STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of General Sessions

Thomas A. Russo, Circuit Court Judge

Opinion No. 5110 (S.C. Ct. App. filed April 3, 2013), Appellate Case No. 2011-197635

THE STATE,

RESPONDENT/PETITIONER,

V.

ROGER BRUCE,

PETITIONER/RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER/RESPONDENT'S QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in asking the lower court to determine if petitioner "had a legitimate expectation of privacy in the trunk of Creel's car . . ." when the Fourth Amendment violation occurred at the moment the police seized the car keys in petitioner's apartment without his consent and without a search warrant?

II. Whether the Court of Appeals erred in asking the lower court to determine if the error in admitting the evidence was harmless when a trial judge is not to sit in judgment of his own decision and it is the job of the reviewing court to determine if an error is harmless?

III. Whether the Court of Appeals erred in asking the lower court to make additional findings when the State failed to present an adequate record when it had the chance to do so?

BACKGROUND AND STATEMENT OF THE CASE

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

Bruce was indicted by the Florence County grand jury for murder (#2010-GS-21-0254). (R. 465-66). Following his indictment, Bruce was tried before the Honorable Thomas A. Russo and a jury on August 8-11, 2011 in Florence. (R. 1). At trial, Bruce was represented by chief public defender, Jack Lawson and assistant public defender Scott P. Floyd, while the State was represented by solicitor E.L. Clements, III. (R. 1). At the conclusion of trial, Bruce was found guilty and received a life sentence. (R. 459-60, 464). Thereafter, Bruce filed a timely notice of appeal and, on May 23, 2012, filed his final brief arguing, "the trial court erred in refusing to suppress evidence seized from appellant's residence and a car in his backyard when the police took keys to the car from the residence without consent and without a search warrant." (App. 4). In the conclusion of his brief, Bruce requested only that his conviction be reversed. (App. 10). In response, the State, via its' final brief maintained the trial court's factual finding, that the victim's body would have discovered pursuant to the inevitable discovery doctrine, was not clearly erroneous and furthermore, even if it was, reversal was not the appropriate remedy in light of a variety of evidence supporting the trial court's judgment. (App. 16). Accordingly, the State asked the Court of Appeals to affirm the trial court's judgment below. (App. 29).

On April 3, 2012, the Court of Appeals issued a published opinion remanding the case back to the trial court, stating "the court did not make adequate factual findings or legal conclusions." (App. 33). In particular, the Court of Appeals determined, the trial court's finding, that suppression was not the appropriate remedy under the inevitable discovery doctrine,

was "inadequate for appellate review." (App. 34). Accordingly, the Court of Appeals instructed the trial court to evaluate (1) whether Appellant had a legitimate expectation of privacy in the trunk of the victim's car; (2) whether Appellant consented to the search; and (3) if Appellant's Fourth Amendment rights were violated, whether the exclusionary rule applied. (App. 34). Both the State and Bruce timely sought rehearing, which the appellate panel denied. Thereafter, both the State and Bruce sought certiorari. The State now files its return to Bruce's petition for writ of certiorari.

STATEMENT OF THE FACTS

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

Pursuant to this request, Officer Gary Beckett was dispatched to Victim and Bruce's residence, a one bedroom garage apartment. (R. 109, 110-11). After knocking on the door for approximately ten minutes and receiving no response, Beckett returned to his patrol car and had dispatch connect him with Shane. (R. 110-11, 113-14, 115). During Shane and Beckett's conversation, Shane informed Beckett that Bruce was inside as Shane had called and spoken to

Bruce from a different line while he was on the line with dispatch. (R. 92). Shane further informed Beckett that both he and his brother spoke with Victim almost daily, but neither of them had heard from Victim in three days. (R. 116). Additionally, Beckett learned Bruce had a substance abuse problem; the couple had recently been in an argument; and it was unusual for Victim to leave the residence without her cell phone or car. (R. 116, 92-93).

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

Over the course of their conversation, the officers observed a cell phone and keys which were consistent with the vehicle parked outside of the residence prompting them to ask Bruce who owned the cell phone and keys. (R. 119). Bruce then explained the cell phone and keys belonged to Victim. (R. 119, 49-50, 50-51, 167, 168).

At that time, Hobgood picked up the car keys and proceeded out to the vehicle in an effort to find "maybe a pocketbook" or "something that may give us an idea where she may be." (R. 118, 144). Bruce and the remaining officers followed and after Hobgood scanned the interior

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

At trial, forensic pathologist, Dr. Cynthia Schandl testified Victim died as a result of a single, small caliber gunshot wound to the head fired at point blank range. (R. 241, 256). Further, SLED firearms and ballistics expert Kenneth Whitler explained that a spent cartridge recovered from the residence was fired by a Marlin .22 caliber rifle, which was found under Bruce's bed. (R. 321, 283, 323-24, 278-79, 167). Whitler further testified that while he could not conclusively state the bullet recovered from Victim's head was fired by Bruce's rifle due to deformities in the bullet, the bullet was consistent with having been fired by the rifle. (R. 326-28). Additionally, SLED DNA and serology expert Katherine Leisy testified Bruce's DNA was found on the rifle's trigger, stock and barrel. (R. 334, 335-36). Leisy also determined a portion of blood soaked carpet found inside the residence contained Victim's DNA. (R. 339).

PRESENTATION OF ISSUE AT TRIAL

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

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

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

(R. 122). Thereafter, the trial court noted, "[i]t appears that this is inevitable discovery; but/for hitting the trunk release button and opening the trunk according to the earlier testimony, [Bruce] was gonna open the trunk for them, or at least was providing the keys to do so." (R. 122). Continuing, the trial court determined, "I'm gonna overrule the objection and allow it." (R. 122). Defense counsel then argued "I understand it may inevitably have been discovered at a later point and what I'm saying is that any evidence gathered in the time between when it was discovered and when it would have been discovered would be appropriately suppressed in spite of the fact that they may have inevitably discovered it with a proper search warrant." (R. 122-23). Notably, defense counsel never objected to any testimony regarding the seizure of the keys. (R. 119, 167-68).

STANDARD OF REVIEW

In criminal cases, appellate courts sit only to review errors of law and are bound by the factual findings of the trial court unless they are found to be clearly erroneous. State v. Hernandez, 386 S.C. 655, 659, 690 S.E.2d 582, 584 (Ct. App. 2010). With respect to reviewing a Fourth Amendment search and seizure issue, the court must affirm "if there is any evidence to support the trial court's ruling and will reverse only where there is clear error." State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 326 (2011); State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000).

ARGUMENTS

I. Bruce's Fourth Amendment rights were not violated because the victim's keys were obtained as a result of authorities receiving consent from Bruce to search the residence after which Bruce informed authorities the keys found in the residence, which were in plain view, were the victim's car keys, a car in which he had no possessory interest, no legitimate expectation of privacy and thus no standing to challenge the search of the victim's vehicle

In his petition for writ of certiorari, Bruce first contends the Court of Appeals erred in asking the trial court to determine if he "had a legitimate expectation of privacy" in the trunk of victim's car arguing the alleged violation of his Fourth Amendment rights occurred when authorities seized the victim's car keys. Continuing, Bruce maintains, "[i]t was the taking of the keys from the house without permission and without a warrant that was the Fourth Amendment violation." Br. of Pet./Resp. at 5. In response, the State submits this question is not preserved and further contends Bruce's Fourth Amendment rights were not violated since the record establishes authorities had consent to search the residence after which Bruce informed authorities the keys found in the residence, which were in plain view, were Victim's car keys meaning they were lawfully seized. As such, Victim's body was not obtained as a result of an unlawful seizure meaning it is not the fruit of the poisonous tree. Finally, because Bruce had no possessory interest in Victim's vehicle and thus no legitimate expectation of privacy in either the vehicle or its' trunk, Bruce cannot object to authorities subsequent search of Victim's vehicle.

Preservation

Initially, the State highlights that to the extent Bruce's first argument can be considered a clarification in that Bruce was never appealing the trial court's inevitable discovery ruling, but is instead only arguing his Fourth Amendment rights were violated by the seizure of the keys, such an argument is not preserved since the issue was neither raised to nor ruled upon by the trial court. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (holding that in

order for an issue to be preserved for appellate review it must be both raised to and ruled upon by the trial court); Glover v. County of Charleston, 361 S.C. 634, 640-41, 606 S.E.2d 773, 777 (2004) (explaining the preservation requirement applies to constitutional arguments). Specifically, while defense counsel objected to the search of Victim's trunk (R. 120) and the trial court's inevitable discovery ruling (R. 120), defense counsel never objected to the testimony regarding the seizure of Victim's keys, and as a result, the trial court never determined whether the seizure of Victim's keys was unlawful.[1] (R. 119, 120). Additionally, Bruce cannot bootstrap his current unlawful seizure argument on defense counsel's objection regarding the search or the trial court's subsequent inevitable discovery ruling. See State v. Lynn, 277 S.C. 222, 226, 284 S.E.2d 786, 789 (1981) (holding the failure to contemporaneously object to the introduction of allegedly prejudicial testimony cannot be bootstrapped to a subsequent objection). Accordingly, because a review of the record reflects the testimony regarding the alleged unlawful seizure of the keys came in without objection on multiple occasions (R. 119, 167-68), Bruce's claim that the alleged seizure of Victim's keys was unlawful is not preserved for appellate review.[2]

Merits

As detailed above, and mentioned in the State's petition for writ of certiorari, Bruce's Fourth Amendment rights were not violated since the record establishes authorities had consent to search the residence after which Bruce informed authorities the keys found in the residence,

[1] Defense counsel's specific objection was as follows:

> We're getting to the point where the trunk is about to be open, and I understand—the Defense would object to the discovery of the body in that fashion, *basis that there was no search warrant obtained and no—does not appear any consent by my client given at the time to search the vehicle.* I know that he allowed them to come in and look when they asked, but there's no indication that he consented[.]"

(R. 120) (emphasis added).

[2] Additionally, if Bruce is indeed clarifying his position as merely contesting the allegedly unlawful seizure of Victim's keys, the trial court's inevitable discovery ruling must be considered law of the case meaning the Court of Appeals' ruling must be vacated. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling, right or wrong, is law of the case).

which were in plain view, were Victim's car keys meaning Victim's keys were lawfully seized and Victim's body was not the fruit of the poisonous tree. Further, because Bruce had no possessory interest in Victim's vehicle and therefore no legitimate expectation of privacy in either the vehicle or its' trunk, Bruce cannot object to authorities search of Victim's vehicle.

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

As detailed in the State's brief before the Court of Appeals, the record conclusively shows Bruce voluntarily gave authorities permission to search the residence he shared with Victim. Therefore, even if the trial court's ruling on inevitable discovery is clearly erroneous, reversal or remand would be unnecessary because Bruce consented to allowing authorities to search the residence he occupied with Victim, and the keys, which were in plain view inside the residence were therefore lawfully seized meaning Victim's body, which was later found in the trunk of her own vehicle, was not the fruit of the poisonous tree.

"The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . ." State v. Spears, 393 S.C. 466, 482, 713 S.E.2d 324, 332 (Ct. App. 2011). "Warrantless searches and seizures are reasonable within the meaning of the Fourth Amendment when conducted under the authority of voluntary consent." State v. Provet, 391 S.C. 494, 507, 706 S.E.2d 513, 520 (Ct. App. 2011). "While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." INS v. Delgado, 466 U.S. 210, 216 (1984). Nevertheless, the State "bears the burden of establishing the voluntariness of the consent." Provet, 391 S.C. at 507, 706 S.E.2d at 520. Determining the voluntariness of consent to search is a question of fact to be determined from the totality of the circumstances. Id. Moreover, "law enforcement officers may seize

evidence in plain view, provided that they have not violated the Fourth Amendment in arriving at the spot from which the observation of the evidence is made." Kentucky v. King, 563 U.S. --, 131 S.Ct. 1849, 1858 (2011) (citing Horton v. California, 496 U.S. 128, 136-40 (1990).

The State submits Bruce voluntarily consented to allowing the officers to search the residence and therefore, cannot object to the seizure of Victim's keys which were found in plain view inside the residence. In support of this assertion the State first notes that even defense counsel agreed Bruce voluntarily consented to a search of the residence.[3] (R. 120). Moreover, the record demonstrates that while Bruce may have been intoxicated, he clearly understood the officers were at the residence to check on Victim and understanding this to be the case, agreed to let the officers search the premises and question him regarding Victim's whereabouts without qualification. (R. 117-19, 141-42, 158, 164-65, 166). In fact, Bruce consistently demonstrated his ability to respond to questions posed to him by the officers volunteering that the keys and cell phone found in the residence were not his, but Victim's. (R. 117, 49-50, 50-51, 167, 168). Accordingly, as there is no question Bruce voluntarily consented to allowing the officers to search and question him regarding Victim's whereabouts, it logically follows that the keys, which were in plain view and obtained as a result of this consent search, were lawfully obtained and therefore, Bruce's Fourth Amendment rights were not violated. See King, 131 S.Ct. ata 1858 ("[L]aw enforcement officers may seize evidence in plain view, provided that they have not violated the Fourth Amendment in arriving at the spot from which the observation of the evidence is made."). As a result, Victim's body, which was found in the trunk, was not the fruit of the poisonous tree.

Bruce had no Standing to Challenge the Search of the Vehicle

[3] Specifically, defense counsel, in the course of his objection regarding the discovery of Victim's body noted "I know that he allowed them to come in and look when they asked. . ." (R. 120).

Additionally, Bruce did not have standing to challenge the search of Victim's vehicle where the record reflects he had no legitimate expectation of privacy in the vehicle or its' trunk, where Victim's body was found. See Rakas v. Illinois, 439 U.S. 128, 133-34 (1978) ("A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed."). While defense counsel argued Bruce had standing to challenge the search based upon the fact the vehicle was located in the yard of the residence he occupied with Victim, this argument is irrelevant, as authorities had consent to be on the property, and the vehicle, which was the property that was actually searched, was not Bruce's, but Victim's. See U.S. v. Castellanos, --F.3d--, 2013 WL 2321976 (4th Cir. 2013) ("[S]uppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence.") (internal citations omitted).

The "capacity to claim the protection of the Fourth Amendment depends ... upon whether the person who claims the protection . . . has a legitimate expectation of privacy in the invaded place." Rakas, 439 U.S. at 143. "In order to demonstrate a legitimate expectation of privacy, [the accused] must have a subjective expectation of privacy," U.S. v. Bynum, 604 F.3d 161, 164 (4th Cir. 2010), and that subjective expectation of privacy must be "objectively reasonable; in other words, it must be an expectation that society is willing to recognize as reasonable[.]" U.S. v. Bullard, 645 F.3d 237, 242 (4th Cir. 2011) (internal quotation marks omitted).

In determining whether a person has a legitimate expectation of privacy in a particular place or object, courts should review the totality of the circumstances, U.S. v. Gray, 491 F.3d 138, 151 (4th Cir. 2007) taking into account "whether [the] person claims an ownership or

possessory interest in the property," U.S. v. Rusher, 966 F.2d 868, 875 (4th Cir. 1992); the individual's "control of the area searched," U.S. v. Horowitz, 806 F.2d 1222, 1225 (4th Cir. 1986); "his efforts to ensure [his] privacy" in the object or area, id.; "the purposes for which the individual uses the property," U.S. v. Stevenson, 396 F.3d 538, 546 (4th Cir. 2005); his "historical use of the property," U.S. v. Sanchez, 943 F.2d 110, 113 (1st Cir. 1991); and "society's common understanding as to areas that deserve Fourth Amendment protection[.]" Stevenson, 396 F.3d at 546. "Any determination of the reasonableness of an individual's expectation of privacy is necessarily fact intensive," U.S. v. Smith, 978 F.2d 171, 180 (5th Cir. 1992), and "custom and contemporary norms necessarily play . . . a large role in the constitutional analysis[.]" Payton v. New York, 445 U.S. 573, 600 (1980). It is well-established that the burden of showing a legitimate expectation of privacy in the area searched lies with the defendant. Rawlings v. Kentucky, 448 U.S. 98, 104 (1980).

Generally, an individual has a reduced expectation of privacy in a motor vehicle due to the high level of regulation to which they are subject. California v. Carney, 471 U.S. 386, 392 (1985). Furthermore, with respect to vehicles, Courts have historically placed a great deal of significance on whether the accused has a possessory interest in the vehicle searched—this is so because "the Fourth Amendment protects people, not places." Katz v. U.S., 389 U.S. 347, 351 (1967). For example, in Rakas v. Illinois, the Supreme Court of the United States determined passengers who had no possessory interest in a vehicle lacked standing to suppress items found in a search of that vehicle ruling:

> Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted. A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, it is proper to

> permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections. There is no reason to think that a party whose rights have been infringed will not, if evidence is used against him, have ample motivation to move to suppress it. Even if such a person is not a defendant in the action, he may be able to recover damages for the violation of his Fourth Amendment rights, or seek redress under state law for invasion of privacy or trespass.

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

This logic was compelling in U.S. v. Rusher, where the Fourth Circuit, applying Rakas, found that a husband and wife who were passengers in a truck in which they lacked any possessory interest, did not have a legitimate expectation of privacy in the truck and thus lacked standing to seek suppression of items found in a search of that truck. 966 F.2d at 874. Continuing, the Fourth Circuit, citing to Rakas noted, "a passenger's privacy rights are no greater in the trunk of a car than in its interior." Id. Similarly, in U.S. v. Sanchez, the First Circuit Court of Appeals found that a defendant who was the driver and only person in the vehicle at the time it was searched, but was not the owner and merely claimed he had permission to drive the vehicle from a person who purportedly had permissive use of it, had not established enough of a possessory interest in order to establish a legitimate expectation of privacy in the vehicle. 943 F.2d at 113-14.

More recently, the Fourth Circuit, in U.S. v. Castellanos, affirmed a district court's denial of a motion to suppress where the defendant was unable to substantiate claims that he had recently purchased the vehicle searched by authorities. --F.3d--, 2013 WL 2321976. In its opinion, the Fourth Circuit explained, "[t]he evidence heard by the district court at the suppression hearing failed to support a conclusion that Castellanos had anything more than a distantly attenuated connection to the [vehicle searched]." Id. As a result, the Court said the

district court's ruling must be affirmed since, "Castellanos bore the burden to show that he had a reasonable expectation of privacy, and he has not done so." Id.

Here, the record clearly reflects Bruce did not have a legitimate expectation of privacy in Victim's vehicle, much less the trunk of Victim's vehicle. Indeed, the record clearly reflects Bruce had no possessory interest in the vehicle meaning the case falls into the category of Rakas, Rusher, Sanchez and Castellanos in that Bruce lacked standing to challenge the search of a vehicle he did not own. Specifically, there was a wealth of testimony indicating Victim owned the vehicle and drove it exclusively. (R. 90, 101-102, 218-219, 236, 345). Additionally, an inventory of the vehicle revealed Victim's driver's license and further indicated the vehicle was registered and insured in Victim's name. (R. 305-306). In fact, Bruce did not have a driver's license meaning he could not lawfully operate the vehicle. (R. 223).

Moreover, Bruce failed to exercise any control over the vehicle, rarely, if ever, used the vehicle and never sought to ensure privacy in the vehicle. In particular, as in Sanchez, Bruce never produced any evidence that he had permissive use of the vehicle at the time of the search and a review of the record conclusively refutes such an assertion. In fact, both Shane and Michael repeatedly said no one other than Victim drove the vehicle and even Bruce's brother admitted essentially the same, testifying Bruce did not normally drive. (R. 90, 101, 219). Furthermore, while Bruce admittedly drove Victim's vehicle around following her murder, there is nothing to suggest he had permissive use while doing so, nor do these actions give Bruce a legitimate expectation of privacy in the vehicle or its' trunk. Indeed, Bruce's interactions with authorities after he drove the vehicle the previous day indicate he was not attempting to ensure privacy in Victim's car. Notably, Bruce freely admitted the keys to the vehicle were not his, and further attempted to aid authorities in opening Victim's trunk. (R. 126-27, 145, 156-58, 168-69).

Accordingly, the State submits Bruce failed to prove he had a legitimate expectation of privacy in Victim's vehicle and therefore, lacked standing to suppress Victim's body which was of course, found in the vehicle's trunk. See Rakas, 439 U.S. at 133 (holding constitutional rights may not be vicariously asserted and as a result one who is aggrieved by the introduction of evidence from a third person's property has not had their Fourth Amendment rights violated); Rusher, 966 F.2d at 874 (concluding that a defendant without a possessory interest in a vehicle does not have a greater expectation of privacy in the trunk of a car than in its interior meaning he cannot seek suppression of items seized from the vehicle searched); Sanchez, 943 F.2d at 114 (stating a defendant's mere assertion of permissive use of a vehicle is not enough to create a legitimate expectation of privacy in the vehicle and thus the defendant cannot seek suppression of the items seized during a vehicle search); Castellanos, --F.3d--, 2013 WL 2321976 (explaining the accused did not have standing to suppress the fruits of a vehicle search where he failed to prove he owned the vehicle searched).

II. While the State, consistent with the position taken in its' petition for writ of certiorari submits there was evidence to support the trial court's ruling regarding inevitable discovery meaning there is no need for a remand, the State agrees with Bruce that the Court of Appeals erred in asking the lower court to determine if the error in admitting the evidence was harmless when a trial judge is not to sit in judgment of his own decision and in it is the job of the reviewing court to determine if an error is harmless

As detailed in its petition for writ of certiorari, the State submits the trial court's ruling regarding inevitable discovery is supported by the evidence, and therefore, the Court of Appeals' erred when it remanded the issue to the trial court. Nevertheless, if one were to assume the Court of Appeals was correct in addressing the issue and further assumes a remand was the proper remedy, the State agrees with Bruce that the Court of Appeals erred in asking the lower to perform a harmless error analysis.

As noted by the State in its' petition for writ of certiorari, "[a] trial judge's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant." See Pet. for Writ of Cert. at 2 (citing State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003)). Additionally, the appellant is tasked with showing not only an error of law, but further demonstrating that the error complained of on appeal is prejudicial. Snyder's Auto World, Inc. v. George Coleman Motor Co., Inc., 315 S.C. 183, 186, 434 S.E.2d 310, 312 (Ct. App. 1993) ("The burden is on the Appellant to show not only error, but also prejudice.").

Here, the State submits the Court of Appeals, by failing to determine whether Bruce had established prejudicial error and instead passing the buck to the trial court to make such a determination, failed to comply with the standard of review. Indeed, even if one were to assume error regarding the trial court's inevitable discovery ruling, the Court of Appeals, had it fulfilled its obligation to determine whether Bruce was prejudiced by such an error, would have found there was no prejudice to Bruce. In fact, as detailed above, it is clear Bruce did not have standing to contest authorities' search of Victim's vehicle meaning the trial court's purportedly erroneous ruling on inevitable discovery was in no way prejudicial to Bruce. Moreover, even if Bruce could establish that he had standing to seek suppression of Victim's body, his Fourth Amendment rights were not violated since Bruce consented to the initial search, the keys were in plain view, and he never objected to the search of the victim's vehicle, instead aiding authorities in searching the vehicle. As a result, Bruce could not have proved the trial court's alleged error regarding inevitable discovery was prejudicial. Accordingly, the Court of Appeals, by remanding the issue to the trial court for a determination of harmless error, neglected its duty to determine whether Bruce established prejudicial error as required by the standard of review.

III. In the event this Court finds the trial court erred in its application of the inevitable discovery doctrine and further decides a remand is necessary, the State submits the Court of Appeals was correct in determining that the trial court should consider: whether Bruce had a reasonable expectation of privacy in the victim's trunk; if Bruce did have a reasonable expectation of privacy in the victim's trunk whether Bruce's Fourth Amendment rights were violated; and if so, whether suppression is the appropriate remedy

Bruce alleges the Court of Appeals erred when it instructed the trial court to consider, on remand: whether Bruce had a reasonable expectation of privacy in the trunk of Victim's car; if so, whether Bruce's Fourth Amendment rights were violated; and finally, in the event Bruce has standing and his Fourth Amendment rights were violated, whether suppression is the appropriate remedy. Specifically, Bruce claims Double Jeopardy and collateral estoppel prohibit the State from introducing additional facts regarding these issues on remand. The State disagrees.

First, the State notes the trial court correctly applied the inevitable discovery doctrine meaning there is no error and thus no need for a remand. Nevertheless, should this Court find otherwise and additionally determine a remand is in fact necessary[4] it is clear the Court of Appeals was correct in instructing the trial court on the issues it should address on remand. Specifically, while Bruce argues that Double Jeopardy prevents the introduction of additional facts concerning the subject of the remand citing to Burks v. U.S., 437 U.S. 1 (1978) the State disagrees. Initially, the State notes the Court of Appeals opinion shows a variety of cases in which a remand on Fourth Amendment issues was proper citing to State v. Jenkins, 398 S.C. 215, 227, 727 S.E.2d 761, 767 (Ct. App. 2012); State v. Austin, 306 S.C. 9, 17, 19, 409 S.E.2d 811, 816, 817 (Ct. App. 1991) and State v. Richburg, 250 S.C. 451, 461, 158 S.E.2d 769, 773

[4] As detailed above and in its' petition for writ of certiorari, the State maintains the record as it currently stands is enough to support the issue being affirmed via the additional sustaining grounds submitted in its petition for writ of certiorari. See Rule 220(c), SCACR (explaining the appellate court may affirm any ruling, order or judgment for any ground appearing in the record on appeal); I'On, L.L.C v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (holding the respondent, the "winner" in the lower court may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling provided the additional sustaining grounds appear in the record on appeal).

(1968). Moreover, as the Double Jeopardy Clause only protects against a second prosecution for the same offense after acquittal, and protects against a second prosecution for the same offense after conviction, Double Jeopardy does not apply in this situation. U.S. v. Brisbane, 729 F. Supp. 2d 99, 110 (D.D.C. 2010).

The Double Jeopardy Clause "does not prevent the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction." Lockhart v. Nelson, 488 U.S. 33, 38 (1988). Further, Lockhart explains Burks merely stands for the proposition that the Double Jeopardy Clause bars retrial when a conviction is reversed due to insufficient evidence against the accused, because the decision is equivalent to an acquittal. 488 U.S. at 39 (citing Burks, 437 U.S. at 16-17). Notably, Burks has been interpreted as an exception to Lockhart's general rule permitting retrial. Id. at 39; Parker v. Norris, 64 F.3d 1178, 1181 (8th Cir.1995), cert. denied, 516 U.S. 1095 (1996). Thus, because the scope of the remand merely relates to issues regarding suppression to be determined by the trial court, issues which under state law the Court of Appeals opinion claims should have been addressed by the trial court, the scope of the Court of Appeals' remand does not offend Double Jeopardy. As explained in Lockhart, "the incorrect receipt or rejection of evidence . . .implies nothing with respect to guilt or innocence of the defendant" but is instead merely a determination by the reviewing court that some aspect of the judicial process was "defective." 488 U.S. at 40. Accordingly, because the basis for the Court of Appeals remand was not a finding regarding the sufficiency of the evidence against Bruce, but was only a request for additional legal rulings regarding the alleged violation of Bruce's Fourth Amendment rights and whether the Exclusionary Rule applies, the remand does not offend Double Jeopardy. In fact, the State submits the remand in this case, rather than

offending Double Jeopardy, serves Bruce's interest by determining whether his Fourth Amendment rights were violated and if they were, determining whether such a violation requires suppression based upon the principles of the Exclusionary Rule. See e.g. Lockhart, 488 U.S. at 42 (holding retrial, or in this case remand, serves the interest of the defendant by affording him an opportunity to obtain a fair adjudication free from error).

Furthermore, while Bruce contends the State is collaterally estopped from introducing additional evidence on remand, the State again disagrees. "Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." Carolina Renewal, Inc. v. South Carolina Dept. of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." Id. In U.S. v. Dixon, 509 U.S. 688 (1993) the Supreme Court of the Unites States explained the effect of collateral estoppel in regard to the Fifth Amendment's Double Jeopardy Clause, stating:

> The collateral-estoppel effect attributed to the Double Jeopardy Clause, see Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), may bar a later prosecution for a separate offense where the Government has lost an earlier prosecution involving the same facts. But this does not establish that the Government "must ... bring its prosecutions ... together." It is entirely free to bring them separately, and can win convictions in both."

509 U.S. at 705.

Here, it is clear collateral estoppel does not apply. First, as explained in Dixon, collateral estoppel, for purposes of Double Jeopardy, applies only when "a later prosecution for a separate offense" occurs after "the Government has lost an earlier prosecution involving the same facts." Id. at 705. This is of course consistent with the general requirement of collateral estoppel, in that

there must be a valid prior judgment, that was actually litigated and stems from the same facts, in order for a party to be collaterally estopped from litigating the issue. Carolina Renewal, 385 S.C. at 554, 684 S.E.2d at 782. Obviously, this has not occurred in Bruce's case since he was convicted in his first and only trial after which the Court of Appeals remanded for the limited purpose of determining whether Bruce had standing to challenge the search of Victim's vehicle; if he did, whether his Fourth Amendment rights were violated and if they were, whether suppression was the appropriate remedy. Indeed, the only purpose for the remand was because the trial court did not previously rule on these issues meaning the issue had not been previously litigated and thus there is no judgment in place with respect to these issues. As such, it seems clear that were the Court of Appeals' remand to stand, there is nothing to stop the State from introducing additional facts related to the issues to be considered by the trial court on remand.

CONCLUSION

In conclusion, the State asks this Court to grant certiorari on Bruce's first argument, vacate the Court of Appeals' opinion since Bruce was apparently not contesting the trial court's inevitable discovery ruling, affirm Bruce's conviction and sentence since the issue now raised by Bruce is not preserved and, consistent with the State's additional sustaining grounds, shows Bruce's Fourth Amendment rights, to the extent they were implicated, were not violated. Second, with respect to Bruce's argument regarding the Court of Appeals instructions to the trial court to potentially determine harmless error, the State requests that this Court grant certiorari, vacate the Court of Appeals ruling and affirm Bruce's conviction and sentence on the basis that the trial court did not err in its inevitable discovery ruling, but even if it did, Bruce failed to show prejudice as is required by the standard of review. Finally, the State asks this Court to deny

certiorari on Bruce's third argument since the scope of the Court of Appeals' remand does not offend the Double Jeopardy Clause and is not barred by collateral estoppel.

Respectfully Submitted,

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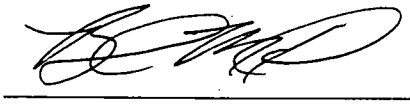

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ATTORNEY(S) FOR RESPONDENT/PETITIONER

July 3, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of General Sessions

Thomas A. Russo, Circuit Court Judge

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

THE STATE,

RESPONDENT/PETITIONER,

V.

ROGER BRUCE,

PETITIONER/RESPONDENT.

CERTIFICATE OF SERVICE

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

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I further certify that all parties required by Rule to be served have been served on this 3rd day of July, 2013.

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