IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAISON O. HARNESS — APPELLANT

VS. — NO. 2007-KA-1415-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO[redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

JAISON O. HARNESS **APPELLANT**

VS. **NO. 2007-KA-1415-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR THE APPELLEE

STATEMENT OF ISSUES

I. THE STATE'S ACCIDENT RECONSTRUCTIONIST WAS PROPERLY QUALIFIED TO TESTIFY AS AN EXPERT.

II. THE TRIAL COURT PROPERLY ADMITTED THE EXPERT'S DIAGRAM INTO EVIDENCE.

III. THE TRIAL COURT PROPERLY DENIED HARNESS'S MOTIONS TO DISMISS AND SUPPRESS.

IV. EVIDENCE OF HARNESS'S BLOOD-ALCOHOL CONTENT WAS PROPERLY ADMITTED INTO EVIDENCE.

V. HARNESS WAS NOT DENIED HIS FUNDAMENTAL RIGHT TO MOUNT A DEFENSE.

STATEMENT OF FACTS

On August 22, 2003, Bobbie Moore was driving home from work in the southbound lane of Westhaven Boulevard. T. 332. By glancing in her rearview mirror, she noticed a white GMC truck driving behind her. T. 328. Both vehicles were driving approximately 40 miles per hour, the posted speed limit. T. 329. Clyde Hampton, Jr., the driver of the white truck, was going to pick up his grandson to come spend the night with him. T. 318. Jaison Harness was driving a blue Mercury Marquis in the northbound lane of Westhaven when Moore saw him cross the center line and come into her lane of traffic. T. 333. Moore was forced to swerve off of the two-lane road to avoid being hit by Harness's vehicle. T. 335. Mr. Hampton was not so lucky. His truck was hit head on, and he subsequently died from the extensive injuries caused by the accident. T. 337, 523.

Jackson Police Department Officer Natyyo Gray was one of the first officer to report to the scene. T. 366. Officer Gray saw the victim trapped in his truck and Harness standing by his own vehicle. T. 369. Harness advised Gray that he had just left a get-together and admitted that he had been drinking, but claimed that he was not drunk. T. 372. However, Officer Gray observed that Harness's eyes were glazed and noted that every time Officer Gray took a step toward him, Harness would back up and "not let me get up on his person." T. 374.

JPD officer and accident reconstructionist Joseph Cotten arrived at the scene after Hampton and Harness had been transported to separate hospitals for treatment. Officer Cotten spoke with Officer Gray and then began marking the crime scene. T. 410. Cotten saw a bottle of liquor laying on the trunk of Harness's vehicle, as well as several beer cans lying on the road. T. 23, 26. When Officer Cotten went to check on Harness and the victim, he smelled alcohol on each of them. T. 28, 31. He then had medical personnel draw blood samples from both parties. T. 29, 33, 442. Hampton's blood-alcohol content was under the legal limit, while Harness's blood-alcohol content

was .11 percent. T. 109.

Harness was ultimately tried and convicted by a Hinds County Circuit Court Jury of aggravated DUI. C.P. 58.

SUMMARY OF ARGUMENT

The trial court correctly ruled that Officer Cotten was qualified to testify as an expert in the area of accident reconstruction. Cotten received all necessary training and had reconstructed 72 accidents by the time he testified as an expert at trial. His testimony was both relevant and reliable. Also, the trial court properly admitted a diagram which Cotten sketched of the scene of the accident into evidence, as the diagram clarified and supplemented his testimony.

The trial court properly denied Harness's motion to suppress evidence of his blood-alcohol content. After analyzing Harness's blood, the crime lab ultimately destroyed the sample as a matter of routine practice. There was absolutely nothing exculpatory about the sample, as four aliquots of the sample showed that Harness's BAC was over the legal limit at the time of the accident. Additionally, the sample was not destroyed in bad faith. The trial court also properly rejected Harness's contention that the blood evidence should be excluded because the nurse who drew it did not specifically recall doing so. The nurses testified that it was her signature which appeared on the blood sample request form, which indicated to her that she did in fact draw Harness's blood at the request of Officer Cotten. Further, Officer Cotten testified that he was present when the nurse drew Harness's blood.

Finally, the trial court properly excluded irrelevant evidence pertaining to Mrs. Hampton's wrongful death claim against Harness, as well as evidence of a settlement offer between Harness and the victim's insurance company.

ARGUMENT

I. THE STATE'S ACCIDENT RECONSTRUCTIONIST WAS PROPERLY QUALIFIED TO TESTIFY AS AN EXPERT.

The trial court conducted a pretrial MRE 702/*Daubert* hearing, which concluded with the trial court ruling that Officer Cotten was qualified to testify as an expert in the field of accident reconstruction. T. 97. The thrust of Harness's argument is that although Officer Cotten was a certified accident reconstructionist at the time of trial, he had not yet been certified at the time of the accident. This honorable Court will not disturb a trial court's decision to admit expert testimony unless the trial court's determination was clearly erroneous. *Cowart v. State*, 910 So.2d 726, 729 (¶11) (Miss. Ct. App. 2005).

MRE 702 governs the admissibility of expert testimony. According to the rule, the following conditions must be met before the expert's testimony is admissible.

> First, the witness must be qualified by virtue of his or her knowledge, skill, experience or education. Second, the witness's scientific, technical or other specialized knowledge must assist the trier of fact in understanding or deciding a fact in issue. In addition, Rule 702 does not relax the traditional standards for determining that the witness is indeed qualified to speak an opinion on a matter within a purported field of knowledge.

Mississippi Transp. Com'n v. McLemore, 863 So.2d 31, 35 (¶7) (Miss. 2003) (internal citations and quotations omitted). A trial court properly admits expert testimony in accordance with MRE 702 when the trial court finds that the testimony is both relevant and reliable. *Id.* at 38 (¶16). In the present case, Harness does not and cannot contend that Officer Cotten's testimony was not relevant. Instead, he argues only that Officer Cotten's testimony was unreliable because Cotten, although a certified accident reconstruction expert at the time of trial, had not been certified at the time of the accident.

By the time of Harness's May 2007 trial, Cotten was a state certified accident reconstruction

expert who had reconstructed 72 accidents. T. 394. However, at the time of the August 2003 accident, Cotten, a fifteen year JPD officer, had only recently been assigned to accident reconstruction. T. 11. At the time of the transfer, Cotten had completed levels one and two of the required curriculum for accident reconstruction at the State Law Enforcement Officer's Training Academy. T. 11-12. Level 1 was an 80 hour course in which Cotten learned drag sled, drag factors, scale diagraming, and methods for collecting data at the scene of an automobile accident. T. 14, 34. Using the training that he had already received, Cotten collected data at the scene of the accident. T. 20. He marked physical evidence such as the fresh gouge marks and scrape marks on the road and the final resting spot of both vehicles. T. 20. Cotten returned to the scene during daylight hours to take measurements and calculate the drag factor of all applicable surfaces. T. 20. The fact that all of the gouge and scrape marks and other relevant evidence was found entirely in the southbound lane, combined with the final resting location of the two vehicles, led Cotten to conclude that the accident occurred in the southbound lane. T. 433. However, it was not until Cotten completed Level 3 of his accident reconstruction training in October 2003 that he applied the inline momentum formula, learned in Level 3, to the previously collected data to determine the speed of the vehicles at the time of the collision. T. 35. Cotten completed his accident reconstruction report in November 2003. T. 37. In his report, he concluded that the cause of the accident was due to Harness driving intoxicated on the wrong side of the road at a minimum speed of 67 mph. T. 37.

The trial court made extensive on-the-record findings before ruling that Cotten was qualified to testify as an expert, and that his proposed testimony was both relevant and reliable. T. 91-97. The court found that the evidence was unrebutted that Cotten possessed all the experience, education, and training necessary to conclude that the collision occurred in the southbound lane. T. 92-93. The court opined that the only real question concerning Cotten's qualification as an expert involved the

fact that he had not completed Level 3, in which he learned momentum and speed, at the time of the accident. T. 91. To this end, the court found the following.

> Subsequent to this collision the witness completed levels two and three of his training as an accident reconstructionist and upon completion of that training and being certified by the State of Mississippi as an accident reconstructionist the Court is of the opinion that the witness possesses the necessary knowledge, training, and skill to testify as an accident reconstructionist in all areas within that field which would include conclusions or opinions concerning momentum and speed.
>
> As of the time of collision the officer not possess that knowledge, training, or education. However, the Court is of the opinion that there is no reason that once obtaining that specialized knowledge, training, and education that the witness could not go back, as he did, and review the data collected during the course of his investigation and from that data, photographs, and other evidence, form a reliable opinion concerning momentum and speed and other matters that fall within the realm of being an accident reconstruction expert.

T. 94-95. The court went on to make other relevant findings before ruling that Cotten was qualified to testify as an expert in the field of accident reconstruction.

The trial court's decision to admit Cotten's expert testimony must be affirmed because Harness has failed to show on appeal that the trial court's ruling was clearly erroneous.

II. THE TRIAL COURT PROPERLY ADMITTED THE EXPERT'S DIAGRAM INTO EVIDENCE.

After photographing the scene and taking measurements, Officer Cotten sketched a diagram of the scene, including placement of the vehicles at final rest and the scrape and gouge marks on the road. T. 414. Several photographs of the scrape and gouge marks were admitted into evidence, as well as photographs of the involved vehicles. The purpose of the diagram was to show an overview of the scene of the accident. T. 423. For example, several of the photographs admitted into evidence apparently showed different marks on the road, and some of these photos apparently did not show the vehicles in relation to the marks.[1] T.425-427. The diagram helped the jury see the scene as whole, while the photographs depicted fragments of the scene.

Defense counsel objected to the admission of the diagram, arguing that a photograph in evidence illustrated the exact position of Harness's vehicle at final rest more accurately than the diagram. T. 415-16. The State agreed that the photographs better depicted the exact position of Harness's vehicle at final rest, and insisted that the diagram would be used only to support Cotten's testimony regarding the measurements he took at the scene and to aid the jury in picturing the scene as a whole after viewing photos of separate portions of the scene. T. 417-18. The court ruled that the diagram would be admitted so long as it was not the basis of Cotten's expert opinion. T. 420-21.

On appeal, Harness claims that the diagram was both irrelevant and confusing to the jury, in violation of MRE 401 and 403. The MRE 401 argument was not made at trial, and Harness should be barred from raising this new argument on appeal. Nevertheless, the relevance of the

---

[1]The appellant failed to include exhibits in the record. However, Cotten's testimony revealed that many of the photographs depicted only portions of the scene, while the diagram was a composite of the entire scene.

photograph is painfully obvious, as it supplemented and clarified Cotten's testimony as well as the photographs in evidence. A determination of such a diagram's evidentiary value is analogous to a determination of whether photographs of a deceased in a murder trial have evidentiary value. Photographs of a murder victim have evidentiary value if they (1) aid in describing the circumstances of the killing, (2) describe the location of the body and cause of death, or (3) supplement or clarify witness testimony. *Dampier v. State*, 973 So.2d 221, 230 (¶25) (Miss. 2008). Similarly, the diagram described the location of the vehicles in relation to gouge and scrape marks on the road, and supplemented Cotten's testimony.

Defense counsel's objection at trial could arguably be construed as a MRE 403 argument. However, no reasonable juror could have been confused by the diagram. Cotten explicitly testified that the diagram was meant only to show an overview of the entire scene, and that the photographs more accurately depicted the final rest of the vehicles. T. 423-424. Further, defense counsel fully cross-examined Cotton about the diagram. During cross-examination, Cotten acknowledged that exhibit 31, a photograph, accurately depicted the location of both vehicles after the collision and acknowledged that his diagram depicted the victim's truck facing a "somewhat a different direction" than the photograph. T. 466-67. Harness has failed to explain how the diagram was confusing. Further, he fails to show how the alleged confusion outweighs the probative value of the diagram. Harness's reliance *Palmer v. Volkswagen of America, Inc.*, 905 So.2d 564, 583 ¶ 53. (Miss. Ct. App. 2003) is unpersuasive. In *Palmer*, this Court held that the trial court did not abuse its discretion in excluding an autopsy diagram because the pathologist's testimony thoroughly described the deceased's injuries. *Id.* A description of bodily injuries, which can be easily visualized by anyone who has ever seen a body, is an entirely different matter than a technical description of various aspects of accident reconstruction. Additionally, *Palmer* illustrates the highly

deferential abuse of discretion standard. Because Harness has failed to show that the trial court abused its discretion in admitting the diagram into evidence, and because he makes no more than a bare assertion of prejudice, the trial court's ruling must be upheld.

III. THE TRIAL COURT PROPERLY DENIED HARNESS'S MOTIONS TO DISMISS AND SUPPRESS.

Harness claims that the trial court erred in overruling his motion to dismiss, or in the alternative, motion to suppress based on the crime lab's routine destruction of his blood sample. In analyzing Harness's blood, toxicologist John Stevenson took a portion of the blood sample and ran the blood-alcohol content test in duplicate. T. 107. Both samples showed Harness's BAC was over the legal limit. T. 107. However, the results fell outside the lab's 2% standard deviation range. T. 108. Accordingly, Stevenson ran the test in duplicate a second time with a different aliquot of the blood sample. T. 108. The results fell within the acceptable standard deviation and each sample again showed that Harness's BAC was above the legal limit. T. 108. Stevenson then submitted a certified report concluding that Harness's BAC was .11%. T. 109. The report included a notation of the lab's policy of destroying evidence within six months of submission unless notified otherwise. T. 109. The sample was not destroyed until almost a year after submission, but Stevenson testified that no one had contacted him to advise him to hold the sample before it was routinely destroyed, nor did anyone instruct him to destroy the sample. T. 111, 114.

Relying on *California v. Trombetta*, 467 U.S. 479 (1984), Harness claims that his right to due process was violated due to spoilation of the evidence. As noted in the appellant's brief, a two prong test must be met before reversal will be based on alleged spoliation of evidence. First, the "evidence must possess an exculpatory value that was apparent before the evidence was destroyed,." *Murray v. State*, 849 So.2d 1281, 1285 (¶16) (Miss. 2003) Second, the evidence must "be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* Additionally, where the appellants claims that the spoilation resulted in a denial of due process, he must also show that the State destroyed the evidence in bad faith. *Id.* at

1285-86.

Harness has not met even the first prong of the test. The blood sample in question was twice analyzed in duplicate. The lowest result of the four aliquots showed a BAC of .1170, well over the legal limit. T. 108. Accordingly, there was nothing exculpatory about the blood sample. Although the inquiry ends here, the State would also note that Harness has failed to put forth even an iota of evidence to show that any state agent acted in bad faith with regard to the routine destruction of the blood sample.

IV. EVIDENCE OF HARNESS'S BLOOD-ALCOHOL CONTENT WAS PROPERLY ADMITTED INTO EVIDENCE.

Harness next claims that evidence of Harness's BAC should have been excluded because nurse Noreen Kenny did not specifically recall having drawn Harness's blood at the direction of Officer Cotten. Harness claims that allowing information from Exhibit 29, which is simply the blood sample request form, to be presented to the jury was a violation of MRE 901. It appears that Harness also claims that the blood sample itself was not properly authenticated. Rule 901of the Mississippi Rules of Evidence states, "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." MRE 901(a). The rule goes on to state that authentication may be accomplished through testimony of a witness with knowledge that the matter is what the proponent claims. MRE 901(b)(1). Although Nurse Kenny could not specifically recall Harness as a patient from whom she drew blood, Cotten testified that he observed Kenny draw Harness's blood and place the vial into the blood sample kit he provided. T. 445, 455. In accordance with MRE 901(b)(1), the blood sample was properly authenticated. Additionally, Kenny acknowledged that it was her signature which appeared on the blood sample request form, which indicated to her that she did in fact draw Harness's blood. T. 359-61. Cotten also testified that he presented Kenny with the blood sample request form, and that she did in fact draw Harness's blood. T. 32-33. As such, the blood sample request form was also properly authenticated.

Contrary to Harness's assertion, the trial court did not instruct the State as to how to get information from exhibit 29 into the record. Appellant's brief at 20-21. Instead, after sending the jury out, the trial court ruled that the State had laid the proper foundation to present information from exhibit 29 under MRE 803(5). Harness argues that Kenny should not have been allowed to

read from the document because she repeatedly stated that she had no specific recollection of drawing Harness's blood. MRE 803(5) states,

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> (5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

MRE 803(5). Exhibit 29 was certainly a document about which Kenny once had knowledge, as she testified that she apparently signed the document, and Cotten testified that he saw her sign the document. T. 359-61. Kenny specifically testified, "Yes, that is my signature, and it does indicated that I drew blood on that individual as requested by the officer." T. 361. Harness insists that because Kenny repeatedly testified that she could not specifically recall drawing blood from Harness, 803(5) is inapplicable because the rule requires that the witness "once had knowledge . . . ." However, as the trial court opined, "if she had that knowledge, then subsection five would be immaterial." T. 554. Kenny certainly had knowledge of the document at one time, evidenced by the fact that she testified that she signed it. Accordingly, the appellant's assignment of error is without merit.

V. HARNESS WAS NOT DENIED HIS FUNDAMENTAL RIGHT TO MOUNT A DEFENSE.

Harness claims that the trial court committed error of constitutional proportions in excluding evidence of a wrongful death complaint filed by Mrs. Hampton, as well as evidence of a settlement between himself and the victim's insurance company. Exclusion of evidence is reviewed for abuse of discretion. *Ladnier v. State*, 878 So.2d 926, 933 (¶27) (Miss. 2004). Reversible error will not be predicated upon the erroneous exclusion of evidence unless a substantial right belonging to the defendant has been violated. *Id.*

In its case-in-chief, defense counsel sought to elicit testimony from Mrs. Hampton concerning a wrongful death claim she filed against Harness. The complaint alleged that Hampton was negligent in causing her husband's death, and that another unknown individual may have contributed to the accident. T. 585. The trial court excluded the complaint because, among other reasons, even if another person had contributed to the accident, Harness would not be relieved of criminal liability. T. 586. "The law is well settled that where the act of the accused contributed to the death, he is not relieved of responsibility by the mere fact that other factors or causes also contributed to the death of another." *Mitchell v. State*, 803 So.2d 479, 482 (Miss. Ct. App. 2001) (Holliday v. State, 418 So.2d 69, 71 (Miss. 1982)). See also *Fairman v. State*, 513 So.2d 910, 913 (Miss. 1987). Accordingly, the trial court did not abuse its discretion in excluding the clearly irrelevant complaint.

Hampton also claims that evidence pertaining to a settlement between himself and the victim's insurance company was also erroneously excluded. Defense counsel sought to elicit testimony from Harness regarding the settlement. The trial court sustained the State's objection to relevance, but allowed Harness to make a proffer. Harness testified that Hampton's insurance

company paid him $50,000. T. 638. The following exchange occurred.

> Q. Now, Mr. Harness, when you went there and met with I believe it's Penny Papizan; is that correct?
>
> A. Yes, sir.
>
> Q. When you met with her, what did she tell you about this claim, why they were paying you the money?
>
> A. Okay. At the time she told me that if I were to sign, there would be nothing else I can do as far as them and the Hamptons. And I asked them before I signed anything I asked her, I said, "Why are y'all paying me,"and she said that she got with the attorneys of that insurance company, and they said that they had found their client at fault. That's what she told me.
>
> Q. That was why they were paying you the money?
>
> A. Yes, sir. That was the reason I was getting the check.

T. 640. The trial court properly excluded the testimony for the following reasons; (1) it is the jury's role to determine whether Harness negligently caused the death of Hampton, (2) the testimony contained hearsay and hearsay within hearsay, (3) MRE 408 prohibits evidence of settlement payments when offered to prove the validity of a claim. T. 641.

"Questions which would merely allow a witness to tell the jury what result to reach are not permitted." *Shirley v. State*, 942 So.2d 322, 329 (¶27) (Miss. Ct. App. 2006). Although MRE 701 allows lay testimony which is helpful to determine a fact in issue, it does not operate to allow any and all opinion testimony. *Garrett v. State*, 956 So.2d 229, 236 (¶28) (Miss. Ct. App. 2006). Specifically, "a lay witness may not express an opinion on an ultimate issue. A lay witness can only give an opinion that is based upon her personal perceptions, and that will help the jury fairly resolve a controverted, material fact." *Id.* Clearly, Harness's proffered testimony was an attempt to tell the jury what result to reach. Further, the testimony constituted hearsay within hearsay, as Harness was testifying as to an out of court statement made by Papazan, in which Papazan relayed to Harness

statements allegedly made by Hampton's insurance company. Accordingly, the proffered testimony was properly excluded. Additionally, relying on MRE 408, the trial court gave a third valid reason for excluding the testimony. See Armstead v. State, 805 So.2d 592, 597 (¶21) (Miss. Ct. App. 2001).

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Harness's conviction and sentence.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL

BY: La Donna C. Holland

LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL
MISSISSIPPI BAR NO[redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

CERTIFICATE OF SERVICE

I, La Donna C. Holland, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Bobby Burt DeLaughter
Circuit Court Judge
Post Office Box 27
Raymond, MS 39154

Honorable Robert Shuler Smith
District Attorney
Post Office Box 22747
Jackson, MS 39225-2747

Imhotep Alkebu-lan, Esquire
Attorney At Law
Post Office Box 31107
Jackson, MS 39286-1107

This the 7th day of June, 2008.

La Donna C. Holland

LA DONNA C. HOLLAND
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680