Rel: September 15, 2023

ALABAMA COURT OF CRIMINAL APPEALS

CR-2022-0924

Kijuan Cortez Flowers v. State of Alabama

Appeal from Montgomery Circuit Court
(CC-18-2000)

MEMORANDUM DECISION

MINOR, Judge.

A jury convicted Kijuan Cortez Flowers of capital murder, see § 13A-5-40(a)(17), Ala. Code 1975, for the shooting death of Zhivago Hines. The circuit court sentenced Flowers, who was 17 years old at the time of the shooting, to life imprisonment. See § 13A-5-43(3), Ala. Code 1975 (authorizing a sentence of life imprisonment for a capital offense for a

defendant who was under the age of 18 at the time he committed the offense). On appeal, Flowers argues that he is entitled to a new trial because, he says, the circuit court abused its discretion when it denied his motion "to limit the extent of the testimony that could be offered regarding the toolmarks comparison done in [his] case." (Flowers's brief, p. 12.) For the reasons below, we find that Flowers's argument lacks merit or, in the alternative, that any error was harmless. Thus, we affirm.

FACTS AND PROCEDURAL HISTORY

The State's evidence at trial tended to show that, in September 2016, Flowers shot Hines while Hines was inside a vehicle and that Hines died from his gunshot wounds.

Delano Gilcrest and his girlfriend, Brishay Williams, lived in a house on South Holt Street in Montgomery, and Gilcrest's mother, Laqueeta Sanders, lived in a house across the street from them. Just before the shooting, Flowers came to Gilcrest's and Williams's house looking for Gilcrest's brother, Jaquan Sanders ("Jaquan"). Gilcrest told Flowers that Jaquan was at Sanders's house, and Gilcrest, Williams, and Flowers walked across the street together. At about the same time, Hines

pulled up to Sanders's house, parked in the driveway, and opened his car door. According to Williams, Gilcrest "was standing in the car door talking to [Hines]" (R. 505) when Flowers "pushed Delano [Gilcrest] out of the way and just started shooting." (R. 506.) According to Gilcrest, after Hines opened his car door, Flowers "walk[ed] up to the car" and shot Hines multiple times. (R. 603.) Gilcrest testified that Flowers used a handgun with a long magazine, and Williams testified that Hines was sitting in his car when Flowers shot him. Williams and Gilcrest ran away from the shooting, and Hines quickly drove away from Sanders's house. Lanquishia Sanders ("Lanquishia"), Gilcrest's and Jaquan's sister and Hines's girlfriend, was inside Sanders's house when she heard the gunshots. Lanquishia ran outside and saw Williams pointing down the street in the direction Hines had driven. Lanquishia ran down the street and heard Hines's car crash. When Lanquishia made it to Hines's car, Hines was slumped over, bleeding, and struggling to breathe. Lanquishia called 911, and Hines was transported to Baptist Medical Center South. Dr. Stephen Boudreau, a senior state medical examiner for the Alabama Department of Forensic Sciences ("ADFS") and an expert

in forensic pathology, reviewed the report of Hines's autopsy and testified that Hines died from multiple gunshot wounds to his chest and abdomen.

Detectives Jason Hunt and Dewayne Davis of the Montgomery Police Department ("MPD") responded to the shooting and processed the scene for evidence. Det. Hunt collected three shell casings from outside Sanders's house, and Det. Davis recovered three projectiles from inside Hines's car. Det. Davis submitted the projectiles and the shell casings to the ADFS for analysis.

In the days after the shooting, Gilcrest and Williams each gave witness statements to Det. Hunt and identified Flowers as the person who shot Hines. Det. Hunt signed a warrant for Flowers's arrest, which he forwarded to the United States Marshal's Fugitive Task Force. Soon after, Deputy John Hamilton of the United States Marshal Service arrested Flowers at a house in Millbrook. Dep. Hamilton testified that he found Flowers sleeping next to a "Springfield Armory forty-caliber semi-automatic pistol" that "had an extended magazine, rounds in the magazine, and a round chambered in the pistol." (R. 747.) Dep. Marshal seized the pistol, the magazine, and the rounds and delivered them to

officers at MPD's Criminal Investigation Division, who in turn submitted those items to the ADFS for analysis.

Michael Dugan, a firearm and toolmarks examiner with the ADFS, testified as an expert in firearm and toolmarks examination. Dugan analyzed: (1) the Springfield .40-caliber semi-automatic pistol, the magazine, and the unfired ammunition seized during Flowers's arrest; (2) one fired metal-jacketed bullet and one fired metal-bullet-jacket fragment removed from Hines's body during his autopsy; (3) the three fired Smith and Wesson .40-caliber cartridge casings collected from outside Sanders's house; and (4) the two fired metal-jacketed bullets and one fired metal-bullet-jacket fragment recovered from Hines's car. Dugan testified that, in his opinion, the cartridge cases, the bullets, and the bullet fragments were all "fired in the Springfield firearm" seized during Flowers's arrest. (R. 767-69.)

After the State rested, Flowers moved for a judgment of acquittal, and the circuit court denied his motion. The jury convicted Flowers of capital murder, and the circuit court sentenced him to life imprisonment. Flowers moved for a new trial, and the circuit court denied his motion. Flowers timely appealed.

ANALYSIS

Flowers contends that the circuit court abused its discretion when it denied his motion to prevent Dugan from testifying that the shell casings and the projectiles were fired in the Springfield firearm. He claims that the testimony was inadmissible because, he says, Dugan's conclusions were "not supported by facts and data," "the principles and methods used by Dugan or the [ADFS]," or "the application of those principles and methods to the facts of [his] case." (Flowers's brief, p. 14.) Although Flowers argues that Dugan's testimony failed to meet the criteria of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) and Rule 702(b), Ala. R. Evid., his reliance on these authorities gives him no right to relief.

Before trial, Flowers moved in limine to prevent any expert or lay witness testimony stating a scientific opinion that the shell casings and projectiles were fired in the Springfield firearm. The circuit court held a hearing on Flowers's motion where Dugan testified about his educational background, training, certifications, and experience. Dugan also stated that he had been working as a firearm and toolmark examiner for 6 years and that he had been qualified as an expert in Alabama courts in about

30 cases. Dugan then testified about the tests he conducted in determining that the Springfield firearm he examined was the same weapon that fired the shell casings and projectiles recovered from the scene and the projectiles removed from Hines's body. After the hearing, the circuit court denied Flowers's motion. Over Flowers's renewed objections, Dugan testified at trial that in his opinion, the cartridge cases, the bullets, and the bullet fragments were all "fired in the Springfield firearm." (R. 767-69.)

"The decision to grant or deny a motion in limine rests within the sound discretion of the trial court, and that decision will not be overturned on appeal absent an abuse of discretion." Marshall v. State, 992 So. 2d 762, 775 (Ala. Crim. App. 2007) (citing Hulsey v. State, 866 So. 2d 1180, 1888 (Ala. Crim. App. 2003)). "'"[W]hether a particular witness will be allowed to testify as an expert is left to the sound discretion of the trial court, whose decision will not be disturbed on appeal except for abuse of that discretion."'" Mazda Motor Corp. v. Hurst, 261 So. 3d 167, 185 (Ala. 2017) (quoting Bagley v. Mazda Motor Corp., 864 So.2d 301, 304 (Ala. 2003), quoting in turn, Ammons v.

Massey-Ferguson, Inc., 663 So. 2d 961, 962 (Ala. 1995) (Houston, J., concurring specially)).

This Court addressed a similar issue in Revis v. State, 101 So. 3d 247, (Ala. Crim. App. 2011), where Revis challenged a witness's firearms-and-toolmarks-examination testimony because, he said, her testing procedures failed to meet the standard for the admission of expert testimony under Daubert, supra. This Court stated:

> "'"Identification based upon a comparison of breechface imprints, firing pin impressions, and extractor and ejector marks, [has] achieved recognition by the courts. ..." A. Moenssens and F. Inbau, Scientific Evidence in Criminal Cases 195 (2d ed. 1978). In Alabama, a properly qualified expert should be permitted to testify whether or not a particular shell was fired from a specific firearm based upon his comparison of the distinctive marks on the shell with the physical features of the firearm. See Douglas v. State, 42 Ala. App 314, 163 So. 2d 477, 492 (1963), cert. denied, 276 Ala. 703, 163 So. 2d 496 (1964), reversed on other grounds, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965). See also 2 Wigmore, Evidence § 417(a) at 495 (Chadbourn rev. 1979); 29 Am. Jur. P.O.F. Firearms Identification § 13 (1972).'
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> "'....
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> "'We recognize that "a witness need not be an expert, in the technical sense, to give testimony as

> to things which he knows by study, practice, or observation on that particular subject." Paragon Engineering, Inc. v. Rhodes, 451 So. 2d 274, 276 (Ala. 1984). "Experience and practical knowledge may qualify one to make technical judgments as readily as formal education." International Telecommunications Systems of Alabama, 359 So. 2d 364, 368 (Ala. 1978). ...
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> > "'The admissibility of all types of expert testimony is "subject to the discretion of the trial court." Ex parte Williams, 594 So. 2d 1225, 1227 (Ala. 1992). "[T]he trial court's rulings on the admissibility of such evidence will not be disturbed on appeal absent a clear abuse of that discretion." Id.'
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> "Bowden v. State, 610 So. 2d 1256, 1257-58 (Ala. Crim. App. 1992).
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> "Here, the trial court did not abuse its discretion in determining that the firearms and toolmarks witness should be allowed to testify concerning the tests that were undertaken in determining that the rifle that discharged the test-fired hulls was the same weapon that discharged the casings gathered from the scene and the bullets that were removed from [the victim's] body.
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> "The witness fully testified concerning her educational background, training, and credentials. She also stated that she had been working as a firearms and toolmark examiner for six years and had worked on over one thousand cases."

Revis, 101 So. 3d at 291-92.

Rule 702, Ala. R. Evid, was amended in 2012, shortly after this Court's decision in Revis, supra. The Alabama Supreme Court recently stated:

> "'Application of Rule 702[, Ala. R. Evid.,] will require Alabama courts to distinguish "scientific" experts and evidence from "non-scientific" experts and evidence. This is a critical determination because scientific evidence is the only species of expert testimony subjected to scrutiny under Rule 702(b) and the Daubert[v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993),] test. Stated differently, it is the proffer of purported scientific evidence that "triggers" a Daubert inquiry.
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> "'As amended, Rule 702 requires courts to make two separate but related determinations regarding scientific evidence. First, pursuant to the first sentence in Rule 702(b), the trial court must determine whether proffered expert testimony purports to be scientific. If so, a Daubert admissibility inquiry is triggered, and the trial court then must determine whether the purportedly scientific evidence is "reliable"—that is, meets the three-pronged admissibility standard imposed by Rule 702(b)(1)-(3). …'"

Ex parte George, [Ms. 1190490, January 8, 2021] ___ So. 3d ___, ___ (Ala. 2021) (quoting Robert J. Goodwin, An Overview of Alabama's New Daubert-Based Admissibility Standard, 73 Ala. Law. 196, 199 (May 2012) (footnotes omitted)). On appeal, both Flowers and the State assume that Dugan's testimony was scientific evidence subject to Daubert and Rule 702(b)(1)-(3). Alabama, however, has not expressly

decided whether firearm-and-toolmark evidence is "scientific" or "non-scientific," and other states are divided on that issue. Compare People v. Robinson, 2013 IL App (1st) 102476, 377 Ill. Dec. 467 with People v. Ross, 68 Misc. 3d 899, 129 N.Y.S. 3d 629 (N.Y. Sup. Ct. 2020). If Dugan's testimony was, in fact, scientific evidence, the record shows that the State satisfied the standards of admissibility under Daubert and Rule 702(b)(1)-(3).

Rule 702 provides, in relevant part:

> "(a) 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.
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> "(b) In addition to the requirements in section (a), expert testimony based on a scientific theory, principle, methodology, or procedure is admissible only if:
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> > "(1) The testimony is based on sufficient facts or data;
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> > "(2) The testimony is the product of reliable principles and methods; and
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> > "(3) The witness has applied the principles and methods reliably to the facts of the case."

In Lewis v. State, 889 So. 2d 623 (Ala. Crim. App. 2003), this Court stated:

> "'[I]f scientific evidence passes the two-pronged test of Daubert—reliability and relevance—it will be admissible and the jury will determine the appropriate weight to give that evidence.
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> "'The "reliability" prong of the Daubert admissibility test requires the party proffering the scientific evidence to establish that the evidence constitutes "scientific knowledge." Daubert, 509 U.S. at 590, 113 S. Ct. at 2795. ...
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> "'....
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> "'The "relevant" prong of the Daubert admissibility test requires the party proffering the scientific evidence to establish that the evidence "assist[s] the trier of fact to understand the evidence or to determine a fact in issue." Daubert, 509 U.S. at 591, 113 S. Ct. at 2796 (quoting Rule 702, Fed. R. Evid.). ...
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> "'....
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> "'... Under Daubert, a party's challenge to the performance of a reliable and relevant scientific technique in a particular case should warrant exclusion of the scientific evidence only if the "'reliable methodology was so altered ... as to skew the methodology itself.'" [United States v. Beasley, 102 F. 3d 1440, 1448 (8th Cir. 1996), cert. denied, 520 U.S. 1246, 117 S. Ct. 1856, 137 L. Ed. 2d 1058 (1997)] (quoting United States v. Martinez, 3 F. 3d 1191, 1198 (8th Cir. 1993), cert. denied, 510 U.S. 1062, 114 S. Ct. 734, 126 L. Ed. 2d 697 (1994)).

> "'....
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> "'Trial courts should use the flexible Daubert analysis in making the "reliability" (scientific validity) assessment. In making that assessment, the courts should employ the following factors: (1) testing; (2) peer review; (3) rate of error; and (4) general acceptance.
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> "'Trial courts should make the "relevance" assessment by addressing the "fit" between what the scientific theory and technique are supposed to show and what must be shown to resolve the factual dispute at trial. Whether otherwise reliable testing procedures were performed without error in a particular case goes to the weight of the evidence, not its admissibility. Only if a party challenges the performance of reliable and relevant technique and shows that the performance was so particularly and critically deficient that it undermined the reliability of the technique, will evidence that is otherwise reliable and relevant be deemed inadmissible.'"

Lewis, 889 So. 2d at 669-71 (quoting Turner v. State, 746 So. 2d 355, 358-61 (Ala. 1998) (footnotes omitted)).

Flowers does not challenge Dugan's qualification as an expert in firearm and toolmark examination, nor does he claim that Dugan's testimony could not have helped the jury to understand the evidence or to determine a fact in issue. See Rule 702(a), Ala. R. Evid., and Daubert, supra. Flowers instead contends that Dugan's methodology was unreliable because, he says: (1) "it is not scientifically possible to say that

[the Springfield pistol] was, without question, the firearm used to commit the alleged crime" (Flowers's brief, p. 15; emphasis in original); (2) the State did not present evidence of any studies that "involved the methods and principles used to conduct ballistic and toolmark comparisons on Springfield handguns" (Flowers's brief, p. 15); (3) the National Academy of Science and "the President's Council of Advisors on Science and Technology has called into question the scientific basis of the entire field" of firearm and toolmark examination (Flowers's brief, p. 15); and (4) Flowers's expert witness, William Tobin, "determined that [Dugan's] conclusions lacked foundational validity and were based [on] flawed methodology reliant on unfounded and contradictory assumptions." (Flowers's brief, p. 8.)

At the pretrial hearing, Dugan explained the ADFS's methods and procedures for firearm and toolmark examination and testified about the tests he performed in determining that the shell casings and the projectiles were fired in the Springfield firearm. Flowers challenged Dugan's methodology when he cross-examined Dugan and when he presented contrary evidence through testimony from his own expert witness. And at trial, the circuit court instructed the jury: "You're not

required to accept the conclusions or expressed opinions of the expert witness. It's up to you to determine for yourselves the weight to be given to such testimony and the evidence when considered in connection with all other evidence material to the issues." (R. 959.)

"'Whether otherwise reliable testing procedures were performed without error in a particular case goes to the weight of the evidence, not its admissibility.'" Lewis, 889 So. 2d at 670 (quoting Turner, 746 So. 2d at 361). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Daubert, 509 U.S. at 596 (citing Rock v. Arkansas, 483 U.S. 44, 61, 107 S. Ct. 2704, 2714, 97 L. Ed. 2d 37 (1987)). Dugan's testimony established that his methods and procedures were reliable. Tobin's testimony established only that there is a difference of opinion within the scientific community about the validity of Dugan's methodology. "'Only if a party challenges the performance of reliable and relevant technique and shows that the performance was so particularly and critically deficient that it undermined the reliability of the technique, will evidence that is otherwise reliable and relevant be deemed inadmissible.'" Lewis, 889 So.

2d at 670-71 (quoting Turner, 746 So. 2d at 361 (footnotes omitted)). Thus, the circuit court did not abuse its discretion when it denied Flowers's motion in limine and admitted Dugan's testimony.

Even if the State failed to satisfy the requirements of Rule 702(b)(1)-(3) and the circuit court erred when it admitted Dugan's testimony, such error was harmless.

> "Rule 45, Ala. R. App. P, states:
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> > "'No judgment may be reversed or set aside, nor a new trial granted in any ... criminal case on the ground of ... the improper admission ... of evidence, ... unless in the opinion of the court to which the appeal is taken or application is made, after examination of the entire case, it should appear that the error complained of has probably injuriously affected substantial rights of the parties.'
>
> "(Emphasis added.)
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> "In determining whether the admission of improper testimony is reversible error, [the Alabama Supreme] Court has stated that the reviewing court must determine whether the 'improper admission of the evidence ... might have adversely affected the defendant's right to a fair trial,' and before the reviewing court can affirm a judgment based upon the 'harmless error' rule, that court must find conclusively that the trial court's error did not affect the outcome of the trial or otherwise prejudice a substantial right of the defendant."

Ex parte Crymes, 630 So. 2d 125, 126 (Ala. 1993) (emphasis in original).

Gilcrest and Williams each testified that they saw Flowers shoot Hines while Hines was sitting in his car. Gilcrest described Flowers's firearm as a handgun with a long magazine. Dep. Hamilton testified that, when he arrested Flowers, Flowers was sleeping next to a Springfield pistol with an extended magazine. Considering the overwhelming evidence of Flowers's guilt, any error in admitting Dugan's testimony was harmless. See, e.g., Davidson v. Cunningham (No. 16-CV-01125 Aug. 29, 2017) (E.D.N.Y. 2017) (not reported in Fed. Supp.) ("The ballistics expert's opinion that the shell casings came from a common weapon with a 'reasonable degree of certainty' was not critical to proving petitioner's guilt beyond a reasonable doubt because, even without that testimony, the evidence of petitioner's guilt was overwhelming in that it was based on several witnesses' firsthand accounts of the assault."). Thus, Flowers is due no relief on this issue.

CONCLUSION

Based on the above, we affirm the judgment of the circuit court.

AFFIRMED.

Windom, P.J., and Kellum, McCool, and Cole, JJ., concur.