RECEIVED
Jan 03 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County
The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JAMES L. GINTHER,

APPELLANT.

Appellate Case No. 2019-000672

INITIAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
S.C. Bar No. 14244

J. ANTHONY MABRY
Senior Assistant Attorney General
S.C. Bar No. 11973

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-6305

HON. ERNEST A. FINNEY, III
Solicitor, Third Judicial Circuit
(803) 436-2185
ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

APPELLANT'S QUESTIONS PRESENTED vii

STATEMENT OF THE CASE 1

FACTS 2

APPELLATE ISSUE I 12

Issues Now Raised on Appeal 15

Lack of Preservation or Mooting of the Issue 17

Standard of Review 20

ARGUMENT I.

I. Judge Cothran did not err in refusing to limit the firearm's expert's testimony as requested 20

Lack of prejudice 35

APPELLATE ISSUE II 41

Standard of Review 43

ARGUMENT II.

II. The still photos of the *Cube like* vehicle headed to Sumter at 1:00 a.m. on the date of victim's murder were relevant, and admissible, and their probative value was not substantially outweighed the danger of unfair prejudice, confusion of the issues, or misleading the jury 45

CONCLUSION 49

DESIGNATION OF MATTER

PROOF OF SERVICE

TABLE OF AUTHORITIES

Page(s)

Cases

Calhoun v. Calhoun,
339 S.C. 96, 529 S.E.2d 14 (2000) 18, 19

Daubert v. Merrell Cow Pharmaceuticals, Inc.,
509 U.S. 579 (1993) 25, 26

Eubank v. Eubank,
347 S.C. 367, 555 S.E.2d 413 (Ct. App. 2001) 18

Ficklin v. Commonwealth,
2022 WL 3640906 (Ky. April 18, 2022)(unpublished) 23, 27, 33

Fields v. Reg'l Med. Ctr. Oraangeburg,
363 S.C. 19, 609 S.E.2d 506 (2015) 35, 36, 41

Garrett v. Commonwealth,
534 S.W.3d 217 (Ky. 2017) 24, 26, 33

Garrett v. Commonwealth,
2020 W.L. 1488775 (Ky. App. 2020)(unpublished) 26

Kumho Tire Co. v. Carmichael,
526 U.S. 137 (1999) 25

Means v. Gates,
348 S.C. 161, 558 S.E.2d 921 (Ct. App. 2001) 20, 35

Merritt v. Arizona,
2021 WL 1541635 (D. Ariz April 2021)(*slip copy)* 31

Missouri v. Mills,
623 S.W.3d 717 (Mo. Ct. App. 2021) 24, 27

Nebraska v. Wheeler,
956 S.W.2d 708 (Neb. 2021) 24, 28

People v. Azcona,
58 CalApp.5th 504 (Cal.App. 6th Dist., filed December 10, 2020, modified Jan. 11, 2021 29

People v. Rodriguez,
106 N.E.3d 436 (Ill. 2018) 24, 29

People v. Therman,
2021 W.L. 4859299 (Cal. App. 3rd District, October 19, 2021)(unpublished) 29

State v. Benton,
338 S.C. 151, 526 S.E.2d 228 (2000) 17, 19

State v. Boss,
577 S.W.3d 509 (Mo. App. W.D. 2019) 24, 28

State v. Braxton,
343 S.C. 629, 541 S.E.2d 833 (2001) 48

State v. Bryant,
369 S.C. 511, 633 S.E.2d 152 (2006) 35

State v. Bullock,
235 S.C. 356, 111 S.E.2d 657 (1960) 21

State v. Caldwell,
300 S.C. 494, 388 S.E.2d 816 (1990) 47
State v. Carter,
559 S.W.3d 92 (Mo. App. W.D. 2018) 28
State v. Council,
335 S.C. 1, 515 S.E.2d 508 (1999) 25, 34
State v. DeJesus,
436 P.3d 834 (Wash. Ct. App. 2019) 30
State v. Dinkins,
319 S.C. 415, 462 S.E.2d 59 (1995) 26
State v. Douglas,
369 S.C. 424, 632 S.E.2d 845 (2006) 20
State v. Ford,
301 S.C. 485, 392 S.E.2d 781 (1990) 25
State v. Gilchrist,
329 S.C. 621, 496 S.E.2d 424 (Ct. App. 1998) 34
State v. Gillian,
373 S.C. 601, 646 S.E.2d 872 (2007) 48
State v. Goudeau,
372 P.3d 945 (Ariz. 2016) 24
State v. Gray,
408 S.C. 601, 759 S.E.2d 160 (Ct. App. 2014) 44
State v. Griffin,
834 S.E.2d 435 (N.C. Ct. App. 2019) 23
State v. Grubbs,
353 S.C. 374, 577 S.E.2d 493 (Ct. App. 2003) 20
State v. Hackett,
215 S.C. 434, 55 S.E.2d 696 (1949) 20, 21, 22, 48
State v. Hardin,
425 S.C. 1, 819 S.E.2d 177 (2018) 48
State v. Heller,
399 S.C. 157, 731 S.E.2d 312 (Ct. App. 2012) 35
State v. Holland,
385 S.C. 159, 682 S.E.2d 898 (2009) 48
State v. Jones,
273 S.C. 723, 259 S.E.2d 120 (1979) 25, 34
State v. Jones,
343 S.C. 562, 541 S.E.2d 813 (2001) 34
State v. Kelley,
319 S.C. 173, 460 S.E.2d 368 (1995) 43
State v. King,
424 S.C. 188, 18 S.E.2d 204 (2018) 20
State v. Kromah,
401 S.C. 340, 737 S.E.2d 490 (2013) 20
State v. Lee,
217 So.3d 1266 (La. Ct. App. 4th Cir. 2017) 24, 28

State v. Mathis,
359 S.C. 450, 597 S.E.2d 872 (Ct. App. 2004) 43
State v. Mattison,
352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003) 43
State v. McCarty,
437 S.C. 355, 878 S.E.2d 902 (2022) 41
State v. McGraw,
779 S.E.2d 787 (N.C. Ct. App. 2015)(unpublished) 25
State v. Miller,
852 S.E.2d 704 (N.C. App. 2020), appeal dismissed 856 S.E.2d 108 (N.C. 2021) 23, 24
State v. Powers,
331 S.C. 37, 501 S.E.2d 116 (1998) 17, 18
State v. Price,
368 S.C. 494, 629 S.E.2d 363 (2006) 20
State v. Scott,
405 S.C. 489, 748 S.E.2d 236 (Ct. App. 2103) 43
State v. Tillman,
304 S.C. 512, 405 S.E.2d 607 (1991) 44
State v. Todd,
290 S.C. 212, 349 S.E.2d 339 (1986) 43
State v. White,
382 S.C. 265, 676 S.E.2d 684 (2009) 19
State v. Wiles,
383 S.C. 151, 679 S.E.2d 172 (2009) 44
State v. Williams,
814 S.E.2d 925 (N.C. Ct. App. 2018)(unpublished) 24, 25
TNS Mills Inc. v. South Carolina Department of Revenue,
331 S.C. 611, 503 S.E.2d 471 (1998) 17, 19
United States v. Brown,
973 F.3d 667 (7th Cir. 2020) 30
United States v. Casey,
928 F.Supp. 397 (D. Puerto Rico 2013) 24
United States v. Cerna,
2010 WL 3448528, n. 4 (N.D. Cal. 2010)(not reported in F.Supp.2d) 32
United States v. Chavez,
2021 WL 5882466 (N.D. Cal. Dec. 13, 2021)(*slip copy*) 31
United States v. Foster,
300 F.Supp.2d 375, 377 n. 1 (D.Md. 2004) 27
United States v. Gil,
680 Fed. Appx. 11 (2d Cir 2017)(unpublished summary order) 30
United States v. Glynn,
578 F.Supp.2d 567 (S.D. N.Y. 2008) 32
United States v. Godinez,
7 F.4th 628 (7th Cir. 2021) 30
United States v. Green,
405 F.Supp.2d 104 (D.Mass. 2005) 13

United States v. Harris,
502 F.Supp. 3d 28 (Dist. of Col. 2020) 23, 30, 32
United States v. Hicks,
389 F.2d 514 (5th Cir. 2004) 27
United States v. Hunt,
464 F.Supp.3d 1262 (W.D. Okla 2020) 32
United States v. Johnson,
875 F.3d 1265 (9th Cir. 2017) 32
United States v. Johnson,
2019 WL 1130258 (S.D.N.Y. Mar. 11, 2019)(not reported in F.Supp.) 31
United States v. McCluskey,
2013 WL 12335325 (D.N.M. February 7, 2013)(unpublished) 32
United States v. Monteiro,
407 F.Supp.2d 351 (D. Mass. 2006) 32
United States v. Otero,
849 F.Supp.2d 425 (D.N.J. 2012) 24, 29
United States v. Perkins,
342 Fed. Appx. 403 (10th Cir. 2009) 23
United States v. Rodriguez-Estrada,
877 F.2d 153 (1st Cir. 1989) 45
United States v. Romero-Lobato,
379 F.Supp.3d (D.Nev. 2019) 31
United States v. Scheffer,
523 U.S. 303 (1998) 27
United States v. Stout,
509 F.3d 796 (6th Cir. 2007) 44
United States v. Tibbs,
2019 WL 4359486 (D.C. Super. Ct. Sept. 5, 2019) 26
United States v. Williams,
2004 WL 2980027 (S.D.N.Y 2004)(not reported in F.Supp.2d) 27
Watson v. Ford Motor Co.,
389 S.C. 434, 699 S.E.2d 169 (2010) 15, 33
Wilder Corp. v. Wilke,
330 S.C. 71, 497 S.E.2d 731 (1998) 17, 18
Williams v. Commonwealth,
2020 WL 1488775 (Ky. Ct. App. 2020)(unpublished) 24, 26

Rules

Rule 208(b)(1)(B), SCACR 18, 19
Rule 401, SCRE 44, 48
Rule 402, SCRE 44
Rule 403, SCRE 47, 48
Rule 702, SCRE 15, 19, 24, 25, 33

Other Authorities

70 Baylor L. Rev. 93, *The Admissibility of Firearms and Toolmarks Expert Testimony in the Shadow of PCAST*, Baylor Law Review (Winter 2022) 33

Black's Law Dictionary, p. 1323 (9th ed. 2009) 44

United States v. Simmons,
2018 U.S. Dist. LEXIS 18606, at *4 (E.D. Va. 2018)(unpublished) 31

APPELLANT'S QUESTIONS PRESENTED

1. Did the trial judge err in refusing to limit the opinion testimony of the expert witness in forensic firearms examination to consistencies in the comparison of the firearm and the shell casing?

2. Did the trial judge err in admitting irrelevant, confusing, and misleading photographs of a vehicle from a traffic camera?

STATEMENT OF THE CASE

On November 16, 2017, appellant, James L. Ginther, kidnapped and then murdered Suzette Ginther, his ex-wife, in Sumter County. On November 18, 2017, an arrest warrant for murder was obtained. On November 20, 2017, appellant was arrested in Kentucky and returned to South Carolina. The Sumter County Grand Jury then indicted appellant for the murder and kidnapping of Suzette Ginther. (2018-GS-43-0206). On April 8, 2019, appellant proceeded to a jury trial before the Honorable R. Ferrell Cothran. Jason E. Bridges and Allen J. Barnes represented appellant. Solicitor Ernest A. Finney, III. prosecuted the case. At the conclusion of the trial, after approximately 1 hour of deliberations, the jury found appellant guilty of murder and kidnapping. Judge Cothran sentenced appellant to life imprisonment without parole for murder and no sentence on the kidnapping indictment. A timely notice of intent to appeal was served on April 16, 2019.

On May 12, 2020, appellant moved for an order to remand the case for a hearing to attempt to reconstruct the record as to missing witness' testimony. (R. p. ** Motion). The trial transcript reflects a portion of the first cross examination of Investigator Randall Stewart, the entire direct and cross-examination of Investigator Randall Hilliard and Agent Kristina Gainey and the direct examination of witness Rachael Salak are not included in the record due to an equipment malfunction. (Tr. 343, ll. 20-21; 344, ll. 1-9; 345, ll. 2-3). On June 4, 2020, this Court granted the motion. (R. p. ** Order). On May 4, 2022, the parties submitted to the Court a proposed stipulation as to the content of the missing testimony to take the place of the missing testimony without the need for a reconstruction hearing. (R. p. ** Letter and Stipulation). In a letter dated May 11, 2022, this Court advised the parties that the case was no longer held in abeyance and directed the parties

to file the initial brief of appellant and designation of matter within thirty (30) days. (R. p. ** Order). That was completed. This is the Initial Brief of Respondent

FACTS

Appellant James L. Ginther ("Ginther") and the victim Suzette Ginther ("Suzie") were divorced. They had 2 children together, a boy and a girl. Before their divorce, Ginther and Suzie resided with their 2 children in a home owned by Suzie's father, John Bates, located at 4164 North Lake Road, Cherryvale, S.C., in Sumter County. Prior to the divorce becoming final, Ginther was forced to move out of the home, and he moved in a mobile home park nearby. Suzie continued to live with the 2 children in the home owned by her father on North Lake Road. Because Ginther had no car, Suzie would allow Ginther to use her van. The van had a broken sliding door that would not lock, and Suzie never locked the doors on the van at night anyway. Ginther would walk from the mobile home park to Suzie's home then drive the van to his job as a security guard, return the van to her home after work, and then walk back to his mobile home. Around, March of 2017, Suzie's boyfriend William Parker ("William") moved in with Suzie and the 2 children she had with Ginther. Ginther was still residing in the mobile home park nearby. (Tr. 79-124; 242-56).

Ginther continued to live in the mobile home park for a while and met Rachael Salak on-line who eventually became his fiancé. Rachael moved in the mobile home with Ginther but did not like the area where the mobile home was located because it was a high crime area. As a result, Ginther and Rachael moved first to Virginia, then moved in with her parents in California, and then to a home off Beltline Boulevard in Columbia, S.C., approximately 1 block from where Suzie worked in Columbia, S.C. (Tr. 79-124; 242-56; 345-77; Stipulation of Record 4).

Suzie had custody of the 2 children Ginther had fathered. (Tr. 79-124; 242-56). At the time of her death in November of 2017, Suzie still lived with her boyfriend William and the 2 children

she had with Ginther, in the home owned by her father in Cherryvale. (Tr. 79, ll. 13-15; 82, ll. 3-6). Ginther had visitation with the children on weekends and was required to pay child support. Ginther and Suzie did not get along. From time to time there would be arguments. Ginther was also angry at Suzie about a "phone application" he found on his daughter's cell phone. Because of her fear of Ginther, Suzie would always have someone with her when she exchanged custody with Ginther. (Tr. 79-124; 242-56; 345-77; 590; Stipulation of Record Rachael Salak).

At the time of Suzie's death, Ginther was still residing in Columbia, S.C. with Rachael and their newborn infant son in the same rental home just off Beltline Boulevard near Suzie's place of employment. (Tr. 323, ll. 6-12). Ginther and Rachael had just recently had the infant child after Rachael had a caesarean section and difficult recovery. In fact, Ginther quit his job to stay home and help Rachel with the new baby. Ginther was attempting to make money with a photography business he recently started. To get by, Ginther and Rachael also depended on support from Rachael's parents who gave them the money to purchase a new car, a *Nissan Cube*. During this time period, Ginther had talked with Rachael about trying to get custody of his 2 children with Suzie. Ginther would also drive from his home to Sumter County, park near Suzie's home, and walk to Suzie's house to check to see if the 2 children he had with Suzie were being properly supervised. (Tr. 345-77; Stipulation of Record Rachael Salak; 323, ll. 6-12).

On early Thursday morning, November 16, 2017, Suzie was supposed to be at work at *Pet Smart* in Columbia, S.C. at 5:00 a.m. to open the store. Her normal routine each morning would be to drive from her home in Cherryvale in Sumter County to work, a drive of approximately 45 minutes. Suzie did not arrive on November 16, 2017. Almost immediately a co-worker and then a manager began trying to reach Suzie by her phone. Suzie did not respond. A phone call to Suzie from work at 5:15 a.m. was routed to voice mail by someone pushing a button on her cell phone.

After that call, there were no outgoing calls on Suzie's phone only incoming calls going straight to voice mail. Suzie never appeared for work, which was unlike her. (Tr. 151-70; 481-97; 573).

On that Thursday morning, November 16, 2017, Suzie was kidnapped from the driveway of her home *or* as she drove to work. She was then murdered. Her live-in boyfriend, William, testified Suzie left for work on the morning of November 16, 2017, at 4:00 AM. while it was still dark. She kissed William goodbye before she left and told him not to get out of bed. She left in her van. William never saw Suzie alive again. William testified the sliding door on the van was broken when he met Suzie; it would not lock; and, it was Suzie's habit not to lock the van at night. The van was still registered in Ginther's name even though Suzie got the van in the divorce. (Tr. 79-124; 131; 151-70; 242-56; 345-77; Stipulation of Record Rachael Salak; 573-78). Ginther was thoroughly familiar with the van Suzie drove to work the morning she disappeared because he had driven it numerous times before. However, Ginther did not know the van was still registered in his name on November 16, 2017. (Tr. 79-124; 242-56; 124-42).

The van Suzie drove was found empty and abandoned on Harwood Drive, a rural paved road in Cherryvale later that morning, at approximately 7:01 a.m. by Deputy Sheriff Cameron Prescott while on routine patrol. The van was parked in the road around a sharp curve where there were only woods on both sides of the van. It was covered in sandy dust especially in the wheel well and on the back bumper. The roads from Suzie's home to where the van was found were all paved. Further, the van was found in a direction that Suzie would not take to work. Suzie's habit was to leave her home turn right on to Cherryvale Road leading directly to Highway 378 and turn left on Hwy. 378 and drive straight to Columbia. (Tr. 123-42; 79-124; 185-89; 242-56; 573; 578).

After Suzie did not appear for work, a co-worker and a manager tried to phone her several times and then began checking hospitals, first responders, jails, and fire departments to determine

what had happened because Suzie was one of the most dependable persons her manager had ever known. Her fellow employees eventually contacted Suzie's family and police were contacted. A formal BOLO for Suzie was issued at 2:00 p.m. (Tr. 151-70; 79-124; 242-56; 578; 588).

Prescott, who found Suzie's van at 7:01 a.m., was not aware Suzie was a missing person at that early hour but determined through dispatch the van was registered to Ginther. A Columbia police officer was sent to Ginther's home. The encounter was videotaped. (State's Ex. 61). At first, no one would answer the door. As the officer was attempting to leave, Rachael came to the door while Ginther was in the shower. The officer eventually informed Rachael and Ginther that his van had been found abandoned in Sumter County. Ginther eventually told Prescott over the phone that the van belonged to his ex-wife Suzie, and he was not aware the van was still registered to him. Prescott went to Cherryvale Elementary and checked on Suzie's 2 children who were fine. In another phone call with Ginther, Ginther told Prescott if something was wrong or something had happened, he would come pick up the 2 children. Prescott spoke with Ginther 3 times by phone between 7:01 a.m. and 12:00 noon. When Suzie was entered as a missing person, police went back to the van and seized it. Suzie was not in the van when Prescott found it at 7:01 a.m. or seized it later in the morning. There was no blood or blood spatter in the van either. (Tr. 125-42).

When Suzie's boyfriend William found out Suzie was missing, he drove her entire route to work and back thinking she may have been in an accident. When William found out Suzie's van had been located, he drove to where it was parked on Harwood Drive. He looked in the van and noticed Suzie could not have driven the van to where it was abandoned because the seat was pulled back too far. When Suzie drove the van, the seat was pulled almost all the way up so her feet could reach the accelerator and brake pedals, and William could not even get in the driver's seat after Suzie drove the van. William also noticed there was dust all over the van, and sand in the seats.

The van also looked as if someone had rifled through it, but no money was missing from the van. A radio headset with wires belonging to 1 of the children was broken and hanging over the driver's headrest. William searched nearby woods and even called Suzie's name but could not locate her. Later, he and Suzie's brother went door to door trying to locate Suzie to no avail. (Tr. 79-124).

The same day, around *4:30 to 5:00* **p.m.**, Suzie's body was accidentally discovered by a deer hunter in some woods in the Wedgefield area of Sumter County. (Tr. 286-87; 166, ll. 18-23). Suzie's fully clothed body was buried in a shallow dug grave behind a pond in a swampy area off Burnt Gin Road. She was wearing her *Pet Smart* uniform. The road to where Suzie's body was located was a sandy dirt road. Witnesses testified if you drove on that road the vehicle you were driving would be covered in a layer of dust. The previous day, the same hunter had been in the same area and saw an empty hole in the ground in the same area where Suzie's body was found, which contained some standing water. On the next day, when the hunter discovered the body, 1 of Suzie's feet was sticking slightly out of the grave. The remainder of her body was covered with dirt, leaves, and branches. Broken limbs were found nearby consistent with those found covering the shallow grave and Suzie's body. After discovering the body on the evening of November 16th, the deer hunter ran to his truck and called 911. (Tr. 265-302; 185-214; 305-20; 399-409).

Police responded immediately. The hunter pointed police to the area where he saw the foot sticking out of the ground. Found near Suzie's body was a fired 9mm Winchester shell casing. There was also blood on the ground near the shallow grave. Also found in a dirt parking area near where Suzie's body was found was 1 work glove. There were marks on the ground near this area indicating a possible struggle. Also found on the ground in the same area was a packaged lady's tampon, which matched other packed tampons found later in Suzie's clothing at autopsy. The forensic pathologist who performed the autopsy testified Suzie died from a single gunshot wound

to the back of the head. She had a bruise on the top of her thigh near the buttocks. She was not sexually assaulted. She breathed several times after being shot before she expired. She had mud and muddy water in her mouth and lungs, and blood in her throat and mouth as well. This indicated she was shot at the scene where she was found and expired in the shallow muddy grave. She also was experiencing her monthly menstrual period or possibly breakthrough bleeding of her uterus at the time she was murdered, consistent with the packaged tampons found on the ground in the parking area and in her clothing at autopsy. (Tr. 265-302; 185-214; 305-25; 377-98; 399-409).

Ginther's residence in Columbia, S.C. was a 45 minute to 1 hour drive from where Suzie's body was found. The easiest and most direct path from Ginther's home to Cherryvale was for Ginther to have driven Highway 378 from Columbia to Sumter. The mobile home park where Ginther and Rachael previously lived was approximately 1 mile from where Suzie's van was found abandoned the morning of her disappearance and murder. Ginther was familiar with the area around Suzie's home and where the van was abandoned. Suzie's boyfriend, William, testified Suzie would never have driven her van to the area where it was found on November 16th, because it was a high crime neighborhood. William testified she did not go to that area of town ever. (Tr. 79-124; 242-56; 345-77; Stipulation of Record Rachael Salak; 305-24; 573; 590-91).

On Saturday, November 18, 2017, Investigators Randall Stewart and Randall Hilliard, of the Sumter Sheriff's Office and Agent Kristina Gainey with S.L.E.D. met with Ginther at his home in Columbia. (Tr. 41, ll. 4-14; Stipulation of Record). The meeting was recorded on a body camera and introduced as State's Exhibit #62. (Tr. 320, ln. 10 - 321, ll. 1-25). Ginther's fiance', Rachael, was present for most of the meeting but at one point she and Agent Gainey stepped outside. (See State's # 62). Ginther told the investigators he owned several firearms, including a Glock, 9mm and showed them the firearms. (See State's #62). The 9mm pistol was on Ginther's person while

he was interviewed by the investigators. Ginther would not give police a DNA swab and refused to let them take his firearms with them including the 9mm. The investigators then left the home. (Tr. 305-24; Stipulation of Record; 332-43; State's Ex. 62). After police left, Rachael told Ginther she did not understand why he would not give a DNA sample. Only then did Ginther agree to provide a sample. (Tr. 332, ln 6 - 333, ll. 1-21). Police were called back to Ginther's home and obtained a buccal swab from Ginther. Ginther still would not allow police to take his 9mm pistol.[1]

Rachael, Ginther's fiancé, testified at trial Ginther was upset the van was still registered in his name even though he and Suzie had been divorced. The fact the van was still registered in Ginther's name directed police immediately to Ginther the morning Suzie's disappeared. Rachael also testified Ginther initially "freaked out" when he found out Suzie's body had been discovered. It was through shear happenstance Suzie's body was discovered so quickly. Not only was it buried behind a dam approximately 219 feet off the Burnt Gin Road, but dirt, leaves, and branches had also been placed on top of the grave. Rachael testified she was very emotional after learning of Suzie's death, but Ginther seemed almost happy after that. Rachael went to a neighbor for comfort because Ginther was simply not in the state of mind to provide any comfort. She testified Ginther was agitated the Saturday night after investigators left their home and believed police were going to charge him with the murder. (Stipulation of Record, Rachael Salek p. 5, Tr. 345-77; 265-302).

Rachael could not sleep Saturday night. She confronted Ginther the next day, Sunday, asking him if he "did it," i.e. killed Suzie. Ginther suggested Rachael tell police she murdered

---

[1] Inv. Stewart also collected DNA samples from Rachael and on another date Warren Dundero. (Tr. 334, ll. 3-5). Dundero lived across the street from where the van was found abandoned, was initially a suspect because of his prior record, but was cleared of any involvement in the murder through further investigation. Dundero also testified to his non-involvement in Suzie's murder and the approximate time Suzie's van appeared abandoned on Harwood Dr., between 7:00 a.m. and 10:00 a.m., November 16th. (Tr. 332-44; State's Ex. 64 & 65; Stipulation of Record; Tr. 216-41).

Suzie because police would be easy on her because she was a woman with bipolar disease. As a result of this conversation, Rachael became afraid of Ginther and told him to leave their home in Columbia. (Stipulation of Testimony of Rachael Salek p. 5, Tr. 345-77; 265-302).

Rachael testified the night of November 15th/16th, Ginther did not sleep with her in their upstairs bedroom. When she got up during the night, he was not in the other upstairs bedroom either. The morning of Suzie's disappearance and murder, November 16th, Rachael awakened about 6:00 a.m. and Ginther was not upstairs in their home where she was. As she started down the stairs from her bedroom, she heard a noise and saw Ginther coming from the back door area of her home as if he had just come in the back door. Rachael was almost certain she heard the back door, which makes a distinct noise, before she saw Ginther come through the kitchen area. Ginther then stripped off his clothes and threw them in the washing machine. Ginther told Rachael at the time that he had had a confrontation with Suzie. Based on what he said and how he said it, Rachael believed the confrontation was *in person* not over the phone. Ginther then showered. Rachael testified Ginther cleaned his 9mm handgun on Thursday or Friday because she asked him to do so outside because the chemicals bothered her and the baby. Later, when Ginther tried to get Rachael to take the blame for the murder, in discussing scenarios she could tell police, Ginther told Rachel that he could tell her the details and how he killed Suzie, but Rachael told him she did not want to know. She didn't. Ginther did tell Rachael he killed Suzie for Rachael, for their baby, and for the 2 children he had with Suzie. (Stipulation of Testimony of Rachael Salek; Tr. 345-77).

As a result, Rachael became afraid of Ginther and asked him to leave. Ginther packed up his survival gear and left the home in the *Nissan Cube*. Other than taking the 9mm pistol with him, he left his other guns behind. He visited his children with Suzie at their school in Cherryvale on Friday, November 19th, and then fled to West-Virginia and then Kentucky on Sunday. Prior to

fleeing, Ginther had been told by Inv. Stewart that Stewart knew how Suzie had been killed, where she was killed, and why she was killed. After Ginther fled, Rachael called investigators on Sunday and told them what she knew about Suzie's murder. (Stipulation; Tr. 345-77; 414-22)

On Sunday, November 18, 2017, at 2:10 p.m., Inv. Stewart received a phone call from Rachael, and Agent Gainey was sent to meet with Rachael in Columbia. (Tr. 414-22; Stipulation Agent Gainey). Based on the video-recorded interview with Rachael, Stewart obtained an arrest warrant for Ginther for murder and entered his name, the make and model of his vehicle, and the serial number of his gun into the NCIC system. (Tr. 416, ll. 1-24; Stipulation Agent Gainey).

Ginther was taken into custody on Monday in Louisville, Kentucky after he fell asleep on the interstate and the *Nissan Cube* drifted off the road, wrecked and was immobilized. When officers arrived, Ginther falsely told them his name was "Zach" and denied he had a gun on him. Ginther first tried to get the officers to let him walk to the next exit allegedly to meet a friend or relative. Officers would not allow him to do so. He then asked to go into nearby woods and retrieve a backpack. Again, the officers said no. After the *Cube's* registration was checked, it was discovered the murder warrant was outstanding, and Ginther was arrested and placed in the back of a patrol car. When Ginther was seen fidgeting in the back seat, he was searched again. Officers discovered a 9mm pistol under Ginther's shirt. About 20 yards into the woods, police found Ginther's backpack, containing an atlas, notebook, and survival gear and food. Ginther was returned to this state, along with his belongings. Included with those was the Glock 9mm firearm Ginther showed investigators here the previous Saturday. (Tr. 535; 561; 414-22; 526-67; 417-18).

As previously stated, a fired shell casing was found in the woods near Suzie's body (State's Ex. 72). (Tr. 195–96). The fired shell casing was submitted to Chad Smith of SLED's Forensic Services Laboratory. (Tr. 429- 31). The 9mm Luger Glock firearm found when officers arrested

Ginther in Kentucky was also submitted to Smith. (Tr. 430, ll. 5-8). Smith was offered as an expert in the field of forensic firearms examination without objection and he had been so qualified 50 times. (Tr. p. 439). Smith, testified, based on microscopic comparison, in his expert opinion, the shell casing found at the crime scene was fired by Ginther's 9mm pistol. (Tr. 440; 451). Smith could not make an identification of any fired bullet components recovered from Suzie's skull at autopsy; they were too damaged or did not contain sufficient markings on them. (Tr. 424-53).

After his arrest, police searched Ginther's home discovering numerous rounds of 9mm ammo and 2 live rounds exactly like the fired casing found at Suzie's grave. This live 9mm ammo found was stamped W.I.N. and on the bottom just like the casing found at the grave. Ginther had worked as a security guard before quitting his job. Also found in his home was a Taser. (Tr. 566-73). Missing from Ginther's home was a shovel. This was confirmed by his fiancé Rachael. (Stipulation of Rachael Salek; Tr. 345-77).

The work glove found in the parking area near Suzie's body was sent to S.L.E.D.'s DNA lab. The interior of the glove was tested for DNA. It contained Ginther's DNA. (Tr. 453-70).

Police could never locate Ginther's phone or Suzie's cell or work phone. They were not in the abandoned van, at the crime scene, in Suzie's home, in Ginther' home, or on Ginther's person or in his backpack when arrested. Police did obtain phone records and cell-site location information (CSLI) on both Ginther's and Suzie's personal phones. Those records showed Ginther left his phone at his home during the time he drove to Sumter and killed Suzie. He turned the phone off that Wednesday night and did not turn it back on until around 7:30 a.m. the morning of Thursday the 16th. However, police were able to determine he and Suzie spoke the afternoon of the 15th and then Suzie sent him a text that evening at 8:12 p.m. He did not answer the text until the next morning after he turned his phone back on. Inv. Stewart testified Ginther showed him his

phone when interviewed at his home on Saturday the 18th, and it showed activity between Ginther and Suzie on the evening of November 15th, and the night of the 15th. (Tr. 481-524; 575-80).

The jury deliberated only 1 hour and 2 minutes before returning its verdicts. Ginther was convicted of murder and kidnapping.

APPELLATE ISSUE I.

What occurred below

Pre-trial, Ginther informed Judge Cothran he may have an objection to a portion of the S.L.E.D. ballistics report (Tr. 29, ll. 19-25), and later informed the court he may have an objection to some of the ballistics testimony and might need a hearing. (Tr. 143). Later in the trial, two (2) witnesses prior to the State's firearm's and toolmark [ballistics] expert testifying, Ginther made the following objection outside the presence of the jury:

> Mr. Bridges: And then my other objection[2] will be with the report. The other report where Item one –where basically the forensic examiner tested the cartridge case. He claims that matching and individual identifying characteristics were found and it was concluded that Item One was fired by Item 19.
>
> My objection would be that – I've consulted with an expert, my own, Richard Earnest. Through my consultation with him and also through my - - now, this is not South Carolina precedent, but there is a case; United States v. Green Federal Case. That kind of language that that firearm fired that cartridge case to the exclusion of other firearms in the world I think - - I don't know if he can actually make that claim.
>
> I think that's beyond the scope of what he can say. He can say there are things that match up. There are things that are consistent, but I don't think he can say that conclusory language. If that report itself comes into evidence I will object to that at that point.
>
> THE COURT: Okay.
>
> MR. FINNEY: Your Honor I don't think I intend to put in his report, the written Report. But I do plan on asking him whether the cartridge found near the body was examined and compared to the gun taken from the Defendant. And my anticipation

[2] The previous objection alluded to was a preliminary firearm's report not relevant here. (Tr. 410).

is he's going to say it was examined microscopically and determined to be fired by that gun.

THE COURT: Okay.

MR. BRIDGES: That's when I would say my objection.

THE COURT: I understand. Whatever he says you can cross-examine him on it. I mean based on what information you have. I mean I'm assuming the question is proper and you can object to the question or form of the question, but it's his opinion if he's qualified to give one you can obviously cross examine him on that. Whether it's accurate or not or whatever.

MR. BRIDGES: Okay.

THE COURT: Based on your information.

MR. BRIDGES: Thank you, Your Honor. My main concern was just the report coming in as is, and if he doesn't introduce the report I think that will cut down.

(Tr. 410, ln. 22–412, ln. 12). [The remainder of the discussion is about chain of custody.]

Ginther offered no testimony from his expert and did not ask for an evidentiary hearing. There is no evidence in the record Ginther even provided the Court with the citation or a copy of the case he cited for his objection.[3] (Tr. 410-14). He did not argue or request that the State's expert should only be allowed to testify to a reasonable degree of scientific or ballistic certainty. He argued only that the expert should not be allowed to testify that the shell casing was a match to Ginther's gun to the exclusion of all other firearms or weapons. (Tr. 410-12).

After 2 witnesses testified, the firearms and toolmark expert Chad Smith testified. Ginther did not object to Smith's qualifications or the methodology that he used. (Tr. 429-40). Ginther only objected when Smith was asked about his ultimate conclusion or expert opinion:

Q: All right. Did you come up with a conclusion as to whether that fired casing was fired by that Luger?

---

[3] The only way Respondent knows what United States v. Green Ginther is referring to is by reference to Ginther's appellate brief. (IBOA, p. 9, citing United States v. Green, 405 F.Supp.2d 104, 124 (D.Mass. 2005).

A. Yes, sir. I did.

Q. And what was your conclusion?

A. I was able to conclude that ---

MR. BRIDGES: Raise my previous objection.

THE COURT: Okay. It's so noted. Go ahead.

THE WITNESS: Yes, sir I was able to conclude that the fired cartridge case submitted as State's Exhibit 72 was fired by this particular firearm, State's Exhibit 68 [Defendant's gun].

(Tr. 440, ll. 4-13). While the expert testified it was his opinion or conclusion the fired shell casing found at the scene was fired by Ginther's gun, he did not testify his opinion was to the exclusion of all other firearms in the world. The State's expert could not match the fired bullet fragments and a bullet jacket recovered at autopsy to Ginther's gun because they were too damaged or did not contain sufficient markings. (Tr. 441-44). Thereafter, Ginther thoroughly cross-examined the expert. (Tr. 444-50). The expert admitted he had not tested every other 9mm firearm in the world and did not compare the casing to any other firearm. (Tr. 446-47). Ginther was not prohibited from cross-examining the expert about any information Ginther had from his consulting expert or the case opinion he mentioned to the Court. On re-direct, the Solicitor asked the expert to clarify his testimony as to the shell casing and Ginther renewed his previous objection. (Tr. 451). Which Judge Cothran overruled. (Tr. 451). The expert confirmed it was his conclusion that State's Ex. 72, the fired shell casing, was fired by Ginther's gun. (Tr. 451, ll. 17-19). Again, he did not testify his opinion was to the exclusion of all other guns in the world. He testified the fired bullet fragments from autopsy could have come out of the fired casing or another, but there was not enough information due to damage to say they came from Ginther's gun. (Tr. 451-52). The State did not introduce the expert's report containing the complained of language. (Tr. 429-51; 410-12).

At the completion of the State's case, Ginther did not testify or introduce any evidence. He did not introduce his own firearm's expert's counter-opinion. However, he was not prohibited from introducing any evidence that he wished to impeach the State's expert's opinion on cross-examination or in his case in chief. (Tr. 592-96; 606). The trial court also gave a limiting instruction to the jury that it should consider expert testimony as any other witness. (Tr. 670-71).

Issues Now Raised on Appeal

Ginther now argues Judge Cothran should have prohibited the state's firearms and toolmark expert from testifying that based on his test firing Ginther's gun and microscopically comparing a fired shell casing from Ginther's gun with the fired shell casing found near the victim's body, that he concluded in his expert opinion that the fired shell casing found at the crime scene was fired by Ginther's 9mm pistol seized in Kentucky on Ginther's person. Contrary to Ginther's assertions in his brief, at no time did the State's firearm expert testify that his opinion "was to the exclusion of all other firearms or weapons" in the world. (Tr. 410-12; 429-53).

Ginther now raises an additional issue not raised below, that the State's expert should have been required to state his expert opinion was to a reasonable degree of scientific certainty or a reasonable degree of ballistic certainty. (IBOA, p. 10). This issue was also not raised in the statement of issue on appeal. (IBOA, p. 1).

Ginther also argues in his brief another issue not raised below *and* not raised in his statement of issue on appeal. (See 410-12; IBOA, p. 11). Ginther argues that *while he did not specifically challenge the methodology used to make the comparison between the fired shell casing found next to victim's body and the test casing fired from Ginther's gun, or the expert's qualifications*, he believes the request to limit the testimony and citation to Green, triggered the trial judge's duty as gatekeeper pursuant to Rule 702, SCRE and Watson v. Ford Motor Co., 389

S.C. 434, 445, 699, S.E.2d 169, 174 (2010), to determine if the methodology was reliable. (IBOA, p. 11). However, the record shows Ginther did not request a Watson hearing below when he raised his objection or when the expert testified at trial. (Tr. 410-12; 440, 451). He did not challenge the qualifications of the expert witness either. (Tr. 410-12; 429-53). And, he concedes he did not challenge the scientific methodology used to make the comparison by the expert. (IBOA, p. 11).

In summary, Ginther now argues Judge Cothran abused his discretion in refusing to limit the expert's testimony in multiple fashions and in not holding a reliability hearing. (IBOA, 7-11). He also argues the error was not harmless. As will be shown, the issue raised below is moot, and the issues now raised are not preserved for appeal, were waived, or Ginther acquiesced to Judge Cothran's ruling. Again, Ginther did not request a Watson hearing and offered no evidence below in support of his objection just his statement that his consulting expert told him the State's expert could not state what he stated in his report and referenced a case without providing the citation or opinion to Judge Cothran. (Tr. 410-12). Further, Ginther acquiesced to the trial court's ruling stating he really only wanted to keep out the expert's report, and given the State was not offering the written report, his cross-examination and challenge to the expert would be reduced or limited. (Tr. 412). While he did renew his previous stated objection at the time the expert testified, he had already acquiesced to the trial court's ruling or waived the issue, and the State did not elicit from its' expert the particular language that he challenged earlier. (Tr. 440, 451).

As to the merits, Ginther is simply wrong, and he cannot prove prejudice on this record given the overwhelming evidence of guilt. In support of these new arguments, Ginther argues additional case authority he did not cite to Judge Cothran below. (IBOA, p. 11). However, as will be shown, he cites to a minority of jurisdictions and many of the cases he cites to are outdated, limited to their peculiar facts, or are wrongly decided as recognized by the most recent authority.

Lack of Preservation or Mooting of the Issue

The first objection raised on appeal, that the State's firearms' expert's opinion that the shell casing found at the scene was fired by Ginther's gun to the exclusion of all other weapons, should have been limited, is moot because contrary to Ginther's argument in his brief, the State's expert never testified his opinion "was to the exclusion of all other firearms." (Tr. 410-12; 429-53). Further, the State did not introduce the expert's report with that challenged language or even attempt to introduce it. (Tr. 410-12; 429-53). The objection is therefore moot, and this appellate ground should be dismissed. *See* Green, 405 F.Supp. **at 106-121** (holding based on that particular firearms examiner's lack of qualifications, failure to apply national or police department standards in conducting his examination, failure to be proficiency tested, lack of error rate, failure to document his findings so his examination could be reproduced, and other deficiencies, the court would only allow him to testify to his observation of consistencies in the submitted evidence and would not allow him to conclude that the match he found "by dint of the specific methodology" he used "permits the exclusion of all other guns.").

Ginther's new argument in his brief that Judge Cothran should not have allowed this expert's opinion the shell casing found at the crime scene was fired by Ginther's gun [without the above challenged language], was waived below and is not preserved for appeal. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998)(issue is not preserved for appeal because it was not raised below; State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998); State v. Benton, 338 S.C. 151 526 S.E.2d 228 (2000)(issue conceded in the trial court cannot be argued on appeal); TNS Mills Inc. v. South Carolina Department of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998)(same).[4] The

[4] As will be discussed herein, case authority recognizes a difference between an expert opinion a fired component came from a particular weapon and a match to the exclusion of all other firearms.

case Ginther cited in his objection to Judge Cothran below, Green, specifically dealt with a challenge to testimony of a particular expert using a particular method that shell casings came from a particular gun to the exclusion of every other firearm in the world. Green, 405 F.Supp.2d **at 107, 108-09, 121**. Because of the failures of that expert in qualifications, methodology, and in providing an error rate, the Court would only allow him to testify to consistencies he observed and not render a match to the exclusion of all other firearms in the world. Id.

The next issue raised under this ground, that the expert's opinion testimony should have been limited to a reasonable degree of scientific or ballistic certainty, is not preserved for appeal. (Tr. 410-12). Ginther only argued below that the expert's testimony that the shell casing found at the crime scene came from Ginther's gun to the exclusion of all other firearms should not have been allowed and should have been limited to stating he found things consistent between the fired shell casing recovered at the crime scene and the test shell casing fired from Ginther's gun. (Tr. 410-12). He never argued below the expert's testimony should have been qualified "to a reasonable degree" of scientific or ballistic certainty. (Tr. 410-12). His new argument, raised for the first time on appeal, that the expert's testimony should have been limited to a reasonable degree of scientific or ballistic certainty is not preserved for appeal because it was not raised below. Wilder Corp., 330 S.C. 71, 497 S.E.2d 731; State v. Powers, 331 S.C. 37, 501 S.E.2d 116 (1998).

Finally, Ginther's argument raised for the first time in the body of his brief that his objection below triggered the need for a Watson hearing is not preserved. First, this issue is not raised in the statement of issue on appeal or even alluded to. (IBOR, p. 1). Rule 208(b)(1)(B), SCACR, Calhoun v. Calhoun, 339 S.C. 96, 529 S.E.2d 14 (2000)(Ordinarily, no point will be considered on appeal which is not set forth in the statement of issues on appeal); *but see* Eubank v. Eubank, 347 S.C. 367, 555 S.E.2d 413 (Ct. App. 2001)(issue may be considered when the

statement of issue read in conjunction with argument adequately raised the issue). Second, Ginther stated his objection was to the ballistics report and the language to the exclusion of all other firearms. When it was conceded the report would not come in, he did not request a Watson hearing, ask to call witnesses, or ask to take testimony from the State's expert. (Tr. 410-12). In fact, earlier, Ginther had told the Court he had an objection to the ballistics report and may have an objection to some ballistics testimony and *might* need a hearing. (Tr. 29 & 143). Instead, when the time came to request a hearing, he stated the fact that the State agreed not to enter the report with the offensive language would limit his objection and shorten it, and then stated he would object when the witness testified to his expert opinion. (Tr. 410-12). When Judge Cothran ruled preliminarily he would allow the expert's opinion and Ginther could impeach the witness with the information provided by his consulting expert and the opinion in Green, Ginther did not object that Judge Cothran did not hold a Watson hearing or make findings pursuant to State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). He agreed to Judge Cothran's ruling. (Tr. 410-12). Ginther acquiesced to Judge Cothran's ruling. State v. Benton, 338 S.C. 151 526 S.E.2d 228 (2000); TNS Mills Inc. v. South Carolina Department of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998)(issue conceded in the trial court cannot be argued on appeal). Immediately, before the witness testified, Ginther did not ask for a Watson/Rule 702, SCRE hearing or object that one had not been held. (Tr. 410-12). And, when he objected during the testimony before the jury, he referred to his previous objection, and the expert did not use the language "to the exclusion of all other firearms." As a result, this issue is not preserved for appeal because it was not raised below or raised in the statement of issue on appeal. Wilder Corp. (issue not raised below is not preserved for appeal); Rule 208(b)(1)(B), SCACR, Calhoun, 339 S.C. 96, 529 S.E.2d 14 (Ordinarily, no point will be considered on appeal which is not set forth in the statement of issues on appeal).

Standard of Review

The decision whether to admit or exclude testimony from an expert witness is within the sound discretion of the circuit court. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006)(citations omitted). The circuit court's decision to admit expert testimony will not be reversed on appeal absent "a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006)(citations omitted). An abuse of discretion occurs when the circuit court's conclusions "either lack evidentiary support or are controlled by an error of law." State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 495 (2013)(quoting Douglas, 369 S.C. at 429-30 632 S.E.2d at 848 (internal quotation marks omitted)). "A [circuit] court's ruling on the admissibility of an expert's testimony constitutes and abuse of discretion where the ruling is manifestly arbitrary, unreasonable, or unfair." State v. Grubbs, 353 S.C. 374, 379, 577 S.E.2d 493, 496 (Ct. App. 2003)(citing Means v. Gates, 348 S.C. 161, 166, 558 S.E.2d 921, 924 (Ct. App. 2001).

ARGUMENT I.

Judge Cothran did not err in refusing to limit the firearm's expert's testimony as requested.

As previously set forth, this issue is moot because the State did not introduce the SLED report with the offensive language or have the expert testify his opinion was "to the exclusion of all other weapons or firearms." *See* Green, *supra*.

Petitioner now argues in his brief that Judge Cothran should have prevented the SLED expert from testifying in his opinion the fired shell casing found near victim's body was fired by Ginther's 9mm pistol. There is no merit to this argument either.

Historically, a witness skilled in firearm and toolmark examination [commonly called ballistics] may testify that a particular bullet or shell casing came from a particular gun. *See* State

v. Hackett, 215 S.C. 434, 444-47, 55 S.E.2d 696 701-02 (1949); State v. Bullock, 235 S.C. 356, 378-79, 111 S.E.2d 657, 668 (1960)(proof that defendant's gun fired bullet that struck 2nd victim was admissible because it showed whoever fired that bullet also killed the deceased in the same shooting). This type of testimony has been regularly admitted in South Carolina for years. Hackett; Bullock. In Hackett, our Supreme Court set forth that this type of expert testimony was reliable and explained the process by which the expert reaches his opinion:

> Thereafter, on March 3, 1948, the sheriff, accompanied by a deputy, carried the pistol, the bullet and the two discharged shells to Washington, and turned these exhibits over to Mr. Zimmers, a technical ballistics expert with the Federal Bureau of Investigation. The examination was made by Mr. Zimmers on the same day. The sheriff and his deputy returned to Greenwood with these exhibits and they were put into a shoe box and placed in the vault in the office of the county treasurer of Greenwood County.
>
> It is now common knowledge that by means of the science of ballistics, it may often be determined that a bullet was fired from a certain pistol, and it is the modern tendency of our courts to allow the introduction of expert testimony to show that the bullet which killed the deceased was fired from a particular pistol or rifle, where it is first definitely shown that the witness by whom such testimony is offered is, by experience and training, qualified to give an expert opinion in the field of ballistics. 22 C.J.S. Criminal Law, § 565, page 876; 26 Am.Jur., § 440, page 460. The weight of such testimony is for the determination of the jury.
>
> Before giving his testimony concerning the comparison tests which he made, Mr. Zimmers, the technical ballistics expert, who had seven years experience in the firearms department of the Federal Bureau of Investigation, testified at length as to his qualifications and training. He stated that he had been a witness as a technical ballistics expert in about eighty cases, and he described in minute detail the tests upon which he predicated his unqualified opinion that the bullet which had been taken from the body of Mr. Hunt was fired from appellant's pistol. He explained that he had fired several test bullets from this pistol for the purpose of comparison. He testified in part as follows:
>
> 'A. The first thing I did was to examine the bullet superficially to determine whether it could have been fired in this gun, and when I determined that was so, I then proceeded to test the bullet and cartridge cases and compared that with the bullet and cartridge cases submitted by Sheriff White and that was carried out on an instrument known in the Fire-Arms Identification Department as a comparison microscope. That instrument consists of two separate and distinct compound microscopes which are joined by a common eye piece. By having the two eye-

pieces it is possible to view simultaneously two separate and distinct objects which are placed on the two separate stages of this compound microscope.

'In so doing it is possible to examine the pattern of the microscopic marks which appear on the bullets which are fired from a particular weapon. The pattern of the microscopic markings if they are duplicated on both, that is on a bullet which is removed from the person's body, and a bullet or bullets which are fired from the suspect's weapon, it is possible then to identify that particular weapon as having fired the bullet submitted for comparison, and such an examination as that was conducted in this case.

'The examination is based on these microscopic markings found on the surface of the bullet by virtue of the marks imparted to the bullet as it passes thru the gun barrel. When a weapon is manufactured, the manufacturer will insert in the gun barrel a definite turn that is referred to as 'lands' and 'grooves'. The grooves are the portion which are cut into the gun barrel in a spiral motion so that any projectile fired thru the gun barrel will have imparted to its surface the spiral motion to give the true trajectory while the bullet is in flight. The tools used in making these lands and grooves will impart to the surface of the gun barrel certain imperfections as the tools used are pulled thru and along the gun barrel on the machining operation, which leaves small pits and lines on the inside of the gun barrel, and each of these will in turn impart to a bullet fired thru the barrel of the gun a pattern of scratches which are characteristic to that gun barrel and to no other gun barrel. In addition to such marks left by the tool used to manufacture the gun barrel there are other marks which can be imparted by virtue of dust, rust, corrosion or anything else which might get into the gun barrel because the user has not taken care of it. By virtue of the aggregate number of imperfections on the inside of a gun barrel, and the manner in which these imperfections get there, it is safe to conclude that there could be no two weapons which will impart to the surface of a bullet the same pattern of microscopic markings.

'It has found by scientific tests that it is not possible for two weapons to exist that impart the same pattern of microscopic markings. It is similar in this respect to finger printing examination where it has not yet been found that any two persons have identical fingerprints. The same is true of weapons, each leaves its own identifying marks characteristic to that weapon alone and no other weapon can impart similar markings.'

Mr. Zimmers gave detailed testimony as to the ejector and extractor markings of the weapon and the pattern imparted to the discharged shells, and fully explained to the jury by photographs magnified thirty times, the special and peculiar indentations made by the firing pin of appellant's pistol upon the cap in the cartridge case.

State v. Hackett, 215 S.C. 434, 444–47, 55 S.E.2d 696, 701–02 (1949).

Even though this type of expert testimony has been readily admitted and found reliable, it came under challenge in other jurisdictions from criminal defense attorneys beginning around 2004-05, *see* Green, *supra*, and increased with the National Academy of Research of the National Academy of Sciences ("the NAR") reports in 2008 [called the Ballistic Imaging Report] and 2009 [called the Strengthening Forensic Science Report][5] and then the President's Counsel of Advisors on Science and Technology ("P-CAST") report issued during the Obama Justice Department in 2016.[6] These 3 reports criticized the science of firearm identification and stated further studies needed to be done before its validity could be accepted. However, after the early challenges and the issuance of these reports, as will be discussed in detail below, these reports themselves came under criticism, flaws were found in these reports and those who issued them, and the further blind studies recommended by the reports and case opinions were in fact conducted, which verified that firearms identification was in fact valid.

As a result, recently, after the 2008/2009 NAR reports and the 2016 P-CAST report, the majority of courts have rejected the arguments raised in the early challenges, those raised after the reports were issued, and that now raised here, including both state and federal courts. State v. Miller, 852 S.E.2d 704 (N.C. App. 2020), *appeal dismissed*, 856 S.E.2d 108 (N.C. 2021); State v. Griffin, 834 S.E.2d 435 (N.C. Ct. App. 2019); Ficklin v. Commonwealth, 2022 WL 3640906 (Ky.

[5] The NAR reports are also referred to in case opinions as the NAS reports. For uniformity's sake, Respondent will use "NAR" in this brief but reference which report by the year 2008 or 2009.
[6] Green only dealt with the admissibility of a particular expert's testimony that he found a match "to the exclusion of all other guns." The court found based on that expert's lack of professional certification, failure to follow national standards or his own police departments standards in conducting his comparison, his lack of proficiency testing, and the lack of testability of the method being conducted at the time, but which could have been done, and lack of note taking, and other deficiencies, the expert would only be allowed to testify to the consistencies he noted in the compared evidence not visible to the jury. Id.; United States v. Harris, 502 F.Supp. 3d 28, n. 4 (D.D.C. 2020)(distinguishing Green); United States v. Perkins, 342 Fed. Appx. 403 (10th Cir. 2009) (explaining the holding in Green)(*Not selected for publication in Federal Reporter*)

April 18, 2022)(*Unpublished*); Williams v. Commonwealth, 2020 WL 1488775 (Ky. Ct. App. 2020)(*Unpublished*)(citing Garrett v. Commonwealth, 534 S.W.3d 217 (Ky. 2017)); Missouri v. Mills, 623 S.W.3d 717 (Mo. Ct. App. 2021); People v. Rodriguez, 106 N.E.3d 436, 442-45, 447, 449-51 (Ill. 2018); State v. Boss, 577 S.W.3d 509, 518-19 (Mo. App. W.D. 2019. *See* Nebraska v. Wheeler, 956 S.W.2d 708 (Neb. 2021) State v. Lee, 217 So.3d 1266 (La. Ct. App. 4th Cir. 2017); State v. Goudeau, 372 P.3d 945 (Ariz. 2016); State v. Williams, 814 S.E.2d 925 (N.C. Ct. App. 2018)(*Unpublished*); United States v. Otero, 849 F.Supp.2d 425, 437-38 (D.N.J. 2012), *aff'd* 557 F.App'x 146 (3rd Cir. 2014). These courts allowed an expert to testify that based on his expertise and training, and on his examination of test evidence against the evidence from the crime scene, a particular bullet or shell casing was a match with or came from a particular weapon. Id. (above); United States v. Casey, 928 F.Supp. 2d. 397 (D. Puerto Rico 2013)(2008 and 2009 NAR reports did not prevent firearms expert from giving his opinion or to the certainty of his opinion of a match).

In State v. Miller, 852 S.E.2d 704 (N.C. App. 2020), *appeal dismissed*, 856 S.E.2d 108 (N.C. 2021), the Court rejected the very argument being made here. Miller, like Ginther here, cited to cases from other jurisdictions and the NAR and P-CAST reports to exclude the State's firearms expert's testimony that shell casings from the defendant's gun matched those at the crime scene. The State's expert was questioned about the P-CAST report and testified she disagreed with elements of the report and that that report should be viewed with caution as the report was created by academics rather than firearms examiners. She then testified how she conducts her microscopic comparison and she had previously done so in 350 to 400 examinations. She testified her work was not rushed and a peer reviewer looked over her examination results and concurred in her findings. The trial court admitted the evidence under Rule 702, N.C.R.E., in its discretion finding

the expert's opinion was the product of reliable principles and methods which she applied in this particular case based on her testimony under extensive foundation and *voir dire* questioning. The trial court understood that some scholars have questioned the reliability of this sort of testimony, and the court weighed that against the expert's explanation of her principles and methods and her testimony about why she believed them to be reliable. The Court found the trial court's determination that the expert's testimony satisfied Rule 702's three-pronged test, despite some evidence from Miller challenging the reliability of this type of expert testimony, was not arbitrary; it was a reasoned decision. Id. The dissent would not have allowed the expert to testify her error rate was zero, without testimony of the general error rate in her field. Id. Again, the appeal to the North Carolina Supreme Court was dismissed. Likewise, in State v. Griffin, 834 S.E.2d 435 (N.C. App. 2019), the Court again affirmed the admission of the very type of evidence admitted in this case. Id.

Miller and Griffin followed a series of unpublished opinions from the North Carolina Court of Appeals affirming the admission of this exact type of testimony challenged here. State v. Williams, 814 S.E.2d 925 (N.C. App. 2018)(*Unpublished*); State v. McGraw, 779 S.E.2d 787 (N.C. Ct. App. 2015)(*Unpublished*). Williams was decided after Daubert v. Merrell Cow Pharmaceuticals, Inc., 509 U.S. 579 (1993) was recently adopted by the North Carolina Legislature and McGraw was decided under the standard prior to Daubert.[7] Like Miller, *supra*, both Courts found expert testimony identifying a fired component to a particular weapon was admissible over challenges raised pursuant to the P-CAST and the NAR reports in Williams and the NAR 2008

[7] South Carolina has not adopted Daubert or Frye v. United States, 293 F.1013 (1923). *See* State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999); State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979); State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990); Rule 702, 703, 704, and 403, S.C.R.E. *See also* Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

report and other documents in McGraw. The experts did not have to testify as appellant suggested to a reasonable degree of scientific certainty, a reasonable degree of ballistics certainty, or that the evidence was only consistent. The trial court's instructions to the jury regarding expert testimony, cross-examination of the expert, and the availability of a defense expert were found sufficient to challenge the expert before the jury. McGraw; Williams; *See also* State v. Dinkins, 319 S.C. 415, 462 S.E.2d 59 (1995)(similar).

Ginther cites to 2 cases from the District of Columbia, United States v. Tibbs, 2019 WL 4359486 (D.C. Super. Ct. Sept. 5, 2019) (trial order) and Williams v. United States, 210 A.3 734 (D.C. 2019). However, recently, the Kentucky Court of Appeals refused to follow those decisions finding the expert testimony as admitted in this case had long been admissible under Kentucky law and was still admissible; and, recognized that its state Supreme Court had likewise held that this testimony was admissible after the 2009 NAR and 2016 P-CAST studies were issued. Williams v. Commonwealth, 2020 W.L. 1488775 (Ky. Ct. App. 2020)(*Unpublished*)(citing Garrett v. Commonwealth, 534 S.W.3d 217 (Ky. 2017). Specifically, in Garrett, 517 S.W.3d at 222-23, the appellant argued that a firearm and toolmark expert should not be allowed to testify that a particular bullet came from a particular gun, relying on the NAR 2009 report. In a decision that occurred after both the 2009 NAR and the 2016 P-CAST reports, the Kentucky Supreme Court held the testimony was admissible under Daubert criteria. Garrett, 517 S.W.3d at 22-23. As the Kentucky Court of Appeals held in Williams, *supra* (2020), and as the Kentucky Supreme Court held in Garrett, *supra* (2017), "the proper avenue for the defendant to address his concerns about the methodology and reliability of the expert witness's testimony was through cross-examination as well as testimony from his own expert witness." Id., citing Garrett, 534 S.W.3d at 223; *See also* Council, 335 S.C. at 21-22; 515 S.E.2d at 519 (same); Dinkins, 319 S.C. at 418; 462 S.E.2d at 69

(same). More recently, the Supreme Court of Kentucky followed its decision in Garrett again in Ficklin v. Commonwealth, 2022 WL 3640906 (April 18, 2022)(*Unpublished*). Ficklin raised the 2009 NAR and 2016 P-CAST reports in opposition to the firearms examiners' testimony that 2 particular fired shell casings came from the same gun. The Court upheld the validity of the science of firearms identification, finding the trial court did not abuse his discretion in admitting the expert's testimony, and affirmed the admission of the testimony. Id. The Court held the fact that the expert did not testify consistent with the 2009 NAR report's recommendation that his opinion was within a reasonable degree of scientific certainty was not preserved for appeal. Id.

Similarly, Green, cited by Ginther, is not helpful to him for the reasons already noted. That court found based on that expert's lack of professional certification, failure to follow national standards or his own police departments standards in conducting his analysis, his lack of proficiency testing, and the lack of testability of the method being conducted at the time, but which could have been done, and lack of documentation, and other deficiencies, the expert would only be allowed to testify to the consistencies he noted in the compared evidence not visible to the jury. Green is limited to its particular facts. Id.; Harris, 502 F.Supp. 3d 28, n. 4 (D.D.C. 2020) (distinguishing Green); Perkins, 342 Fed. Appx. 403 (10th Cir. 2009) (explaining Green).[8]

In Missouri v. Mills, 623 S.W.3d 717 (Mo. Ct. App. 2021), the Court was confronted with the same issue and objection raised here and another. The appellant alleged first that he should have been allowed to cross-examine the State's firearms expert with the NAR and P-CAST reports,

---

[8] Green also recognized the early challenges to firearms identification in 2004/2005 had already been rejected by numerous other courts because of the longstanding acceptance of ballistics reliability including by the United States Supreme Court. Id. citing United States v. Hicks, 389 F.2d 514, 526 (5th Cir. 2004); United States v. Foster, 300 F.Supp.2d 375, 377 n. 1 (D.Md. 2004); (*Unpublished*); United States v. Williams, 2004 WL 2980027 (S.D.N.Y 2004)(*not reported in F.Supp. 2d*) & referencing United States v. Scheffer, 523 U.S. 303, 313 (1998) (other citations omitted).

and second that the trial court should have held a Daubert hearing and excluded the expert's testimony that a shell casing found at the crime scene came from a particular gun. The Court held the appellant was not allowed to cross-examine the expert with the NAR or P-CAST reports because he offered no expert testimony as to those reports' reliability, simply the reports and other courts that had accepted them, and the State's expert testified both the NAR and P-CAST reports were flawed and not reliable and not conducted by those in the appropriate field of expertise. Id., citing State v. Carter, 559 S.W.3d 92, 96 (Mo. App. W.D. 2018)(excluding NAR and P-CAST reports where no foundation was laid as to their reliability as learned treatises and State's expert testified they were not reliable). Further, the Court found the firearms expert's testimony was sufficiently reliable and was properly admitted. The expert could testify that in his expert *opinion* the shell casing was a match to a particular gun, but the weight to be given to his testimony was for the jury after thorough cross-examination as had occurred in this case. Mills, 623 S.W.3d 730-32, *referencing* State v. Boss, 577 S.W.3d 509, 518-19 (Mo. App. W.D. 2019)(holding firearm and toolmark examination evidence was sufficiently reliable to be admitted over a challenge based on the 2009 NAR report, even if the results somewhat relied on "subjective analysis' and the examiner's expertise and experience, and the expert could testify to their conclusions regarding the same of a match; defendant could cross-examine expert or call his own expert; weight and credibility of the expert's testimony was for the jury).

Nebraska agreed. *See* Nebraska v. Wheeler, 956 S.W.2d 708 (Neb. 2021)(finding state's firearms expert was qualified in the face of the 2016 P-CAST report, and testimony that 7 fired shell casings came from the same gun was not overly prejudicial where defendant dropped challenge to ballistics methodology on appeal as appellant did here below, and expert did not testify another gun could not have been fired at the scene only that 7 shell casings she examined

came from the same gun). Louisiana reached the same result. State v. Lee, 217 So.3d 1266 (La. Ct. App. 2017). Relying in part on United States v. Otero, 849 849 F.Supp. 2d 425. 431-38 (D.N.J. 2012), *aff'd* 557 Fed. Appx. 146 (3rd Cir. 2014), which was released after the 2008 and 2009 NAR reports, the Court upheld the admissibility of the expert's opinion of a match, as did the Otero Court. Lee, *supra*. Illinois also agreed with Louisiana after both the NAR report and the P-CAST report. People v. Rodriguez, 106 N.E.3d 436, 442-45, 447, 449-51 (2018). The Court held the expert witness could testify to his opinion that a particular piece of evidence came from a particular weapon, and the NAR report's concerns went to weight of the evidence not its admissibility. Rodriguez, 106 N.E.3d at 442-45, 447, 449-51. And, the Court noted this was fully explored on cross-examination of the witness. Id. at 451.

Recently, even a California appellate court rejected Ginther's argument made here holding the firearms examiner could testify that in her opinion a fired shell casing found at the crime scene matched a test casing fired from a gun found on the defendant and therefore, in her opinion, came from the defendant's gun. People v. Therman, 2021 W.L. 4859299 (Cal. App. 3rd District, October 19, 2021)(*Unpublished*)(following the analysis in People v. Azcona, 58 CalApp.5th 504 (Cal.App. 6th Dist., filed December 10, 2020, modified, January 11, 2021), but reaching a different result).[9] The Court in Therman noted that the trial court admitted the evidence in part because **flaws have been discovered in the P-CAST report** since it was issued; it was not the only opinion on the subject, the Attorney General of the United States and the F.B.I. had rejected that report, and that

[9] In Azcona, the court held the error below was to allow language such as "to the practical exclusion of all other guns" when the expert did not present evidence at the pre-trial hearing to support that conclusion except his statement he had done numerous studies trying to see what could happen by random chance. Id. 58 Cal.App. at 513-14. That court also reversed for an issue not raised here below or in this appeal. Id. at 514-15.

report had been refuted by the Association of Firearm and Toolmark Examiners (the AFTE).[10] The way for the defendant to address the testimony is through cross-examination of the State's expert and calling his own expert. United States v. Brown, 973 F.3d 667, 702-04, (7th Cir. 2020).

Finally, the State of Washington also agrees. State v. DeJesus, 436 P.3d 834, 841-42 (Wash. Ct. App. 2019). There the Court admitted ballistics identification testimony over a challenge relying on the P-CAST report and noted that a number of courts had also rejected similar challenges relying on the 2008 and 2009 NAR reports. Id. at 841-43 (citations omitted).

Since the NAR reports and the P-CAST report, several federal circuits have also upheld the admissibility of firearm's identification testimony as admitted here without limitation. United States v. Brown, 973 F.3d 667, 702-04 (7th Cir. 2020), cert. denied, 141 S.Ct. 1253 (2021); United States v. Gil, 680 Fed. Appx. 11 (2d Cir 2017)(*Unpublished Summary Order*); *see* United States v. Godinez, 7 F.4th 628, 633-36 (7th Cir. 2021)(upholding another district court's admission of firearms identification expert testimony). In Brown, the trial court admitted the same testimony as admitted in the present case over the concerns in the P-CAST report. At trial, several firearm and toolmark experts testified that shell casings found at one crime scene were fired by the same gun that fired shell casings at another crime scene. Id. at 702-04. The Brown Court affirmed the trial court's admission of the evidence not giving great weight to the P-CAST report. The Brown Court noted that after an extensive hearing below, the lower court found the methodology

---

[10] Further "black box studies" have been conducted as the P-CAST report recommended, which demonstrated the science of firearm's identification was reliable and had a miniscule error rate, if any, and the P-CAST committee did not include any firearm and toolmark examiners or researchers in the field, thus raising the question whether the P-CAST report criticism would even constitute a lack of acceptance in the "relevant scientific community." United States v. Harris, 502 F.Supp.3d 34-38, 42-43 (D.D.C. 2020). Harris also recognized the 2008 and 2009 NAR studies were outdated due to intervening scientific studies and repeatedly rejected by courts as a proper basis to exclude firearm and toolmark identification testimony. Id. at 34-38. Harris was decided after Williams, cited by Ginther in his brief.

employed by the firearm and toolmark experts was almost uniformly accepted by federal courts; the method had been tested and subject to peer review; 3 different peer-reviewed journals addressed the AFTE method, several reliability studies had been conducted and the error rate was miniscule including sometimes better than algorithms developed by scientists; and, firearm and toolmark analysis was widely accepted beyond the judicial system. Id. The Court found the contentions or concerns from the P-CAST report could be raised on cross-examination and went to the weight of the evidence, not its admissibility. And, expert testimony is still testimony not irrefutable fact, and its ultimate persuasive power is for the jury to decide. Id. at 704.

Federal district courts have also weighed in on the admissibility of firearms identification since the P-CAST report. Courts in Arizona, California, New York, Oklahoma, and Virginia also found firearms identification expert testimony admissible. Merritt v. Arizona, 2021 WL 1541635, at *3 (D. Ariz April 2021)(*Slip Copy*); United States v. Romero-Lobato, 379 F.Supp.3d 111, 1114 (D.Nev. 2019)(admitting firearms identification testimony over objection based on 2009 NAR and 2016 P-CAST reports); United States v. Johnson, 2019 WL 1130258 at *1-2 (S.D.N.Y. Mar. 11, 2019)(*not reported in F.Supp*)(admitting firearms identification testimony over objection which relied on 2008 and 2009 NAR reports and 2016 P-CAST report); United States v. Simmons, 2018 U.S. Dist. LEXIS 18606, at *4 (E.D. Va. 2018). Many courts have rejected the findings of the P-CAST report. *See* United States v. Chavez, 2021 WL 5882466, at *17-18 (N.D. Cal. Dec. 13, 2021)(*Slip Copy*)(admitting governments' agreed to limited firearms identification testimony over challenge based on NAR and P-CAST reports, noting the 2009 and 2016 committees were not members of the forensic ballistic community, and rejecting defendant's citation to authority of the minority view relied on by appellant here, including that the minority court expanded the definition

of relevant scientific community, and even including that definition, the firearm identification methodology still has overwhelming acceptance in the U.S. and worldwide).

Ginther also argues for the first time on appeal that the ballistics expert's testimony that the fired shell casing was fired by Ginther's gun should have been limited to a reasonable degree of ballistic or scientific certainty. Multiple courts that agree with this unpreserved argument or issue, do not limit the expert to testimony to that Ginther argued below, that the expert only found consistencies in the evidence comparison. *See* United States v. Johnson, 875 F.3d 1265 (9th Cir. 2017)(limiting opinion of a match only to a reasonable degree of ballistic certainty); United States v. Hunt, 464 F.Supp.3d 1262 (W.D. Okla 2020)(similar); United States v. Cerna, 2010 WL 3448528, n. 4 (N.D. Cal. 2010)(not reported in F.Supp. 2d); United States v Diaz, 2007 WL 485967 (N.D. Cal. 2007); United States v. Monteiro, 407 F.Supp.2d 351, 372 (D. Mass. 2006)(allowing expert to give opinion of a match to a reasonable degree of ballistic certainty, if expert follows established standards for intellectual rigor in toolmark identification field);[11] United States v. McCluskey, 2013 WL 12335325, *10 (D.N.M. February 7, 2013)("to a practical certainty" or "practical impossibility of different origin"); United States v. Harris, 502 F.Supp.3d 28 (Dist. of Col. 2020)(limiting testimony to DOJ guidelines of such expert testimony and when a match can be testified to); *See also* United States v. Glynn, 578 F.Supp.2d 567, 574-75 (S.D. N.Y. 2008)(allowing expert to testify it was "more likely than not" that bullets matched)(other citations omitted including some in Ginther's own brief).

[11] Montiero is cited Ginther's brief, however, Montiero did not hold that the expert could only testify to consistencies in the compared evidence. Montiero initially excluded the expert's opinion because he did not document his findings which would insure reliability of the results and testability. If the government met those standards, the expert could testify to a match to a reasonable degree of certainty in the field of ballistics. Id.

In addition to the failure to preserve the issue of whether the expert's testimony should be limited to a reasonable degree of scientific or ballistic certainty, this practice by several district courts has been criticized as limiting or re-structuring an expert's testimony which is clearly admissible under Rule 702. 70 Baylor L. Rev. 93, *The Admissibility of Firearms and Toolmarks Expert Testimony in the Shadow of PCAST*, Baylor Law Review (Winter 2022).

As recent case law has shown, Ginther's challenge here is without merit. Ginther admits he does not challenge the methodology of firearms identification or the expert's qualifications. (BOA). Instead, he argues that the expert should not be able to opine that a particular piece of evidence came from a particular weapon, even when that is the expert's opinion is based on the methodology Ginther does not challenge. Since, the 2008 and 2009 NAR reports and the 2016 P-CAST report, flaws have been discovered in the reports or studies, and further testing as recommended by P-CAST has been done confirming the reliability of firearms identification. *See* Therman, 2021 W.L. 4859299 (Cal. App. 3rd October 19, 2021); Harris, 502 F.Supp.3d 28 (Dist. of Col. 2020). As a result, as cited above, the great majority of courts have rejected the challenge raised by Ginther, admitting this expert opinion testimony, and allowing the defendant to cross-examine or impeach the expert with those reports and even call a counter expert witness. Miller, 852 S.E.2d 704; Griffin, 834 S.E.2d 435; Ficklin, 2022 WL 3640906; Williams, 2020 WL 148877; Garrett, 534 S.W.3d 217 (Ky. 2017); Mills, 623 S.W.3d 717; Rodriguez, 106 N.E.3d at 442-51; Boss, 577 S.W.3d at 518-19; Wheeler, 956 S.W.2d 708; Lee, 217 So.3d 1266; Goudeau, 372 P.3d 945; Otero, 849 F.Supp.2d 425, 437-38, *aff'd* 557 F.App'x 146; Brown, 973 F.3d at 702-04; Casey, 928 F.Supp.2d 397. As Judge Cothran did not abuse his discretion, this ground is without merit.

Finally, Ginther argues that his *in limine* objection triggered Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169. As shown, the *in limine* objection was to the SLED Report coming in because of the language of a match to the exclusion of all other weapons or firearms, which the State agreed it would not introduce. When Ginther informed the court he would raise the same objection to the expert's testimony, Ginther acquiesced to the trial court's ruling that he could cross-examine the expert on what his consulting expert had told him and what was in the case opinion he referenced. And, when the expert testified, the State did not attempt to introduce or introduce the offensive language. Ginther never requested Judge Cothran conduct a Watson hearing or make findings pursuant to State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979) or State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999); *See also* State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001). As a result, this issue was waived and abandoned at the trial level.

Regardless, as shown above, this type of expert testimony has been found reliable by our Supreme Court and repeatedly admitted in our courts. *See* Hackett, 215 S.C. 434, 55 S.E.2d 696; *See also* Bullock, 235 S.C. at 378-79, 111 S.E.2d at 668. In fact, our Supreme Court explained the methodology by which a firearms expert makes his determination in detail. Hackett, 215 S.C. at 444–47, 55 S.E.2d at 701–02. Judges are presumed to know the law, and Judge Cothran would have been aware of our case precedent admitting this type of expert testimony. The firearms expert testified to the same methodology before the jury. (Tr. 429-453). Ginther does not challenge and did not challenge the expert's qualifications. (IBOA & Tr. 439). Even if he did, it would have no merit. The expert had been qualified over 50 times. (Tr. 439). Ginther did not challenge the methodology the expert used to reach his opinion. (IBOA p. 11). Ginther does not contest the testimony was helpful to the jury. Even if he did, the challenge would hold no merit. Scheffer, 523 U.S. at 313 (recognizing helpfulness of this testimony to the jury); Hackett, *supra*. The

evidence' probative value outweighs any prejudicial effect. Council, *supra*. It is unfair prejudice the Rules of Evidence prevent, not the true importance of the evidence and its natural resulting effect on the case. State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424 (Ct. App. 1998). As a result, there was no error in admitting the expert's testimony. White, 382 S.C. at 270-71; 676 S.E.2d 686-87.

The expert conceded he had not tested every other 9mm firearm in the world and did not compare the casing to any other firearm. (Tr. 446-47). Judge Cothran also properly charged the jury it should consider expert testimony as any other witness and determine its credibility for themselves and give it whatever weight they determined appropriate. White, at 271, 676 S.E.2d at 687. This dispelled any aura of infallibility.

Lack of Prejudice

Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Bryant, 369 S.C. 511,518, 633 S.E.2d 152, 156 (2006); State v. Heller, 399 S.C. 157, 171, 731 S.E.2d 312, 320 (Ct. App. 2012). Thus, an insubstantial error not affecting the result of the trial is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. Bryant at 518, 633 S.E.2d at 156. To show prejudice in the admission of expert testimony, Ginther must prove "that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or lack thereof." Fields v. Reg'l Med. Ctr. Oraangeburg, 363 S.C. 19, 609 S.E.2d 506, 509 (2015)(citing Means, 348 S.C. at 166, 558 S.E.2d at 924).

Ginther cannot show prejudice under this standard for several reasons including the language he specifically objected to was not testified to. (Tr. 410-12; 440; 451). The State did not introduce the SLED report containing the language "to the exclusion of all other" firearms. (Tr.

410-12; 429-53). The expert did not testify to the offensive language either. (Tr. 429-53). He did not testify his opinion was "to the exclusion of all other weapons." (Tr. 410-12; 440; 451). Fields.

Further, Ginther has not shown that allowing the expert to give his opinion that the fired shell casing was fired by a particular weapon, rather than that the opinion was to a reasonable degree of scientific or ballistic certainty, or that the markings on the shell casing were perfectly consistent with being fired from Ginther's 9mm pistol, influenced the verdict. The evidence of Ginther's guilt was overwhelming. Further, expert testimony using the language Ginther suggests would not change the result but confirm his guilt when combined with all of the evidence. Fields.

The evidence established the victim ended the marriage between herself and Ginther. Ginther had to move out of the victim's home in Sumter because it was owned by Suzie's father. Ginther initially lived nearby in a mobile home park in a high crime area. He had no car, and Suzie allowed him to use the van, but he had to walk to her home to use the van and then walk home after he returned it. As a result, Ginther was familiar with the area surrounding Suzie's home and with the van which had a door which would not lock. The evidence also established Ginther was familiar with the areas where victim's van was found the morning she disappeared and the location where her body was discovered that afternoon. Because they had 2 children together and because Ginther had rented a home practically across the street from Suzie's employer, Ginther also knew Suzie's routine, including what time she would have left for work and what time she would arrive there. (Tr. 79-124; 242-56; 321; 323; 344-77; 590-91; Stipulation of Record Rachael Salak).

There were prior difficulties and animosity between Ginther and Suzie establishing both a motive for the crime and malice against the victim. Ginther and Suzie argued over their children. Suzie was afraid of Ginther and would have someone with her when she exchanged custody with him. Ginther was upset about an "app" he found on his daughter's phone while she was in victim's

custody. Ginther was planning to try to obtain custody of their 2 children. Ginther had to pay child support to Suzie and was having financial difficulties due to a new infant child with his fiancé. Ginther would park near Suzie's home and spy on the home to see if she was supervising the children. Ginther had rented a home almost directly across the street from Suzie's place of employment. There was a phone call between Ginther and Suzie the afternoon before her murder and a text message to Ginther from Suzie on the night before her murder. (Tr. 481-524; 79-124; 242-56; 344-77; 590-91; Stipulation of Record, Rachael, paragraph 4; 323, ll. 6-12).

Rachael testified that at 6:00 a.m. the morning of Suzie's murder she got up and Ginther was not upstairs in their home. As she descended the stairs, she saw Ginther coming from the back door area of her home, and she recalled hearing a noise at the back door. Ginther told her he had got into an altercation with Suzie, which Rachael understood to be a physical altercation, and Ginther took of his clothes off and put them in the washing machine. Ginther then showered. When police visited Ginther's home around 7:10 a.m. and then began to question him the same morning when Suzie's van was located, he became upset because the van was still in his name, leading police to question Ginther immediately. Ginther initially refused to give police his DNA or his gun, which led Rachael to question him why he would not assist in the investigation of his ex-wife's murder. Only after she confronted him, did Ginther agree to give police a DNA sample, which led to police returning to Ginther's home and obtaining a DNA sample from Ginther. This gave police a DNA sample which was matched to the glove found in the parking area near where Suzie's body was found. This glove was found in the same area there were marks on the ground indicating a possible struggle. (Tr. 344-77; Stipulation of Record Rachael Salak; Tr. 322-24).

Victim's body was discovered on Thursday evening. Rachael testified when Ginther learned victim's body had been located, he became extremely nervous or agitated. He then seemed

happy, but Rachael was not. Ginther was not able to comfort Rachael because of his attitude about Suzie's death. (Tr. 286-87; 166; 344-77; Stipulation of Record, Rachael Salak).

At the crime scene where Suzie's body was discovered, a fired 9mm Winchester shell casing was discovered. Suzie had a gunshot wound to the back of the head. Blood was found on the ground, but not in Suzie's abandoned van. The autopsy indicated Suzie was shot next to her grave and expired in the grave. Suzie's was fully clothed and wearing her work uniform indicating she was kidnapped on her way to *Pet Smart*. While Suzie had a small bruise on her upper thigh near her buttocks, Suzie *had not been sexually assaulted* and there was *nothing missing from her van found abandoned 1 mile from her home or from her person* but her phone and work phone. The evidence indicated someone wanted Suzie dead and executed her in a secluded area, but the motive was not sexual assault or robbery. (Tr. 265-302; 185-214; 305-24; 377-98; 399-409).

Ginther admitted to police on Saturday he had a 9mm semi-automatic pistol that when fired would eject a 9mm shell casing just like that found at the crime scene. Ginther had the gun on his person while being interviewed, but it was concealed. When investigators asked to see the gun, Ginther showed the gun to them but would not give the gun to the investigators to take with them for testing. Even after giving his DNA sample to police, he would not turn over his 9mm pistol. Ginther had been employed as a security guard including in the armored car industry. (Tr. 41; 305-24; 332-43; 424-53; State's Ex. 62; 265-302; 185-214; 377-409; State's Ex. 62). Rachael testified the 9mm pistol was Ginther's favorite gun and he cleaned the gun on Thursday or Friday afternoon after Suzie's murder, indicating he had recently used the gun. She asked Ginther to take the gun outside because of the smell. (Tr. 344-77; Stipulation of Record Rachael Salak).

When police began to focus their investigation on Ginther, Ginther became extremely nervous and told Rachael he believed he was going to be charged with Suzie's murder. Because

of all that had occurred and all she knew Rachael could not sleep on Saturday night and confronted Ginther on Sunday morning. Ginther admitted he had killed Suzie. Ginther asked Rachael to tell investigators she committed the murder, so he would not be arrested or go to prison. He told Rachael the police would go easy on her because she was bipolar. He told her if she wanted to know the details of the murder and how he killed Suzie, he would tell her. She declined. He told her he had killed Suzie for Rachael, the baby, and his 2 children with Suzie. She told him to leave their home. (Tr. 344-77; Stipulation of Record Rachael Salak; Tr. 265-302).

On Saturday, the chief investigator had told Ginther he believed he knew who killed Suzie and why but would soon know for sure. The following day, Sunday, Ginther packed his belongings including survival gear and his 9mm pistol. At first, he talked about taking the 2 children he had with Suzie with him, but Rachael convinced him not to. He told Rachael he would meet her in the farthest town west in Wyoming. Ginther then took her credit card, some cash, and the couple's only vehicle, and fled the State. (Tr. 344-77; Stipulation of Record Rachael Salak; 414-22).

After Ginther fled, Rachael called police and told them what she knew about the murder. Police obtained an arrest warrant for Ginther and entered it into the NCIC database. Police also searched Ginther's home finding ammunition exactly like what was found next to Suzie's body, 9mm Winchester stamped at its base W.I.N. Police also found a Taser, which could have been used to immobilize the victim before her death. Ginther was also employed as a security guard and had military training. He could have subdued the victim through other means or simply by use of the gun as a threat to her or others. Missing from Ginther's home was Ginther's shovel. (Tr. 414-22; 566-73; 344-77; 570-74; 588-91; Stipulation of Record Rachael Salak & Agent Gainey).

Ginther fled through North Carolina, Virginia, and West Virginia, then headed west in the direction of Wyoming but wrecked in Kentucky after falling asleep. He gave police a false name when they responded to the wreck and tried to leave the scene several times on foot, stating falsely he was going to meet a relative at a nearby exit. Police took him into custody and found his survival gear in a backpack 20 yards into the woods. He denied he had a gun on his person but Ginther's loaded 9mm semi-automatic pistol was found in his waistband. Also found was an Atlas, a notebook, and receipts for non-perishable items. (Tr. 526-67; 44; 195-96; 414-22; 424-53).

The glove recovered in the parking area near where Suzie's body was discovered was lying next to a wrapped lady's tampon. Victim was having her period or breakthrough bleeding at the time of her death. More wrapped tampons were found in her coat pocket at autopsy. The glove was sent to SLED for testing which revealed Ginther's DNA in the glove. The second glove was never found. It was not in the van, Ginther's home, his *Nissan Cube*, or on his person. Ginther got rid of it. Even though Ginther showed police his phone on Saturday November 18th, after that his phone could not be found nor could Suzie's phones, which meant Ginther had gotten rid of them. The jury deliberated about 1 hour before returning guilty verdicts. (Tr. 265-302; 185-214; 305-24; 377-98; 399-409; 453-70; 481-524; 575-80; 79-124; 151-70).

The firearms expert testified Ginther's gun was a 9mm semi-automatic firearm that ejects shells when fired. While he could not match the fired bullet fragments or fired bullet jacket to Ginther's gun because of the damage, the fired bullet was consistent with a 9mm bullet and could have come from the fired shell casing found at the crime scene. He also testified the casing found at the crime scene was a fired 9mm semi-automatic shell casing stamped W.I.N. (Tr. 429-53).

Further, even if the Court had limited the expert's testimony as Ginther suggests, to a reasonable degree of ballistic or scientific certainty, or limited his opinion to the markings on the

casing found at the crime scene and the markings on the test fired casing from Ginther's gun were consistent, it would not change the result; therefore, whatever testimony Ginther objects to did not influence the verdict. Fields; Watson. Here the evidence of Ginther's guilt was overwhelming and the jury was instructed expert opinion testimony did not have to be accepted by them.[12]

APPELLATE ISSUE II.

What occurred below relevant to this issue

Pre-trial Ginther notified the Court he had an objection to still photographs [State's Ex. 66 & 67] taken from a South Carolina Department of Transportation (SCDOT) highway surveillance camera of a vehicle consistent with Ginther's *Nissan Cube* headed toward Sumter County on Highway 378 shortly after midnight, a few hours before Suzie was kidnapped and murdered. (App. 61-64). As previously stated, Ginther lived practically across the street from victim's place of employment, the *Pet Smart*, on 378 in Columbia, S.C. The still photos are of a vehicle consistent with Ginther's *Nissan Cube* headed toward Sumter coming from the direction of Ginther and Rachael's home at approximately 1:00 a.m. the same morning victim disappeared. The relevance of the photos was that in order to kidnap and murder Suzie, Ginther had to drive to Sumter late Wednesday night/early Thursday morning, park near victim's home, and kidnap her. A co-worker of Suzie was present in the parking lot of the *Pet Smart* when Suzie would have arrived. William stated Suzie left their home at about 4:00 a.m. the same morning and was supposed to be at work at 4:45 to 5:00 a.m. Prior to admission of these 2 photos, Ginther raised his objection that the photos were irrelevant because you could not tell definitively from the surveillance photos, which

---

[12] To the extent this Court does not accept the lack of preservation or waiver of this issue or Respondent's merits and lack of prejudice analysis, the most appropriate remedy would be a remand to Judge Cothran for an *in camera* hearing pursuant to Watson and White. *See* State v. McCarty, 437 S.C. 355, 878 S.E.2d 902 (2022)(remanding for *in camera* determination of whether defendant is entitled to immunity)

were grainy and in black and white, that it was his car. He also argued their admission would be prejudicial since you could not definitively tell the car in the photo was his. (Tr. 61-64; 344).

The State responded the still photos were admissible because, even though you could not definitively tell the vehicle was Ginther's because of the nature of the photos, the vehicle was consistent with or appeared to be the type of vehicle Ginther drove, i.e. it could be Ginther's vehicle, and, it would explain how Ginther was able to get from Columbia to Cherryvale in Sumter County on the night of the crime and kidnap the victim and murder her. Further, as part of the investigation, Agent Gainey went to Ginther's home. Thereafter, investigators determined there was a traffic camera close to Ginther's home and searched the traffic camera on 378 coming out of Columbia, near Ginther's home, at the time the State believed Ginther would have to have left his home to commit the crime and discovered these 2 images consistent with Ginther's vehicle headed toward Sumter on Highway 378 at approximately 1:00 a.m. (Tr. 62-64). Judge Cothran stated he understood the objection and would defer ruling on the matter as the photos may become relevant during the trial. When the evidence was offered, much later in the trial, after extensive testimony of when and how victim disappeared, Ginther renewed his prior objection:

> MR. FINNEY: At this time I would like to offer these pictures.
>
> Mr. BRIDGES: Any post objections about relevance and prejudice.
>
> THE COURT: Okay. I'll overrule your objection and I'll allow them in. Get them marked.
>
> (WHEREUPON, State's Exhibit Nos. 66 and 67 were marked for identification and received into evidence)

(Tr. 344, ll. 12-18; Stipulation p. 3)

As will be explained, Judge Cothran properly admitted the still photos because they were relevant because they showed a vehicle consistent with Ginther's vehicle, that could actually be photos of Ginther's vehicle, and were part of a chain of circumstantial evidence regarding how

Ginther was able to get to Cherryvale on the night in question and kidnap and then murder the victim Suzie and return home around 6:00 a.m. Thereafter, during the trial, SLED agent Christina Gainey testified that as part of her investigation of victim's murder she searched SCDOT surveillance footage of areas Ginther could have driven to reach Suzie's home before she was kidnapped. Gainey was able to locate 2 still photographs taken at the same time of a vehicle consistent with Ginther's vehicle headed toward Suzie's home in Sumter County at 12:50 a.m. and coming from the direction of Ginther's residence. She readily admitted that you cannot see the license plate, only that it is consistent with Ginther's *Nissan Cube*. (Stipulation of Record Gainey). In closing argument, Solicitor Finney asked the jury to compare the vehicle in the 2 still photos with Ginther's vehicle in a photo taken upon his arrest in Kentucky (State's Ex. 76). (Tr. 624-25).

Standard of Review

The determination of the relevancy and materiality of a photograph is left to the sound discretion of the trial judge. State v. Kelley, 319 S.C. 173, 177, 460 S.E.2d 368 (1995); State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986). In reviewing findings on the admissibility of evidence, appellate courts are limited to determining whether the trial judge abused his discretion, and whether that abuse prejudiced the defendant. State v. Scott, 405 S.C. 489, 497, 748 S.E.2d 236, 241 (Ct. App. 2103)("appellate courts recognize that the trial judge has considerable latitude [in the admissibility of evidence] and will not disturb such rulings absent a prejudicial abuse of discretion"). In criminal cases, appellate courts do not reevaluate the facts based on their view of the evidence, but merely determine whether the trial judge's ruling is supported by any evidence. State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003). If there is any evidence to support the admission of the evidence, a trial judge's ruling will not be disturbed on appeal. State v. Mathis, 359 S.C. 450, 597 S.E.2d 872, 878 (Ct. App. 2004). Abuse occurs when the determination of the

trial judge lacks factual support or is controlled by an error of law. Id. Evidence is deemed relevant and admissible if "it logically or reasonably tends to prove or disprove a crime charged or any fact material to the issue." State v. Tillman, 304 S.C. 512, 405 S.E.2d 607, 611 (1991).

"Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible." Rule 402, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

"Probative" means "[tending to prove or disprove." *Black's Law Dictionary,* p. 1323 (9th ed. 2009). "Probative value" is the measure of the importance of that tendency to the outcome of a case. State v. Gray, 408 S.C. 601, 609-10, 759 S.E.2d 160, 165 (Ct. App. 2014). "It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues." Id. at 610, 759 S.E.2d at 165. "[T]he more essential the evidence, the greater its probative value." Id. (quoting United States v. Stout, 509 F.3d 796, 804 (6th Cir. 2007)) (internal quotation marks omitted). "Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates." Gray, 408 S.C. 610, 759 S.E.2d 165. "Unfair prejudice means an undue tendency to suggest decision on an improper basis." State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers

to evidence which tends to suggest decision on an improper basis." Gilchrist, 329 S.C. at 630, 496 S.E.2d at 429. "[A]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided." United States v. Rodriguez-Estrada, 877 F.2d 153, 156 (1st Cir. 1989).

ARGUMENT II.

The still photos of the *Cube like* vehicle headed to Sumter at 1:00 a.m. on the date of victim's murder were relevant, and admissible, and their probative value was not substantially outweighed the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Judge Cothran did not abuse his discretion in admitting the still photos of a car consistent with Ginther's *Nissan Cube* headed toward victim's home in Sumter County on Hwy. 378 at 12:50 a.m. coming from the direction of Ginther's home. The evidence was relevant because of all of the facts and evidence in the case. The photos were pieces of circumstantial evidence in a chain of circumstantial evidence pointing to Ginther's guilt. However, the jury did not have to believe the photos were of Ginther's car to find him guilty, because there was other overwhelming evidence of his guilt, so there could be no prejudice. There also could be no prejudice because the jury could have determined they could not determine if the photos were of Ginther's vehicle or not because of their nature, grainy and black and white. As a result, there is no merit to this appellate issue.

Ginther first argues the still photos were not relevant. He is wrong. The victim was kidnapped from her come in Cherryvale in Sumter County sometime shortly after 4:00 a.m. Ginther was charged with and on trial for her murder. There was overwhelming evidence Ginther committed the crimes independent of the 2 photos, but the photos link up with that other evidence.

Ginther lived on Highway 378 practically across the street from victim's employer. The victim never made it to her place of employment after leaving her home in Sumter County around 4:00 a.m. in her van. The van was found abandoned at 7:01 a.m on Harwood Road and covered in dust and containing sand. Victim's body was found unexpectedly that afternoon off a dirt road

which if you drive on it covers the vehicle driven in dust. Ginther's fiancé testified Ginther was at home the night before the victim's disappearance and murder, but the fiancé went to bed upstairs and Ginther did not sleep in the same bedroom with her. When she got up the next morning, Ginther was not upstairs, and as she descended the stairs at about 6:00 a.m., Ginther came into the home from the area of the back door, and she believed she heard the back door shut. Ginther told her he had been in an altercation with the victim. Based on what Ginther said and how he said it, Rachael understood it to be a physical altercation. Based on victim's boyfriend's testimony, the victim was at home all night the night before her kidnapping and did not leave her home until 4:00 a.m. And, based on victim's co-workers' testimony, victim never arrived at work at her expected time, 4:45 to 5:00 a.m. the same morning. One co-worker was in the parking lot and would have seen if victim had been kidnapped from the *Pet Smart* parking lot. Ginther also later told his fiancé that he killed the victim. As a result, the only way Ginther could have had an altercation or kidnapped and murdered the victim is if he drove from his home in Columbia to Sumter after his fiancé Rachael went to bed and then returned home shortly before Rachael came down the stairs the following morning. The only vehicle Ginther had available to drive from Columbia to Sumter was the *Nissan Cube* he and his fiancé had purchased. And, the direct route of travel for Ginther to victim's home was to drive from his residence down Highway 378 to Sumter County which would have resulted in him being captured on the SCDOT surveillance camera as depicted in State's Exhibits 66 and 67. While the photos do not show the license plate or driver, this is because of the nature of the photos, and the photos clearly show a vehicle consistent with Ginther's. The *Cube like vehicle* was captured coming from the direction of Ginther's home headed toward Sumter County and victim's home at 12:50 a.m. This is consistent with the other evidence in the case and would have given Ginther plenty of time to park near victim's home around 1:30 to 2:00

a.m., walk to her home, get in her van which was unlocked, kidnap her when she got in her van or as she was driving away from her home, murder her off Burnt Gin Road, drive the van back to where he had parked *the Nissan Cube*, and abandon victim's dusty van and drive away. As a result, the still photos were relevant and admissible as to how Ginther was able to commit the crime and arrive home at 6:00 a.m.

This evidence is no different than evidence typically offered in that a vehicle consistent with the defendant's vehicle was seen in the area of a crime near the time of a crime. Here a vehicle consistent with Ginther's was seen at the *peculiar hour* of 12:50 a.m. headed in the exact direction of victim's home in Sumter County coming from the direction of Ginther's home, located near the surveillance camera, on the highway which provided the most direct route for Ginther to victim's home to kidnap and murder her. The vehicle in the stills is also consistent with the photo of Ginther's vehicle upon his arrest. (State's Ex. 76). Judge Cothran did not abuse his discretion.

Further, the photos probative value was not substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury. Rule 403, SCRE; State v. Gray, Howard Advance Sheets, Opinion No. 5951 (Ct. App. Filed November 23, 2021). The burden is on the opponent of the evidence to establish its inadmissibility. Id.; State v. King, 424 S.C. 188, 200 n. 6, 818 S.E.2d 204, 210, n. 6 (2018). The still photos are what they are. They are still photos of a *Cube like vehicle* coming from the direction of Ginther's home and headed toward Sumter County and victim's home at approximately 1:00 a.m. the morning of her murder. The fact that the Solicitor in his closing argument referred to the still photos in evidence and asked the jury to compare them to the photo of Ginther's vehicle upon arrest in Kentucky was not improper or prejudicial. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990)(the Solicitor may argue the evidence and reasonable inferences from the same), *overruled on other grounds by* State v.

Evans, 371 S.C. 27, 30, 637 S.E.2d 313, 315 (2006). The Solicitor admitted to the jury that you could not see the license plate or the color in the still photos, but asked the jurors to compare those photos to the car Ginther was arrested in (State's Ex. 76). There was no objection to the Solicitor's closing argument in this regard. It was for the jury to determine what weight they gave to the still photos after comparing them to the photo of Ginther's vehicle upon arrest. The evidence' probative value was not substantially outweighed by the danger of unfair prejudice, confusing or misleading the jury. Rule 403, SCRE; State v. Holland, 385 S.C. 159, 173, 682 S.E.2d 898 (2009) citing State v. Braxton, 343 S.C. 629, 634, 541 S.E.2d 833 (2001). The jury was able to view the still photos, and though grainy, and black and white, compare them to the photo of Ginther's *Nissan Cube* he was arrested in in Kentucky (State's Ex. 76). Therefore, allowing the jury to view the photos, closely, and as many times as they wished, and compare them to the photo of Ginther's car in Kentucky, was unlikely to cause confusion, mislead the jury, or cause undue prejudice. Gray.

Harmless Error

Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Bryant, 369 S.C. at 518, 633 S.E.2d at 156; Heller, 399 S.C. at 171, 731 S.E.2d at 320. Thus, an insubstantial error not affecting the result of the trial is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. Bryant at 518, 633 S.E.2d at 156; State v. Hardin, 425 S.C. 1, 15, 819 S.E.2d 177 (2018); State v. Gillian, 373 S.C. 601, 609-12, 646 S.E.2d 872 (2007).

Even if the trial court erred in admitting the surveillance video stills of the *Cube like* vehicle heading toward Sumter at approximately 1:00 a.m. on November 16th, whether under Rule 401 or 403, SCRE, Ginther cannot show any prejudice and as a result the error was harmless. The evidence of Ginther's guilt was overwhelming independent of the traffic surveillance video stills.

Further, the jury could have simply concluded they could not tell from the still photos if this was Ginther's car or not. They could also have determined the photos were consistent with Ginther's car, but they could not tell definitively, and gave them little or no weight. The jury did not convict Ginther based on the stills, but the overwhelming evidence of guilt independent of the still photos previously discussed in detail in the Statement of Facts and the analysis of Appellate Issue I.

CONCLUSION

For the above stated reasons, Ginther's convictions for the murder and kidnapping of Suzie Ginther should be affirmed.

Respectfully Submitted,

J. ANTHONY MABRY
Senior Assistant Attorney General
S.C. Bar No. 11973
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305

By: _s/J. Anthony Mabry_
J. ANTHONY MABRY
ATTORNEYS FOR RESPONDENT

January 3, 2022.

RECEIVED
Jan 03 2023
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Sumter County
The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JAMES L. GINTHER,

APPELLANT.

Appellate Case No. 2019-000672

PROOF OF SERVICE

I, **Donna D'Alessio**, an employee of the Respondent and legal assistant to J. Anthony Mabry, of counsel for the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Initial Brief of Respondent, and Designation of Matter has been forwarded to Appellant's counsel, Kathrine Hudgins, Esq., via email today, January 3, 2023 to Khudgins@sccid.sc.gov, and to her assistant at cstock@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 3rd day of January, 2023.

s/ Donna D'Alessio

Donna D'Alessio, Legal Assistant to
J. Anthony Mabry,
Senior Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305

Donna D'Alessio

From:	Donna D'Alessio
Sent:	Tuesday, January 3, 2023 6:11 PM
To:	Hudgins, Kathrine
Cc:	Stock, Chris
Subject:	Ginther, James L. - Appellate Case No. 2019-000672 - Initial Brief of Respondent, DOM and Proof of Service
Attachments:	Ginther, James L. - Appellate Case No. 2019-000672 - Initial Brief of Respondent, DOM and Proof of Service 1-3-23 (03186472xD2C78).pdf

Dear Ms. Hudgins:

Attached is a scanned copy of the Initial Brief of Respondent, Designation of Matter and Proof of Service regarding the above matter. The Initial Brief of Respondent is being submitted to the South Carolina Court of Appeals through e-filing, along with a copy of this email.

Happy New year and hope you are well.

Donna D'Alessio,
Legal Assistant
Office of the Attorney General
State of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211-1549
(803) 734-6305