STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM COLLETON COUNTY
Honorable Thomas W. Cooper, Circuit Court Judge

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Appellate Case No. 2021-000452

THE STATE, .....RESPONDENT,

v.

JERMAINE SILAS WHITE,.....APPELLANT.

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# FINAL BRIEF OF RESPONDENT

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**1.** Did the trial court abuse its discretion allowing Detective Kevin Kinard to opine regarding statements made by Lennon Polland in Officer Ballard's body worn camera video?

**2.** Did the trial court abuse its discretion by allowing Detective Kevin Kinard to opine regarding statements made by appellant in his recorded jail phone where the evidence had been played for the jury and both recordings were nearly unintelligible, because it was improper opinion testimony by a lay witness in violation of Rule 701(a), SCRE?

## RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

**1.** Whether this Court may entertain the Appellant's claim regarding the victim's statement "eating the cheese" – which Detective Kinard testified to – when no contemporaneous, pre-, or post-trial objection was made?

**2.** Whether this issue is preserved for appellate review because the defense only objected to speculation; but if it is, whether the record holds any evidence the trial court treated the defense's objections improperly after the jail call "FBI" statement was brought up when the court sustained both objections and the defense failed to ask for a curative instruction after the detective continued to explain?

## STATEMENT OF THE CASE

Appellant was indicted at the March 2019 term of the Colleton County grand jury for murder and possession of a weapon during the commission of a violent crime. Indictments 2018-GS-15-00648 and -00649; R. 1, 323. The case was prosecuted by Assistant Solicitor Reed Evans, Esq. and Deputy Solicitor Ceth Utsey, Esq., and Appellant was represented by David Mathews, Esq. R. 1. Appellant proceeded to trial by jury from April 19 to 21, 2021, before the Honorable Thomas W. Cooper, Jr., and was found guilty as charged on both counts. R. 342. He was sentenced by Judge Cooper to thirty-five years' imprisonment for murder and five concurrent years' imprisonment for the weapons charge. R. 345. Appellant timely filed a notice of intent to appeal his convictions and sentence and subsequently submitted a brief in support of his appeal. This brief of respondent follows.

## STATEMENT OF FACTS

"From the beginning till the end it pointed to Jermaine White."

- Detective Kevin Kinard, R. 219.

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Jermaine Silas White left 368 Cleveland Street where he lived with his father and his girlfriend and headed for the Horizon Enmarket on the morning of July 15, 2019. R. 129, 225-226; Defense Exhibit 1. He drove his girlfriend's brown Oldsmobile 88, which had very obvious yellow paint and other damage on the driver's side door. R. 131-134, 205-214; State's Exhibits 3, 13-16, 28-31, 34. He was captured on Horizon's surveillance cameras pumping gas at 11:34 a.m. and was captured making a purchase inside the store a minute later. R. 206-208; State's Exhibits 13, 27-30. He pulled out of the Enmarket parking at 11:36 a.m., driving in the direction of where he would later meet the victim. State's Exhibit 31.

Lennon "Lee-Lee" Poland ("victim") went to an area behind Williams Seafood in Walterboro, South Carolina that was a common gathering place for "doing and exchanging drugs" that afternoon. R. 91, 107-109, 189. He was spending time with Mark McQune, Edwin McCord, and others when the Appellant suddenly shot him in the back of the head with a .25 caliber Titan Tiger pistol. R. 92, 278-279. The first 911 call came in at 3:40 p.m., followed by a second at 3:42 p.m. R. 88-89. Officers arrived on scene at 3:42 p.m. and 27 seconds. *Id*.

Officer Ballard of the Colleton County Sheriff's Office's Investigative Unit approached Lennon first, finding him sitting in a blue camping chair, vomiting. R. 90-92. When Ballard asked who shot him, Lennon said, "White." R. 93-94, 97-100, 113-114, 209-217; Court's Exhibit 7. Ballard asked him if it was Jermaine White, and Lennon affirmed that it was two more times. *Id*. Ballard asked him why Jermaine shot him, and Lennon said, "eating the cheese, he thinks I'm telling." *Id*. EMS arrived shortly after to transport Lennon to the hospital. State's Exhibit 40. A blue bicycle lay nearby, along with an old school desk and a blue bucket. R. 176.

Officer Ballard received information that Jermaine had been driving a brown vehicle that day, so he relayed that to dispatch and additional units pursued the vehicle back toward Hampton Street. R. 94; Defense Exhibit 1, State's Exhibit 34. Ballard did not know it at the time, but that same brown vehicle with obvious yellow paint damage was captured on his body and in-car cameras coming toward Williams Seafood just a block away from the scene right after he arrived. R.101-103, 202-215; Defense Exhibit 1, State's Exhibits 3, 15. That same brown vehicle was also caught by Horizon's cameras yet again at 3:44 p.m. driving in the opposite direction from which it came on Hampton Street – away from Williams Seafood. R. 210-248, 211, 215; State's Exhibits 32-33. It was headed back toward Jermaine's house on the quickest possible route. *Id*. Jermaine was found the next day in the house on Cleveland Street burning a cell phone and clothing. R. 183-187. A .25 caliber Titan Tiger pistol and its matching ammunition was found in a plastic bag on his kitchen table. R. 187-191; State's Exhibits 19-21.

Ballard and Detective Kevin Kinard of the Colleton County Sheriff's Office recovered a .25 caliber shell casing at the scene that matched the pistol found in Jermaine's house. R. 95, 99-100, 174-181; State's Exhibits 5-12. Jermaine White was recorded on a jail call to his girlfriend Tonya saying, "that's what I told FBI, man, why'd you have to come out here and get in my business? He says, 'I'm telling.'" R. 217-219, 303; State's Exhibits 7, 17. "I should have run." R. 303. Edwin McCord, Jermaine White's cousin, gave a statement to law enforcement on July 26, 2018, that he saw Jermaine shoot Lennon. R. 268-269. Jermaine was the clear suspect.

Lennon Poland fought for nine days but passed away in a North Charleston hospital on July 24, 2018, from a single gunshot wound to the back of his head. R. 95, 184, 216, 238-253, 270. Jermaine White was charged with murder the same day. R. 184, 216.[1]

[1] White was initially charged with attempted murder, but the charge was upgraded on the 24th.

## *Evidence of Guilt at Trial*

**Tonya Gibson – Jermaine White's Ex-Girlfriend**

At trial, Tonya Gibson testified she had been Jermaine White's girlfriend from 2016 to the beginning of 2019. R. 127. She testified she was at Jermaine's house on Cleveland Street all day on July 15, 2018 and did not leave until around 5:30 or 6:00 p.m. that night. R. 127-128, 145. She said Jermaine came and went and was driving her brown Oldsmobile 88 with yellow paint and other damage on the driver's side front door every time he left. R. 129-145; State's Exhibits 15, 16, 27, 32, & 33. She testified no one else used her car that day except Jermaine. R. 134. She told the jury he had called her the next day while she was at work: "[H]e was wanting me to meet with him to go get rid of a gun or something, and I'm like, for what, I asked, why. That's all I remember." He wanted to use her car to do it. R. 146-147.

**Detective Kevin Kinard – Colleton County Sheriff's Office**

Kinard testified he was the on-call investigator on July 15, 2018 and got to the scene shortly after Lennon had been taken to the hospital. R. 174, 181-182. He observed the scene and collected evidence, including a DNA swab from the blood spot, a swab from the back of the blue camping chair, and from the blue bucket. R. 174-181.[2] He also collected the .25 caliber shell casing from the scene. R. 175. He responded with other officers to 368 Cleveland Street the next day and found Jermaine White in the house in a room with a fire still burning in the fireplace in the middle of July. R. 183-187. Kinard recovered a burned cell phone and clothing from that fireplace. *Id*. On the table in the kitchen he found a plastic Family Dollar bag with a .25 caliber

[2] The DNA swabs were tested at SLED but did not provide any relevant inculpatory or exculpatory evidence. R. 220-223.

Titan Tiger pistol, a single magazine, and .25 caliber Remmington ammunition that matched the .25 caliber shell casing from the scene. R. 185-191; State's Exhibits 19 to 21.

Kinard interviewed Jermaine after he waived his *Miranda* rights[3] on July 17, 2018, two days after the shooting. R. 194-195; State's Exhibit 26. Jermaine admitted that he burned the cell phone found in his fireplace during the interview. R. 302; State's Exhibits 24 & 26. He also admitted that no one else drove the Oldsmobile 88 but him. R. 304-305; State's Exhibit 26. He did not present an alibi when asked where he was between 3:30 p.m. and 4:00 p.m. on July 15th. R. 305; State's Exhibit 26. He also reviewed a jail call that Jermaine made to his girlfriend Tonya where Jermaine said, "FBI." Kinard testified that, in his training and experience, FBI was slang for a snitch or a rat. R. 217-219; State's Exhibit 17. He affirmed that he did not uncover an alternative suspect over the course of his investigation, even though he would have exhausted all resources tracking down any credible lead if he had. R. 219. "From the beginning till the end it pointed to Jermaine White." R. 219.

**Edwin McCord – Jermaine White's Cousin**

Jermaine's cousin Edwin McCord initially did not want to testify. R. 115-116. However, he changed his mind after the court intervened and told the jury, "I was sitting there behind [] on the bucket . . . . I was sitting in the chair behind Williams Seafood . . . . Lennon was there and he got shot. I was sitting next to him." R. 261. When asked who shot Lennon Poland, he said, "Jermaine White" and confirmed it two more additional times after that. R. 259-269. He established that Jermaine had arrived and had left on foot. R. 265.

[3] *Miranda v. Arizona*, 384 U.S. 436 (1996).

**SLED Forensic Firearms Examiner Michelle Eichenmiller**

After being qualified as an expert in the field of firearms identification, Eichenmiller testified that she had examined and had fired the .25 caliber Titan Tiger pistol recovered at Jermaine's house, even though the magazine was not functional (as it was missing a spring). R. 271-276. But "anyone else could just hand-load a magazine into the chamber and pull the trigger so it would fire once." R. 276-77. She told the jury she had found enough matching identifying characteristics on the cartridge or shell casing found at the scene of the crime to conclusively say it had been fired by the Titan Tiger pistol in evidence. R. 278-279.

**Desi White and Brittany Creek – The Defense**

The defense floated the theory that Jermaine's brother Desi "Bam" White was the shooter instead of Jermaine, but the jury did not buy it. R. 111-113, 147-148, 226-229, 267-268; Defense Exhibit 3. They also presented the theory that the victim had issues with his ex-girlfriend Brittany Creek, theoretically presenting the possibility that she could have been the shooter instead of Jermaine as well. "Does the word crack my jaw mean anything to you?" R. 226-228. A witness even testified that the victim had punched Brittany Creek in the face once. R. 227-228. The jury did not buy that theory either.

In all, the victim gave three dying declarations that Jermaine White was his killer; Jermaine's own cousin testified that Jermaine was the shooter; Jermaine's girlfriend at the time testified he was not with her that day but was driving the car seen at or about the scene before and after the crime; she also told the jury Jermaine had asked her for help getting rid of a gun the day after the crime. Jermaine himself admitted to burning a cell phone and to driving the car seen near the scene. The murder weapon was found on the kitchen table inside his house. He had no

alibi. At the end of the trial, the jury convicted Jermaine White for the murder of Lennon Poland.[4] R. 342. The judge sentenced him to 35 years and 5 concurrent years. R. 345-346.

[4] The jury also found Jermaine guilty of possession of a weapon during the commission of a violent crime.

## STANDARD OF REVIEW

In criminal cases, an appellate court sits to review errors of law only; it is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The admission or exclusion of evidence is an action within the sound discretion of the circuit court and will not be disturbed on appeal absent an abuse of discretion." *State v. Williams*, 386 S.C. 503, 509, 690 S.E.2d 62, 65 (2010). An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions. *State v. Douglas*, 369 S.C. 424, 429-430, 632 S.E.2d 845, 848 (2006). It is well-settled that the trial court has very broad discretion in determining the admission or exclusion of evidence. *State v. Bottoms*, 260 S.C. 187, 194-195, 195 S.E.2d 116, 119 (1973).

## ARGUMENT

**I. Appellant's claim that the trial court erred when it permitted Detective Kinard to testify about "eating the cheese" as a lay witness is not preserved for appellate review. Even if it were, the detective's testimony was proper under 602 & 701, SCRE, as it was based on his personal knowledge of the case and resulted from a thought process common to ordinary man. One does not have to be a specialist in a field to conclude "cheese" could mean "rat."**

Appellant argues the trial court erred by allowing Detective Kinard to testify as a lay witness about a statement recorded on a body camera. IBOA at 7-8. When asked why Jermaine White shot him, the victim stated, "eating the cheese," or "I don't eat cheese, he thinks I'm telling" R. 44-45, 217. However, the defense did not contemporaneously object when the trial court allowed Kinard to testify to the statement's meaning as a lay witness. Therefore, this claim is not preserved for appellate review. *State v. Johnson*, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996); *State v. Vanderbilt*, 287 S.C. 597, 598, 340 S.E.2d 543, 543-544 (1986) (eliminating in favorem vitae review in all but death penalty cases and holding issues not preserved at trial may not be raised for the first time on appeal); *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (eliminating in favorem vitae review in death penalty cases as well and holding a contemporaneous objection is required to properly preserve an error for appellate review.)

"[T]his court will not consider issues not raised to or ruled upon by the trial judge." *State v. Williams*, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991); *State v. Woodruff*, 300 S.C. 265, 387 S.E.2d 453 (1989). "A defendant must object at his first opportunity to preserve an issue for appellate review." *Williams*, 303 S.C. at 411, 401 S.E.2d at 169. "[A]n objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge." *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003).

Among other matters, the defense, the State, and the trial court discussed the admissibility of Officer Ballard's body camera footage and the statements on it by the victim and Mark McQune before the trial began. R. 7-64. The defense objected to hearsay, reliability, and prejudice regarding the admissibility of McCune's statement of, "Jermaine, Jermaine, Jermaine White, Silas White's son," and the victim's statements of "White." R. 12-14, 39-41. The trial court held McQune's statement was inadmissible but held the victim's multiple and repeated affirmations that Jermaine White was the one who shot him admissible as a dying declaration. R. 18-19, 39-40. However, even though the solicitor brought up the "eating the cheese" matter pre-trial, the defense did not object or move that the statement be excluded on a lay witness ground. *Id*. The only part of the transcript that even "hints" the defense may have objections to Detective Kinard testifying to "eating the cheese" was pre-trial:

> **Attorney Mathews:** And now all of a sudden there was no motive, and for some reason they've got the makings of a motive. That's one of the problems with the state's case in the beginning is McQune says in his interview in, you know, did they argue or not? I don't think Jermaine knows himself why he did this.
>
> That's one of the things McCord says in his interview. So we don't have any – you know, we've got hints and shadows of things that create, that create suggestions. And this is why, Your Honor, frankly, I need a gatekeeper on this because I don't know the jury – it's a lot for the jury [to] do.

R. 41-42.

That is not a clear and discernable objection to the lay witness matter that would properly allow this Court to entertain it. That is a hint and a shadow of an objection, not an actual one. The solicitor raised the matter pre-trial with:

> **Solicitor Evans:** I hope I understand your ruling and that we'll be permitted to play that [redated portion of the body camera video].

> **The Court:** You would be. And, of course, the entirety of the video, of course, will be made a part of the record for appellate review.
>
> **Solicitor Evans:** . . . There is also, you know, as far as not having a motive, Mr. Poland makes additional comments which are visible on the video other than the actual identity of the shooter. At one point he says, he says, **I'm telling, but I don't eat cheese**.
>
> The theory by law enforcement, and I think it's supported by this natural language of what he's saying, is that Mr. Poland believed that Mr. White did this because Mr. White believed Mr. Poland was informing to the police about various things, whatever they may be. There's no evidence that he was, at the time, an informant. But that's evidence coming straight from Mr. Poland.

R. 44-45.

The defense does not respond to Solicitor Evans' comments and the court concluded the "eating the cheese" discussion by saying, "ok". R. 45-46.

During trial, the solicitor called Detective Kevin Kinard to the stand. R. 173-174.

> **Solicitor Evans**: You reviewed – as part of your investigation and certainly earlier today at trial you saw and heard Mr. Ballard's body camera video, correct?
>
> **Kinard**: I did.
>
> **Solicitor Evans**: What, if anything, did you learn from that, you know, other than his identification? . . . . What, if anything, did you learn from the video that Mr. Poland said on that video?
>
> **Kinard**: Right. At one point in the video Ballard asked him, like, why he did it, or he keeps mumbling, eating the cheese, like, he thinks I'm telling, eating the cheese, some references to that.
>
> **Solicitor Evans**: And did that mean anything to you in your training and experience?
>
> **Kinard**: It does. I mean, telling and then eating the cheese is a common term for, if you're a rat, or, like, a snitch or telling on somebody, or, like, you know, you would be talking to the police over some issues . . . . criminal.

> **Solicitor Evans**: About somebody committing some kind of crime?
>
> **Kinard**: Correct.
>
> **Solicitor Evans**: Rat and snitch are street words for informant?
>
> **Kinard**: Correct.

R. 216-217.

At that point, the solicitor then begins to ask Detective Kinard about the jail calls. The defense *later* objects to the Appellant's statement of "FBI" on the jail call twice but does *not* object to the "cheese" reference at his first opportunity or in a post-trial motion. In fact, the phrase "lay witness" does not appear in the transcript at all until the judge's charge. The judge instructed the jury on the difference between lay and expert witnesses in his charge, but that was likely because Michelle Eichenmiller testified as an expert. R. 329-331. The defense did not raise the issue clearly or firmly enough to give the trial court the opportunity to rule on it. Therefore, the "cheese" issue is not preserved for appellate review. Even if it were though, the testimony was admissible under Rules 602 and 701, SCRE.

The State never moved to qualify Detective Kinard as an expert as the testimony was admissible as general or lay witness testimony. The explanation that "cheese" meant "rat" was well within Detective Kinard's personal knowledge and helped the jury understand the steps he took in deciding whom to arrest as the lead detective on the case. Under Rule 602, SCRE, a witness may testify to any matter as long as there is any evidence introduced to support a finding that they have personal knowledge of the matter. "Evidence to prove personal knowledge **may, but need not, consist of the witness' own testimony**." Rule 602, SCRE. The witness may give an opinion or inference as a lay witness if the testimony is **(a)** rationally based on his or her perception; **(b)** is helpful to a clear understanding of the witness' testimony or a determination of

a fact in issue; and **(c)** does not require special knowledge, skill, experience, or training. Rule 701, SCRE.

The solicitor asked Detective Kinard if he had learned anything from any of Mr. Poland's statements on the body camera (that helped him in his investigation), and he answered, **"[a]t one point on the video Ballard asked him, like, why he did it, or he keeps mumbling, eating the cheese, like, he thinks I'm telling, eating the cheese, some reference to that." R. 217.** It is worth pointing out that the victim did explain his own "cheese" statement by saying, "he thinks I'm telling." The solicitor then asked Kinard if that meant anything to him in his training and experience and he said, "It does." R. 217. He was affirming on the record that he had personal knowledge of what the phrase meant as a law enforcement officer in general *and* as lead detective. He was giving the jury yet another glimpse into his mind about the steps he took and the evidence he reviewed when deciding to seek arrest warrants for Jermaine White.

Even if the defense had brought up the lay versus expert discussion at trial, Kinard's brief testimony did not fall within the parameters for expert testimony. It was testimony derived from a thought process common to ordinary men and is a conclusion that resulted from a process of reasoning familiar to everyday life. Thus, squarely lay testimony."[T]he distinction between lay and expert witness testimony is that lay testimony 'results from a process of reasoning familiar in everyday life,' **while expert testimony 'results from a process of reasoning which can be mastered only by specialists in the field.**'" *United States v. Yanez Sosa*, 513 F.3d 194, 200 (5th Cir. 2008) (emphasis added). "As explained by the Second Circuit, 'a lay opinion must be the product of reasoning processes familiar to the average person in everyday life.'" *Id*. (*quoting United States v. Garcia*, 413 F.3d 201, 215 (2d Cir. 2005)).

Making the jump from "eating the cheese" to "rat" to "informant" is not something one needs a Ph.D., peer reviewed articles, or specialized data to understand, or is a hypothesis the jury must accept on faith, "not capable of proof or disproof in court and not even generally accepted outside the courtroom." *State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979). It is not a process of reasoning which can be mastered only by specialists in the field. Therefore, it would not have been admissible as expert testimony even if that point had been raised.[5] In fact, "**experts may *not* testify as to matters of common knowledge or experience** . . . ." *McBeth v. TNS Mills, Inc*., 319 S.C. 388, 392, 458 S.E.2d 52, 54 (Ct. App. 1995) (cleaned up.) "**Expert testimony is only essential where the topic is not a matter within the common knowledge and experience of most lay persons**." Advisory Committee's Notes, Rule 701, SCRE (2021).

This Court adeptly provided two examples of matters that *would* be outside the common knowledge and experience of most lay persons in *Spartanburg Regional Med. Center v. Bulsa* and *Armstrong v. Union Carbide*.[6] In *Spartanburg Regional*, the process of how to treat severe burns and how much it costs was definitively ruled as a matter outside the common knowledge and experience of most lay persons. In *Armstrong*, the medical effect of inhalation of ethylene glycol was definitively ruled as a matter outside the common knowledge and experience of most individuals. That is simply not the case with the meaning of the phrase "eating the cheese." Therefore, the need did not exist for the State to move that Detective Kinard by qualified as an expert because his testimony was properly admissible under Rules 602 or 701, SCRE. "[S]o long

[5] A lay opinion must be based on personal perception, must be one that a normal person would form from those perceptions, and must be helpful to the jury. *United States v. Riddle*, 103 F.3d 423, 428 (5th Cir. 1997); *United States v. Cuti*, 720 F.3d 453, 460 (2d Cir. 2013) (lay opinion testimony was proper, because the "witnesses testified based only on their experiences with matters pertinent to this case, and their reasoning was evident to the jury").

[6] *Spartanburg Regional Med. Center v. Bulsa*, 308 S.C. 322, 325, 417 S.E.2d 648, 650 (Ct. App. 1992); *Armstrong v. Union Carbide*, 308 S.C. 235, 238, 417 S.E.2d 597, 599 (Ct. App. 1992).

as the jury, by virtue of common experience, is capable of resolving a factual issue, it will not be prevented from doing so because of the absence of expert testimony." *Scott v. Sears, Roebuck & Co*., 789 F.2d 1052, 1055 (4th Cir. 1986). This Court should affirm.

**II. This issue is also not preserved for appellate review. If this Court finds differently, however, the record shows no error in the trial court's treatment of Appellant's objections to "FBI." The trial court sustained the defense twice when the detective testified about the jail call reference and the defense did not ask for a curative instruction when he continued to explain. Even so, if there was error here, it was harmless. Appellant cannot show prejudice as there was separate, conclusive evidence of his guilt.**

Appellant argues the trial court abused its discretion by permitting Detective Kinard to explain what "FBI" meant to the jury as a lay witness. The State disagrees and submits Appellant's argument is without merit. First, this issue is not preserved for review as the defense only objected to (and the court only ruled on) speculation. No contemporaneous objection to Detective Kinard testifying to what "FBI" meant as a lay instead of an expert witness can be found in the record. However, if this Court disagrees and finds the objection was preserved, the solicitor asked permissible questions well within the court's rulings and the detective mostly remained within those rulings. The defense did not then move the court to instruct the jury to disregard any allegedly out-of-bounds statements or move for a curative instruction (even though one was likely not needed). Therefore, Judge Cooper appropriately responded to the defense within his zone of discretion. Even so, it was proper lay witness testimony under Rules 602 and/or 701. If there was any error here at all, it was harmless because the Appellant cannot show prejudice. There was a plethora of separate, conclusive evidence from which the jury could have drawn Appellant's guilt.

Even though motive is never something the State is required to prove, the solicitors sought to introduce testimony that might help the jury piece together what had happened. R. 303. For example, Jermaine White was recorded on a jail call telling his girlfriend Tonya, "that's what I told FBI, man, why'd you have to come out here and get in my business? He says, 'I'm telling.'" R. 170-171, 217-219, 303; State's Exhibits 7, 17. The solicitor raised this issue pre-

trial but the defense did not object to its admission. R. 45. Detective Kinard was then asked about the Appellant's jail call statement at trial and the following conversation occurred:

> **Solicitor Evans**: What, if anything, did you hear in that jail phone call?
>
> **Attorney Mathews**: Objection, Your Honor. I think that that's in evidence and we can all make our own conclusions on that.
>
> **The Court**: You can refer to what part of it he's talking about, but it will speak for itself. It's already in evidence. It was already played.
>
> **Solicitor Evans**: Yes, Sir. Did you hear Mr. White refer to Mr. Poland as the FBI?
>
> **Kinard**: I did.
>
> **Solicitor Evans**: What does that mean to you –
>
> **Attorney Mathews**: Excuse me.
>
> **Solicitor Evans**: --- in your training?
>
> **Attorney Mathews**: Excuse me. Your Honor, I object to this. He's referring to what – there is no reference to Lennon Poland in any of that jail talk. In all of this, there's not a single reference to Lennon Poland. As far as who they're talking about, this is pure speculation. And I'd ask the Court to instruct –
>
> **Solicitor Evans**: I'd be happy to rephrase that.
>
> **The Court**: I'll sustain the objection if it's not referred to.
>
> **Solicitor Evans**: Did you hear the words FBI?
>
> **Kinard**: I did.
>
> **Solicitor Evans**: What does that mean? I mean, we know what FBI is. But again, in your training and experience, you know some slang that we don't; correct?
>
> **Kinard**: Right. That would also be synonymous with a snitch or a rat.

> **Solicitor Evans**: Thank you. Was Mr. Poland, to the best of your knowledge, an informant with any agency around here?
>
> **Kinard**: Not that I know of. Not with Walterboro Police Department.
>
> **Solicitor Evans**: You looked into that?
>
> **Kinard**: I did, yes. I would know.

R. 218-219.

The defense did not make a lay witness objection. They object, and explain their objection by saying, "we can all make our own conclusions on that." The court responds in the same vein, saying the detective could refer to what was said, but that "it [would] speak for itself." That is an objection and a response to speculation. The defense then objected a second time to what apparently was speculation and the court responded in kind. Speculation is very different than a lay versus expert witness objection. The issue the defense now raises was not properly specific enough at trial to preserve for appellate review pursuant to Rule 103, SCRE.

But for argument's sake and out of respect for the spirit of Rule 103, the record does not show that the trial court erred in its treatment of either of the defense's objections. The trial court agreed with the defense that the testimony should be limited to ensure the detective did not "make an assumption or guess based on a small amount of data or none at all," the definition of "speculate." Black's Law Dictionary, 2nd ed. However, the solicitor cured the lack of foundation issue when he asked the detective about where his knowledge came from, which is a proper way to lay foundation for testimony admissible under Rule 602, SCRE. He told the jury he had personal knowledge of what "FBI" meant from his training and experience as a law enforcement officer. That personal knowledge could help an ordinary, reasonable jury understand the specific steps Detective Kinard took in making his decision to arrest Jermaine White in this specific case.

Therefore, it was general, personal knowledge testimony under Rule 602 *and* proper lay witness opinion or inference testimony under Rule 701. This testimony did not require Detective Kinard to be a specialist or master in the field of street slang in order to be able to testify to it; again, as referenced in section one, the thought processes of ordinary jurors could easily make the jump from "FBI" to "snitch." It was also helpful to the jury to understand and to determine a fact in issue; to wrap their heads around why the crime may have occurred. Thus, the testimony was proper under Rules 602 and 701 and this Court should affirm.

To add to that, the meaning of "FBI" was merely a minor puzzle piece in the major, big picture Detective Kinard put together to make an arrest. Kinard arrived on scene shortly after the 911 call, conferred with Officers Ballard and McQuinn, observed the scene, and collected evidence, including the .25 caliber shell casing, DNA swabs of the chair, bucket, vomit, blood spot, etc. R. 173-183. He then responded with other officers to 368 Cleveland Street after obtaining information that Jermaine White was at the house and after procuring a search warrant. R. 183. He noticed smoke coming from the chimney in the middle of July and found a cell phone, clothing, and other items actively burning in the fireplace when he arrived. R. 183-185. He took photos of the crime scene, recovered the .25 caliber Titan pistol, its magazine, and .25 caliber Remmington ammunition from a Family Dollar plastic bag, along with the fire-damaged cell phone, and other evidence. R. 185-193.

He interviewed Jermaine, walked him through the process of waiving his *Miranda* rights,[7] and conferred with officers once again all before arresting White for attempted murder and then murder after the victim died days later. R. 193-216. Kinard learning that Jermaine White possibly referred to the victim as "FBI", or a snitch, was simply one of the many pieces of

[7] *Miranda v. Arizona*, 384 U.S. 436 (1996).

the puzzle the detective had that contributed to his decision to arrest Appellant. It was proper for the jury to hear them all, as each helped them understand how the case progressed. Nevertheless, the record does not show the trial court erred in its treatment of the defense's objections. Judge Cooper limited the testimony and ensured the proper foundation was laid even though the detective continued his testimony.

Even if this Court finds some kind of error by the trial court, it was harmless. "The key factor for determining whether a trial error constitutes reversible error is 'whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."'" *State v. Tapp*, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012) (*quoting Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824 (1967)). "Whether an error is harmless depends on the circumstances of the particular case." *State v. Mitchell*, 378 S.C. 305, 316, 662 S.E.2d 493, 499 (2008). "No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it 'could not have reasonably affected the result of the trial.'" *State v. Key*, 256 S.C. 90, 180 S.E.2d 888 (1971).

The evidence of Appellant's guilt at trial was strong. In all, the victim himself gave three dying declarations that Jermaine White was his killer, and those statements were captured on Officer Ballard's body camera. Appellant's own cousin testified that he was the shooter; Appellant's girlfriend at the time testified he was not with her that day but was driving the car seen at or about the scene before and after the crime; she also told the jury Appellant had asked her for help getting rid of a gun the day after the crime. The appellant himself admitted to burning his cell phone in the fireplace the next day and to driving the car seen near the scene. The murder weapon was found on the kitchen table inside his house. He had no alibi. The

defense cannot conclusively or reasonably show that the detective's explanation of "FBI" means "snitch" affected the outcome of the trial.

*In State v. Liverman*, this Court found that if there was error by the trial court in allowing testimony that hash mark tattoos referred to prior homicides, it was harmless. There was substantial other evidence suggesting defendant's guilt. *State v. Liverman*, 386 S.C. 223, 687 S.E.2d 70 (Ct. App. 2009). In *Liverman*, however, unlike in this case, the solicitor introduced the testimony through an expert witness qualified to testify about gang activity. *Id*. at 240, 687 S.E.2d at 78-79. Entering that testimony in through an expert was necessary, as knowing a tattoo of a hash mark referred to prior homicides was specialized knowledge. This was proven by the simple fact that the defense's own expert in the field of gang identification did not even know what a hash tag tattoo on a gang member meant. *Id*. at 241, 687 S.E.2d at 79. That is not the case here. As the solicitor said, we all know what the "FBI" is. It does not take specialized knowledge to make the inferential leap (as lay people are permitted to do under Rule 701) from "FBI" to "snitch." It's a conclusion common to the thought process of ordinary men.

This case is fundamentally different from *State v. Ostrowski*, 435 S.C. 364, 867 S.E.2d 269 (Ct. App. 2021). The definitions of "clear" or "no green" are not readily known or common to an ordinary juror's reasoning process like "FBI" or "eating the cheese" are. 435 S.C. at 376, 867 S.E.2d at 376. "Clear" and "no green" are terms common only to the drug trade, whereas "FBI" and "eating the cheese" are terms common in ordinary life, film, and schoolhouse lore. They're street slang terms, rather than drug trade or gang terms. This case is also fundamentally different from *Hamrick v. State* where a law enforcement officer improperly interpreted evidence as a lay witness by commenting on the trajectory of the victim's body as it flew through the air and on whether the vehicle that struck the victim actually traveled into the construction zone or

not: the main issue at trial. *Hamrick v. State*, 426 S.C. 638, 828 S.E.2d 596 (2019). Here, the detective did not interpret or apply the evidence. He merely explained that, based on his personal knowledge in general and based on his duty to explain the steps he took to decide to arrest Jermaine White for murder to the jury, "FBI" meant "snitch."

To close, law enforcement officers are permitted to offer lay opinions regarding what street slang terms mean all over this country. In Arkansas, a police investigator properly gave lay opinion testimony about the definitions of a "jack move" and "creepen" in a burglary case. *Hill v. State*, 2018 Ark. 194, 546 S.W.3d 483 (2018). A detective's testimony of the definitions of "fam," "wea at," "we are at," "he b-tched out," and "we still havin 5" was proper lay testimony in Colorado. *People v. Glover*, 363 P.3d 736 (Colo. App. 2015). In D.C.,"Gleezy," and "bagging" was properly explained to the jury by a lay witness law enforcement officer because it was testimony that resulted from a process of reasoning familiar in everyday life. *King v. U.S.*, 74 A.3d 678 (D.C. 2013). An Indiana detective properly testified under their version of Rule 701 to the definitions of "go lay on him," "go all the way with this mother f***er," "post up at the crib," "it might not be a rap but…" and more in *Erkins v. State*, 988 N.E.2d 299 (Ind. Ct. App. 2013) (vacated on other grounds, 13 N.E.3d 400 (Ind. 2014)). A detective in Louisiana told the jury as a lay witness that he interpreted the phrase "b-tch" to mean untraceable gun. *State v. McClure*, 169 So. 3d 510 (La. Ct. App. 5th Cir. 2015). The list goes on and on.

The issue of whether the trial court permissibly allowed Detective Kinard to testify as a lay witness to the meaning of "FBI" is not preserved for appellate review. Even if it were, though, the record does not show the trial court erred in its treatment of the defense's two objections. Even if the court did err, though, it was a harmless error due to the separately strong evidence of Appellant's guilt. Nevertheless, the testimony was proper under Rules 602 and 701

as lay witness testimony. Just because a juror does not have the specific knowledge base of a topic when they walk in the courtroom does not mean that lay witness testimony explaining a topic to them is improper. It is proper as long as it was from a process of reasoning common to ordinary life. The inference that "FBI" meant "snitch" (and that "eating the cheese" meant "snitch" for that matter) was just that. This Court should affirm.

## CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, convictions, and sentences of the lower court be affirmed.

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June 14, 2022

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STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM COLLETON COUNTY
Honorable Thomas W. Cooper, Jr., Circuit Court Judge

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Appellate Case No. 2021-000452

THE STATE, .....RESPONDENT,

v.

JERMAINE SILAS WHITE,.....APPELLANT.

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**CERTIFICATE OF COMPLIANCE**

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The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

This 14th day of June, 2022.

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