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ARKANSAS COURT OF APPEALS

DIVISION I
No. CR-12-936

Opinion Delivered June 5, 2013

JUSTIN JARQUEL MARTIN APPELLANT	APPEAL FROM THE JEFFERSON COUNTY CIRCUIT COURT [NO. CR-2010-126-2]
V.	HONORABLE ROBERT H. WYATT, JR., JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

BRANDON J. HARRISON, Judge

Justin Martin was found guilty by a jury of aggravated residential burglary, aggravated robbery, aggravated assault, and two counts of committing a terroristic act. He now appeals his convictions, arguing that the circuit court abused its discretion by allowing the testimony of James Looney, a firearm-and-toolmark examiner at the Arkansas State Crime Laboratory, because Looney had not personally conducted the test-firing of a gun that was admitted as evidence during the State's case-in-chief. We find no error and affirm.

Because Martin does not challenge the sufficiency of the evidence against him, only a brief recitation of the facts is necessary. *See Banks v. State*, 2010 Ark. 108, 366 S.W.3d 341. Martin and two other suspects were arrested on 22 January 2010, after they had fled the scene of an armed home invasion. The men were armed with a handgun and a shotgun, and Martin was identified as the suspect in possession of a handgun during the robbery. After searching a dumpster in which two of the suspects had been found, the police found a Jennings 9-

illimeter handgun. Police officers also recovered one live 9-millimeter round and two spent casings from the area around the victims' driveway.

James Looney testified that the crime lab was asked to determine whether the two spent cartridge cases were fired from the Jennings 9-millimeter found in the dumpster. He testified that the case was assigned to Ron Andrejack, who had since retired, but that he (Looney) had verified the identification by examining the test cartridge himself under the microscope. At this point, Martin's counsel objected to Looney's testimony because

> he is not the one that test fired the casings that is [sic] being looked at underneath the microscope. So, he has no personal knowledge that these are the actual casings that came from the test-fired pistol. That was done by Mr. Andrejack. And so, I believe he lacks the personal knowledge of where these things come from. He knows what Mr. Andrejack has told him; but, of course, that's not personal knowledge. That's hearsay. . . . [T]his violates Mr. Martin's right to confront his accusers or witnesses and that this witness lacks personal knowledge of the actual test-fired casings that they are what they claim to be.

The objection was overruled, and Looney explained that both the gun and the test cartridges that were fired through that gun were assigned the same laboratory case number and that he was comfortable saying that the test cartridges were, in fact, the shells test-fired by Andrejack. Looney testified that the spent cartridge cases were fired from the Jennings pistol that was recovered by the police.

A jury found Martin guilty of aggravated residential burglary, aggravated robbery, aggravated assault, and two counts of committing a terroristic act. He was sentenced to an aggregate term of twenty-two years' imprisonment. Martin then timely appealed to this court.

The admissibility of evidence rests in the broad discretion of the circuit court. *See Miller v. State*, 2010 Ark. 1, 362 S.W.3d 264. This court will not reverse the circuit court's ruling on the admissibility of expert testimony or a hearsay question unless Martin can show an abuse of discretion. *See id.* To qualify as an abuse of discretion, the circuit court must have acted improvidently, thoughtlessly, or without due consideration. *Id.* The challenged ruling must have also prejudiced Martin's defense. *See id.*

Martin argues that Looney's testimony should have been excluded because he had no personal knowledge of the weapon, spent cartridges, or test firings, and his testimony "consisted of hearsay in that he relied upon another's firearm examination." Because it was Andrejack who actually received and tested the firearm, argues Martin, Looney could not verify that the test cartridges had been fired from that particular gun. Thus, asserts Martin, admitting Looney's testimony violated his right to confront the only witness, Andrejack, who had received the evidence and tested it. Martin also contends that he was prejudiced by the admission of this evidence because use of a deadly weapon—in this case, a firearm—was a required element in three of his convictions. In support, Martin cites *Llewellyn v. State*, 4 Ark. App. 326, 630 S.W.2d 555 (1982), in which the circuit court allowed a drug laboratory supervisor to testify as to the results of chemical testing, even though he had not been present when the substance was delivered to the crime lab, nor did he have any personal knowledge of the receipt or testing of the substance. On appeal, this court agreed that the supervisor's testimony was inadmissible hearsay and should have been excluded pursuant to Ark. R. Evid. 803(8).

In response, the State first argues that Looney's testimony falls outside the definition of hearsay in Ark. R. Evid. 801(c) (2012), as his testimony was not a statement made by an out-of-court declarant, and the admission of nonhearsay raises no confrontation-clause concerns. *See Vidos v. State*, 367 Ark. 296, 239 S.W.3d 467 (2006). The State cites *Sauerwin v. State*, 363 Ark. 324, 214 S.W.3d 266 (2005), where the Arkansas Supreme Court found no error in allowing a medical examiner who had not performed the autopsy to testify on the results and meaning of the autopsy report. Basing its opinion on Ark. R. Evid. 703, our supreme court held that the medical examiner's testimony

> was not a reading of the report, but was an expert analysis and opinion based upon his review of the report as well as the photos. This type of expert testimony and reliance upon autopsy reports is in line with the purposes of Rule 703. For the above reasons, it is clear that the trial court did not abuse its discretion in allowing the expert testimony.

363 Ark. at 328–29, 214 S.W.3d at 270.

In the alternative, the State contends that even if the evidence associated with the test fire is considered hearsay, Rule 703 allows an expert to base his or her opinion on facts or data in a particular case, even if such facts or data are otherwise inadmissible, if they are of a type reasonably relied on by experts in that particular field. Ark. R. Evid. 703 (2012); *Goff v. State*, 329 Ark. 513, 953 S.W.2d 38 (1997). When an expert's testimony is based on hearsay, the lack of personal knowledge on the part of the expert does not mandate the exclusion of the testimony, but instead it presents a jury question as to the weight of the testimony. *Goff*, *supra*. Here, the State argues, Looney reasonably relied on the case-numbering system routinely used by the crime lab to track evidence as it is processed, and any doubt as to the

veracity of the test cartridges was for the jury to weigh.

We conclude that, even if Looney lacked personal knowledge of the test-firing protocol that produced the test cartridge, this case is similar to *Goff*, *supra*. In *Goff*, the circuit court allowed the testimony of Dr. Marcia Eisenberg regarding DNA profiling evidence, even though Eisenberg had not performed the tests or prepared the DNA report. Distinguishing *Llewellyn*, the supreme court noted that Eisenberg had not only supervised but had also independently reviewed the test results, and, in addition, that Rule 703, which was not discussed in *Llewellyn*, allowed an expert to render an opinion based on facts and data not otherwise admissible. As we have stated, the supreme court in *Goff* explained that lack of personal knowledge on the part of the expert does not mandate the exclusion of the testimony; instead, it presents a jury question as to the weight of the testimony. *See also Ferrell v. State*, 325 Ark. 455, 929 S.W.2d 697 (1996) (explaining that while a jury may choose to give less weight to an expert's opinion formed in reliance on outside data, the expert's opinion is not rendered inadmissible by reliance on such data).

Looney was cross-examined on this issue extensively, and the jury was well aware that he had not performed the test firing, that Andrejack had actually performed the test firing, and that Looney had relied on the case-numbering system regularly used by the crime lab to verify that the test cartridges had been fired from that particular gun. The circuit court did not abuse its discretion in allowing Looney's testimony.

Affirmed.

WYNNE and WHITEAKER, JJ., agree.

Robert M. "Robby" Golden, for appellant.

Dustin McDaniel, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., and *Margaret Ward*, Law Student Admitted to Practice Pursuant to Rule XV of the Rules Governing Admission to the Bar of the Supreme Court under the supervision of *Darnisha Evans Johnson*, Deputy Att'y Gen., for appellee.