THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of General Sessions
Thomas A. Russo, Circuit Court Judge

Opinion No. 5110 (S.C. Ct. App. filed April 3, 1013), Appellate Case No.2011-197635

THE STATE,

RESPONDENT/PETITIONER,

V.

ROGER BRUCE,

PETITIONER/RESPONDENT.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Thomas A. Russo, Circuit Court Judge

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V.

ROGER BRUCE,

APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to suppress evidence seized from appellant's residence and a car in his backyard when the police took keys to the car from the residence without consent and without a search warrant?

STATEMENT OF THE CASE

Appellant was convicted of murder after a jury trial held before the Honorable Thomas A. Russo on August 8, 2011, in Florence County. A life sentence was imposed. Jack W. Lawson, Esquire was trial counsel. E. L. Clements, III, Esquire was the solicitor.

This appeal follows.

ARGUMENT

The trial court erred in refusing to suppress evidence seized from appellant's residence and a car in his backyard when the police took keys to the car from the residence without consent and without a search warrant.

On October 12, 2009, around 11:00 Officer Gary Beckett with the Florence Police Department was dispatched to 1450 King Avenue for a welfare check on the victim, Laura Creel. (ROA p. 112, line 16 – p. 113, line 5). The victim's son had called the police and told them he had not seen or spoken to the victim in about three days. (ROA p. 115, line 20 – p. 116, line 3). The victim lived in a garage apartment with appellant. The apartment was behind the main house on 1450 King Avenue. Her vehicle was there. (ROA p. 113, lines 3-23). Officer Beckett walked to the apartment with Cpl. Hobgood and Officer Starling. Beckett said he saw someone looking out a screened door. He shined a flashlight and it was appellant. The police explained they were doing a welfare check on the victim and asked if she may be inside. Appellant told them she was not inside and they asked if they could come in and take a quick look. Appellant gave them permission to come inside. Beckett said he did not notice anybody else inside. (ROA p. 116, line 19 – p. 117, line 24). They asked appellant when was the last time he may have talked to the victim or seen her. Appellant said he and the victim had an argument a few days earlier and then she left. He didn't know where she went. (ROA p. 118, lines 14-23).

Officer Beckett then said they noticed a cell phone and some keys which were consistent with the vehicle outside. They asked whose phone and appellant said it was the victim's. Then Cpl. Hobgood picked up the keys and went outside to the vehicle. He shined a flashlight through the windows and everything appeared fine inside. He attempted

to open the trunk. At this point defense counsel objected and the jury was sent out. (ROA p. 119, lines 1-25). Defense counsel objected to the evidence concerning police opening the trunk and finding the victim's body. The police had no search warrant and did not get consent from appellant to search the vehicle. The trial court questioned about appellant's standing to raise the issue, but defense counsel noted that the car was on his property parked on the driveway at the back of his house and the keys were in his house. The police did not ask permission to take the keys. (ROA p. 120, line 6 – p. 121, line 21).

The solicitor then tried to argue that previously Cpl. Hobgood had testified that appellant went for the keys to show them which key to open the trunk with before the police used the trunk release button. (ROA p. 121, line 22 – p. 122, line 11). Contrary to the solicitor's assertion, a review of Cpl. Habgood's testimony from the day before does not show that appellant went for the keys to show them how to open the trunk. (ROA p. 33, line 7 – p. 38, line 2). Later in the trial, Cpl. Habgood did testify that appellant tried to grab the keys and Habgood did not know what appellant's intentions were so he pulled the keys back. (ROA p. 144, line 10 – p. 181, line 18).

Even though the trial court did not have the correct information before it, it held the issue was one of inevitable discovery: "but/for hitting the trunk release button and opening the trunk according to the earlier testimony Mr. Bruce was going to open the trunk for them, or at least was providing the keys to do so." (ROA p. 122, lines 12-16).

The trial court's ruling on this matter was in error. The prosecution bears the burden of showing by a preponderance of the evidence that the items seized would ultimately have been discovered lawfully even though it was obtained by an illegal seizure. Nix v. Williams, 467 U. S. 431, 444, 104 S. Ct. 2501 (1984). The prosecution has not met that

burden. See, State v. Brown, 389 S.C. 473, 698 S.E.2d 811, 817 (Ct. App. 2010). The prosecution has also not shown why they could not have obtained a search warrant for the car keys or why they could not have asked for consent in accordance with the Fourth Amendment to the United States Constitution. The trial court did not even address the fact that the initial seizure of the keys was in violation of the Fourth Amendment.

In the United States v. Allen, 159 F. 3d 832 (4th Cir 1998) the court dealt with the question of whether the existence of probable cause triggers the inevitable discovery doctrine. It wrote:

> The existence of probable cause for a warrant in and of itself and without any evidence that the police would have acted to obtain a warrant, does not trigger the inevitable discovery doctrine any more than probable cause, in and of itself, renders a warrantless search valid. The inevitable discovery doctrine applies to alleviate "formalistic" and "pointless" applications of the exclusionary rule, Nix, 467 U.S. at 445, 104 S. Ct. 2501, but it does not and cannot eliminate Fourth Amendment protections.

159 F. 3d at 841.[1]

Where "no exception to the warrant requirement applies, and no warrant has been obtained, and nothing demonstrates that the police would have obtained a warrant absent the illegal search, the inevitable discovery doctrine has no place." Id at 841 (emphasis in original).

Finally:

> To permit the presence of evidence establishing probable cause to whitewash the unlawful search would eviscerate the warrant requirement. As Judge Posner has noted, "a warrant is a condition precedent to a lawful search or seizure, other

[1] See, also United States v. Cabassa, 62 F. 3d 470, 472 – 474 (2d Cir. 1995) and United States v. Cherry, 759 F.2d 1196, 1206 (5th Cir. 1985) where there was no warrant the inevitable discovery doctrine did not apply.

> than in exceptional circumstances of which superfluity is not one." United States v. Cardona-Rivera, 904 F. 2d 1149, 1155 (7th Cir. 1990).

Id at 843.

All of the evidence obtained as a result of the illegal seizure of the car keys was the fruit of the poisonous tree and should not have been admitted. Wong Sun v. U.S., 371 U. S. 471, 83 S. Ct. 407 (1963); State v. Brown, 389 U.S. 473, 698 S.E. 2d 811 (Ct. App. 2010); Commonwealth v. Benoit, 382 Mass. 210, 415 N.E. 2d 818 (1981).

CONCLUSION

Appellant's conviction should be reversed.

Respectfully submitted,

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of May, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 23rd, 2012

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STATE OF SOUTH CAROLINA

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Appeal from Florence County

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APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Brendan J. McDonald, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rd day of May, 2012.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of May, 2012.

(L.S.)
Notary Public for South Carolina
My Commission Expires: June 21, 2020 .

STATE OF SOUTH CAROLINA

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A. The Officers had Consent to Search the House and Seize the Keys

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I. Whether the trial court erred in refusing to suppress evidence seized from appellant's residence and a car in his backyard when the police took keys to the car from the residence without consent and without a search warrant?

RESPONDENT'S COUNTER-QUESTION PRESENTED

I. Whether the trial court's factual finding supporting its ruling that the victim's body would have been discovered pursuant to the inevitable discovery doctrine is clearly erroneous.

II. If in fact the trial court's factual finding supporting its ruling that the victim's body would have been discovered pursuant to the inevitable discovery doctrine is clearly erroneous, whether reversal is appropriate where the record clearly demonstrates the keys to the victim's car were obtained as a result of authorities receiving consent from appellant to search the residence, appellant informed authorities the keys found in the residence were the victim's car keys, a car in which he had no possessory interest, and appellant never expressly limited or revoked his consent to the search.

INTRODUCTION

On October 12, 2009, Florence authorities, while performing a welfare check at a residence occupied by Laura Creel ("Victim") and her boyfriend, Roger Bruce ("Appellant"), discovered Victim's body stuffed in the trunk of her car. (R. 109-10, 116-17, 127). The ensuing investigation culminated in the trial and conviction of Appellant. (R. 459).

STATEMENT OF THE CASE

Appellant was indicted by the Florence County grand jury for murder (#2010-GS-21-0254). (R. 465-66). Following his indictment, Appellant was tried before the Honorable Thomas A. Russo and a jury on August 8-11, 2011 in Florence. (R. 1). At trial, Appellant was represented by chief public defender, Jack Lawson and assistant public defender Scott P. Floyd, while the State was represented by solicitor E.L. Clements, III. (R. 1). At the conclusion of trial, Appellant was found guilty and received a life sentence. (R. 459-60, 464).

STATEMENT OF THE FACTS

On Monday, October 12, 2009, at approximately 11:00 PM, Appellant called Victim's son, Shane Ritch ("Shane"), from Victim's cell phone. (R. 88-89). During the course of the conversation, Appellant informed Shane that while Victim's car was at the residence he shared with Victim, he had not seen or heard from Victim "in a couple of days" and was curious whether Shane had heard from Victim. (R. 90). After telling Appellant he had not heard from Victim, Shane became concerned and called his brother Michael Ritch ("Michael") who in turn called Appellant. (R. 91). Thereafter, Michael, who described his conversation with Appellant as "funny," called Shane to express his concern over the situation. (R. 91). As a result of their conversation, Shane called Florence authorities requesting that they perform a welfare check at the residence occupied by Victim and Appellant. (R. 91).

Pursuant to this request, Officer Gary Beckett was dispatched to Victim and Appellant's residence, a one bedroom garage apartment. (R. 109, 110-11). After knocking on the door for approximately ten minutes and receiving no response, Beckett returned to his patrol car and had dispatch connect him with Shane. (R. 110-11, 113-14, 115). During Shane and Beckett's conversation, Shane informed Beckett that Appellant was inside as Shane had called and spoken to Appellant from a different line while he was on the line with dispatch. (R. 92). Shane further informed Beckett that both he and his brother spoke with Victim almost daily, but neither of them had heard from Victim in three days. (R. 116). Additionally, Beckett learned Appellant had a substance abuse problem, the couple had recently been in an argument and that it was unusual for Victim to leave the residence without her cell phone or car. (R. 116, 92-93).

In the midst of Shane and Beckett's conversation, Beckett was joined by his supervisor, Charles Hobgood and an additional patrol officer, Steven Starling, prompting Beckett to end the telephone conversation with Shane in order to brief them on the situation. (R. 116). After briefing Hobgood and Starling, the three returned to the residence where they saw Appellant who was looking out of the apartment's screen door. (R. 117). At that time, the officers explained to Appellant that they were there to check on Victim and asked Appellant if she was inside. (R. 117). In response, Appellant informed the officers that Victim was not inside, but gave the officers permission to "come in and take a look." (R. 117). After scanning the residence, the officers asked Appellant when he last saw Victim and if he had any idea where she may be. (R. 118). Answering the officers, Appellant explained Victim had left him following an argument a few days ago and he did not know where she was. (R. 118).

Over the course of their conversation, the officers observed a cell phone and keys which were consistent with the vehicle parked outside of the residence prompting them to ask Appellant

who owned the cell phone and keys. (R. 119). Appellant then explained the cell phone and keys belonged to Victim. (R. 119, 49-50, 50-51, 167,168).

At that time, Hobgood picked up the car keys and proceeded out to the vehicle in an effort to find "maybe a pocketbook" or "something that may give us an idea where she may be." (R. 118, 144). Appellant and the remaining officers followed and after Hobgood scanned the interior of the vehicle and unsuccessfully attempted to open the trunk, he asked Appellant which key opened the trunk. (R. 126, 145, 156-57, 168). Responding to Hobgood's question, Appellant, who was positioned towards the front of the car, "walked towards" Hobgood "with his arm out like he was going to grab the keys" prompting Hobgood to instruct Appellant to tell him which key opened the trunk rather than show him which key opened the trunk. (R. 126, 145, 156-57, 168). During this exchange, Starling, who was positioned next to Hobgood behind the trunk, hit the trunk release button on the key fob, opening the trunk. (R. 90-91, 146, 169). When the trunk opened, Starling and Hobgood observed a female body, later identified as Victim's, in the trunk. (R. 127-28, 146, 169). At that time, Appellant was handcuffed and later transported for questioning. (R. 128-29, 151-52, 153-54). He was subsequently arrested after telling investigators, who were unaware of what caused Victim's death, "he wouldn't shoot Laura." (R. 381).

At trial, forensic pathologist, Dr. Cynthia Schandl testified Victim died as a result of a single, small caliber gunshot wound to the head fired at point blank range. (R. 241, 256). Further, SLED firearms and ballistics expert Kenneth Whitler explained that a spent cartridge recovered from the residence was fired by a Marlin .22 caliber rifle, which was found under Appellant's bed. (R. 321, 283, 323-24, 278-79, 167). Whitler further testified that while he could not conclusively state the bullet recovered from Victim's head was fired by Appellant's

rifle due to deformities in the bullet, the bullet was consistent with having been fired by the rifle. (R. 326-28). Additionally, SLED DNA and serology expert Katherine Leisy testified Appellant's DNA was found on the rifle's trigger, stock and barrel. (R. 334, 335-36). Leisy also determined a portion of blood soaked carpet found inside the residence contained Victim's DNA. (R. 339).

PRESENTATION OF ISSUE AT TRIAL

Prior to trial, defense counsel informed the trial court they intended to suppress "evidence obtained in relation to the body itself" based upon their belief the evidence was obtained in violation of Appellant's Fourth Amendment rights. (R. 5). However, defense counsel further informed the court that it would seek to suppress such evidence at the time the State sought to introduce it. (R. 5). Accordingly, while Becket was testifying regarding the officers attempt to open the trunk, defense counsel objected and the jury was sent to the jury room. (R. 119). Defense counsel then explained "[w]e're getting to the point where the trunk is about to be open, and I understand—the Defense would object to the discovery of the body in that fashion, basis that there was no search warrant obtained and no—does not appear any consent by my client given at that time to search the vehicle. I know that he allowed them to come in and look when they asked, but there's no indication that he consented[.]" (R. 120).

In response to defense counsel's objection, the trial court questioned whether Appellant had standing to object to the search of a vehicle that was not his. (R. 120). Replying to the trial court's question, defense counsel argued Appellant had standing to challenge the search because the car was on his property and the keys were found in the house. (R. 120). The State then argued Appellant did not have standing to challenge the search since the officers knew the keys and car belonged to Victim and Appellant had given the officers permission to enter the

residence. (R. 120). Continuing, the State noted Appellant simply did not have a reasonable expectation of privacy in a car that was not his. (R. 120-21). Defense counsel then argued Appellant and Victim were essentially in a common law marriage and the officers only knew the vehicle in the driveway looked like Victim's car. (R. 121). Based upon this, defense counsel further argued that the officers needed Appellant's permission to take the keys, which defense counsel claimed, they never attempted to do. (R. 121). In response, the State explained:

> Your Honor, I think Corporal Hobgood yesterday testified that [Appellant] said, here, and went to the keys and said, I'll show you which key to open it with and they hit the trunk release button and opened the trunk and so [Appellant] didn't have to. I think that was the testimony of Corporal Hobgood yesterday, and I'm pretty sure that that would have been testimony we'd gotten from him as well, but I don't think—I don't think there's any evidence; I don't think no one has ever said, yeah we're husband and wife. Just the fact that people live together, that doesn't establish in and of itself common law marriage. I just don't think he had any standing or any expectation of privacy in that vehicle and he also had offered to open the trunk for him before they hit the trunk release button.

(R. 122). Thereafter, the trial court noted, "[i]t appears that this is inevitable discovery; but/for hitting the trunk release button and opening the trunk according to the earlier testimony, [Appellant] was gonna open the trunk for them, or at least was providing the keys to do so." (R. 122). Continuing, the trial court determined, "I'm gonna overrule the objection and allow it." (R. 122). Defense counsel then argued "I understand it may inevitably have been discovered at a later point and what I'm saying is that any evidence gathered in the time between when it was discovered and when it would have been discovered would be appropriately suppressed in spite of the fact that they may have inevitably discovered it with a proper search warrant." (R. 122-23).

STANDARD OF REVIEW

In criminal cases, appellate courts sit only to review errors of law and are bound by the factual findings of the trial court unless they are found to be clearly erroneous. State v.

Hernandez, 386 S.C. 655, 659, 690 S.E.2d 582, 584 (Ct. App. 2010). With respect to reviewing a Fourth Amendment search and seizure issue, the court must affirm "if there is any evidence to support the trial court's ruling and will reverse only where there is clear error." State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011); State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000).

ARGUMENT

I. The trial court's factual finding supporting its ruling that the victim's body would have been discovered pursuant to the inevitable discovery doctrine is supported by the evidence in the record and is not clearly erroneous

Appellant first argues the trial court erroneously determined the victim's body would have been inevitably discovered.[1] Specifically, Appellant contends the trial court's ruling was based upon the solicitor's incorrect recollection of the facts as testified to by the State's witnesses during a Jackson v. Denno hearing conducted the previous day. Accordingly, Appellant concludes the State failed to show Victim's body would have been discovered lawfully. See Nix v. Williams, 467 U.S. 431, 444 (1984) (holding the government must establish, by a preponderance of the evidence, that the evidence seized unlawfully would ultimately have been discovered through lawful means). The State disagrees because even assuming the solicitor's recollection of the factual testimony from the Jackson v. Denno hearing was incorrect, the evidence at trial supported the trial court's ruling on inevitable discovery meaning the trial court's ruling does not amount to clear error. See State v. Wright, 391 S.C.

[1] Initially, the State notes the trial court did not rule on whether Appellant had standing to challenge the search of the car, and if he did, whether Appellant had consented to such a search. Thus, while Appellant argues the State has "not shown why they could not have obtained a search warrant for the car keys or why they could not have asked for consent in accordance with the Fourth Amendment" neither of these questions are before this Court as the trial court declined to rule on both of these issues. In fact, Appellant concedes this writing, the trial court "did not even address the fact that the initial seizure of the keys was in violation of the Fourth Amendment." (Br. of App. at 7). Accordingly, these issues are not preserved for appellate review. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (requiring an issue be raised to and ruled upon by the trial court in order to be preserved for appellate review).

436, 442, 706 S.E.2d 324, 326 (2011) ("When reviewing a Fourth Amendment search and seizure issue, this court must affirm if there is any evidence to support the trial court's ruling and will reverse only where there is clear error.").

The inevitable discovery doctrine is an exception to the exclusionary rule which states that evidence which is illegally obtained will still be admissible where the prosecution can establish, by a preponderance of the evidence, that such evidence would have been discovered by lawful means. Nix, 467 U.S. at 444. Thus, "[w]hen the State has met its burden of proving it inevitably would have discovered the evidence, the 'deterrence' purpose of the exclusionary rule is not 'clearly subserved,' and there is no rational basis to keep that evidence from the jury to ensure the fairness of the trial proceedings.'" State v. Spears, 393 S.C. 466, 482, 713 S.E.2d 324, 332 (Ct. App. 2011) (quoting Nix 467 U.S. at 447).

As noted above, Petitioner maintains the State failed to prove inevitable discovery by a preponderance of the evidence because the solicitor incorrectly informed the trial court regarding the substance of Hobgood's testimony in the Jackson v. Denno hearing. In response, the State notes that while Appellant is correct insofar as Hobgood's testimony from the Jackson v. Denno hearing did not establish that Appellant was reaching for the keys, the record conclusively supports the trial court's inevitable discovery ruling—that but for Starling's actions, Appellant, who was aiding the officers in their search, would have shown Hobgood the key to the trunk resulting in a lawful discovery of the evidence.

In fact, almost immediately after the trial court denied defense counsel's motion to suppress, the solicitor elicited testimony from Officer Beckett indicating Appellant was reaching for the keys to show Hobgood which key would open the trunk. (R. 126-27). Specifically, Beckett testified Appellant was attempting to show Corporal Hobgood which key opened the

trunk of Victim's car immediately before Officer Starling hit the trunk release button on Victim's key ring. (R. 126-27). Likewise, Hobgood testified to essentially the same, adding that Appellant actually offered to show him which key opened the trunk right before Starling hit the trunk release button. (R. 145). This was confirmed on cross-examination and again during Starling's direct examination. (R. 156-58, 168-69). Accordingly, the State submits Appellant cannot demonstrate the trial court's ruling on inevitable discovery amounted to clear error as there was evidence to support the trial court's ruling. See State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) ("When reviewing a Fourth Amendment search and seizure issue, this court must affirm if there is any evidence to support the trial court's ruling and will reverse only where there is clear error.").

II. Even if the trial court's factual finding supporting its ruling that the victim's body would have been discovered pursuant to the inevitable discovery doctrine is clearly erroneous, the record clearly demonstrates the keys to the victim's car were obtained as a result of authorities receiving consent from appellant to search the residence, appellant informed authorities the keys found in the residence were the victim's car keys, a car in which he had no possessory interest, and appellant never expressly limited or revoked his consent to the search

The State further asserts, as additional sustaining grounds, that even if the trial court's factual finding is determined to be clearly erroneous, the judgment should still be affirmed as the record reflects: (A) Victim's keys were obtained as a result of a consent search; (B) the keys were not Appellant's and Appellant had no possessory interest in Victim's car meaning Appellant had no standing to challenge the search of the car; and (C) even if Appellant did have a possessory interest in Victim's car, Appellant never expressly limited or revoked his consent to search, but instead, through his actions, implicitly consented to the search of the car. See Rule 220(c), SCACR (explaining the appellate court may affirm any ruling, order or judgment for any ground appearing in the record on appeal).

A. The Officers had Consent to Search the House and Seize the Keys

As noted in the statement of facts, the record conclusively shows Appellant voluntarily gave the officers permission to search his house. Therefore, even if the trial court's ruling on inevitable discovery is clearly erroneous, reversal would not be required because Appellant consented to allowing the officers to search his home.

"The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . ." State v. Spears, 393 S.C. 466, 482, 713 S.E.2d 324, 332 (Ct. App. 2011). "Warrantless searches and seizures are reasonable within the meaning of the Fourth Amendment when conducted under the authority of voluntary consent." State v. Provet, 391 S.C. 494, 507, 706 S.E.2d 513, 520 (Ct. App. 2011). "Undoubtedly, a law enforcement officer may request permission to search at any time." Id. Nevertheless, the State "bears the burden of establishing the voluntariness of the consent." Id. Determining the voluntariness of consent to search is a question of fact to be determined from the totality of the circumstances. Id.

Here, the State submits Appellant voluntarily consented to allowing the officers to search the residence and therefore, cannot object to the seizure of Victim's keys which were found in plain view inside the residence. Specifically, the record demonstrates that while Appellant may have been intoxicated, he clearly understood the officers were at the residence to check on Victim and understanding this to be the case, agreed to let the officers search the premises and question him regarding Victim's whereabouts without qualification. (Tr. 117-19, 141-42, 158, 164-65, 166). In fact, Appellant consistently demonstrated his ability to respond to questions posed to him by the officers volunteering that the keys and cell phone found in the residence were not his, but Victim's. (Tr. 117, 49-50, 50-51, 167, 168). Accordingly, as Appellant

voluntarily consented to allowing the officers to search and question him regarding Victim's whereabouts, it logically follows that the keys, which were obtained as a result of this consent search were lawfully obtained and therefore the seizure was not unreasonable and did not violate Appellant's Fourth Amendment rights.

B. Appellant had no Standing to Challenge the Search of the Car

Additionally, Appellant did not have standing to challenge the search of Victim's car where the record reflects Appellant did not have a possessory interest in the car. While defense counsel argued Appellant had standing based upon the fact the car was located in the yard of the residence he occupied, the State submits this fact simply does not matter, as the car, which was the property that was actually searched, was not Appellant's.

For purposes of Fourth Amendment analysis, "[a] 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." State v. Moore, 377 S.C. 299, 307, 659 S.E.2d 256, 260 (Ct. App. 2008) (quoting U.S. v. Jacobsen, 466 U.S. 109, 113 (1984)). Further, in Rakas v. Illinois, 439 U.S. 128 (1978) the Supreme Court of the United States addressed whether evidence seized in an automobile in which defendants had been passengers should have been suppressed. In doing so, the Court held that:

> Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted. A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections. There is no reason to think that a party whose rights have been infringed will not, if evidence is used against him, have ample motivation to move to suppress it. Even if such a person is not a defendant in the action, he may be able to recover damages for the violation of his Fourth Amendment rights, or seek redress under state law for invasion of privacy or trespass.

Rakas, 439 U.S. at 133–34 (internal citations omitted).

Here, the record clearly reflects Appellant did not have a possessory interest in Victim's vehicle. Specifically, there was a wealth of testimony indicating Victim owned the car and drove the car exclusively. (R. 90, 101-102, 218-219). Additionally, an inventory of the car indicated the car was registered in Victim's name and was insured in Victim's name. (R. 305-306). Furthermore, there is no evidence showing Appellant had permissive use of the vehicle at the time the car was searched. Accordingly, the State submits Appellant did not have standing to contest the search of Victim's car and therefore could not seek exclusion of the evidence seized pursuant to the search of the car. See Rakas, 439 U.S. at 133 ("Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted. A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed.").

C. Appellant Never Expressly Revoked or Limited his Consent to the Search

Finally, even if Appellant did have a possessory interest in Victim's car, Appellant never expressly limited or revoked his consent to search once the officers removed the keys from the residence and began to use them to open Victim's car. In fact, rather than expressly revoke or limit his consent, Appellant instead, by way of his actions, implicitly consented to the search of Victim's car.

In State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001) the Supreme Court of South Carolina explained that pursuant to the South Carolina Constitution, "suspects are free to limit the scope of the searches to which they consent." 343 S.C. at 648, 541 S.E.2d at 843. Continuing, the Forrester Court stated, "[w]hen relying on the consent of a suspect, a police

officer's search must not exceed the scope of the consent granted or the search becomes unreasonable." Id. "The scope of the consent is measured by a test of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" State v. Mattison, 352 S.C. 577, 585–86, 575 S.E.2d 852, 856 (Ct.App.2003) (citation omitted).

Here, the State submits the facts and circumstances surrounding the search clearly informed Petitioner of the scope of the search. Furthermore, even if one were to assume that Appellant did not consent to a search of Victim's car when he granted consent, the facts surrounding his questioning and the subsequent actions of the officers and Appellant clearly demonstrate Appellant, despite having the opportunity to limit the search or revoke his consent, declined to do so, instead deciding to aid the officers in the search of Victim's vehicle.

Indeed, Appellant was clearly aware, based upon the statements and actions of the officers that they intended to use the keys to search Appellant's car. Specifically, Appellant was asked who owned the keys they found in the residence, and after he explained the keys were Victim's, observed the officers as they proceeded to Victim's car in an attempt to unlock the vehicle. (R. 118, 119, 49-50, 50-51, 144, 167, 168). Nevertheless, Appellant, rather than revoking or limiting consent, chose to aid the officers in their search by attempting to show them which key opened the trunk in Victim's car. (R. 126, 145, 156-57, 168).

Understanding these circumstances, the State submits an objectively reasonable person would have understood that when the officers asked whose keys were in the apartment, picked the keys up, headed outside and began using the keys, the scope of consent may have changed. However, despite these facts, the State submits that an objectively reasonable person would have interpreted Appellant's additional actions of attempting to aid the officers in their search, as

implicitly consenting to the expanded search rather than seeking to limit or revoke his consent. Accordingly, the State submits Appellant's Fourth Amendment Rights were not violated and therefore, the evidence obtained from the search of the car should not be excluded.

CONCLUSION

For the aforementioned reasons, the State respectfully requests this Court affirm the judgment imposed by the trial court.

Respectfully Submitted,

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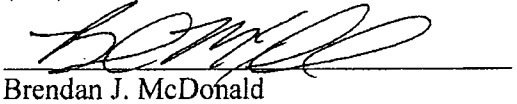

Brendan J. McDonald
ATTORNEY(S) FOR RESPONDENTS

June 12, 2012.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

ROGER BRUCE,

APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR. The undersigned also certifies that the Final Brief is in compliance with the South Carolina Supreme Court's Order of August 13, 2007.

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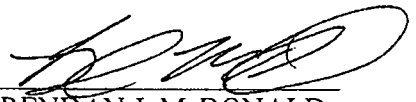
By: 

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Florence County

Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

ROGER BRUCE,

APPELLANT

PROOF OF SERVICE

I, Brendan J. McDonald, Counsel for Respondent, certify that I have served the Final Brief of Respondent and Designation of Matter, dated June 12, 2012, on Appellant by depositing two copies of the same in the United States mail, first class postage prepaid, addressed to his attorney of record:

Robert M. Pachak, Appellate Defender
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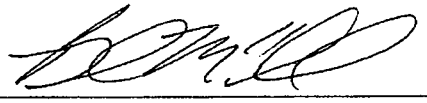
This 12th day of June, 2012.



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ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Roger Bruce, Appellant.

Appellate Case No. 2011-197635

Appeal From Florence County
Thomas A. Russo, Circuit Court Judge

Opinion No. 5110
Heard January 9, 2013 – Filed April 3, 2013

REMANDED

Appellate Defender Robert M. Pachak, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Brendan J. McDonald, all of Columbia, for Respondent.

FEW, C.J.: Roger Bruce was convicted of murdering his girlfriend Laura Creel. On appeal, he argues the trial court erred in admitting evidence of the discovery of Creel's body, which police found in the trunk of her car, because he claims the search violated his Fourth Amendment rights. In ruling on the issue at trial, the court did not make adequate factual findings or legal conclusions. Rather, the court summarily stated, "I'm going to overrule the objection and allow it." We

hold the trial court's findings are inadequate for appellate review. We remand to the trial court to determine (1) whether Bruce had a legitimate expectation of privacy in the trunk of Creel's car, (2) whether Bruce consented to the search, and (3) if the police violated Bruce's Fourth Amendment rights, whether the exclusionary rule applies.

I. Facts and Procedural History

Late in the evening on October 12, 2009, Creel's son contacted the Florence police department, requesting the police check on Creel at the apartment she shared with Bruce. He told the police he had not heard from her or seen her in "a couple of days." He also informed them that Creel's "goldish" 1997 Chrysler Concord was parked at the apartment and that Bruce had called him from Creel's cell phone.

As officers Gary Beckett, Charles Hobgood, and Steven Starling approached the apartment on foot, they saw Bruce looking out of the apartment's screen door. The officers explained to Bruce they were there to check on Creel and asked if she was home. When Bruce answered no, the officers asked if they could "take a quick look and make sure that she wasn't inside," and he consented. After briefly scanning the residence, the officers observed a cell phone and keys on a table. The keys were consistent with the vehicle parked outside the apartment, and the vehicle was consistent with the description given by Creel's son. Bruce stated the keys and cell phone belonged to Creel, which prompted Hobgood to pick up the keys and walk toward her car, along with the other officers and Bruce.

Hobgood looked through the car windows with his flashlight, searching for "maybe a pocketbook" or "something that may give us an idea where she may be." Hobgood then attempted to open the trunk but was unsuccessful. Hobgood testified Bruce asked, "well, you want me to show you what key[?]"[1] At that point, Bruce "walked towards" Hobgood "with his arm out like he was going to grab the keys," causing Hobgood to instruct Bruce to tell him which key opened the trunk rather than show him. Hobgood testified he was not sure what Bruce's intent was when he walked toward him. However, both Beckett and Starling testified it appeared Bruce walked toward Hobgood with the intent to help him find the correct key. During Hobgood's exchange with Bruce, Starling "got the keys from Hobgood" and pushed the trunk release button, which opened the trunk and revealed a female body, later identified to be Creel.

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[1] There is conflicting testimony as to whether Hobgood asked Bruce which key opened the trunk or whether Bruce volunteered his help.

At trial, Bruce moved to suppress the discovery of the body, arguing the search violated his Fourth Amendment rights because the officers had no search warrant and he had not consented to the search of the car. The court asked, "What standing would he have to object to a search of a vehicle that was not his?" Counsel responded Bruce could make the challenge based on the fact that the car was on his property and the keys were found inside his apartment. The State argued that Bruce had no expectation of privacy in Creel's car, and that he consented to the search and even offered to help the officers open the trunk.

After the court heard counsels' arguments, it stated,

> It appears that this is inevitable discovery; but for hitting the trunk release button and opening the trunk according to the earlier testimony Mr. Bruce was gonna open the trunk for them, or at least was providing the keys to do so.

The court then ruled, "I'm going to overrule the objection and allow it." The jury found Bruce guilty and the court imposed a life sentence.

II. The Sufficiency of the Court's Fourth Amendment Ruling

When a criminal defendant moves to suppress evidence on Fourth Amendment grounds, the trial court must first determine whether the defendant has a legitimate expectation of privacy in the searched premises. *See State v. Crane*, 296 S.C. 336, 341, 372 S.E.2d 587, 589 (1988) ("Because appellant cannot make the threshold demonstration of a legitimate expectation of privacy in connection with the searched premises, he is not entitled to launch the constitutional challenge to the search."); *State v. McKnight*, 291 S.C. 110, 114-15, 352 S.E.2d 471, 473 (1987) (stating a defendant who seeks to have evidence suppressed on Fourth Amendment grounds "must establish that his *own* Fourth Amendment rights were violated" by "demonstrat[ing] a legitimate expectation of privacy in connection with the searched premises"). If the trial court finds the defendant had a legitimate expectation of privacy, it must then determine whether the police violated *his* Fourth Amendment rights. *See, e.g., State v. Missouri*, 361 S.C. 107, 115, 603 S.E.2d 594, 598 (2004) (holding defendant had a legitimate expectation of privacy, which entitled him to challenge the search under the Fourth Amendment); *State v. Rivera*, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009) ("'Warrantless searches and seizures are reasonable within the meaning of the Fourth Amendment

when conducted under the authority of voluntary consent.'" (quoting *Palacio v. State*, 333 S.C. 506, 514, 511 S.E.2d 62, 66 (1999))). If the trial court finds the police violated the defendant's own Fourth Amendment rights, it must then determine whether the evidence should be excluded pursuant to the exclusionary rule. *See State v. Weston*, 329 S.C. 287, 293, 494 S.E.2d 801, 804 (1997) (stating "[s]uppression is appropriate in only a few situations"); *State v. Sachs*, 264 S.C. 541, 566, 216 S.E.2d 501, 514 (1975) (stating "[t]he exclusionary rule is harsh medicine," and "[e]xclusion should be applied only where [the purpose of] deterrence is clearly subserved").

Whether a defendant may challenge a search, whether the police violated a defendant's Fourth Amendment rights, and whether to apply the exclusionary rule are mixed questions of law and fact. *See United States v. Gray*, 491 F.3d 138, 145 (4th Cir. 2007) (stating "the expectation [of privacy] must be one which the law recognizes as legitimate," meaning it "must be objectively reasonable . . . by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society" (internal quotations and citation omitted)); *State v. Austin*, 306 S.C. 9, 17, 19, 409 S.E.2d 811, 816, 817 (Ct. App. 1991) (stating whether a legitimate expectation of privacy exists "depends on a factual determination" and "is a question of fact"); *State v. Tindall*, 388 S.C. 518, 523 n.5, 698 S.E.2d 203, 206 n.5 (2010) (stating that when addressing a challenge under the Fourth Amendment, an appellate court "must ask first, whether the record supports the trial court's [factual] findings . . . and second, whether these facts support a finding that the officer" did not violate the defendant's Fourth Amendment rights); *United States v. Allen*, 159 F.3d 832, 838 (4th Cir. 1998) (explaining "mixed questions of law and fact are involved" in an inevitable discovery ruling). Unless the trial court makes sufficiently specific factual findings on the record, this court has no basis on which to review those findings or the trial court's legal conclusions. *See generally State v. Blackwell-Selim*, 392 S.C. 1, 4, 707 S.E.2d 426, 428 (2011) (holding because the trial court failed to make specific findings of fact to support its ruling, "there was nothing for the Court of Appeals to review").

In admitting the evidence of the discovery of Creel's body, the trial court stated, "It appears that this is inevitable discovery." The court's statement suggests it admitted the evidence under the inevitable discovery doctrine, which is an exception to the exclusionary rule. *State v. Jenkins*, 398 S.C. 215, 227, 727 S.E.2d 761, 767 (Ct. App. 2012). However, a trial court has no need to consider whether the exclusionary rule applies until it has first determined the police violated the defendant's Fourth Amendment rights. The record does not indicate the trial court ever made that determination.

Moreover, this does not appear to be a situation in which the inevitable discovery doctrine is properly applied. *See State v. Spears*, 393 S.C. 466, 482, 713 S.E.2d 324, 332 (Ct. App. 2011) (stating evidence may be admitted despite a violation of the Fourth Amendment "if the government can prove that the evidence would have been obtained *inevitably*" (emphasis added) (quoting *Nix v. Williams*, 467 U.S. 431, 447, 104 S.Ct. 2501, 2511, 81 L.Ed.2d 377, 389 (1984))). In this case, the State presented no evidence that it would have inevitably discovered Creel's body by some other means had the officers not searched the trunk of her car as they did. Therefore, because the record contains no evidence to support the trial court's statement regarding inevitable discovery and inadequate findings as to the requirements of the doctrine, we may not affirm on that basis. *See Jenkins*, 398 S.C. at 230, 727 S.E.2d at 769 (remanding issue of whether inevitable discovery doctrine applied because State did not present evidence in support of the doctrine and the determination "should not be made by this court on a blank record").

We remand with instructions that the trial court make findings consistent with this opinion. *See Austin*, 306 S.C. at 19, 409 S.E.2d at 817 (remanding for determination of whether the defendant "had a reasonable expectation of privacy" because trial court failed to make that determination when it admitted evidence pursuant to an exception to the exclusionary rule); *State v. Richburg*, 250 S.C. 451, 461, 158 S.E.2d 769, 773 (1968) (emphasizing the need for specific findings of fact when the legality of a search or seizure is raised); *Jenkins*, 398 S.C. at 230-31, 727 S.E.2d at 769 (remanding issue of whether inevitable discovery doctrine applied). If the court determines Bruce had a legitimate expectation of privacy in the trunk of Creel's car, the police violated Bruce's Fourth Amendment rights by exceeding the scope of his consent, and the evidence should have been suppressed pursuant to the exclusionary rule, the court shall consider whether the error in admitting the evidence was harmless. If the court determines it erred and the error was not harmless, it shall grant a new trial. If the court determines it did not err in admitting the evidence, or the error was harmless, Bruce's conviction must be affirmed.

REMANDED.

WILLIAMS and PIEPER, JJ., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

ROGER BRUCE,

APPELLANT

Appeal from Florence County

Thomas A. Russo, Circuit Court Judge

Opinion No. 5110

Appellate Case No. 2011-197635

PETITION FOR REHEARING

Pursuant to Rule 221(a), petitioner petitions this Court for rehearing concerning the following points that may have been overlooked or misapprehended. The opinion of the Court asks the lower court to determine if petitioner "had a legitimate expectation of privacy in the trunk of Creel's car..." The Fourth Amendment violation, however, occurred at the moment the police seized the car keys in petitioner's apartment without his consent and without a search warrant. Everything that followed after that was the fruit of the poisonous tree. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1981). The lower court is then asked to determine if the error is harmless. But a trial judge is not to sit in judgment of his own decision. State v. Floyd, 303 S.C.

298, 400 S.E.2d 145 (1991). It is the job of the reviewing court to determine if an error is harmless. State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012); State v. Salley, 398 S.C. 160, 727 S.E.2d 740 (2012); Ex parte Crymes, 630 So.2d 125 (Ala. 1993); Driven v. Com., 361 S.W.3d 877 (Ky. 2012).

The lower court is also asked to make additional findings, but the State should not be allowed to introduce any new evidence as the solicitor had his chance to make the record he did make. Any further attempts to introduce additional facts raises the question of double jeopardy and collateral estoppel. Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141 (1978); Williams v. State, 314 Ga. App. 840, 846, 726 S.E. 2d 66, 71 (Ga. App. 2012). The record in this case is insufficient to support the admissibility of any evidence seized from petitioner's residence in violation of the Fourth Amendment and any evidence that was the fruit of the poisonous tree is also inadmissible.

The petition for rehearing should be granted.

Respectfully submitted,

Robert M. Pachak
Appellate Defender

This 18th day of April, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
Thomas A. Russo, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROGER BRUCE,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Brendan J. McDonald, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 18th day of April, 2013.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 18th day of April, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County

Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2011-197635

THE STATE,

RESPONDENT,

V.

ROGER BRUCE,

APPELLANT

PETITION FOR REHEARING

Comes now Respondent, above named, by and through the Attorney General of South Carolina, and pursuant to Rule 221(a), SCACR, hereby respectfully petitions this Court for rehearing.

INTRODUCTION

On October 12, 2009, Florence authorities, while performing a welfare check at a residence occupied by Laura Creel ("Victim") and her boyfriend, Roger Bruce ("Appellant"), discovered Victim's body stuffed in the trunk of her car. (R. 109-10, 116-17, 127). The ensuing investigation culminated in the trial and conviction of Appellant. (R. 459).

STATEMENT OF THE CASE

Appellant was indicted by the Florence County grand jury for murder (#2010-GS-21-0254). (R. 465-66). Following his indictment, Appellant was tried before the Honorable

Thomas A. Russo and a jury on August 8-11, 2011 in Florence. (R. 1). At trial, Appellant was represented by chief public defender, Jack Lawson and assistant public defender Scott P. Floyd, while the State was represented by solicitor E.L. Clements, III. (R. 1). At the conclusion of trial, Appellant was found guilty and received a life sentence. (R. 459-60, 464). Thereafter, Appellant filed a timely notice of appeal and, on May 23, 2012, filed his final brief arguing, "the trial court erred in refusing to suppress evidence seized from appellant's residence and a car in his backyard when the police took keys to the car from the residence without consent and without a search warrant." Br. of App. at 3. In the conclusion of his brief, Appellant requested only that his conviction be reversed. Br. of App. at 9. In response, the State, via its' final brief maintained the trial court's factual finding, that the victim's body would have discovered pursuant to the inevitable discovery doctrine, was not clearly erroneous and furthermore, even if it was, reversal was not the appropriate remedy in light of a variety of evidence supporting the trial court's judgment. Br. of Resp. at 1. Accordingly, the State asked this Court to affirm the trial court's judgment below. Br. of Resp. at 16.

On April 3, 2012, this Court issued a published opinion remanding the case back to the trial court, stating "the court did not make adequate factual findings or legal conclusions." State v. Bruce, No. 5110 (Ct. App. filed April 3, 2013). In particular, this Court determined, the trial court's findings, that suppression was not the appropriate remedy under the inevitable discovery doctrine, were "inadequate for appellate review." Id. Accordingly, this Court instructed the trial court to evaluate (1) whether Appellant had a legitimate expectation of privacy in the trunk of the victim's car; (2) whether Appellant consented to the search; and (3) if Appellant's Fourth Amendment rights were violated, whether the exclusionary rule applies. Id. The State now seeks rehearing as it believes this Court overlooked or misapprehended the evidence supporting

the trial court's ruling as well as the evidence in the record supporting the additional sustaining grounds advanced by the State.

STANDARD OF REVIEW

"[A] petition for rehearing must 'state with particularity the points supposed to have been overlooked or misapprehended by the court.' " Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011) (quoting Rule 221(a), SCACR). Similarly, "[t]he purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." Kennedy v. S.C. Retirement Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (quoting Jean H. Toal, Appellate Practice in South Carolina 309 (1999)).

BACKGROUND

Prior to trial, defense counsel informed the trial court they intended to suppress "evidence obtained in relation to the body itself" based upon their belief the evidence was obtained in violation of Appellant's Fourth Amendment rights. (R. 5). However, defense counsel further informed the court that it would seek to suppress such evidence at the time the State sought to introduce it. (R. 5). Accordingly, while Beckett, one of the first officers on the scene, was testifying regarding his and others officers attempt to open the trunk, defense counsel objected and the jury was sent to the jury room. (R. 119). Defense counsel then explained "[w]e're getting to the point where the trunk is about to be open, and I understand—the Defense would object to the discovery of the body in that fashion, basis that there was no search warrant obtained and no—does not appear any consent by my client given at that time to search the vehicle. I know that he allowed them to come in and look when they asked, but there's no indication that he consented[.]" (R. 120).

In response to defense counsel's objection, the trial court questioned whether Appellant had standing to object to the search of a vehicle that was not his. (R. 120). Replying to the trial court's question, defense counsel argued Appellant had standing to challenge the search because the car was on his property and the keys were found in the house. (R. 120). The State then argued Appellant did not have standing to challenge the search since the officers knew the keys and car belonged to Victim and Appellant had given the officers permission to enter the residence. (R. 120). Continuing, the State noted Appellant simply did not have a reasonable expectation of privacy in a car that was not his. (R. 120-21). Defense counsel then argued Appellant and Victim were essentially in a common law marriage and the officers only knew the vehicle in the driveway looked like Victim's car. (R. 121). Based upon this, defense counsel further argued that the officers needed Appellant's permission to take the keys, which defense counsel claimed, they never attempted to do. (R. 121). In response, the State explained:

> Your Honor, I think Corporal Hobgood yesterday testified that [Appellant] said, here, and went to the keys and said, I'll show you which key to open it with and they hit the trunk release button and opened the trunk and so [Appellant] didn't have to. I think that was the testimony of Corporal Hobgood yesterday, and I'm pretty sure that that would have been testimony we'd gotten from him as well, but I don't think—I don't think there's any evidence; I don't think no one has ever said, yeah we're husband and wife. Just the fact that people live together, that doesn't establish in and of itself common law marriage. I just don't think he had any standing or any expectation of privacy in that vehicle and he also had offered to open the trunk for him before they hit the trunk release button.

(R. 122). Thereafter, the trial court noted, "[i]t appears that this is inevitable discovery; but/for hitting the trunk release button and opening the trunk according to the earlier testimony, [Appellant] was gonna open the trunk for them, or at least was providing the keys to do so." (R. 122). Continuing, the trial court determined, "I'm gonna overrule the objection and allow it." (R. 122). Defense counsel then argued "I understand it may inevitably have been discovered at a later point and what I'm saying is that any evidence gathered in the time between when it was

discovered and when it would have been discovered would be appropriately suppressed in spite of the fact that they may have inevitably discovered it with a proper search warrant." (R. 122-23).

ARGUMENTS

I. Contrary to this Court's determination, the trial court made adequate legal and factual findings supporting its' ruling that the victim's body would have been discovered pursuant to the inevitable discovery doctrine

On appeal, Appellant claimed the trial court erroneously determined the victim's body would have been inevitably discovered explaining the trial court's ruling was based upon the solicitor's incorrect recollection of the facts as testified to by the State's witnesses during a Jackson v. Denno hearing conducted the previous day. As a result, Appellant maintained the State failed to meet its burden of showing, by a preponderance of the evidence, that Victim's body would have been discovered lawfully.[1] The State disagreed with Appellant's contention arguing that even assuming the solicitor's recollection of the factual testimony from the Jackson v. Denno hearing was incorrect, the evidence at trial supported the trial court's ruling on inevitable discovery meaning the ruling should be affirmed. See State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011) ("When reviewing a Fourth Amendment search and seizure issue, this court must affirm if there is any evidence to support the trial court's ruling and will

[1] Notably, Appellant *never* argued the trial court erroneously applied the inevitable discovery doctrine. Rather, Appellant's only argument on appeal was that the State failed to prove, by a preponderance of the evidence, that the victim's body would have been discovered through lawful means. See Br. of App. at 6-7 ("The prosecution bears the burden of showing by a preponderance of the evidence that the items seized would ultimately have been discovered lawfully even though it was obtained by an illegal seizure. The prosecution has not met that burden.") (internal citation omitted). In other words, Appellant only argued the trial court made a *factual error* rather than a *legal error*. Thus, because Appellant only alleged that the trial court made a *factual error* in his inevitable discovery ruling, this Court by finding "this does not appear to be a situation in which the inevitable discovery doctrine is properly applied," has answered a question which was never asked of it. See Atlantic Coast Builders and Contractors, LLC v. Lewis, 396 S.C. 323, 331 n.4, 730 S.E.2d 282, 286 n.4 (2012) ("If a question is not presented for our review, we should not answer it no matter how much we may want to do so. For as former Chief Judge Alex Sanders famously wrote, 'appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.' ") (quoting Langley v. Boyter, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct.App.1984), quashed on other grounds, 286 S.C. 85, 332 S.E.2d 100 (1985)).

reverse only where there is clear error."). Ruling on the issue, this Court opined there was "no evidence" to support the trial court's inevitable discovery ruling. In so finding, the State submits this Court misapprehended the trial court's application of the inevitable discovery doctrine and further overlooked evidence which clearly supported the trial court's ruling and as such, asks this Court to reconsider its' previous ruling.

Applicable Law

The inevitable discovery doctrine is an exception to the exclusionary rule which states that illegally obtained evidence should not be suppressed where the prosecution can establish, by a preponderance of the evidence, that such evidence would have been discovered by lawful means. Nix v. Williams, 467 U.S. 431, 444 (1984). Thus, "[w]hen the State has met its burden of proving it inevitably would have discovered the evidence, the 'deterrence' purpose of the exclusionary rule is not 'clearly subserved,' and there is no rational basis to keep that evidence from the jury to ensure the fairness of the trial proceedings.'" State v. Spears, 393 S.C. 466, 482, 713 S.E.2d 324, 332 (Ct. App. 2011) (quoting Nix 467 U.S. at 447).

Subsequent case law from the Fourth Circuit Court of Appeals regarding the application of Nix illustrates at least three circumstances in which inevitable discovery may apply. Specifically, in United States v. Allen, 159 F.3d 832 (1998), a case cited by Appellant and relied upon by undersigned counsel throughout the oral argument, the Fourth Circuit found, "[t]he inevitable discovery doctrine may apply where additional routine or factually established investigative steps would inevitably lead to discovery of the evidence without undertaking any search." Id. at 841. Similarly, the Allen Court said, "*the doctrine also may apply where the facts indicate another search inevitably would have occurred and would inevitably have uncovered the evidence, and that search falls within an exception to the warrant requirement.*" Id.

(emphasis added). Continuing, the Allen Court explained, "[t]he doctrine may even apply where the subsequent search that inevitably would have uncovered the disputed evidence required a warrant and the police had probable cause to obtain this warrant prior to the unlawful search but failed to do so, *if* the government produces evidence that the police would have obtained the necessary warrant absent the illegal search." Id. (emphasis in original).

Analysis

As detailed above, this Court determined there was no evidence supporting the trial court's ruling on inevitable discovery. In response, the State submits this Court misapprehended the basis for the trial court's inevitable discovery ruling and as a result, overlooked evidence supporting the trial court's application of inevitable discovery. Specifically, a review of the record shows the trial court's ruling was *not* based upon a factual determination that authorities would have sought and obtained a search warrant as contemplated under the first circumstance in the Allen case. Indeed, the State agrees there was nothing supporting this assertion in the record. Rather, as explained by undersigned counsel during the oral argument, the factual basis supporting the trial court's inevitable discovery ruling was that if Starling had not hit the trunk release button, police would have still lawfully opened the trunk because it was clear Appellant, through his words and actions, consented to the trunk being opened. (R. 126-27, 145, 156-58, 168-69). Thus, consistent with the second example in Allen, because authorities had implicitly received consent from Appellant to open the trunk and consent is a warrantless search exception, the record shows police would have discovered the victim through lawful means absent Starling's intervening action of hitting the trunk release button. See Allen, 159 F.3d at 841 ("The doctrine also may apply where the facts indicate another search inevitably would have occurred and would inevitably have uncovered the evidence, and that search falls within an

exception to the warrant requirement."). Indeed, the record reflects this was clearly the trial court's line of thinking when he stated, "[i]t appears that this is inevitable discovery; but/for hitting the trunk release button and opening the trunk according to the earlier testimony, [Appellant] was gonna open the trunk for them, or at least was providing the keys to do so." (R. 122).

Keeping in mind the trial court's rationale in admitting the evidence, the State submits there is a variety of evidence supporting the trial court's ruling. First, the State notes that almost immediately after the trial court denied defense counsel's motion to suppress, the solicitor elicited testimony from Officer Beckett indicating Appellant was reaching for the keys to show Hobgood which key would open the trunk. (R. 126-27). Specifically, Beckett testified Appellant was attempting to show Corporal Hobgood which key opened the trunk of Victim's car immediately before Officer Starling hit the trunk release button on Victim's key ring. (R. 126-27). Hobgood later corroborated this, adding that Appellant actually offered to show him which key opened the trunk right before Starling hit the trunk release button. (R. 145). This was confirmed on cross-examination and again during Starling's direct examination. (R. 156-58, 168-69). Understanding this, the State submits there is evidence supporting the trial court's inevitable discovery ruling and as such, asks this Court to reconsider its previous ruling. See Wright, 391 S.C. at 442, 706 S.E.2d at 326 ("When reviewing a Fourth Amendment search and seizure issue, this court must affirm if there is any evidence to support the trial court's ruling and will reverse only where there is clear error.").

II. Even if the trial court's inevitable discovery doctrine was not supported by the evidence, the record requires the trial court's judgment be affirmed since: (A) the keys to the victim's car were obtained as a result of authorities receiving consent from Appellant to search the residence; (B) Appellant informed authorities the keys found in the residence were the victim's car keys, a car in

> which he had no possessory interest, and (C) Appellant never expressly limited or revoked his consent to the scope of the search

On appeal, the State asserted three additional sustaining grounds, explaining that even if the trial court's factual finding was determined to be incorrect, the judgment should still be affirmed as the record reflects: (A) Victim's keys were obtained as a result of a consent search; (B) the keys were not Appellant's and Appellant had no possessory interest in Victim's car meaning Appellant had no standing to challenge the search of the car; and (C) even if Appellant did have a possessory interest in Victim's car, Appellant never expressly limited or revoked his consent to search, but instead, through his actions, implicitly consented to the search of the car. See Rule 220(c), SCACR (explaining the appellate court may affirm any ruling, order or judgment for any ground appearing in the record on appeal). In its decision, this Court failed to rule on the State's additional sustaining grounds, instead remanding the case to the trial court and requesting a ruling on these questions. Accordingly, the State submits this Court overlooked the State's additional sustaining grounds in failing to address, or even explain, its' rationale in failing to address the additional sustaining grounds advanced by the State. Therefore, the State asks this Court to substitute an opinion determining, whether the additional sustaining grounds it has submitted may obviate the need for a remand.

Applicable Law

In I'On, L.L.C v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) our Supreme Court explained the purpose served by the submission of additional sustaining grounds opining:

> [A] respondent—the "winner" in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate

> review. *It also could violate the principle that a court usually should refrain from deciding unnecessary questions.*

338 S.C. at 419, 526 S.E.2d at 723 (emphasis added); Williams Carpet Contractors, Inc. v. Skelly, 400 S.C. 320, 327, 734 S.E.2d 177, 181 (Ct. App. 2012). Explaining other requirements of additional sustaining grounds the I'On Court said, "additional sustaining grounds must appear in the record on appeal" Id. at 419-20, 526 S.E.2d at 723 and further stated:

> The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment. An appellate court may not rely on Rule 220(c), SCACR, when the reason does not appear in the record, or when the court believes it would be unwise or unjust to do so in a particular case. It is within the appellate court's discretion whether to address any additional sustaining grounds.

Id. Here, the State submits there is evidence in the record supporting its' assertion that even if the trial court's ruling on inevitable discovery is incorrect, Appellant's conviction and sentence should be affirmed. Specifically, because (A) Appellant consented to the search of the residence at which time he identified the keys found in plain view within the residence as being (B) the *victim's car keys*, a car in which he had no possessory interest, and (C) Appellant never expressly revoked his consent, but instead implicitly consented to the search of the car, his conviction and sentence should be affirmed.

A. The Officers had Consent to Search the House and Seize the Keys

As detailed in the State's brief, the record conclusively shows Appellant voluntarily gave the officers permission to search the residence he shared with the victim. Therefore, even if the trial court's ruling on inevitable discovery is clearly erroneous, reversal would not be required because Appellant consented to allowing the officers to search his home.

"The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . ." State v.

Spears, 393 S.C. 466, 482, 713 S.E.2d 324, 332 (Ct. App. 2011). "Warrantless searches and seizures are reasonable within the meaning of the Fourth Amendment when conducted under the authority of voluntary consent." State v. Provet, 391 S.C. 494, 507, 706 S.E.2d 513, 520 (Ct. App. 2011). "Undoubtedly, a law enforcement officer may request permission to search at any time." Id. Nevertheless, the State "bears the burden of establishing the voluntariness of the consent." Id. Determining the voluntariness of consent to search is a question of fact to be determined from the totality of the circumstances. Id.

Here, the State submits Appellant voluntarily consented to allowing the officers to search the residence and therefore, cannot object to the seizure of Victim's keys which were found in plain view inside the residence. Specifically, the record demonstrates that while Appellant may have been intoxicated, *he clearly understood the officers were at the residence to check on Victim and understanding this to be the case, agreed to let the officers search the premises and question him regarding Victim's whereabouts without qualification.* (R. 117-19, 141-42, 158, 164-65, 166). In fact, Appellant consistently demonstrated his ability to respond to questions posed to him by the officers volunteering that the *car keys and cell phone found in the residence were not his, but Victim's.* (R. 117, 49-50, 50-51, 167, 168). Accordingly, as Appellant voluntarily consented to allowing the officers to search and question him regarding Victim's whereabouts, it logically follows that the keys, which were in plain view and were obtained as a result of this consent search, were lawfully obtained and therefore, the seizure was not unreasonable and did not violate Appellant's Fourth Amendment rights.

B. Appellant had no Standing to Challenge the Search of the Car

Additionally, Appellant did not have standing to challenge the search of *Victim's car* where the record reflects Appellant did not have a possessory interest in the car. While defense

counsel argued Appellant had standing based upon the fact the car was located in the yard of the residence he occupied, the State submits this fact simply does not matter, as the car, which was the property that was actually searched, was not Appellant's.

For purposes of Fourth Amendment analysis, "[a] 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." State v. Moore, 377 S.C. 299, 307, 659 S.E.2d 256, 260 (Ct. App. 2008) (quoting U.S. v. Jacobsen, 466 U.S. 109, 113 (1984)). Further, in Rakas v. Illinois, 439 U.S. 128 (1978) the Supreme Court of the United States addressed whether evidence seized in an automobile in which defendants had been passengers should have been suppressed. In doing so, the Court held that:

> Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted. A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections. There is no reason to think that a party whose rights have been infringed will not, if evidence is used against him, have ample motivation to move to suppress it. Even if such a person is not a defendant in the action, he may be able to recover damages for the violation of his Fourth Amendment rights, or seek redress under state law for invasion of privacy or trespass.

Rakas, 439 U.S. at 133–34 (internal citations omitted).

Here, the record clearly reflects *Appellant did not have a possessory interest in Victim's vehicle.* Specifically, there was a wealth of testimony indicating Victim owned the car and drove the car exclusively. (R. 90, 101-102, 218-219, 236, 345). Additionally, an inventory of the car revealed the victim's driver's license was in the car and further indicated the car was registered and insured in Victim's name. (R. 305-306). In fact, Appellant did not have a driver's license meaning he could not lawfully operate the vehicle. (R. 223). Furthermore, there is no evidence

showing Appellant had permissive use of the vehicle at the time the car was searched. Accordingly, the State submits Appellant did not have standing to contest the search of Victim's car and therefore could not seek exclusion of the evidence seized pursuant to the search of the car. See Rakas, 439 U.S. at 133 ("Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted. A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed.").

C. Appellant Never Expressly Revoked or Limited his Consent to the Search

Finally, even if Appellant did have a possessory interest in Victim's car, Appellant never expressly limited or revoked his consent to search once the officers removed the keys from the residence and began to use them to open Victim's car. In fact, rather than expressly revoke or limit his consent, Appellant instead, by way of his actions, implicitly consented to the search of Victim's car.

In State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001) the Supreme Court of South Carolina explained that pursuant to the South Carolina Constitution, "suspects are free to limit the scope of the searches to which they consent." 343 S.C. at 648, 541 S.E.2d at 843. Continuing, the Forrester Court stated, "[w]hen relying on the consent of a suspect, a police officer's search must not exceed the scope of the consent granted or the search becomes unreasonable." Id. "The scope of the consent is measured by a test of 'objective' reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" State v. Mattison, 352 S.C. 577, 585–86, 575 S.E.2d 852, 856 (Ct.App.2003) (citation omitted).

Here, the State submits the facts and circumstances surrounding the search clearly informed Petitioner of the scope of the search. Furthermore, even if one were to assume that Appellant did not consent to a search of Victim's car when he granted consent, the facts surrounding his questioning and the subsequent actions of the officers and Appellant clearly demonstrate Appellant, despite having the opportunity to limit the search or revoke his consent, declined to do so, instead deciding to aid the officers in the search of Victim's vehicle.

Indeed, Appellant was clearly aware, based upon the statements and actions of the officers that they intended to use the keys to search Appellant's car. Specifically, Appellant was asked who owned the keys they found in the residence, and after he explained the keys were Victim's, observed the officers as they proceeded to Victim's car in an attempt to unlock the vehicle. (R. 118, 119, 49-50, 50-51, 144, 167, 168). Nevertheless, Appellant, rather than revoking or limiting consent, chose to aid the officers in their search by attempting to show them which key opened the trunk in Victim's car. (R. 126, 145, 156-57, 168).

Understanding these circumstances, the State submits an objectively reasonable person would have understood that when the officers asked whose keys were in the apartment, picked the keys up, headed outside and began using the keys, the scope of consent may have changed. However, despite these facts, the State submits that an objectively reasonable person would have interpreted Appellant's additional actions of attempting to aid the officers in their search, as implicitly consenting to the expanded search rather than seeking to limit or revoke his consent. Accordingly, the State submits Appellant's Fourth Amendment Rights were not violated and therefore, the evidence obtained from the search of the car should not be excluded.

CONCLUSION

For the aforementioned reasons, the State respectfully requests this Court grant rehearing or, in the alternative, substitute an opinion addressing the concerns advanced by the State in this petition and affirm the judgment imposed by the trial court.

Respectfully Submitted,

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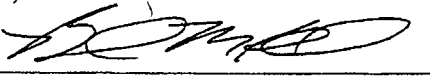

Brendan J. McDonald
ATTORNEY(S) FOR RESPONDENTS

April 18, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County

Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2011-197635

THE STATE,

RESPONDENT,

v.

ROGER BRUCE,

APPELLANT

PROOF OF SERVICE

I, Brendan McDonald, counsel for the Respondent, certify that I have served the within ***Petition for Rehearing,*** on Appellant by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney of record:

Robert M. Pachak, Esq., SCCID/Division of Appellate Defense
P.O. Box 11589
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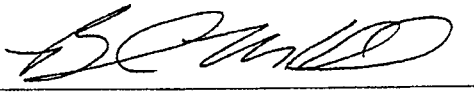
I further certify that all parties required by Rule to be served have been served.

This 18th day of April, 2013.



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April 18, 2013.

11347

The South Carolina Court of Appeals

The State, Respondent,

v.

Roger Bruce, Appellant.

Appellate Case No. 2011-197635

ORDER

After careful consideration of the Appellant's and Respondent's petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petitions for rehearing are denied.

John Cannon Fw C.J.

J.

Daniel G. Pieper J.

Columbia, South Carolina

cc:
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Brendan Jackson McDonald
Thomas A. Russo

FILED
May 6, 2013