying the cell phones were was "an estimation." Kelley acknowledged how big **an estimation** of the area "depends on the tower." The following occurred on cross-examination of Kelley:

> Q. The tower in particular that we're talking about. Pick one of the ones he just asked you about.
>
> A. *You would have to get a Verizon engineer to talk about how far and what wattage that tower is.* I can give you an example of what I spoke with the Verizon rep *and what they told me how that relates to the strength of a tower.* A tower in Greenville, South Carolina on top of a big tall building doesn't have to have very many watts or very strong power to get out and reach a lot of people, because there's a lot of people right there. But if you move further out in a more rural area and you have a larger area to cover, the tower has to have more power, so the phone can hit further away.
>
> Q. So as you said, *we would need a Verizon expert to tell us about the particular tower to give us a better feel for the exact accuracy of your pinpoint, right? In other words, your pinpoint is an estimation?*
>
> *A. Correct. That's Verizon's best estimate.*
>
> Q. Okay. And so, can you tell me what you believe, when you put a pinpoint somewhere, what you think the radius is?
>
> A. **I couldn't tell you.**
>
> Q. So by putting a pinpoint, you can't tell me the accuracy of that pinpoint?

A. Down to the foot, no?

Q. Down to the yard? Down to the -- how -- I mean, how far? What's the radius?

A. There is no -- I can't tell you the exact radius. You'll have to get a Verizon expert or an engineer to speak to that matter. But what I can tell you is, is that those -- it is hitting a tower in that area and it showing the best estimate of where that handset is at the time that call was made or that time it was talking to the tower. That's all that it will speak to.

Q. So, in other words, the phone was pinging in Cross Hill. We know that?

A. Yeah, that's correct. It's not pinging in Greenville until 4:04.

Mr. Wilkes: Very good. No further questions.

REDIRECT EXAMINATION

BY MR. MOWRY:

Q. Actually, it's not ever pinging in Greenville, is it?

A. Not anywhere in the city. No, Sir.

Q. It's pinging in Fountain Inn --

A. Correct.

Q. -- is that right, which straddles Greenville and Laurens Counties?

A. Correct.

R. 379, l. 2 – 380, l. 23.

Kelley stated and admitted he could not vouch for the radius or accuracy of the information he was giving his "expert" opinion about. He claimed in some regards that Verizon Wireless had high confidence in some of the evidence. R. 380, l. 24 – 381, l. 18.

In his closing argument, the solicitor harped on Kelley's testimony about the cell phone evidence that the solicitor said proved if the state was wrong in accusing appellant of the murder "would be the colossal bad coincidence of all history." The cell phone evidence, the solicitor strongly urged what Tevin Hill said happened. R. 400, l. 5 – 403, l. 21.

Discussion

Defense counsel correctly objected to the court qualifying Investigator Kelley as an expert so that he could give his opinion testimony about the information and data on appellant's cell phone. Kelley admitted he could not speak or vouch for the reliability of the Verizon Wireless data, and several times told defense counsel that a Verizon Wireless engineer would be needed to answer his basic questions on accuracy and reliability. These were questions regarding **appellant's cell phone**, and **what** Kelley was opining **this evidence revealed from appellant's cell phone.**

In State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009), our Supreme Court considered Rule 702, SCRE, as it related to expert testimony involving dog tracking evidence. Unlike the dog handler in State v. White, defense counsel here certainly did not concede the qualifications of the proposed expert, and instead strongly attacked Kelley's qualifications pursuant to Rule 702, SCRE, to testify about the cell phone evidence in this case. As in White, appellant strongly contends that the trial court here failed in its gatekeeping role to vet the reliability of Kelley's cell phone evidence, thus leaving the jury to speculate about the reliability of the evidence. Our Supreme Court noted in State v. White that Rule 702, SCRE, imposes on the trial court an affirmative and meaningful gatekeeping duty.

Further, the Supreme Court in State v. White overruled State v. Morgan, 326 S.C. 503, 485 S.E.2d 112 (Ct.App. 1997), to the extent it supported the then-familiar tenet of evidence law

that a continuing challenge to evidence only goes to "its weight, not admissibility." Yet, that was ultimately the trial court's ruling here, that the defense's well-founded challenge to the reliability of this scientific evidence went to its "weight and not its admissibility," and that counsel could cross-examine on the defects of the evidence. The judge had a gatekeeping function to ensure the qualifications of the alleged "expert," and reliability of the evidence before admitting it, and respectfully, he failed in that gatekeeping duty in this case to appellant's considerable detriment.

Further, under State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), the apparent total lack of peer review of this evidence, the fact Kelley could not and would not testify as a Verizon representative or expert that the evidence was reliable made this evidence inadmissible through Kelly. On questions from defense counsel about the data from appellant's cell phone Kelley claimed supported his opinions, Kelley several times deferred and stated that a Verizon expert or Verizon engineer would be needed to answer the question. Yet, there was absolutely no Verizon witness present to testify in this case.

The cell phone evidence, and opinion testimony was not admissible through investigator Kelley and it should have been excluded under State v. White, supra, Watson v. Ford Motor Company, 389 S.C. 434, 699 S.E.2d 169 (2010), and State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999).

The admission of expert testimony is governed by Rule 702, SCRE, which 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."

Importantly, it must be remembered that our Supreme Court has stressed that qualifying a witness as an "expert" allows him or her to testify with the aura, force or glow of an expert of the subject matter. Kelley was not entitled to that in this case given his own admissions as to his qualifications, and his referrals to a Verizon expert witness that was not present for this trial -- for whatever reason. "[A]lthough an expert's testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts. The label of expert should be jealously guarded by the court and never loosely bandied about." State v. Kromah, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013).

In Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010), our Supreme Court held, "Expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge." The Court emphasized that "expert testimony receives additional scrutiny relative to other evidentiary decisions. Specifically, in 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."

> 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. 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*. Finally, **the trial court must evaluate the substance of the testimony and determine whether it is reliable**.

Id. at 446, 699 S.E.2d 169, 175 (internal citations omitted) (emphasis added).

The Supreme Court concluded that "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 447-447, 699 S.E.2d at 175. (emphasis added).

In Graves v. CAS Med. Sys., Inc., 401 S.C. 63, 735 S.E.2d 650 (2012), our Supreme Court exclaimed, "It is this final requirement of reliability which is the central feature of the inquiry." Graves, 401 S.C. at 74, 735 S.E.2d at 655 (citing State v. White, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009)).

"If the proffered testimony is scientific in nature, then the circuit court must determine its reliability per the factors set forth in [State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999)]." Id. at 74, 735 S.E.2d at 655 (citing Watson, 389 S.C. at 449-450, 699 S.E.2d at 177). Under Council, the court must consider the following: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." Id. (citing Council, 335 S.C. at 19, 515 S.E.2d at 517).

The judge erred here in qualifying Dan Kelley as an expert witness, he thereby respectfully also abdicated his duty as a gatekeeper on the reliability of the evidence, and once Kelley was qualified as an expert he was allowed to give extremely damaging opinion testimony regarding appellant's cell phone "evidence." This was highly prejudicial error.

The error was far from harmless. The state admitted it did not know why appellant would allegedly kill the two victims in this case, and no motive appears on this record. Further, appellant strongly challenged Tevin Hill who was essentially "exonerated" for testifying against appellant, and blaming the murder on him. Tevin Hill appeared to receive very preferential

treatment in this case by testifying for law enforcement where his former AAU basketball coach, and his cousin, Deputy Hill, were very involved in the prosecution of this case. Further, although the defense was very limited, it tried to show the involvement that James Morgan Hill might have had as far as third party guilt, where he was a "stalker" of victim James.

The cell phone evidence was used by the solicitor to for him to argue it corroborated the otherwise questionable testimony of Tevin Hill, which was meant to get Hill out of all legal trouble, and it did in this murder case.[3]

Appellant had no prior criminal record and he had no motive for this crime, as the state acknowledged. Appellant should be given a new trial.

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[3] This Court can take judicial notice that Tevin Hill is not listed as serving any prison time in the South Carolina Department of Corrections. See http://public.doc.state.sc.us/scdc-public/.

ARGUMENT

2.

The court erred by charging the jury the *Belcher* instruction that "inferred malice may arise when the deed is done with a deadly weapon," since this was a purely circumstantial evidence case as to who the shooter was, the state admitted it had no theory of a motive for appellant to shoot the victims, and where the defense sought to show that a third-party was more likely actually the shooter, since the court improperly reasoned the instruction was proper because there were no lesser-included offense involved, but there was evidence in this case which "mitigated" against a verdict of murder

Relevant Facts

Defense counsel objected to the court giving a Belcher[4] instruction that the use of a deadly weapon could be used by the jury to infer malice. The judge reasoned that the inference of malice instruction "would be appropriate in this case because there's no evidence tending to reduce the homicide to a voluntary or involuntary homicide. R. 410, l. 22 – 411, l. 18. The judge said he understood the defense objection to the Belcher instruction. R. 410, l. 22 – 411, l. 18.

Defense counsel correctly argued in closing to the jury that this was a circumstantial evidence case and he attempted to point out that law enforcement did not adequately investigate James Morgan Hill as a suspect, where he was the stalker and the father of "Ms. Pulley's child. Ms. Pulley is the one that says she saw a pistol earlier that evening . . ." R. 417, l. 2 – 420, l. 21. Defense counsel pointed out that Tevin Hill had a lot to gain by blaming the murder on appellant where he was the co-defendant. R. 417, l. 9 – 422, l. 16.

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[4] State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009).

The judge instructed the jury that "inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is defined under our law as an article, instrument, or substance which is likely to cause death or great bodily harm." R. 433, ll. 14-25. Defense counsel again took exception to this jury charge. R. 439, ll. 4-13.

The pathologist testified in this case that both victims died as a result of gunshot wounds. "A pistol, shotgun, rifle . . ." are obviously deadly weapons. R. 433, ll. 22-25.

Discussion

The judge erred by including the State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), instruction in his charge to the jury. The judge reasoned because voluntary and involuntary manslaughter were not lesser-included offenses in this case that the implied malice from the use of a deadly weapon instruction was proper. However, any evidence that would "reduce, mitigate, excuse, or justify the homicide" made the implied malice from the use of a deadly weapon instruction improper.

The jury in this case could have concluded that appellant was present at the murder scene with Tevin Hill but determine that appellant was not the shooter. Appellant did not have gunshot residue on the clothes he allegedly wore on the night of the shooting. R. 342, l. 18 - 345, l. 19 There was no DNA, fingerprints, or other forensic evidence linking appellant to the murder. R, 339, l. 8 – 342, l. 8. Further, evidence that appellant had a gun, and that he allegedly told Pulley it was nine millimeter "Ruger" on the night of the shooting, and that a nine millimeter Ruger was the murder weapon was speculation. The murder weapon was never found, and all the state's witnesses could opine was that the same gun fired the shots that killed both victims.

If appellant was present with another person who shot the victims (Tevin Hill) or knew who may have shot the victims (James Morgan Hill) but he was not the shooter, that could be

evidence appellant was guilty of some other crime with either Hill, but it mitigated or reduced against a finding of his guilt for murder, even though it was not evidence of voluntary manslaughter or involuntary manslaughter which the judge erroneously found conclusive. R. 296, l. 2 – 298, l. 19; R. 336, l. 13 – 338, l. 11. The judge's reasoning that because voluntary manslaughter and involuntary manslaughter were not lesser-included offenses to be charged in this case, that the jury instruction on implied malice from the use of a deadly weapon was therefore proper was erroneous.

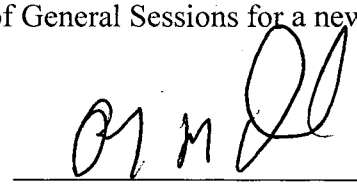
The state admitted it could not point to a single reason why appellant would kill these two victims. True enough that the state did not have to prove motive, but here it admitted it knew of none, did not theorize of one, and none appeared in this record. A jury instruction that malice could be implied from appellant having a deadly weapon was consequently very prejudicial in a case where no motive to kill existed, and the evidence was purely circumstantial as to whom the shooter was in this case.

Further, the jury did not have to accept the state's blind acceptance of the story of Tevin Hill to save himself, nor did it have to not have to focus on James Morgan Hill (the stalker) as a being the possible shooter because the judge would not allow the defense to pursue a full third-party guilt defense on James Hill being the stalker, and the shooter. R. 296, l. 2 – 298, l. 19; R. 336, l. 13 – 338, l. 11.

The error was far from harmless as argued above, and the jury also struggled over two days of deliberations to reach a verdict. R. 439, l. 4 – 446, l. 22. Appellant should be granted a new trial.

CONCLUSION

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



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of March, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 20014, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 20, 2018

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