



In the Missouri Court of Appeals Eastern District

DIVISION TWO

STATE OF MISSOURI,	)	ED108022
	)	
Respondent,	)	Appeal from the Circuit Court
	)	of the City of St. Louis
v.	)	1722-CR01106-01
	)	
DESMOND ARTEZ MILLS,	)	Honorable Michael W. Noble
	)	
Appellant.	)	Filed: March 30, 2021

Desmond Artez Mills (Appellant) appeals from the trial court's judgment, following a jury trial, convicting him of (Count I) first-degree murder, in violation of Section 565.020¹; (Count II) armed criminal action, in violation of Section 571.015; and (Count III) unlawful use of a weapon, in violation of Section 571.030. He was sentenced to two concurrent terms of life in prison on Counts I and II, and a term of 15 years on Count III to run consecutively with Count I. The sentences for Counts I, II and III were to run consecutively with Appellant's sentence in a separate case in St. Louis County, No. 16SL-CR08833-01. We affirm.

BACKGROUND

On October 31, 2016, Appellant went with his then-girlfriend, Latraneice Duncan (Duncan) to a pawn shop where she purchased a handgun. She brought it to her home in Lemay

¹ All statutory references are to RSMo (2016) as updated, unless otherwise indicated.

and put it in a purse in her closet. Appellant also lived there and did not have permission to use the gun, but he photographed the gun with his phone.

The next day, Duncan took Appellant to a 7-Eleven to meet Douglas Coats (Victim). Appellant and Victim exchanged numerous phone calls and texts throughout that day and into the next morning. They referenced doing “business,” “playing games,” and Victim not being a “baby.” One message referred to “Ol gal” planning to call the police, and another message from Appellant advised Victim that he had heroin for Victim. Their final text message at 3:09 a.m. on November 2, 2016, indicated Appellant was on his way to his mom’s house. Around 6:15 a.m. on November 2, Appellant dropped Duncan off at work and took her car. About three hours later, shortly after 9 a.m., Appellant called Victim one last time.

Around 9:15 a.m., near the intersection of Winnebago and Wisconsin in St. Louis, Joyce Griffin (Witness) was getting ready for work when she heard a gunshot and then a vehicle speed away. She went outside and saw Victim leaning over in the driver’s seat of a car in the street. She recognized him as someone who she “always” saw in the neighborhood. She first thought he was drunk, but then she came close enough to see he had been shot and was dead.

Police arrived to find Victim had been killed by a gunshot wound to the neck. There was a bullet hole in the rear driver’s seat window. Victim’s car was still in gear and his foot was on the brake. No firearms were located in the vehicle and there were no signs of a struggle. Victim’s cell phone was recovered from the car, along with controlled substances. Heroin and cocaine were packaged in a manner consistent with sales.

Up the street from Victim’s vehicle, police found an empty shell casing and a cell phone in the street. Examination of the phone revealed it belonged to Appellant and included records of all the phone calls and text messages between Appellant and Victim, including the call

minutes before Victim was murdered. Based on the phone, Appellant was identified as a person of interest in the investigation.

On December 5, 2016, Appellant was home with Duncan and had possession of her gun, even though Duncan had never told him where she kept it. Police were called to the scene where they recovered the gun. Tests showed that it fired the shell casings found at the crime scene and was of the same class that fired the bullet recovered from Victim.

An autopsy conducted on Victim revealed he was killed by a single gunshot that entered his neck and went through his thyroid gland, trachea, two major blood vessels, and his lung. The bullet exited the right side of Victim's chest and then entered his arm. The bullet jacket was recovered from Victim's neck wound and the core from his arm. The trajectory and lack of stippling demonstrated the gun was likely fired from outside the car. Victim's injuries were consistent with a shot fired through the rear driver's seat window where the bullet hole was found.

The State of Missouri (State) charged Appellant as a prior offender with first-degree murder, armed criminal action, unlawful use of a weapon, and unlawful possession of a firearm.² Prior to trial, Appellant filed a "Request for a *Daubert*³ Hearing" regarding the toolmark examination conducted that linked the shell casing found at the scene to the gun owned by Duncan and possessed by Appellant. The trial court denied the motion for a *Daubert* hearing. The State filed a motion in *limine* to prohibit defense counsel from cross-examining the State's toolmark and firearms experts about information contained in reports authored by the National Academy of Science (NAS) from 2009 and Presidential Council of Advisors on Science and

² Unlawful possession of a firearm, Count IV, was dismissed by the State.

³ *Daubert* refers throughout this opinion to *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993).

Technology (PCAST) from 2015, especially asserting a “false positive” rate as fact in toolmark examination. The trial court granted the State’s motion in *limine* to prevent a cross-examination of the toolmark experts about the NAS and PCAST reports. The relevant facts regarding the pre-trial hearings and testimony on toolmark examination will be discussed in greater detail in the Analysis of Points III and IV.

The first three counts were tried by a jury. Appellant presented no evidence in his defense. The jury found him guilty on all three counts and sentenced him to life without parole for murder, a concurrent term of life for armed criminal action, and a consecutive term of 15 years for unlawful use of a weapon. The sentence was to run consecutively with the sentence Appellant received in a separate case in St. Louis County, where he was convicted of two counts of domestic assault in the second degree. This appeal follows.

DISCUSSION

Appellant raises five points on appeal. His first two points allege the trial court erred in denying his motion for judgment of acquittal, denying the motion for new trial, and imposing sentences on Appellant for Counts I, II, and III, in that the evidence did not prove the crimes beyond a reasonable doubt. Appellant’s third and fourth points allege the trial court abused its discretion in prohibiting defense counsel from cross-examining the State’s toolmark expert, Officer David Menendez (Menendez), and denying his request for a *Daubert* hearing. Appellant’s fifth point alleges the trial court erred in denying his motion for judgment of acquittal, and in denying the motion for new trial, because the cumulative effect of all the errors in Points I through IV resulted in a miscarriage of justice. We will discuss Appellant’s points in the order raised.

Points I and II

Appellant's first two points allege the trial court erred in denying his motion for judgment of acquittal, denying the motion for new trial, and imposing sentences on Appellant for Counts I, II, and III, in that the evidence did not prove the crimes beyond a reasonable doubt. His first point alleges the trial court erred in denying his motion for judgment of acquittal at the close of the State's evidence, denying the motion for new trial, and in imposing sentences on Appellant for Count I, first-degree murder, and the associated Count II, armed criminal action, in that the evidence did not prove beyond a reasonable doubt that Appellant was the shooter or had the specific intent necessary to commit the charged murder against Victim. Appellant's second point alleges the trial court erred in denying his motion for judgment of acquittal at the close of all the evidence, denying the motion for new trial, and imposing sentences on Appellant for Count III, unlawful use of a weapon, in that the evidence did not prove beyond a reasonable doubt that Appellant knowingly discharged a firearm at a motor vehicle. Appellant alleges the trial court's errors prejudiced him by depriving him of his right to due process of law, as guaranteed by the Fourteenth Amendment to the U.S. Constitution, and Article I, Section 10 of the Missouri Constitution. Appellant urges this Court to reverse his conviction on Counts I, II, and III and discharge him.

Standard of Review

In reviewing the trial court's denial of a motion for judgment of acquittal, the Court must determine if the State presented sufficient evidence to make a submissible case. *State v. Johnson*, 244 S.W.3d 144, 152 (Mo. banc 2008). We determine whether there is sufficient evidence from which a reasonable juror may have found the defendant guilty beyond a reasonable doubt. *Id.* This Court views the evidence in the light most favorable to the judgment,

disregarding any contrary evidence, and grants the State all reasonable inferences from the evidence. *Id.* However, an appellate court “may not supply missing evidence, or give the [S]tate the benefit of unreasonable, speculative or forced inferences.” *State v. Clark*, 490 S.W.3d 704, 707 (Mo. banc 2016) (quoting *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001) (overruled on other grounds)). We give deference to the jury as the trier of fact, in their superior position, to assess the credibility of witnesses and the weight and value of their testimony. *Johnson*, 244 S.W.3d at 152.

The State may meet its burden of proof by presenting either direct or circumstantial evidence connecting the defendant to each element of the crime. *State v. Burns*, 444 S.W.3d 527, 529 (Mo. App. E.D. 2014). Furthermore, circumstantial evidence is given the same weight as direct evidence in considering whether there was sufficient evidence to support a conviction. *State v. McBenge*, 507 S.W.3d 94, 104 (Mo. App. E.D. 2016).

Analysis
Point I

Appellant’s first point alleges the trial court erred in denying his motion for judgment of acquittal at the close of the State’s evidence, denying the motion for new trial, and in imposing sentences on Appellant for Count I, first-degree murder, and the associated Count II, armed criminal action, in that the evidence did not prove beyond a reasonable doubt that Appellant was the shooter or had the specific intent necessary to commit the charged murder against Victim. The State contends the evidence was sufficient to identify Appellant as the murderer and demonstrate his deliberation.

A person commits the crime of first-degree murder if “he or she knowingly causes the death of another person after deliberation upon the matter.” Section 565.020.1. “Deliberation” is defined as “cool reflection for any length of time no matter how brief[.]” Section 565.002(5).

The requirement of deliberation distinguishes first-degree murder from all other forms of homicide. *State v. Glass*, 136 S.W.3d 496, 514 (Mo. banc 2004). Deliberation does not require that the defendant be detached or disinterested; it does not require any length of time to pass before the killing, as an instant is sufficient. *State v. Perkins*, 600 S.W.3d 838, 846 (Mo. App. E.D. 2020) (citing *State v. Nathan*, 404 S.W.3d 253, 266 (Mo. banc 2013)). Rather, deliberation requires that the defendant acted consciously, and not reflexively. *Id.* at 847. Deliberation may be proved by indirect evidence and inferences reasonably drawn from the circumstances surrounding the killing. *Id.* (quoting *State v. Johns*, 34 S.W.3d 93, 110 (Mo. banc 2000)). Deliberation can be inferred from evidence of planning. *State v. Vickers*, 560 S.W.3d 3, 22 (Mo. App. W.D. 2018). An inference of deliberation can also be strengthened by post-shooting flight without providing aid to the victim. *State v. Sanders-Ford*, 527 S.W.3d 223, 226 (Mo. App. S.D. 2017). Similarly, intent can be inferred from the use of a deadly weapon on some vital part of the victim's body. *State v. Alexander*, 505 S.W.3d 384, 394 (Mo. App. E.D. 2016). The act of aiming and intentionally firing a gun at a victim supports an inference of a "cool and deliberate state of mind." *See State v. Morris*, 844 S.W.2d 549, 551-52 (Mo. App. S.D. 1992).

The evidence on the record was sufficient to show Appellant knowingly caused the death of Victim after deliberation. Appellant and Victim were at least acquaintances and sufficient evidence demonstrates they were involved in drug distribution. In addition to the references they made to their "business" and exchanging heroin, Victim's car contained controlled substances packaged as if he were distributing them when he was found dead. Based on the final text messages that someone was playing games, Victim not being a baby, and "Ol gal" planned to call the police, an inference can be made that they feared trouble with the police. This supports a motive for Appellant to end the drug relationship with Victim by murdering him.

Appellant called Victim shortly after 9 a.m. and just before the murder occurred. Victim was found in an area where he was regularly seen. The shot that killed Victim most likely came from behind. This evidence combines to support the inference that Appellant planned to bring Victim to a familiar area but Appellant remained out of his sight to avoid detection when he shot Victim while he was not looking. The wound to Victim's neck and shell casings found some distance from Victim's body also demonstrate Appellant's intent to kill by use of a deadly weapon, shot into a vital part of Victim's body from a location far enough away to require Appellant's careful and precise aim. This evidence is sufficient to support an inference that the State proved the element of deliberation.

Additional evidence identified Appellant as Victim's murderer. Up the street from Victim's vehicle and body, police located Appellant's cell phone and a shell casing near each other. The cell phone's user accounts had Appellant's name on them. The shell casing was fired from a gun owned by Appellant's girlfriend and kept in the same residence where Appellant lived. Appellant photographed the gun with his phone just prior to the murder. The bullet was consistent with the same gun, although it was not matched to the gun. This is sufficient to connect Appellant to the crime at issue.

Even more evidence here provides proof beyond a reasonable doubt that Appellant committed this murder. Witness heard the shooting, and she immediately heard a vehicle speed away. The jury could reasonably infer this vehicle speeding away was involved in the shooting and did not attempt to aid Victim. Again, the jury had sufficient evidence to draw the conclusion that Appellant murdered Victim after deliberation. The trial court did not err in denying Appellant's motion for judgment of acquittal for first-degree murder and the associated charge of armed criminal action. Point I is denied.

Point II

Appellant's second point alleges the trial court erred in denying his motion for judgment of acquittal and the close of all the evidence, denying the motion for new trial, and imposing sentences on Appellant for Count III, unlawful use of a weapon, in that the evidence did not prove beyond a reasonable doubt that Appellant knowingly discharged a firearm at a motor vehicle. The State argues evidence showing Appellant shot Victim in the left side of the neck from a distance and immediately fled the scene supports an inference that Appellant shot "at" a motor vehicle to prove beyond a reasonable doubt that Appellant committed unlawful use of a weapon.

Section 571.030.1(9) provides that:

1. A person commits the crime of unlawful use of a weapon if he or she knowingly:
... (9) Discharges or shoots a firearm at or from a motor vehicle, . . . , discharges or shoots a firearm at any person, or at any other motor vehicle, or at any building or habitable structure, unless the person was lawfully acting in self defense[.]

Appellant was charged with unlawful use of a weapon for knowingly discharging a firearm at a motor vehicle on November 2, 2016. The State presented evidence at trial of a bullet hole in the rear driver's seat window of Victim's vehicle. The injury causing Victim's death was consistent with the same shot fired through that window. The trajectory and lack of stippling demonstrated that the gun was likely fired from outside the car. The evidence further proved that the shot came from behind, such that Victim did not see it coming; Victim had no weapons with him, and it is reasonable to infer the shot from behind was not in self-defense. The shell casing found near Appellant's cell phone and up the street from Victim further provided sufficient evidence linking Appellant to the crime of unlawful use of the weapon recovered from his possession.

Together, this was sufficient evidence from which a jury could find proof beyond a reasonable doubt that Appellant was guilty of unlawful use of a weapon for knowingly discharging a firearm at Victim's motor vehicle on November 2, 2016. The trial court did not err in denying Appellant's motion for judgment of acquittal on this count. Point II is denied.

Points III and IV

Both Appellant's third and fourth points allege the trial court abused its discretion with regard to the State's toolmark expert testimony, both in prohibiting defense counsel from cross-examining the toolmark expert, and in denying a *Daubert* hearing regarding the toolmark examination expert testimony. With similar facts and law at issue, we will review these two points together.

Appellant filed a pre-trial request for a *Daubert* hearing arguing that toolmark analysis does not meet the *Daubert* standard because it is untested and subjective according to the NAS and PCAST reports. The motion suggested that not enough facts or data exist to state with confidence that one can match a particular bullet or shell casing to a particular firearm. Further, no identifiable set of procedures and protocols support what the examiner did was reliable, what the false positive rates are, whether the subjective testing methods employed were reliably applied to the case, or whether the subjective testing methods used could be replicated. During the pre-trial conference on April 2, 2019, the trial court denied Appellant's request for a *Daubert* hearing.

The State filed a motion in *limine* requesting the trial court prohibit defense counsel from cross-examining the State's toolmark and firearms experts, Menendez and Michael Wunderlich, about the NAS and PCAST reports. The State reported that during his deposition, Menendez was confronted with the reports and told Appellant that the studies were not authoritative in the

field of firearms and toolmark examination, but were “significantly flaw[ed].” The motion noted that Appellant had not endorsed any expert witnesses to lay a foundation establishing that the reports were authoritative, and the court had not taken judicial notice of the reports.

At a hearing on the motion, Appellant did not present any evidence establishing the authoritative nature of the reports, but instead merely argued that they were authoritative because they were written by “respected,” “elite,” and “prestigious” organizations, and because courts in other jurisdictions had found them authoritative. Appellant argued that the Department of Justice had modified its guidelines for tool mark examiners in direct response to the PCAST report, which found they could no longer state a “zero error rate[,]” “that tool mark examiners could no longer say that they could exclude all other firearms as the source of a bullet, which was typical of firearms examiners before the PCAST report.”

The State cited *State v. Carter*, 559 S.W.3d 92, 96 (Mo. App. W.D. 2018), in support of its motion to prohibit cross-examination regarding the NAS and PCAST reports. Appellant argued the *Carter* case was not controlling. The trial court agreed with *Carter* and held the reports should have been discussed through a battle of experts. With regard to judicial notice, the court stated:

You're requiring me to take on a skill set that the Court doesn't have. I mean, what you've shown me is that other people in the field have used this report. Now, I don't know if those other people have used it because an expert told them to use it, but right now I have a defense attorney saying use it, I have a state's attorney saying don't use it, and the only people that have experts are the State.

The court further stated that their motion hearing was effectively a “miniature *Daubert* hearing” but only heard one side of the issue because the defense simply argued the documents should be used without the support of an expert witness. The court granted the State’s motion in

limine to prevent cross-examination of the toolmark experts specifically based upon the NAS and PCAST reports.

During trial, Menendez testified that he had worked in firearms examination for 20 years following his retirement from the police force. He explained that he had examined a .45 caliber cartridge case from the crime scene, which he entered into the National Integrated Ballistic Imaging Network (NIBIN) database. He explained it was not a “match” because

We're looking at two digital images on a flat screen, two dimensional, and we line them up and look at them, they look good. We will not confirm or verify it as a hit until we look at it under a comparison microscope, which also gives you 3D in the different lighting. And then we verify it, a second examiner comes up then behind me and also verifies that it's a match before we release it as a confirmed hit.

On cross-examination, Menendez again explained that the NIBIN hit examination only confirms an association and does not mean there was a match between the shell casing and the firearm. He used microscopic testing to compare them and, based on a finding of eight “lands and grooves with a polygonal rifling,” he could say the bullet from Victim’s body was “most likely from a Glock or a Bersa made .45 caliber gun.”

Menendez testified he also used test shots to compare them to the cartridge case from the crime scene evidence. He concluded that the cartridge casings had matching firing pin and breech face impressions; therefore, he found this particular cartridge case that was recovered at the scene was fired from that firearm.

He also looked to individual characteristics, unique to one firearm, such as imperfections in the metal and wear and tear on the tool making them, which make individual marks on a particular firearm and transfer over in repeatable test shots. He explained that the pattern recognition was used to find an identification or elimination, pursuant to the Association of Firearms and Tool Mark Examiners (AFTE) organization standard. He said pattern recognition

did not have a quantifiable number, but the examiner's training and experience helps to find enough marks in the totality of the breech face area to call it an identification or elimination. He agreed that was determined by the examiner, but the verification process allowed another well-qualified examiner to repeat the process. The examiners fire a series of test shots, look at the test shots to make sure they match each other and that the gun is producing reproducible characteristics. They look at what is not reproducible, the class, sub-class, and individual characteristics. All lab reports are reviewed by at least one other analyst; this case used a third examiner and all three agreed with the findings.

On cross-examination, Menendez confirmed he could not say the shell casing he examined from the scene and the bullet from the Victim's body were fired from the same firearm. He could only say that the cartridge case was fired from the firearm. Defense counsel asked Menendez about cognitive bias in knowing the result that law enforcement wanted and how to safeguard against it, so it did not subconsciously affect the examination. Menendez answered, "I refuse to believe that. We are trained, we have evidence that can be looked at again, reproduced, additional set of test shots." He knew there was a chance for false positives and those did occur in the NIBIN system, but he would never start examination of a case with a predetermined opinion.

Following Menendez's testimony, defense counsel made an offer of proof outside of the jury's presence, "that both the NAS and the PCAST report came to the conclusion that there were not an identifiable certain set of procedures that were reproducible. . . . Which is directly contrary to what Officer Menendez testified to." Defense counsel continued that the reports "recommended that the science is not solid enough to be able to claim an exact match, which, as we've discussed earlier in the week, the DOJ now does not even allow their examiners to testify

to the amount of certainty that Officer Menendez testified to today.” He added that he wanted to cross-examine Menendez with regard to the error rates in the studies collected in the PCAST report, and specifically, that there were about one in forty.

Point III

Appellant’s third point alleges the trial court abused its discretion in prohibiting defense counsel from cross-examining the State’s toolmark expert, Menendez, about the findings, reliability, or error rates of toolmark and firearm examinations in violation of his right against confrontation of witnesses, right to due process of law, and right to a fair trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. Appellant alleges he was prejudiced in that the court’s error was not harmless and there was not overwhelming evidence of guilt. Appellant alleges that, had defense counsel been allowed to cross-examine Menendez about the findings, reliability, or error rates of toolmark and firearm examinations, defense counsel would have impeached the validity, opinion, and reliability of the State’s toolmark expert that the gun and shell casing were a match. Appellant urges this Court to reverse his convictions and sentences and remand for a new trial.

Standard of Review

“It is well established that the extent and scope of cross-examination . . . is within the discretion of the trial court and will not be disturbed unless an abuse of discretion is clearly shown.” *Klotz v. St. Anthony’s Med. Ctr.*, 311 S.W.3d 752, 765 (Mo. banc 2010), *as modified* (May 25, 2010) (internal citations omitted); *State v. Gardner*, 8 S.W.3d 66, 72 (Mo. 1999), *as modified on denial of reh’g* (Jan. 11, 2000). An abuse of discretion occurs when the court’s ruling is “clearly against the logic of the circumstances then before the trial court and is

so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration.” *Mansil v. Midwest Emergency Med. Servs.*, 554 S.W.3d 471, 475 (Mo. App. W.D. 2018). This Court reviews for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial. *State v. Rogers*, 529 S.W.3d 906, 910 (Mo. App. E.D. 2017).

Analysis

The trial court agreed with *State v. Carter*, 559 S.W.3d at 96, finding a “learned treatise” can be used to challenge an expert’s credibility on cross-examination, but holding the proponent must lay a foundation with evidence that the text or treatise is authoritative. Otherwise, the writings are inadmissible hearsay offered to prove the truth of the matter asserted as independent evidence of the facts asserted in the text. *Id.* To establish a writing as authoritative, one must demonstrate (1) a concession of the witness; (2) judicial notice; or (3) other experts. *Id.* “Judicial notice must be exercised cautiously and must be declined if there is doubt about the notoriety of a fact.” *State v. Martin*, 388 S.W.3d 528, 535 (Mo. App. S.D. 2012).

Carter contested the lack of judicial notice on the authoritative nature of the NAS report, but the Court ruled the authentication of a document provided no support on the authoritative nature of the report. *Carter*, 559 S.W.3d at 96. Moreover, the Court noted that the expert specifically testified that the NAS report was not authoritative by any sanctioning body and was simply considered a “research report.” *Id.* at 97. The Court held Carter failed to establish the trial court abused its discretion in refusing to allow the use of the NAS report during cross-examination of the State’s fingerprint expert. *Id.*

Similarly in the record before us, Appellant failed to present any evidence establishing that the reports were authoritative. Menendez made no concession and would have testified that

the reports were not authoritative, but were flawed. Moreover, the trial court refused to take judicial notice of the reports based merely on defense counsel's argument against the State's expert. Appellant had no expert to support his position. Thus, the trial court cautiously refused to exercise judicial notice and did not abuse its discretion in refusing to allow the hearsay reports and their contents to be referenced for purposes of cross-examination.

Furthermore, Appellant argues the prohibition of cross-examining Menendez regarding the NAS and PCAST reports prevented evidence of the findings, reliability, or error rates of toolmark and firearm examinations. We disagree. The trial court excluded the reports and their contents but did not deny defense counsel from asking questions about the flaws in toolmark and firearm examination as Appellant argues. In fact, the record demonstrates that cross-examination of Menendez reveals the subjective rather than quantifiable nature of toolmark and firearm examination as well as the lack of certainty in its findings. The defense asked Menendez about cognitive bias and the potential for confirmation bias based on the "hit" in the NIBIN system. We find Appellant was fully able to cross-examine Menendez regarding the issues he raised, without specifically referring to the NAS and PCAST reports.

The trial court did not abuse its discretion in refusing to allow Appellant to use inadmissible hearsay reports to cross-examine Menendez. Point III is denied.

Point IV

Appellant's fourth point alleges the trial court erred and abused its discretion when it denied his request for a *Daubert* hearing regarding the State's use of toolmark examination expert testimony and allowing the admission of this testimony in violation of his right to due process of law and right to a fair trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 10 and 18(a) of the Missouri

Constitution. Appellant alleges the court allowed the State to call Menendez to testify to a match between a shell casing located at the murder scene and a firearm recovered from Appellant's girlfriend's home. Appellant alleges this testimony failed to meet the *Daubert* standard and he was prejudiced by the court's failure to grant a *Daubert* hearing. Appellant further alleges the admission of Menendez's testimony that the gun and shell casings were a match was not harmless and there was not overwhelming evidence of guilt. Appellant urges this Court to reverse his convictions and sentences and remand for a new trial.

Standard of Review

“A trial court enjoys considerable discretion in the admission or exclusion of evidence, and, absent clear abuse of discretion, its action will not be grounds for reversal.” *Revis v. Bassman*, 604 S.W.3d 644, 649 (Mo. App. E.D. 2020), *transfer denied* (Sept. 1, 2020) (citing *Koelling v. Mercy Hosps. E. Cmtys.*, 558 S.W.3d 543, 550 (Mo. App. E.D. 2018) (internal quotation omitted)). We review a trial court's decision to admit expert testimony for abuse of discretion. *State v. Rogers*, 529 S.W.3d 906, 910, 917 (Mo. App. E.D. 2017). An abuse of discretion occurs when the court's ruling is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration. *Mansil*, 554 S.W.3d at 475. The burden is on the appellant to prove the trial court abused its discretion and prejudice resulted. *Matter of Care & Treatment of Lester Bradley v. State*, 554 S.W.3d 440, 452 (Mo. App. W.D. 2018).

Analysis

“[A]ll you really need to know about the admissibility of expert testimony in civil proceedings” is in the “straightforward statutory words” in Section 490.065. *State Bd. of*

Registration for Healing Arts v. McDonagh, 123 S.W.3d 146, 160 (Mo. banc 2003) (J. Wolff, concurring in part and dissenting in part). The statute allows admission of expert opinion testimony where “scientific, technical or other specialized knowledge will assist the trier of fact . . .” *Id.* If the facts and data on which the opinion is based are “of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject” and are “otherwise reasonably reliable,” the expert’s opinion is admissible under the statute. Section 490.065.3.⁴

A formal *Daubert* hearing is not required by statute. *Revis*, 604 S.W.3d at 656 n.6. The statute imposes an independent duty on the court to determine whether the facts and data relied on are otherwise reasonably reliable. *McDonagh*, 123 S.W.3d at 157. Even under the Federal Rules of Evidence (FRE), federal courts have rejected claims that a trial court abuses its discretion by failing to hold an evidentiary hearing prior to its *Daubert* ruling, because “[a]lthough in limine hearings are generally recommended prior to *Daubert* determinations, they are not required. The only legal requirement is that the parties ‘have an adequate opportunity to be heard’ before the district court makes its decision.” *Revis*, 604 S.W.3d at 656 n.6 (citing *Grp. Health Plan, Inc. v. Philip Morris USA, Inc.*, 344 F.3d 753, 761 n.3 (8th Cir. 2003) (internal citations omitted)).

An inquiry about admissible evidence is to be flexible, and no single factor is necessarily dispositive of the reliability of a particular expert’s testimony. *State ex rel. Gardner v. Wright*, 562 S.W.3d 311, 319 (Mo. App. E.D. 2018). Under *Daubert*, reliable evidence is determined based on (1) whether the expert’s theory can be and has been tested; (2) whether the theory has

⁴ Section 490.065.2, RSMo Cum. Supp. 2017, amended in 2017, provides that a qualified expert may testify to an opinion in a criminal case if:

- (a) The expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) The testimony is based on sufficient facts or data;
- (c) The testimony is the product of reliable principles and methods; and
- (d) The expert has reliably applied the principles and methods to the facts of the case[.]

been subject to peer review and publication; (3) the known or potential rate of error of the particular scientific technique; and (4) whether the technique is generally accepted in the scientific community. 509 U.S. at 593-94.

In *Revis*, the appellant argued the trial court erred in failing to hold a hearing on an expert witness's qualifications. 604 S.W.3d at 656 n.6. The trial court noted she had an opportunity to be heard on her expert witness challenge in both her motion in limine and at the motion hearing, thus the argument had no merit. *Id.* Moreover, in finding the expert testimony sufficiently met the reliability standard, the Court noted an expert may "draw a conclusion from a set of observations based on extensive and specialized experience." *Id.* at 655 (quoting *State ex rel. Gardner*, 562 S.W.3d at 319) (internal quotation omitted). Importantly, "the trial court's role as gatekeeper under the federal rules and our statute is not intended to serve as a replacement for the adversary system." *Revis*, 604 S.W.3d at 656 (quoting *Wright*, 562 S.W.3d at 322). "Any weakness in the factual underpinnings of the expert's opinion . . . goes to the weight that testimony should be given and not its admissibility." *Kivland v. Columbia Orthopaedic Group, LLP*, 331 S.W.3d 299, 311 (Mo. banc 2011) (quoting *Elliott v. State*, 215 S.W.3d 88, 95 (Mo. banc 2007)).

Here, after the trial court denied Appellant's request for a *Daubert* hearing, the court heard argument during the pre-trial hearing on the State's motion in *limine* on a related challenge to the credibility and reliability of toolmark identification procedures that would be discussed by Menendez. The State wanted to prevent Appellant from cross-examining its toolmark expert using the NAS and PCAST reports as authority to criticize the procedures that Appellant had previously challenged in his request for *Daubert* hearing. Moreover, the court deemed this pre-trial conference a "miniature *Daubert* hearing."

Additionally, during trial, Menendez’s testimony on toolmark and firearm examination was backed by his 20 years of experience in the field using these identification principles and methods. He explained his procedures and the data he obtained. Menendez testified regarding the “match” between the recovered gun and shell casing located at the murder scene and drew conclusions based on his experience and observations. He was subject to extensive cross-examination demonstrating the findings were associations rather than exact matches, and the examinations were more subjective than quantitative. However, his findings were supported by a verification process in which two other qualified examiners agreed with him. A *Daubert* hearing was not required to admit Menendez’s testimony, which we find sufficiently reliable. *See State v. Boss*, 577 S.W.3d 509, 518-19 (Mo. App. W.D. 2019) (holding toolmark examination evidence was sufficiently reliable, even if results somewhat rely on a “subjective analysis” and the examiner’s expertise and experience). The trial court did not abuse its discretion by failing to have a hearing. Moreover, any weakness in Menendez’s testimony went to its weight and not its admissibility.

The trial court did not err in denying Appellant’s request for a *Daubert* hearing regarding the State’s use of toolmark examination expert testimony and allowing admission of Menendez’s testimony. Point IV is denied.

Point V

Fifth and finally, Appellant alleges the trial court erred in denying his motion for judgment of acquittal at the close of all of the evidence, and in denying the motion for new trial, because the cumulative effect of all the errors in Points I through IV resulted in a miscarriage of justice in that the trial court’s rulings prohibited Appellant from effectively and appropriately cross-examining the State’s toolmark and ballistic expert, Officer Menendez, about evidence of

the examiner's error rate, inappropriately allowed the State's expert to testify about the shell casing and gun being a match (without allowing defense counsel to ask about false positive rates), and erroneously denied Appellant's request for a *Daubert* hearing, in violation of Appellant's right to confrontation of witnesses, right to due process, and right to a fair trial, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and Article I, Sections 10 and 18(a). Appellant urges the Court to reverse his convictions and remand for a new trial.

Standard of Review

As explained in the first two points on appeal, the standard for reviewing the trial court's denial of a motion for judgment of acquittal is a determination whether the State presented sufficient evidence to make a submissible case, such that a reasonable juror may have found the defendant guilty beyond a reasonable doubt. *Johnson*, 244 S.W.3d at 152. This Court views the evidence in the light most favorable to the judgment, disregarding any contrary evidence, and grants the State all reasonable inferences from the evidence. *Id.* We give deference to the jury as the trier of fact, in their superior position, to assess the credibility of witnesses and the weight and value of their testimony. *Id.*

Analysis

"An appellate court may grant a new trial based on the cumulative effects of errors, even without a specific finding that any single error would constitute grounds for a new trial." *State v. West*, 551 S.W.3d 506, 525 (Mo. App. E.D. 2018) (citing *Koontz v. Ferber*, 870 S.W.2d 885, 894 (Mo. App. W.D. 1993)). "However, relief will not be granted for cumulative error when there is no showing that prejudice resulted from any rulings of the trial court." *Id.* Here, in his identified points on appeal, Appellant "has failed to persuasively identify any error during the trial, [and

therefore] the point must fail.” *Giles v. Riverside Transp., Inc.*, 266 S.W.3d 290, 300 (Mo. App. W.D. 2008). Additionally, given the evidence of guilt presented at trial, Appellant fails to show that the alleged errors resulted in manifest injustice. *Koontz*, 870 S.W.2d at 894. Point V is denied.

CONCLUSION

The judgment of the trial court is affirmed.



Lisa P. Page, Judge

Robin Ransom, P.J. and
Sherri B. Sullivan, J., concur.