

# South Carolina Law Review

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Volume 44  
Issue 1 *ANNUAL SURVEY OF SOUTH CAROLINA  
LAW*

Article 12

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Fall 1992

## Evidence

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### Recommended Citation

Steven M. Pruitt, Evidence, 44 S. C. L. Rev. 110 (1992).

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## EVIDENCE

### I. CONSPIRACY TO IMPORT MARIJUANA IS A CRIME OF MORAL TURPITUDE

In *Green v. Hewett*<sup>1</sup> the South Carolina Supreme Court held that conspiracy to import marijuana is a crime of moral turpitude.<sup>2</sup> Therefore, a witness's prior conviction for this crime is admissible at trial to impeach his credibility.<sup>3</sup> The *Green* decision places South Carolina among a minority of states that have classified conspiracy to import marijuana as a crime of moral turpitude.

The appellant, Gladys M. Green, sued the respondent, Trubie Elbie Hewett, for damages arising from an automobile accident. At trial Hewett filed a motion *in limine* to prohibit Green from using Hewett's prior conviction for conspiracy to import marijuana to impeach his credibility.<sup>4</sup> The trial judge granted the motion and prohibited the appellant from questioning Hewett about his criminal record. The jury subsequently returned a verdict for Hewett, and Green appealed.<sup>5</sup>

On appeal, the supreme court held that the trial judge erred in failing to allow Green to impeach Hewett's credibility with the prior conviction. The court defined a crime of moral turpitude as one involving an act "of baseness, vileness, or depravity in private and social duties which man owes to his fellow man or to society in general, contrary to the customary and accepted rule of right and duty between man and man."<sup>6</sup> The determination of whether a particular crime involves moral turpitude should focus primarily on the societal duties that the criminal breached in committing the particular crime.<sup>7</sup> Accordingly, because the *Green* court recognized that the importation of large quantities of drugs "undoubtedly contributes to the destruction of ordered society," the court

1. 305 S.C. 238, 407 S.E.2d 651 (1991).

2. *Id.* at 238-39, 407 S.E.2d at 651.

3. *Id.* at 242, 407 S.E.2d at 653.

4. Hewett was convicted in 1983 for conspiring to import 27,000 to 32,000 pounds of marijuana into the United States. *Id.* at 239, 407 S.E.2d at 652.

5. *Id.*

6. *Id.* at 240, 407 S.E.2d at 652 (citing *State v. Ball*, 292 S.C. 71, 354 S.E.2d 906 (1987), *overruled by State v. Major*, 302 S.C. 181, 391 S.E.2d 235 (1990)). Although *Major* overruled *Ball*, the court retained the *Ball* test for determining whether a crime involves moral turpitude. *Green*, 305 S.C. at 241 n.2, 407 S.E.2d at 652 n.2.

7. *Green*, 305 S.C. at 241, 407 S.E.2d at 652 (citing *Ball*, 292 S.C. 71, 354 S.E.2d 906).

concluded that conspiracy to import marijuana is a crime of moral turpitude.<sup>8</sup>

The supreme court broke relatively new ground with the *Green* decision. Apparently, only two other states have held that conspiracy to import marijuana is a crime of moral turpitude.<sup>9</sup> However, some states have held that “[i]f the actual commission of an offense involves moral turpitude, then a conspiracy to commit such offense would involve moral turpitude.”<sup>10</sup> The court’s reasoning in *Green* is also consistent with other states which have held that, although mere possession of marijuana is not a crime of moral turpitude,<sup>11</sup> possession of marijuana with intent to distribute does involve moral turpitude.<sup>12</sup>

A recent decision by the South Carolina Court of Appeals, *State v. Hall*,<sup>13</sup> appears to conflict with the *Green* court’s reasoning. In *Hall* the court of appeals held that a first offense for driving under the influence is not a crime of moral turpitude.<sup>14</sup> Under the *Green* court’s reasoning, however, driving under the influence should be a crime of moral turpitude because it involves a breach of “duty to society and fellow man.”<sup>15</sup>

Even if no one is injured, a drunk driver’s actions arguably involve a breach of a societal duty. If, in deciding whether a crime involves moral turpitude, the court focuses on whether there is a breach of duty to society, then driving under the influence should certainly fall within this category. Drunk drivers cause thousands of deaths and injuries each

8. *Id.* at 241-42, 407 S.E.2d at 652-53 (citing *State v. Drakeford*, 290 S.C. 338, 350 S.E.2d 391 (1986) (holding that manufacturing of marijuana is a crime of moral turpitude); *State v. Lilly*, 278 S.C. 499, 299 S.E.2d 329 (1983) (holding that possession of marijuana with intent to distribute is a crime of moral turpitude)).

9. *See, e.g.,* *Muniz v. State*, 575 S.W.2d 408, 413 (Tex. Ct. App. 1979); *In re Higbie*, 493 P.2d 97, 103 (Cal. 1972) (per curiam) (en banc).

10. *In re McAllister*, 95 P.2d 932, 933 (Cal. 1939) (en banc), limited by *In re Mostman*, 765 P.2d 448, 455 (Cal. 1989) (en banc); *see also In re Anderson*, 195 N.W.2d 345, 349 (N.D. 1972). Examples of other crimes of moral turpitude include conspiracy to distribute cocaine, *e.g., In re Gorman*, 379 N.E.2d 970, 971-72 (Ind. 1978) (per curiam), and conspiracy to import cocaine into the United States, *e.g., Louisiana State Bar Ass’n v. Bensabat*, 378 So. 2d 380, 382 (La. 1979).

11. *See e.g., Ex parte McIntosh*, 443 So. 2d 1283, 1286 (Ala. 1983); *Luker v. State*, 361 So. 2d 1124, 1126 (Ala. Crim. App. 1978); *Higbie*, 493 P.2d at 103.

12. *See, e.g., McIntosh*, 443 So. 2d at 1286; *People v. Standard*, 226 Cal. Rptr. 62, 64 (Ct. App. 1986); *In re Campbell*, 572 A.2d 1059, 1059 (D.C. 1990); *Florida Bar v. Sheppard*, 518 So. 2d 250, 250 (Fla. 1988).

13. 411 S.E.2d 441 (S.C. Ct. App. 1991).

14. *Id.* at 442.

15. *Green*, 305 S.C. at 241, 407 S.E.2d at 252; *see supra* notes 6-7 and accompanying text.

year; surely these deaths and injuries represent a breach of a societal duty.

The *Hall* decision is also inconsistent with the supreme court's holding in *State v. Major*<sup>16</sup> that possession of cocaine for personal use is a crime of moral turpitude. The *Major* court based its holding on the addictive nature of cocaine and the devastating effect that it has had on families and society as a whole.<sup>17</sup> Arguably, alcohol has had this same effect.

The South Carolina courts have apparently based their determination of whether a particular drug-related crime involves moral turpitude on the general societal acceptance of that drug.

Steven M. Pruitt

## II. SUPREME COURT PROMULGATES REQUIREMENTS FOR PROSPECTIVE COURT'S WITNESS

In *State v. Anderson*<sup>18</sup> the South Carolina Supreme Court set forth the requirements that must be satisfied before a court can call its own witness.<sup>19</sup> The court established these guidelines to protect defendants from the prejudicial impact that court's witnesses often create.<sup>20</sup> The *Anderson* holding should help trial judges to make informed decisions about the admissibility of court's witnesses and should prevent the use of impeachment for improper purposes.<sup>21</sup>

In 1980 Tony Anderson, his brother Donald Anderson, the victim's girlfriend Barbara Nesbitt, and others were charged with the murder of Nathaniel Reed. Donald Anderson pleaded guilty to noncapital murder and testified at Nesbitt's trial that she had hired him to commit the murder, but that his brother actually killed Reed. Tony Anderson was not captured until 1987, when he was arrested in New York for an unrelated offense. He was finally tried in 1988 for the murder of Reed. On motion by the prosecution and outside of the presence of the jury, the trial judge

16. 301 S.C. 181, 391 S.E.2d 235 (1990).

17. *Id.* at 183, 391 S.E.2d at 237.

18. 304 S.C. 551, 406 S.E.2d 152 (1991).

19. *Id.* at 554-55, 406 S.E.2d at 153-54. These requirements are discussed *infra* text accompanying notes 27-28.

20. *See Anderson*, 304 S.C. at 554, 406 S.E.2d at 153.

21. *See generally* Don Johnsen, Note, *Impeachment with an Unsworn Prior Inconsistent Statement as Subterfuge*, 28 WM. & MARY L. REV. 295 (1987) (addressing the approach of the federal courts to using impeachment as a subterfuge to present otherwise inadmissible evidence to a jury).

determined that Donald Anderson should be called as a court's witness in his brother's trial. Tony Anderson was subsequently convicted and sentenced to life imprisonment.<sup>22</sup>

On appeal, Tony Anderson contended that the trial judge abused his discretion by calling Donald Anderson as a court's witness because doing so allowed the prosecution to avoid the "vouch" rule. Under the vouch rule an offering party generally cannot cross-examine or impeach his own witness unless the witness is hostile and the offering party first shows surprise and harm.<sup>23</sup> As the court noted, "[t]he decision to call a court's witness is generally within the discretion of the trial court."<sup>24</sup>

The *Anderson* court recognized the potential prejudice of using a court's witness at trial to avoid the vouch rule.<sup>25</sup> Accordingly, the court established four prerequisites to protect defendants from jury prejudice caused by evidence admitted through a court witness:

- (1) The prosecution must be unwilling to vouch for the veracity or integrity of the witness;
- (2) a close relationship must exist between the accused and the potential court's witness, i.e. accomplices, family members, etc.;
- (3) there must be evidence that the prospective witness was an eyewitness to the transaction upon which the prosecution is based, gave a sworn statement concerning pertinent facts and the statement has been contradicted or it is probable that it will be contradicted; and
- (4) the testimony the witness is to relate must be material, such that without the testimony a miscarriage of justice would likely result.<sup>26</sup>

The court also established that a trial judge must hold a hearing outside the jury's presence to consider whether a court's witness should be called.<sup>27</sup> Applying these guidelines, the supreme court found no abuse

22. *Anderson*, 304 S.C. at 553, 406 S.E.2d at 153.

23. *Id.* at 554 n.1, 406 S.E.2d at 153 n.1 (citing *State v. Hamlet*, 294 S.C. 77, 362 S.E.2d 644 (1987); *State v. Bendoly*, 273 S.C. 47, 254 S.E.2d 287 (1979)).

24. *Id.* at 554, 406 S.E.2d at 153 (citing *State v. Tillman*, 255 S.C. 528, 180 S.E.2d 209 (1971); *Elletson v. Dixie Home Stores*, 231 S.C. 565, 99 S.E.2d 384 (1957)).

25. *Id.* (quoting KENNETH S. BROWN ET AL., MCCORMICK ON EVIDENCE § 8, at 16 (3d ed. 1984)).

26. *Id.* at 554-55, 406 S.E.2d at 153-54 (citing *Scarborough v. State*, 437 A.2d 672, 676 (Md. Ct. Spec. App. 1981)).

27. *Id.* at 555, 406 S.E.2d at 154.  
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of discretion in the instant case because all the prerequisites for calling a court's witness had been met.<sup>28</sup>

The requirements established in *Anderson* for a prospective court's witness are a necessary and logical addition to South Carolina evidence law. Ordinarily in South Carolina, prior inconsistent statements may be used as substantive evidence only "when the declarant testifies at trial and is subject to cross examination."<sup>29</sup> The vouch rule tempers this exception to the hearsay rule by preventing an offering party from impeaching his own witness.<sup>30</sup> However, because both sides are allowed to impeach a court's witness, the concern of improper prejudice to jurors arises when a court's witness testifies.<sup>31</sup> The rule established by the *Anderson* court will allow important witnesses to testify, but will limit the possibility that impeachment will be used to present unreliable evidence.

Unlike South Carolina courts, the federal courts allow fairly extensive impeachment. Rule 607 of the Federal Rules of Evidence allows any party to impeach a witness.<sup>32</sup> The advisory committee for the federal rules rejected the traditional notion of the vouch rule:

A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right leaves the party at the mercy of the witness and the adversary. . . . The substantial inroads into the old rule made over the years by decisions, rules, and statutes are evidence of doubts as to its basic soundness and workability.<sup>33</sup>

Although the federal rules apparently allow more proper impeachment than the vouch rule, federal courts are also faced with a prosecutor's ability to impeach a witness with an otherwise inadmissible prior inconsistent statement.<sup>34</sup> "A crafty attorney may do this in hopes that the jury will ignore the judge's limiting instructions which admitted these

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28. *Id.*

29. *State v. Copeland*, 278 S.C. 572, 581, 300 S.E.2d 63, 69 (1982), *cert. denied*, 460 U.S. 1103, and *cert. denied*, 463 U.S. 1214 (1983).

30. *See supra* text accompanying note 23.

31. *Anderson*, 304 S.C. at 555, 406 S.E.2d at 154 (citing 81 AM. JUR. 2D *Witnesses* § 3 (1976)).

32. FED. R. EVID. 607.

33. FED. R. EVID. 607 advisory committee's note.

34. *See* FED. R. EVID. 801(d)(1)(A) (requiring that a prior inconsistent statement be given under oath in order to qualify as non-hearsay).

statements for credibility purposes only and not as substantive evidence.<sup>35</sup>

In South Carolina the vouch rule generally continues to prevent a party from using impeachment to present otherwise inadmissible hearsay evidence before a jury.<sup>36</sup> If the prosecutor is not allowed to impeach his own witness without showing surprise and harm, little opportunity exists for using impeachment as a subterfuge.<sup>37</sup> The new *Anderson* rule should allow judges flexibility to help discover the truth at trial while protecting the rights of the accused. However, a change in South Carolina's adherence to the vouch rule would raise questions about the scope of these new requirements.

*Steven E. Williford*

### III. EXPERT TESTIMONY ABOUT EYEWITNESS RELIABILITY HELD ADMISSIBLE

In *State v. Whaley*<sup>38</sup> the South Carolina Supreme Court held that expert testimony about the reliability of eyewitness identifications need not meet the *Jones* test for the admissibility of scientific evidence.<sup>39</sup> In addition, the court specifically declared that a trial court's refusal to admit such expert testimony would constitute reversible error<sup>40</sup> if: (1) the eyewitness suffers from a mental or physical disability that could impair his perception or reliability;<sup>41</sup> or (2) the identity of the perpetra-

35. Colleen G. Treml, *State v. Hunt: Rekindling Requirements for Impeaching One's Own Witness*, 68 N.C. L. REV. 1236, 1236 (1990).

36. See Johnsen, *supra* note 21, at 331.

37. *Id.* at 298 n.6.

38. 305 S.C. 138, 406 S.E.2d 369 (1991).

39. *Id.* at 142, 406 S.E.2d at 372. The *Jones* test refers to *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979), in which the court held that the admissibility of scientific evidence depends upon "the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom." *Jones*, 273 S.C. at 731, 259 S.E.2d at 124 (quoting *People v. Marx*, 126 Cal. Rptr. 350, 355-56 (Ct. App. 1975)); cf. *State v. Ford*, 301 S.C. 485, 392 S.E.2d 781 (1990) (admissibility of DNA evidence). The *Jones* test is less restrictive than the familiar test for admissibility of scientific evidence of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (requiring that scientific evidence be generally accepted by the scientific community).

40. Generally, admission of expert testimony is within the sound discretion of the trial court. *Whaley*, 305 S.C. at 143, 406 S.E.2d at 372 (citing *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979)).

41. *Id.* (citing *Jones v. State*, 208 S.E.2d 850 (Ga. 1974)).  
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tor is the main issue, the only evidence of the perpetrator's identity is eyewitness identification, and the reliability of the identification is not substantially supported by other independent evidence.<sup>42</sup> Because *Whaley* is the supreme court's first consideration of the admissibility of expert testimony regarding eyewitness reliability, it is uncertain whether a trial court's failure to admit this kind of testimony under different circumstances would constitute an abuse of discretion.

In *Whaley* the defendant, a black male, allegedly attacked a white female at her place of employment. Although the victim stared at the assailant throughout the encounter, a black cloth covered the lower part of the assailant's face the entire time. The victim's co-worker, a white male, entered the premises during the attack and obtained a clear view of the assailant's face during a brief confrontation with the fleeing assailant. Both the victim and the witness assisted the police in developing a composite drawing of the suspect and separately identified the defendant in a photographic lineup.<sup>43</sup>

At trial the defendant sought to introduce expert testimony from a qualified psychologist that eyewitness identifications, particularly those by white victims of black defendants, are unreliable.<sup>44</sup> The State objected to this testimony on the grounds that the psychologist was not an acknowledged expert within the scientific community, and that the field of eyewitness reliability was not a recognized area of expertise under the *Jones* test.<sup>45</sup> The trial judge sustained the objection,<sup>46</sup> and

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42. *Id.* (citing *People v. McDonald*, 690 P.2d 709 (Cal. 1984)). Notably, the supreme court cautioned that an expert could not express an opinion about the reliability of a particular witness's identification. *Id.* A trial court should exclude expert testimony that gives a direct opinion on a matter that is an ultimate issue of fact to be decided by the jury. See *State v. Koon*, 278 S.C. 528, 537, 298 S.E.2d 769, 774 (1982), *overruled on other grounds by* *South Carolina v. Skipper*, 476 U.S. 1 (1986). But see S.C. R. CRIM. P. 24(c) ("Testimony 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.").

43. *Whaley*, 305 S.C. at 140-41, 406 S.E.2d at 371.

44. *Id.* at 141, 406 S.E.2d at 371. During the proffer of testimony, the expert witness, who had been qualified as an expert in over fifty trials, testified that there are three stages of eyewitness identification: the acquisition stage (comprehension of the situation), the retention or memory stage, and the recall stage. He noted that fear, stress, fatigue, presence of weapons, lighting, exposure time, lapse in time between incident and identification, race, existence of a composite drawing, and the organization and content of a photographic lineup all can affect the reliability of an eyewitness identification. *Id.*

45. *Id.* at 142, 406 S.E.2d at 371.

the jury subsequently convicted Whaley of second-degree burglary, armed robbery, and assault with intent to commit criminal sexual conduct.<sup>47</sup> The defendant appealed, alleging that the trial judge erred in refusing to admit the expert testimony.<sup>48</sup>

In reversing the trial court, the supreme court reasoned that testimony concerning the reliability of eyewitness identification is not the type of scientific evidence considered in *Jones*.<sup>49</sup> Instead, the court likened such testimony to expert testimony given by doctors and psychiatrists.<sup>50</sup> If the witness is a qualified expert who merely explains how internal and external factors affecting human perception and memory influence the accuracy of an identification, then no additional foundation is necessary to admit the testimony.<sup>51</sup>

Although the *Whaley* court specifically defined two situations in which a trial court's failure to admit expert testimony about eyewitness reliability would be an abuse of discretion,<sup>52</sup> the *Whaley* opinion does not address whether excluding this kind of testimony in other situations would be reversible error. The court noted that "other factors" also favored admission of the expert's testimony in the instant case.<sup>53</sup> Therefore, it is uncertain whether the existence of these, or similar

46. *Id.* Although Dr. Cole was sufficiently qualified to testify as an expert, the trial judge noted that the juries of South Carolina were not ready to receive testimony regarding the reliability of eyewitness identifications. *Id.*

47. *Id.* at 140, 406 S.E.2d at 370.

48. *Id.*

49. *Id.* The *Jones* test is discussed *supra* note 39.

50. *Whaley*, 305 S.C. at 142, 406 S.E.2d at 371. The supreme court noted that "scientific" evidence" refers to such items as "DNA test results, blood spatter interpretation, and bite mark comparisons." *Id.*

51. *Id.* at 142, 406 S.E.2d at 371-72 (citing *People v. McDonald*, 690 P.2d 709 (Cal. 1984)). In accord with the *McDonald* court, the *Whaley* court adopted a standard less restrictive than *Jones* for the admission of eyewitness reliability evidence. *See supra* note 39. The *McDonald* court noted that the scientific evidence rule is invoked in cases concerning "novel devices or processes such as lie detectors, . . . Naline testing, experimental systems of blood typing, . . . and hypnosis." *McDonald*, 690 P.2d at 724. Because expert eyewitness reliability testimony does not concern devices or processes, such as those described in *McDonald*, that are incapable of being proved or disproved in court, neither the *Jones* nor the *Frye* test is applicable. Rather, the jury is capable of receiving the testimony and reaching its own conclusions.

52. *See supra* text accompanying notes 41 and 42.

53. *Whaley*, 305 S.C. at 143, 406 S.E.2d at 372. The court noted three factors: the partial obfuscation of the assailant's face during the attack on the victim, the cross-racial nature of the identification, and the short length of time each witness was exposed to the perpetrator. *Id.*

factors, beyond the two situations delineated by the court, would warrant admission of such expert testimony. The court implied, however, that trial courts generally should admit this kind of testimony.

Several other jurisdictions have examined the admissibility of expert testimony regarding the reliability of eyewitness identifications. Generally, courts have based their analyses on the following issues: (1) whether such testimony is within the common knowledge of the jury;<sup>54</sup> (2) whether such testimony invades the province of the jury to decide an ultimate fact in issue;<sup>55</sup> and (3) whether the accuracy of an eyewitness identification is more properly handled by cross-examination of the eyewitness.<sup>56</sup> However, reliance on these factors to exclude such testimony is unfounded and mischaracterizes the nature of this testimony. Accordingly, South Carolina appellate courts should not rely on these factors in considering whether a trial court's refusal to admit expert testimony about eyewitness identification constitutes an abuse of discretion.

First of all, eyewitness reliability is not necessarily within the common knowledge of the jury. Generally, expert testimony is admissible if the testimony is about matter not within the common knowledge or experience of the jury, and if the testimony gives guidance and assistance to the jury in determining a factual issue.<sup>57</sup> Although some jurisdictions have held that the various factors affecting the reliability of eyewitness testimony are within the common knowledge of the jury,<sup>58</sup> most jurors do not fully understand all of the factors that affect eyewitness identifications.<sup>59</sup> Consequently, it is difficult to see how a trial court could conclude that information from an expert on eyewitness reliability is both within the common understanding of, and not helpful to, an average juror.

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54. See cases cited *infra* note 58 and accompanying text.

55. See cases cited *infra* note 60 and accompanying text.

56. See cases cited *infra* note 63 and accompanying text.

57. See FED. R. EVID. 702 ("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 . . . may testify thereto in the form of an opinion . . ."). South Carolina adopted FED. R. EVID. 702 as S.C. R. CIV. P. 43(1) and S.C. R. CRIM. P. 24(a), effective July 1, 1990. WALTER A. REISER, JR., A COMPARISON OF THE FEDERAL RULES OF EVIDENCE WITH SOUTH CAROLINA EVIDENCE LAW 52 (4th ed. 1990).

58. See, e.g., *Jones v. State*, 208 S.E.2d 850, 853 (Ga. 1974); *People v. Gibbs*, 550 N.Y.S.2d 400, 400 (App. Div. 1990); *State v. Buell*, 489 N.E.2d 795, 802 (Ohio), *cert. denied*, 479 U.S. 871 (1985); *State v. Hill*, 463 N.W.2d 674, 677 (S.D. 1990); *State v. Bell*, 788 P.2d 1109, 1112 (Wash. Ct. App. 1990).

59. See *People v. McDonald*, 690 P.2d 709, 720 (Cal. 1984).

Another common argument for excluding expert testimony regarding eyewitness reliability is that such testimony invades the province of the jury to judge the credibility of the eyewitness.<sup>60</sup> South Carolina follows the generally accepted principle that expert witnesses may not give an opinion on the credibility of a witness.<sup>61</sup> However, in simply relaying to the jury a list of the various factors that may affect perception and memory, the expert does not express an opinion about the truthfulness of a particular eyewitness.<sup>62</sup> The jury may apply the expert's testimony to the facts of the case and come to its own conclusion as to the eyewitness's credibility.

Finally, numerous jurisdictions have held that the proper way to assess the credibility and accuracy of an eyewitness's identification is through cross-examination of the eyewitness.<sup>63</sup> However, this argument incorrectly assumes that both the jury and the examining counsel understand how the various internal and external factors affect the identification. If a jury has no basis of knowledge from which to judge an eyewitness's responses, whether the eyewitness's testimony during cross-examination would aid the jury in determining the accuracy of the identification is questionable. Therefore, the use of cross-examination is no substitute for the expert's testimony.

The supreme court in *State v. Whaley* opened the door for the admission of expert testimony about the reliability of eyewitness identification by declaring that such testimony need not meet the requirements of the *Jones* test. The court held that the admission of expert testimony should remain within the sound discretion of the trial court, but recognized two instances in which failure to admit this kind of eyewitness testimony would constitute an abuse of that discretion. Unfortunately, the court did not go far enough. Such testimony is beyond the common knowledge and experience of the jury, does not invade the province of the jury to determine the credibility of the eyewitness, and cannot be effectively elicited through cross-examination of the eyewitness; therefore, courts should admit this type of testimony in cases that involve an eyewitness identification when the record shows that the accuracy of the identification is questionable.

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60. See, e.g., *Jones v. State*, 208 S.E.2d 850, 853 (Ga. 1974); *Cox v. State*, 398 S.E.2d 262, 264 (Ga. Ct. App. 1990); *State v. Miller*, 565 N.E.2d 840, 847 (Ohio Ct. App. 1988); *State v. Hill*, 463 N.W.2d 674, 677 (S.D. 1990).

61. See *Bailey v. MacDougall*, 251 S.C. 290, 162 S.E.2d 177 (1968).  
<https://scholarcommons.sc.edu/sclr/vol44/iss1/12>

62. See *McDonald*, 690 P.2d at 722; see also FED. R. EVID. 608.

63. See, e.g., *United States v. Amaral*, 488 F.2d 1148, 1153 (9th Cir. 1973);