STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Honorable Benjamin H. Culbertson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TAMMY CAISON MOORER,

APPELLANT.

APPELLATE CASE NO. 2018-001938

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

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Did the trial judge abuse his discretion by admitting evidence of text messages allegedly sent and received by Appellant that were both sexually explicit and contained references to drug use since this testimony constituted inadmissible bad character evidence where Appellant had not put her character at issue, in violation of Rule 404, SCRE, and where the probative value of this evidence was also substantially outweighed by its unfair prejudice in violation of Rule 403, SCRE?

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STATEMENT OF THE CASE

A Horry County Grand Jury indicted Appellant Tammy Moorer on March 20, 2014 for kidnapping, and on April 25, 2018 for conspiracy to kidnap. R. 2804. On April 18, 2016, a pretrial hearing was held regarding the proposed expert testimony of Grant Fredericks before the Honorable R. Markley Dennis, Jr. R. 1. A second pretrial hearing on various motions was held on September 5, 2018 before the Honorable Benjamin H. Culbertson. R. 133.

Appellant Moorer's case was ultimately called to trial on October 8, 2018 before Judge Culbertson, and a jury. R. 139. Assistant Solicitors Nancy Livesay and Christopher Helms prosecuted the case. R. 139. Gregory McCollum and Casey Brown represented Appellant. R. 139.

On October 23, 2018, the jury found Appellant guilty as indicted. R. 2342, ll. 2-14. Judge Culbertson sentenced her to thirty years' imprisonment on each offense, concurrent. R. 2352, l. 22 – 2353, l. 3.

This appeal follows.

STATEMENT OF FACTS

Sidney Moorer, Appellant's husband, and Heather Elvis (hereinafter "Elvis") had an affair from July 2013 until early November 2013. Elvis, who was twenty years old, was a hostess at the Tilted Kilt, a restaurant at Broadway at the Beach in Myrtle Beach. Sidney did maintenance, usually after hours, for various restaurants, including the Tilted Kilt. Elvis and Sidney met through their employment and had an intimate relationship. The affair ended on or about November 2, 2013 when Appellant discovered the relationship. Communication between Elvis and Sidney ceased within a few days of that date.

Elvis went missing during the early morning hours of December 18, 2013. She has not been seen or heard from since that date. The last person to see her alive was Stephen Schiraldi, who went on a first date with Elvis on the night of December 17, 2013. R. 247, l. 9 – 249, l. 14. Schiraldi dropped Elvis off at her apartment sometime after 1:00 am the following morning, December 18, 2013. R. 249, ll. 15-23.

At 4:00 am on December 18, 2013, Corporal Casey Guskiewicz discovered Elvis's car, a Dodge four door Intrepid, at the Peachtree Boat Landing during his routine patrol. R. 266, l. 12 – 267, l. 14; R. 272, l. 17 – 273, l. 4. Guskiewicz described the boat landing as a small parking lot that could hold approximately ten to twelve cars. R. 273, ll. 7-21. It did not have any lights. R. 274, ll. 2-4.

When Guskiewicz arrived at the landing at 4:00 am, no one was there. The Intrepid was parked near the entrance to the landing. Guskiewicz asserted, "All the windows were intact. The doors were all secured. The ignition was intact . . . There was nothing that appeared to be mechanically wrong with the car. The tires weren't flat." R. 274, l. 18 – 275, l. 1. He ran the

license tag at 4:03 am. The car had not been reported stolen. It was registered to an "Elvis subject." R. 275, l. 12 – 276, l. 13.

Guskiewicz used his flashlight to search the landing. He checked the water for people and boats, but did not see any. He checked the swamp next to the landing and the nearby mobile home park. He also did not see anyone in or around the swamp or near the mobile home park. He did not see any keys. He did not see a phone. He did not see anything that would indicate a struggle had occurred at the landing. R. 276, l. 16 – 277, l. 17. Seeing nothing suspicious, Guskiewicz left the landing and continued his patrol. R. 281, ll. 15-20.

Sometime after sunset the next day, December 19, 2013, Lance Corporal Kenneth Canterbury responded to the Peachtree Boat Landing in regard to a suspicious vehicle. R. 332, ll. 13-25. When he arrived, he observed a Dodge Intrepid. The vehicle appeared to be operable. "It was just sitting there locked." R. 334, ll. 1-18. Canterbury ran the tag and then contacted the registered owner, Terry Elvis, Elvis's father. Because he did not have a telephone number for Terry, he drove to Terry's house. Terry had a set of keys for the vehicle. Canterbury drove Terry back to the landing. Terry opened the car and the men briefly looked through the vehicle. Canterbury did not see a purse, identification, phone, or keys. R. 336, l. 9 – 338, l. 25. Terry repeatedly tried to call his daughter, the driver of the car, "with no answer." R. 350, ll. 1-12. Terry eventually drove the car home. R. 350, ll. 6-16. Later that evening, Terry provided Canterbury with a copy of Elvis's phone records. R. 339, l. 13 – 340, l. 7.

Corporal Danny Furr went to the Tilted Kilt that night, December 19, 2013, in an effort to locate Elvis. R. 329, l. 20 – 330, l. 1. She was not there. R. 330, ll. 2-3. Based on his visit to the Tilted Kilt, Furr called Sidney Moorer. R. 330, ll. 4-12. Sidney was also the last person Elvis spoke to according to her phone records. R. 341, ll. 1-6. After speaking with Sidney on

the phone, Furr instructed Lance Corporal Canterbury to go to the Moorers' house and speak with Sidney in person. R. 330, l. 11 – 331, l. 5; R. 341, l. 13 – 342, l. 3. Canterbury spoke to Sidney shortly after midnight on December 20, 2013 at the end of his driveway. R. 342, ll. 4-17; R. 344, l. 7 – 345, l. 5. On that date, Sidney and his wife, Appellant, became suspects in Elvis's disappearance.

The state alleged at trial that Appellant and her husband, Sidney, kidnapped Elvis from the Peachtree Boat Landing. During its investigation, law enforcement discovered that Sidney purchased a pregnancy test from Walmart around 1:15 am on December 18, 2013. R. 2090, ll. 2-18. Shortly thereafter, Elvis received a call from a payphone located at a Kangaroo Express gas station at 1:35 am. Sidney allegedly admitted he called Elvis from the payphone. The call lasted nearly five minutes. After Sidney called Elvis from the payphone, Elvis called her roommate Brianna Warrelmann at 1:44 am. The two spoke for just over two minutes. Brianna claimed Elvis sounded "upset and scared." "She was hysterical." R. 1478, ll. 14-24. Brianna allegedly told Elvis, "Do not call Sidney back. Don't do anything rash. Go to sleep and we'll talk about it tomorrow." R. 1478, l. 25 – 1479, l. 14.

After talking to Brianna, Elvis called the payphone back nine times. Elvis ultimately called Sidney's phone number at 3:16 am. This call was routed to voicemail. Elvis called Sidney's number again at 3:17 am. The two spoke for a little over four minutes. R. 381, l. 23 – 382, l. 13. During an interview with law enforcement in January 2014, Appellant admitted she heard Elvis's voice during this call. However, during her testimony before the jury, Appellant stated only that she heard a female voice, but that Sidney told her it was Elvis. R. 2115, l. 2 – 2116, l. 1. Elvis called Sidney's number four more times at 3:38 am, 3:39 am, 3:40 am, and 3:41 am. All four of these calls were routed to voicemail. R. 382, l. 14 – 383, l. 8. Location data

showed Elvis's phone was at the Peachtree Boat Landing when she made these last four calls. There was no further activity on Elvis's phone after 3:41 am.

Grant Fredericks, who was qualified as an expert in forensic video analysis over objection, testified that Appellant and Sidney Moorer's 2013 Ford Limited F-150 pickup truck was the vehicle captured on surveillance footage driving towards the Peachtree Boat Landing around 3:35 am on the morning of December 18, 2013. Fredericks claimed the Moorers' truck was then captured driving away from the landing several minutes later around 3:46 am. The margin of error was approximately two to four minutes. R. 947, l. 14 – 948, l. 8.

Fredericks also testified that he was "able to synchronize the times" using the location data from Elvis's phone and the surveillance videos of the vehicle. R. 943, ll. 17-23. He claimed the vehicle on the videos, which he identified as the Moorers' truck, was moving towards the Peachtree Boat Landing "at the same time that . . . and just after [Elvis's] cell phone is pinging those areas, including the landing area. So they [Elvis's phone and the vehicle] are converging on the same spot, towards the same area," at the same time. R. 944, l. 23 – 945, l. 9.

Lastly, for the state, it presented the testimony of Donald Demarino, Appellant's cousin.[1] R. 1583, ll. 2-13. Demarino, who had pending charges at the time of trial and an extensive criminal record, claimed that after Appellant and Sidney were released on bond in 2015, he was at a cookout at the Moorers' house. R. 1600, ll. 19-25. He alleged Sidney showed him a photograph of Heather Elvis on a "Boost Mobile flip phone." He claimed it did not appear Elvis could talk, walk, or move in the photograph. R. 1585, l. 12 – 1586, l. 1; R. 1587, ll. 21-24; R. 1610, ll. 6-22. Demarino "believed" the "picture was taken . . . for Tammy Moorer [Appellant]." R. 1587, l. 25 – 1588, l. 1. After seeing the photograph, he said he did not "expect anybody to

[1] Appellant's father and Demarino's grandmother were brother and sister. R. 1614, ll. 13-19.

hear from Heather Elvis." R. 1588, ll. 7-9. Demarino admitted he first told the state about seeing this alleged photograph when he was incarcerated at the local detention center with pending charges. R. 1597, l. 23 – 1598, l. 16. He also admitted that he told his mother on a recorded jail call that "it's not true." This vague claim about an alleged photograph no one else ever saw was just Demarino talking. R. 1605, l. 5 – 1606, l. 15.

Appellant testified in her own defense. She explained that she went to work with Sidney on the night of December 17, 2013. Sidney worked into the early morning hours of December 18, 2013. R. 2085, ll. 5-25. He did maintenance work at LongHorn Steakhouse and the Sticky Fingers Restaurant. R. 2085, ll. 20-25. The couple stopped at Walmart to purchase a pregnancy test for Appellant. R. 2087, ll. 1-6. They stopped at a Bi-Lo and also went to look at some Christmas lights. R. 2087, ll. 6-8; R. 2088, ll. 6-8. Appellant was not aware Sidney made a phone call from a payphone and Sidney denied to her that he made the call. R. 2088, l. 21 – 2089, l. 9.

Appellant texted her sister, Ashley Caison, at 3:10 am that she was home. This is when Appellant and Sidney returned home that morning. Ashley, who was watching Appellant's children, immediately sent the children home. Ashley watched the children walk from her house across the yard to the Moorers' house, which was on the same property. R. 2077, 11. 4-22; R. 2078, l. 24 – 2079, l. 23. Sidney carried Caison, the youngest child, home because he was sleeping. R. 2081, ll. 1-19. Appellant and Sidney stayed home for the rest of the morning.

Appellant's children were homeschooled. Appellant was awake until 4:00 am getting the children's assignments and writing samples together to mail to their teachers. R. 2082, l. 18 – 2083, l. 10. Appellant stayed home until her mother called around noon because she had a flat tire and needed help. R. 2092, ll. 8-12; R. 2094, l. 1 – 2095, l. 25. Sidney and the children were

also home all night. R. 2094, ll. 11-20. Sidney never left the house except for when he went outside to feed the dogs. R. 2082, ll. 8-17.

Appellant denied going to the Peachtree Boat Landing on December 17, 2013 or December 18, 2013. R. 2050, ll. 14-24. To her knowledge, no one drove her Ford Limited F-150 pickup truck to the landing during the early morning hours of December 18, 2013. R. 2051, ll. 4-7. She denied kidnapping Elvis or knowing who kidnapped her. R. 2123, ll. 9-14.

ARGUMENT

1.

The trial judge erred by refusing to direct a verdict for kidnapping and conspiracy to kidnap when there was no direct evidence or substantial circumstantial evidence to support the kidnapping and conspiracy to kidnap charges and the evidence merely raised a suspicion Appellant was involved in Heather Elvis's disappearance.

Relevant Facts

After the state rested, Appellant moved for a directed verdict. Defense counsel argued the state failed to present substantial circumstantial evidence to support either offense. R. 1668, ll. 19-24. Counsel argued there was no evidence the Moorers' truck ever went to the Peachtree Boat Landing. R. 1672, ll. 3-6. In fact, the evidence established that Appellant and Sidney's cell phones were located at their home that morning. R. 1686, ll. 22-24. Counsel emphasized that there was absolutely no evidence Heather Elvis had ever been inside the Moorers' truck. R. 1672, ll. 23-25; R. 1673, ll. 3-5. An officer who searched the truck testified that the truck "smelled new." There was no evidence the truck had been cleaned. R. 1672, l. 25 – 1673, l. 3. Moreover, there was no evidence Appellant ever had physical contact with Elvis. R. 1673, ll. 5-7.

Defense counsel further argued there was no evidence of a struggle. R. 1673, ll. 10-12. Assuming Elvis got into the truck voluntarily, counsel argued there was no evidence of if or when her freedom was restricted in order to constitute a kidnapping. Counsel stressed that the state had to prove the kidnapping occurred in Horry County. R. 1673, l. 10 – 1674, l. 10. Specifically, he asserted, "Case law says that her freedom has to be restricted and stopped, but if she voluntarily gets in the car, then when does it occur? State versus Williams says they have to

prove that it happened in this county. We have North Carolina, Marion County, Florence County. If she freely got in the car and then leaves, they haven't proven or shown any evidence that it happened here." R. 1673, l. 25 – 1674, l. 10.

Lastly, as to kidnapping, counsel argued, "Near proximity to someone else who may have committed a crime doesn't get you there. It is not enough per case law. So even if she [Appellant] was riding around in the truck with her husband because she's expecting infidelity . . . that doesn't reflect on Tammy [Appellant], and that is who is on trial today." R. 1686, ll. 8-14.

As to conspiracy to kidnap, defense counsel argued there was no evidence presented "at all of an agreement, an understanding, a conspiracy, a confederation . . . a plan, a scheme to kidnap this woman." R. 1674, ll. 15-24.

Counsel concluded, "Your Honor, the case law . . . is clear. There has to be . . . substantial circumstantial evidence for the jury to consider, and in this case the State has failed. They have not presented evidence that meets the elements in either charge to where a reasonable trier of fact could find these essential elements beyond a reasonable doubt." R. 1674, l. 25 – 1675, l. 6. If the case goes to the jury, the jurors will be "forced to assume and guess." R. 1675, ll. 7-9.

In response, the assistant solicitor said that the evidence must be viewed in the light most favorable to the state, which no one disputed. R. 1675, ll. 18-22. While she admitted "this is a circumstantial case," she claimed the state had presented substantial circumstantial evidence to survive a directed verdict motion. R. 1675, ll. 22-24. The solicitor then outlined the evidence she contended got the state past the directed verdict motion: (1) Appellant admitted she was in the truck with Sidney Moorer all night; (2) Sidney called Heather Elvis from a payphone; (3) Elvis repeatedly called the payphone number back; (4) when Elvis did not reach anyone on the

payphone, she called Sidney; (5) Appellant admitted she heard Elvis's voice on the phone when Elvis called Sidney; (6) after talking to Sidney on the phone, Elvis left her apartment and drove towards the Peachtree Boat Landing; (7) as Elvis was driving to the landing, the Moorers' truck was driving towards the landing at the same time; (8) no one ever saw or heard from Elvis again; (9) Sidney showed Donald Demarino "a picture" of Elvis, in which it appeared Elvis could not walk or talk; (10) Demarino said the picture was for Appellant and that, based on the picture, he did not expect anyone to hear from Elvis again. R. 1676, l. 20 – 1684, l. 21.

The trial judge ultimately denied the motion for a directed verdict. R. 1687, ll. 9-11. He merely stated, "I think there is enough evidence to get past a directed verdict; that motion is denied." R. 1687, ll. 10-11.

After the defense rested, Appellant properly renewed her motion for a directed verdict. R. 2227, ll. 19-23. The trial judge again denied the motion. R. 2227, l. 24 – 2228, l. 2.

Standard of Review

"The defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged." State v. Odems, 395 S.C. 582, 586, 720 S.E.2d 48, 50 (2011) (citing State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001)). "However, if there is any direct or *substantial* circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury." Id. (citing State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000)) (emphasis in original). "On appeal from the denial of a directed verdict, this Court must view the evidence in the light most favorable to the State." Id. (citing State v. Lollis, 343 S.C. 580, 583, 541 S.E.2d 254, 256 (2001)).

"A [trial] judge should grant a directed verdict motion when the evidence merely raises a suspicion the accused is guilty." Id. (citing State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984)). "Suspicion implies a belief or opinion as to guilt based upon facts or circumstances which do not amount to proof." State v. Buckmon, 347 S.C. 316, 322, 555 S.E.2d 402, 404-405 (2001) (citing Lollis, 343 S.C. at 584, 541 S.E.2d at 256). "When ruling on a motion for a directed verdict, the trial [judge] is concerned with the existence or nonexistence of evidence, not its weight." State v. Shands, 424 S.C. 106, 135, 817 S.E.2d 524, 539 (Ct. App. 2018) (citing State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009)).

Discussion

The trial judge erred by denying Appellant's motion for a directed verdict for kidnapping and conspiracy to kidnap when the state failed to present any direct evidence or substantial circumstantial evidence of Appellant's guilt. At most, the state presented evidence that merely raised a suspicion Appellant was involved in Elvis's disappearance. The state conceded at trial that there was no direct evidence of Appellant's guilt. Consequently, the question is whether the state presented *substantial* circumstantial evidence to support the offenses.

South Carolina Code Ann. § 16-3-910 defines kidnapping as: "Whoever shall unlawfully seize, confine, inveigle, decoy, kidnap, abduct, or carry away any other person by any means whatsoever without authority of law . . . is guilty of a felony." "Kidnapping is a continuous offense which 'commences when one is wrongfully deprived of freedom and continues until freedom is restored.'" State v. East, 353 S.C. 634, 637, 578 S.E.2d 748, 750 (Ct. App. 2003) (quoting State v. Tucker, 334 S.C. 1, 13, 512 S.E.2d 99, 105 (1999)); See State v. Hall, 280 S.C. 74, 310 S.E.2d 429 (1983). "South Carolina's kidnapping statute requires proof of an unlawful act taking one of several alternative forms, including seizure, confinement, inveiglement, decoy,

kidnapping, abduction, or carrying away." Id. (citing State v. Owens, 291 S.C. 116, 352 S.E.2d 474 (1987)); See State v. Berntsen, 295 S.C. 52, 54, 367 S.E.2d 152, 153 (1988). The mens rea required for the offense of kidnapping is "knowledge." Tucker, 334 S.C. at 13, 512 S.E.2d at 105 (citing State v. Jefferies, 316 S.C. 13, 446 S.E.2d 427 (1994)).

In State v. Owens, 291 S.C. 116, 352 S.E.2d 474 (1987), a case relied on extensively by the state at trial, even though factually it was so much stronger than this case as seen below, our Supreme Court held the trial judge properly denied Owens' motion for a directed verdict as to the offense of kidnapping. Ernest Vereen disappeared from his home between the evening of October 10, 1984 and the morning of October 11, 1984. Id. at 117, 352 S.E.2d at 475. "There was evidence that a slight struggle had occurred in the kitchen." Id. On the night of October 11, 1984, Vereen's son received a typewritten ransom demand for $250,000. Id. Ernest Vereen's driver's license was included in the envelope. Id. On October 13, 1984, Vereen's son delivered $75,000 to "a location specified by a telephone caller who identified himself as his father's captor." Id. "Owens was observed picking up the money and was followed by law enforcement officers to his home. He was arrested and all but $18 of the $75,000 was recovered from him." Id.

In addition to this evidence, the state established: (1) Owens rented a typewriter on October 6, 1984 and returned it on October 8, 1984; (2) it was "very possible" the rented typewriter was used to prepare the ransom note; (3) the note stated Vereen was in the author's custody; (4) pieces of paper with language similar to that in the ransom note were found in Owens' bedroom, some of which had his fingerprints on them; and (5) on October 13, 1984, Owens contracted to buy a new car telling the salesman he expected to receive a $200,000 insurance settlement in the near future. Id.

Our Supreme Court concluded that the "corpus delicti of kidnapping was established circumstantially by the evidence of a struggle in the Vereen home and the fact that Mr. Vereen remained missing at the time of trial." Id. at 118, 352 S.E.2d at 476. The Court further asserted, "While the State offered no evidence directly connecting Owens with the events at the Vereen home, there is evidence which connects him with the preparation of the ransom note. The note, in turn, states that Mr. Vereen was in the author's custody . . . Moreover, the driver's license, delivered with the ransom note, provides a direct connection between Owens and Mr. Vereen." Id. at 118-119, 352 S.E.2d at 476. Consequently, the Court held the evidence was sufficient to submit the case to the jury. Id. at 119, 352 S.E.2d at 476.

In this case, there was no evidence Heather Elvis was kidnapped—let alone kidnapped by Appellant. There was absolutely no evidence of a struggle at the Peachtree Boat Landing, unlike the evidence of a struggle in Owens. There was no evidence of a struggle inside Appellant's truck. In fact, there was no evidence Elvis had ever been inside Appellant's truck or had ever had physical contact with Appellant. The state's case was based solely on the fact that Elvis and Sidney Moorer had an affair months earlier that Appellant discovered, that Elvis was missing, that her last known communication was allegedly with Sidney, and Grant Fredericks' testimony that Appellant and Sidney's truck was the vehicle seen traveling towards and away from the boat landing around the time Elvis went missing. This circumstantial evidence simply is not sufficient to survive a directed verdict. At most, it raises a suspicion Sidney and Appellant were involved in Elvis's disappearance.

The evidence established Appellant was home around the timeframe Elvis disappeared. Appellant texted her sister, Ashley Caison, that she was home at 3:10 on the morning of December 18, 2013. Ashley testified she saw Appellant immediately thereafter when she

(Ashley) observed the Moorer children, whom she was babysitting, walking home when Appellant and Sidney returned that morning. The cell phone location evidence established that both Appellant's phone and Sidney's phone were home for the rest of the morning.

Conspiracy to kidnap is defined in S.C. Code Ann. § 16-3-920 as: "If two or more persons enter into an agreement, confederation, or conspiracy to violate the provisions of Section 16-3-910 [the statute defining the offense of kidnapping] and any such persons do any overt act towards carrying out such unlawful agreement, confederation, or conspiracy each such person shall be guilty of a felony." The state presented zero evidence, direct or circumstantial, of any agreement, confederation, or conspiracy between Appellant and Sidney to kidnap Elvis. The evidence is simply not there.

Respectfully, this Court should hold the trial judge erred by finding there was substantial circumstantial evidence to submit the case to the jury, and this Court should issue an order directing a verdict as to both offenses.

2.

The trial judge abused his discretion by admitting evidence of text messages allegedly sent and received by Appellant that were both sexually explicit and contained references to drug use since this testimony constituted inadmissible bad character evidence where Appellant had not put her character at issue, in violation of Rule 404, SCRE, and where the probative value of this evidence was also substantially outweighed by its unfair prejudice in violation of Rule 403, SCRE.

Relevant Facts

On December 24, 2013, Will Lynch with the North Myrtle Beach Police Department was contacted by Horry County to conduct a forensic extraction on Appellant and Sidney Moorer's cell phones. R. 1259, ll. 14-15; R. 1265, ll. 1-21. The extraction device Lynch used took the raw data or information from the phones and converted it into a readable report. R. 1261, ll. 16-24. The report showed all incoming and outgoing calls and text messages, including the content of the text messages. R. 1266, ll. 3-25. The report also contained some, but not all, of the content that had been deleted from the phones. R. 1284, ll. 8-24.

Lynch was asked to focus his investigation on the timeframe of November 1, 2013 until December 18, 2013. R. 1268, ll. 8-22. He claimed, based on the content of the text messages on Sidney's phone and Appellant's phone, that Appellant was using both phones from November 2, 2013 until the early morning hours of December 18, 2013, when Elvis went missing. R. 1277, ll. 3-18. During his testimony before the jury, the state had Lynch read aloud numerous text messages sent and received by both phones during that time period.

Lynch testified that there was a text message sent from Appellant's phone to Christine Johnson, a friend, that said, "OMFG, we just went through border patrol that had drug dogs and

cuz left a piece of J in my truck, that was scary." R. 1297, ll. 18-21. There was a subsequent message to Ashley Caison, Appellant's sister, that said, "Went through border patrol with pot in the toolbox. Dog walked right by. Sidney was fucking nervous." R. 1297, ll. 22-25.

During a break in Lynch's testimony, defense counsel put his objection on the record to the testimony concerning drugs. Counsel explained that *before* Lynch's testimony began, he objected during "a side-bar" to the references of "marijuana crossing the border." He argued the evidence was improper bad character evidence being introduced when Appellant had not placed her character into evidence. R. 1300, l. 7 – 1301, l. 5. Counsel asserted, "I just want to reiterate that objection . . . we're going through many, many references that tend to put her character into evidence. It is bad evidence . . . of character. . . It sounded even worse . . . from the witness stand than I thought it was going to." R. 1301, ll. 6-14.

The judge acknowledged "there was an objection by the defense to the introduction of these text messages because . . . it was attacking the defendant's character when the defendant's character had not been placed into evidence." R. 1303, ll. 11-16. The judge reasoned, "The state's contention is that the probative value is that it shows the defendant was not pregnant because she wouldn't have had marijuana if she was pregnant . . . Every reference to marijuana by the State has been to show a person wouldn't have marijuana with them if they were pregnant. I don't know that that is true. That's their argument. That's the probative value." R. 1301, l. 19 – 1302, l. 11. The judge said, "I have to make a judgment call of probative value versus prejudicial effect." He ultimately concluded that the evidence concerning marijuana was admissible. R. 1302, l. 21 – 1303, l. 20. However, the judge made clear, "If it gets into character assassination where the defendant has not placed her character into evidence, you are right, that is grounds for reversal." R. 1301, l. 25 – 1302, l. 2.

After Lynch's testimony continued, he explained that there were numerous web searches on Appellant's phone on the night of December 10, 2013 into the early morning hours concerning "Cougar Life." He testified, "It starts off: Sign up now, Cougar Life. Search Near the Beach SC Cougar Life." He continued to read off the searches. R. 1305, l. 14 – 1306, l. 10. Defense counsel immediately renewed his objection, which the trial judge overruled. R. 1306, ll. 5-7.

After he completed reading the text messages from Appellant's phone, Lynch began reading aloud messages sent and received by Sidney's phone during that same timeframe. However, Lynch claimed Appellant was the one using Sidney's phone during this period. He read messages allegedly exchanged between Appellant and an individual who is only identified as "Caleb." It was later discovered that Caleb was eighteen years old or perhaps a minor. These messages were sexually explicit. For example, Lynch testified, "[T]his will be on December 16th right after midnight at 12:09 am. . . . there is, *You are amazing*, from the phone. It says, *I love it.* Another message, *I want to feel it inside of me.* Another message, *You are perfect.* And then there's a message, *Have you fucked a lot of girls*?" R. 1319, ll. 16-24 (emphasis added).

He continued, "Again, on December 16th, talking about 12:14 am there is a message, *Do I get to see more*? Then there is a message from the phone that says, *You are making my pussy wet*. And then there's a message from the phone, *I cum like 40 times during sex*. And then there's a message from the phone that says, *Something is wrong or very right with me.*" R. 1320, ll. 14-21 (emphasis added). Lynch continues, "So again, in the early morning of December 16th, again this is right after midnight, 12:23 am in the morning. There is another message from Sidney's phone that says, *Do you want a dirt pic?* The reply is, *yes, ma'am* . . . . And then there is a message . . . from the phone that says, *I'm in a dark spot. Dude, it's not the best.* And then

there is another response from the phone that says, *Will that do for now?* . . . Then there is a message, *I want you Caleb.* There is a message, *You don't even know*. There is a message again from the phone, *I want to fuck the hell out of you*." R. 1321, l. 14 – 1322, l. 5 (emphasis added).

Defense counsel again renewed his objection. R.1322, ll. 6-7. The judge asked the solicitor to explain the probative value of the testimony. R. 1322, ll. 8-9. The solicitor asserted, "This is Sidney's phone and it is showing at the time that Tammy [Appellant] had the phone and this is just two days prior to the 18th when Heather goes missing. And the other one shows she also had her own phone during these same dates." R. 1322, ll. 10-14. The judge merely ruled, "Overruled go ahead." R. 1322, l. 15.

Lynch then continued, "The next message from the phone says, *I'm so fucking hot for you*. And then there's a message from the phone that says, *I'm lit. It's not fair. I'm saying all this crazy shit*. And then there's a message again from the phone that says, *I want to fuck the hell out of you*. And then there is a message from the phone that says, *What would you want me to do to you, sweetie*? . . . and then that same person is responding says, *Well, you could start by sucking [my] dick.* . . . And then the phone also says right after that, *I def do that for you, babe*. . . . And then again, there is another message from the phone, *Until you are fucking begging me to stop*. And then the person responds, *Oh, yeah? I don't think I would*." R. 1323, ll. 4-25 (emphasis added).

Lynch continued, "The message after that from the phone says, *I want to fuck you so bad it hurts*. Then the message from the phone says, *God damn you are one sexy mother fucker*. Then there is a message after that from the phone that says, *I've been fantasizing about your face for weeks*. There is a message after that that says, *When it's blackout time boys beg to stop. I want you* - - and then there's a message after that that says, *When do you turn 19*? There is

another message from the phone after that that says, *I am so wet for him right now*." R. 1325, ll. 6-17 (emphasis added).

Lynch continued yet again, "Next message from the phone says, *I want to fuck you*. And then there's a message from someone else that says, *That would feel so good*. And then there's a message from the phone that says, *Hell, yes, it would*. And then there's a message from someone that says, *It's hard*. And then there's a message from the phone that says, *You don't even know how bad I want that dick of yours*. . . . There is a message from the phone that says, *I wish it was in me*." R. 1326, ll. 3-18 (emphasis added).

Finally, the judge instructed the solicitor to move on. He asserted, "I think you made your point on the early morning hours of the 16th." R. 1327, ll. 4-7.

Lynch explained that less than twenty-four hours later Sidney's phone received an incoming call on December 16, 2013 at 11:47 pm "apparently from Caleb's mother." R. 1327, l. 14 – 1328, l. 8. "[R]ight after that, there is a message from Sidney's phone that says, *Dude I think your mom just called*." R. 1328, ll. 7-10. There was a subsequent "message from Sidney's phone that says, *Someone just called from New York and asked why I was calling her underaged son*." R. 1329, ll. 8-17 (emphasis added). After the person confirmed the number who called Sidney's phone was his mother, Lynch testified that there was a message from Sidney's phone that said, "*I don't blame you, but, geeze, don't need a crazy mom hating on me because I think her son is handsome*." R. 1330, l. 7 – 1331, l. 1.

Defense counsel again renewed his objection. R. 1331, ll. 6-7. The trial judge finally sustained the objection and instructed the solicitor to move on. He asserted, "You don't need to get into all of the conversations. That deals more <u>with character</u> and *has zero probative value*. I

think you have established what you want to establish, now move on." R. 1331, ll. 8-13 (emphasis added).

At the conclusion of Lynch's direct examination, defense counsel moved for a mistrial based on the "voluminous testimony" constituting bad character evidence that was admitted against Appellant. R. 1347, ll. 1-8. He asserted, "Your Honor knows evidence of bad character is never admissible against a defendant unless they put their character into evidence. *This is the most blush-worthy language I've ever experienced, certainly in a trial* . . . there has been testimony and speculation or evidence that says that the defendant who is on trial here for kidnapping was having this sexually explicit conversation with someone who is 18 years old or maybe a minor." R. 1347, ll. 9-19 (emphasis added).

Defense counsel further asked for the testimony to be stricken from the record and for a curative instruction. R. 1348, ll. 5-7. He asserted, "I understand the State's theory. I understand they want to try to say who is using the phone, . . . but I think there has got to be a way that they can establish that, or try to establish that, without dumping all of this character evidence in." R. 1348, ll. 5-13.

The assistant solicitor claimed the "messages had nothing to do with her [Appellant's] character." Instead, the messages "were to show that she had control of his [Sidney's] phone." R. 1348, ll. 19-21. The judge chastised the solicitor: "*You got into some pretty salty materials that were pretty prejudicial that did get into the defendant's character, and she has not put her character into question yet.* But you said it was to simply show who had possession of the phone, but you went on to ad nauseam on the early morning hours of December 16th . . . Why did you have to get into all the sexual conversation, and then bring out the fact that a mother

contacts that phone number saying that the conversation was with an underaged person?" R. 1348, l. 22 – 1349, l. 9 (emphasis added).

When pressed, the solicitor continued to claim the evidence was probative to show Appellant was in control of Sidney's phone and also that she was "punishing" Sidney for his affair with Elvis, a twenty year old. R. 1349, ll. 10-19. She argued, "It certainly doesn't show this blissful marriage on the heels of two nights later buying a pregnancy test. It shows at this point that, A, she hates him. I mean, the fact that she's using his phone to send these messages shows where that marriage is at that time, and it does not reflect we're taking pregnancy tests because we're back together and things are so wonderful and I'm trying to have a baby. It says, I hate you. I'm using your phone to absolutely punish you for what you have done to me. This affair has come out with Heather Elvis, and now I'm going to rub it in your face that I'm messing around with some 19-year-old." R. 1349, l. 10 – 1350, l. 7. She added, "[T]hey're charged with conspiracy. It shows that the two of them [Appellant and Sidney] are so thick in it together that he's okay letting her use his phone to message another man." R. 1350, ll. 11-14.

The judge ultimately denied the motion for a mistrial. "I'll let it stay as is. I'll overrule your objection." R. 1351, ll. 5-7.

Standard of Review

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012) (quoting State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002)). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id. (quoting Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)).

Discussion

The trial judge abused his discretion by admitting evidence of text messages allegedly sent and received by Appellant that were both sexually explicit and contained references to marijuana use since this testimony constituted bad character evidence when Appellant had not placed her character into evidence in violation of Rule 404, SCRE. The trial judge also should have excluded this evidence pursuant to Rule 403, SCRE, since any probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The admission of this evidence constituted "character assassination," which, as the trial judge warned, is "grounds for reversal." See R. 1301, l. 25 – 1302, l. 2.

"In a criminal case, the State cannot attack the character of the defendant unless the defendant first places his character in issue." State v. Nelson, 331 S.C. 1, 6, 501 S.E.2d 716, 718 (1998) (citing Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989)); See Rule 404(a), SCRE. "In a similar vein, evidence of other crimes or bad acts is generally inadmissible to prove the crime charged unless the evidence tends to establish (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or plan, or (5) identity." Id. (citing State v. Stokes, 279 S.C. 191, 304 S.E.2d 814 (1983) and State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)); See Rule 404(b), SCRE. "Both rules are grounded on the policy that character evidence is not admissible 'for purposes of proving that the accused possesses a criminal character or has a propensity to commit the crime with which he is charged.'" Id. at 6, 501 S.E.2d at 718-719 (quoting State v. Peake, 302 S.C. 378, 380, 396 S.E.2d 362, 363 (1990)); See State v. King, 334 S.C. 504, 512, 514 S.E.2d 578, 582 (1999) (holding "evidence of prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad person.").

"The evidence of the prior bad acts must be clear and convincing to be admissible." King, 334 S.C. at 512, 514 S.E.2d at 582 (citing State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996)). "The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused." Id. (citing Adams, 322 S.C. 114, 470 S.E.2d 366; State v. Smith, 309 S.C. 442, 424 S.E.2d 496 (1992); State v. Gilchrist, 329 S.C. 621, 496 S.E.2d 424 (Ct. App. 1998)). "Further, even though the evidence is clear and convincing and falls within a Lyle[2] exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." Id. (citing Rule 403, SCRE, and Adams, 322 S.C. 114, 470 S.E.2d 366).

The state correctly never argued at trial that the evidence was admissible to prove one of the exceptions found in Rule 404(b), SCRE. Specifically, motive, intent, absence of mistake or accident, common scheme or plan, or identity. This was because the evidence clearly does not meet any of those exceptions. Instead, the state merely sought to attack Appellant's character when she had not placed her character into evidence, which is strictly prohibited by Rule 404(a).

Not only was the evidence inadmissible pursuant to Rule 404, SCRE, it also should have been excluded because any probative value of the text messages was outweighed by the unfair prejudice to Appellant. The state alleged at trial that the probative value of the evidence was (1) it showed Appellant was using Sidney's phone, (2) it demonstrated she was not pregnant or trying to become pregnant, (3) it suggested Appellant hated Sidney and their marriage was far from "blissful" at the time, (4) it showed Appellant was punishing Sidney for his affair with Elvis, a twenty year old, and (5) it indicated that Appellant and Sidney were "so thick in it

[2] State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923)

together" that Sidney did not care if Appellant used his phone to text another man. See R. 1349, l. 10 – 1350, l. 7.

As far as the references to "marijuana crossing the border," the solicitor argued the messages were evidence Appellant was not pregnant or trying to become pregnant, which would refute Appellant's statements that Sidney purchased the pregnancy test during the early morning hours of December 18, 2013 for Appellant and not for Elvis as the state argued. However, as the judge recognized at trial, just because someone used or possessed marijuana did not mean she is not pregnant or trying to become pregnant. See R. 1301, l. 19 – 1302, l. 11. Many women continue to drink alcohol or ingest marijuana before they discover they are pregnant or even after they know they are pregnant. Consequently, any probative value of the messages concerning marijuana was outweighed by their unfair prejudice to Appellant.

While the solicitor claimed the sexually explicit text messages showed Appellant was using Sidney's phone in the month preceding Elvis's disappearance, the evidence did little to support this claim. Further, there was certainly less prejudicial evidence the state could and *did* use to establish this allegation if that was its real intent. While it appeared the messages to Caleb were sent by a female and not Sidney, the state offered no proof they were sent by Appellant. Moreover, the state introduced evidence that Appellant's children were texting Appellant on Sidney's phone. For example, Lynch read a message received by Sidney's phone on November 6, 2013 that read, "*Mom*, are you on Instagram *on Dad's phone*? . . . Liking my pictures and videos?" R. 1318, ll. 10-18 (emphasis added). The child then asked, "Can I have it then when you get home?" A text from Sidney's phone responded, "No, it's for Christmas." The child then said, "*Mom,* please." R. 1318, ll. 19-23 (emphasis added). There are subsequent messages of a similar nature, which Lynch read into the record, that suggest Appellant is using Sidney's phone

to exchange messages with one of her children. See R. 1318, l. 24 – 1319, l. 9. Lynch also described text messages sent from Appellant's phone on December 8, 2013 to three different people that state her "battery is dying" and instruct them to "text [her] other phone (843) 385-3175." This was Sidney's number. R. 1298, l. 12 – 1299, l. 3.

The solicitor also argued the evidence showed Appellant was punishing Sidney for his affair with Elvis and that Appellant and Sidney's marriage at the time was far from perfect. Even if this were true, it did not logically follow that Appellant and Sidney conspired to kidnap and subsequently did kidnap Elvis. Consequently, its probative value was minimal. Instead, the evidence merely made Appellant appear to be a bad person which was its import and intent.

Lastly, while the solicitor claimed Sidney was aware Appellant was using his phone to text another man, she again provided absolutely no evidence to support this claim. The sexually explicit text messages were simply not probative in any way to support the claim that Appellant and Sidney were "so thick in it together" that they conspired to kidnap Elvis and did in fact kidnap her.

On the other hand, the unfair prejudice to Appellant was tremendous as the evidence was extremely damning to her character. Appellant testified in her own defense and her character and credibility were crucial. The state introduced the evidence to not only to attack Appellant's character and demonstrate that she was a bad person, but also to show Appellant had the propensity to conspire to kidnap and did kidnap Elvis.

The trial judge abused his discretion by admitting this inadmissible highly prejudicial bad character evidence, and this Court should reverse Appellant Tammy Moorer's convictions, and grant her a new trial. See Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989), Rule 404, SCRE, and Rule 403, SCRE.

3.

The trial judge abused his discretion by qualifying Grant Fredericks as an expert in forensic video analysis and by allowing Fredericks to testify that Appellant's truck was the vehicle seen on surveillance footage driving towards and away from the Peachtree Boat Landing where Heather Elvis was allegedly kidnapped—to the exclusion of all other vehicles—when his conclusions were not shown to be reliable.

Relevant Facts

During its investigation, the state obtained surveillance footage from a private residence on Highway 814 and from D&S Siteworks, a business on Mill Pond Road. Both locations are along the route from the Moorers' house on Highway 814 to the Peachtree Boat Landing, the last known location of Elvis before she disappeared based on her cell phone records, and her car being abandoned there. The footage from both locations show a vehicle driving in the direction of the boat landing during the early morning hours of December 18, 2013. What appears to be the same vehicle is seen driving away from the boat landing several minutes later. In an effort to identify the vehicle, the state retained Grant Fredericks, a forensic video analyst. R. 10, l. 10.

Fredericks ultimately identified the vehicle in the footage as the Moorers' 2013 Limited Edition Ford F-150 pickup truck *to the exclusion of all other vehicles*. His opinion was based almost exclusively on his analysis of the "headlight spread pattern" of the unknown vehicle seen in the footage.

Appellant moved pretrial to exclude or limit Fredericks' testimony. A pretrial hearing on this issue was held on April 18, 2016 before Judge Dennis. A written motion to suppress was filed by counsel for Appellant's codefendant, Sidney Moorer. R. 132. Appellant's request to join in the motion was granted by Judge Dennis during the pretrial hearing. R. 5, l. 5 – 8, l. 9.

The state proffered Fredericks' testimony during this hearing, and the defense presented the testimony of Bruce Koenig to counter Fredericks' opinion.

At the time of his testimony, Fredericks worked at Forensic Video Solutions, a company that assists in the examination of video evidence, primarily for civil and criminal litigation. R. 865, ll. 1-6. He earned a bachelor's degree in "broadcast television" from Gonzaga University in 1982. R. 13, ll. 4-6; R. 864, ll. 20-23. From 1988 until 2000, Fredericks was a law enforcement officer for the Vancouver Police Department. R. 10, ll. 11-14; R. 875, ll. 22-25. For part of his tenure at the Vancouver Police Department, he was the coordinator of the forensic video unit. R. 875, l. 23 – 876, l. 8.

Fredericks was certified as a forensic video analyst by the Law Enforcement and Emergency Services Video Association (LEVA) in 2006. The certification requires approximately two hundred and eighty-eight hours of classroom training. Fredericks maintains this certification every three years. R. 864, ll. 23-25; R. 866, l. 18 – 867, l. 8. He was a "principal instructor" for LEVA from 1994 until 2012. R. 10, ll. 14-18; R. 867, ll. 8-11; R. 867, ll. 18-25. He has been a contract instructor at the FBI National Academy in Quantico, Virginia since 2002. R. 10, ll. 20-24; R. 868, ll. 1-4. Fredericks has also consulted for the International Association of Chiefs of Police concerning video technology. R. 868, ll. 11-14.

In this case, Fredericks used photographic video comparison and reverse projection photogrammetry, which are both subdisciplines of forensic video analysis, to identify the unknown vehicle seen on surveillance footage from the private residence on Highway 814 and D&S Siteworks. R. 22, ll. 5-20. Photographic video comparison is the "process of comparing images of questioned objects or persons to known objects or persons . . . and *making an assessment of* the correspondence between features in these images" in order to render "an

opinion regarding identification or elimination." R. 60, l. 21 – 61, l. 7 (emphasis added). Reverse projection is the "process of overlaying contemporary images of a scene with historic images of a scene in order to make . . . observations or to obtain measurements." R. 31, l. 23 – 32, l. 11.

Fredericks maintained that "headlight spread pattern analysis" is a feature of reverse projection. R. 33, ll. 10-14. It is "the examination of the reflection of light off an object." R. 33, ll. 12-14. He explained, "In this case, there was an illumination of light in front of the car that could be contrasted and compared, so I described that as headlight spread pattern." R. 33, l. 23 – 34, l. 2.

Fredericks has been qualified as an expert at least one hundred and fifty times during the course of his thirty year career. R. 11, ll. 2-5; R. 868, l. 25 – 869, l. 23. However, he has only provided expert testimony on the comparison of headlight spread pattern about "a half a dozen times." R. 39, ll. 19-24. In some of those cases he opined the questioned vehicle was consistent with the make and model of the known vehicle (it could not be eliminated) while in others he opined the questioned vehicle was the known vehicle. R. 39, l. 25 – 40, l. 10.

Forensic video analysts employ a methodology referred to as ACE-V, which is also used by fingerprint, footwear, and DNA analysts and other identification based analysts. R. 54, ll. 2-5. It stands for analyze, compare, evaluate, and verify. Forensic video analysts add an R for report (ACE-VR) because a visual report is necessary in their field for peer review. R. 54, ll. 5-12. Verification is the aspect that covers quality control to ensure the reliability of their testing. R. 54, ll. 13-16.

During the pretrial hearing, before hearing any argument, Judge Dennis found the subject of Fredericks' testimony is "beyond ordinary knowledge" and that Fredericks "demonstrated a

knowledge of training, background, and experience sufficient to render an opinion." R. 41, ll. 8-14. However, Judge Dennis withheld ruling on the extent of the opinion Fredericks would be permitted to render until he heard further testimony. R. 41, ll. 14-21.

Based on his testing, Fredericks said he was able to determine that the vehicle on the surveillance footage was a dark in color four door pickup truck with a toolbox in the bed of the truck. R. 50, l. 15 – 51, l. 16. He further determined that the truck had HID headlights. R. 51, ll. 17-24. He then examined the headlight spread pattern using the same methods he used to determine the other characteristics of the truck. R. 51, l. 21 – 52, l. 23.

Fredericks ultimately opined during the pretrial hearing that the vehicle seen on the surveillance footage from the residence on Highway 814 and D&S Siteworks during the early morning hours of December 18, 2013 was the 2013 Limited Edition Ford F-150 that belonged to Sidney and Tammy Moorer, "eliminating all others of the same class." R. 75, ll. 1-19.

Fredericks said his report was "peer reviewed" by George Reis, who is certified as a forensic video examiner by the International Association for Identification (IAI). R. 65, ll. 2-23. Reis "agreed with the methodology that was employed and with the results." R. 67, ll. 15-18. He found Fredericks' headlight spread pattern analysis was "an appropriate process." R. 67, ll. 19-21. Reis emailed his findings to Fredericks *the night before the pretrial hearing*. R. 71, ll. 6-23; State's Exhibit No. 7, R. 2386. The email specifically stated, "The premise of the uniqueness of headlight spread patterns is well stated and illustrated." State's Exhibit No. 7, R. 2386.

During the pretrial hearing, the defense called Bruce Koenig to counter the reliability of Fredericks' opinion. Koenig has a bachelor's degree in physics and mathematics from the University of Maryland and a master's degree from George Washington University in forensic science. R. 82, ll. 9-14. He has also taken graduate courses at George Mason University,

University of Utah, University of Colorado Denver, and Massachusetts Institute of Technology. R. 82, ll. 14-17.

Koenig became an FBI agent in 1970 and "was promoted to the laboratory as an examiner and supervisor" in 1974. He worked in the forensic audio and video field throughout his career at the FBI until he retired. During his last eight years with the FBI, he was in charge of the entire audio/video group, which contained roughly thirty people. After he retired, Koenig started a business "doing the same kind of work." He also continued as a consultant to the FBI and "continued to train their people through 2003." R. 82, l. 21 – 83, l. 10.

Koenig is a distinguished member of the International Association for Identification (IAI). He has been a member of and chaired a number of its committees, including the committee that decided the questions for the certification test for forensic video analysts. R. 84, ll. 1-7. Because of his role on this committee, Koenig was not allowed to take the certification test to become certified by the IAI. However, an associate in his group is certified. R. 85, ll. 3-12. He is also not certified by LEVA as a forensic video analyst because LEVA uses a particular software called AVID. Since Koenig does not use this software, it would be difficult for him to take the certification test. R. 84, ll. 16-25.

Koenig has published forty-six peer reviewed scientific publications in the area of forensic audio and video. R. 85, ll. 13-21. He has worked on approximately one thousand cases involving photographic video comparison. R. 95, ll. 2-5. Judge Dennis ultimately qualified him as an expert in forensic video analysis over the state's objection. R. 85, ll. 22-23; R. 106, l. 25 – 107, l. 7.

Koenig testified that photographic video comparison and reverse projection are a "legitimate technique" as long as one has a "stable camera position." R. 105, ll. 15-21. He

asserted that such methods have been used for a long time, including by the FBI. R. 107, ll. 12-19.

Koenig was hired by the defense to review Fredericks' report. Koenig testified that Fredericks "did a very thorough job in the rear projection and . . . in his comparisons." R. 108, ll. 1-22. Koenig agreed with Fredericks' opinion that the unknown vehicle on the surveillance footage was consistent with a certain class of vehicle. R. 109, ll. 1-6; R. 109, l. 23 – 110, l. 1. He asserted, "I believe he is absolutely correct that he tested X amount of vehicles and of those vehicles, the questioned vehicle, as we used to call it, matches by far one of those types of vehicles." R. 109, ll. 2-10.

However, Koenig disagreed with Fredericks' "final decision that, in fact, it must be this vehicle *and no other*." He asserted that "even under great . . . video conditions, it would be difficult to say "*this is the only vehicle in the entire world that could be it"* "unless it has a special dent or something." R. 109, ll. 6-15 (emphasis added).

In Fredericks' report, he stated, "No two vehicles share the same headlight pattern." Koenig testified that this assertion is not a "scientific principle." R. 110, ll. 7-11. No research in the forensic field or peer reviewed articles support the uniqueness of headlight spread pattern to each vehicle. R. 111, l. 13 – 112, l. 2; R. 113, ll. 1-5; R. 116, ll. 14-18. Koenig explained, "I would expect people have tested 5' to 600 of those to say, yeah, every one of those under low quality video, I can make a comparison and say, this is the only vehicle it could've been. And I think even under really high quality [video], I can't believe you're gonna get thousands of vehicles and they're all gonna look different." R. 111, ll. 3-11.

Koenig concluded that while headlight spread pattern analysis is an accepted scientific method to determine the class of a vehicle, it is not accepted "for uniqueness." R. 117, ll. 17-23.

He asserted, "What he [Fredericks] did produces a class decision *not a unique or identification kind of decision.*" R. 123, ll. 15-19 (emphasis added).

During the pretrial hearing, Kirk Truslow, counsel for Sidney Moorer, stated he had no objection to Fredericks' opinion as to the class or characteristics of the questioned vehicle. His objection was to Fredericks' opinion concerning the uniqueness of headlight spread patterns. R. 73, ll. 15-18. He asserted, "The premise set forth, based on his [Fredericks'] experience, not [on] science, is that every, every single vehicle has a unique spread pattern of lights, just like a fingerprint to a person . . . That is a principle that is not based on science. It's never been researched, never been tested, and it's never been peer reviewed." R. 126, l. 15 – 127, l. 6. Truslow requested Judge Dennis limit Fredericks' testimony to his opinion that the vehicle in the surveillance footage is consistent with the make and model of the Moorers' truck. R. 127, ll. 18-22. Truslow emphasized that Fredericks only tested one other vehicle that was the same make and model as the Moorers' truck. R. 128, ll. 5-10. He concluded, "What I'm saying is that the Court, in my opinion, should find that it is not an accepted scientific principle, that no two vehicles have the same headlight spread pattern, just like a fingerprint. It's just not founded in science and it's not [an] accepted or reliable scientific principle." R. 128, ll. 10-15.

During the pretrial hearing, Judge Dennis ultimately concluded that he would "allow the testimony." He emphasized that Fredericks stated "in his experience." The judge asserted, "He's saying in his experience and . . . that's the distinction here. He's testifying from his personal experience in analyzing, he's never encountered that." R. 129, ll. 15-17. According to the judge, if Fredericks had stated the uniqueness of headlight spread pattern was "a standard in the industry" that would be a different matter. R. 129, ll. 19-22. He found it was "a recognized science" and "a recognized standard for identification." R. 130, l. 5 – 131, l. 12.

During trial, Appellant renewed her objection to Fredericks' qualification as an expert. While defense counsel agreed Fredericks was qualified to examine video and give an opinion as to the identify of, for example, a specific make or model of a vehicle, he objected to Fredericks being permitted to identity a certain vehicle as the unknown vehicle captured on the videos to the exclusion of all other vehicles. R. 890, ll. 2-22. Counsel asserted, "What we object to is him being qualified as an expert to say that he can look at a video . . . or two videos very brief in time and then come back and say that is a specific truck and it doesn't match any other F-150 in the world. That is a specific truck. It's like DNA." R. 890, ll. 6-12. Judge Culbertson, the trial judge, ultimately qualified Fredericks as an expert in video forensic analysis over objection. R. 890, ll. 23-24; R. 893, ll. 2-5.

Fredericks told the jury that the footage from the two cameras at the residence on Highway 814 showed a vehicle passing by going southbound, which is towards the Peachtree Boat Landing, at approximately 3:35 am on December 18, 2013.[3] R. 906, l. 2 – 907, l. 12; R. 910, l. 18 – 911, l. 1. The footage from the two cameras at D&S Siteworks on Mill Pond Road showed a vehicle passing by also moving southbound towards the landing at 3:39 am. R. 907, l. 13 – 909, l. 2. The same vehicle is then seen on the footage from D&S Siteworks going northbound, away from the Peachtree Boat Landing, at 3:46 am. R. 909, l. 7 – 910, l. 2. The vehicle is again seen on the footage from the residence on Highway 814 going northbound at 3:45 am.[4] R. 910, ll. 3-13; R. 911, ll. 16-24. Fredericks maintained the vehicle was out of view

[3] Fredericks testified that there is a margin of error of at least two minutes on the footage from the residence on Highway 814. R. 911, ll. 2-10.

[4] Again, Fredericks testified that there is a margin of error of at least two minutes on the footage from the residence on Highway 814. This explains why the vehicle was seen passing D&S Siteworks at 3:46 am and the residence at 3:45 am even though the residence is past D&S Siteworks. R. 911, ll. 2-10; R. 913, l. 25 – 915, l. 7.

of the residential cameras on Highway 814 for about ten minutes and out of view of the cameras as D&S Siteworks for about seven minutes. He "could easily drive that area within that three minute period of time, so it was consistent in that way." R. 913, ll. 7-17.

In order to determine the identity of the unknown vehicle that appears in the footage, Fredericks suggested conducting a photographic video comparison, which includes a reverse projection examination. R. 948, ll. 8-15. He explained, "That examination requires going to the scene, examining the video system and then placing the known vehicle [the Moorers' truck] into a . . . series of positions that are depicted as the same positions of the questioned vehicle [the vehicle that appears on the surveillance footage]. I also recommended that in order to test this process, that the methodology would be to bring in other vehicles of the same and similar class to demonstrate and test how they would appear. And it is my experience that vehicles of a different class will be distinguishable, and vehicles of a same class will be distinguishable if they have unique characteristics, such as different headlight spread pattern or different features of the vehicle, like dents or other after market additions." R. 894, l. 15 – 895, l. 3; See R. 47, l. 11 – 48, l. 4.

He continued, "So I suggested that we do an extensive examination bringing in multiple vehicles that would appear by simple eyeballing . . . to perhaps be the same, but once we overlay the historic images of the questioned vehicle [the vehicle that appears in the surveillance footage] with the new images of each of these test vehicles in the same position, their distinguishing characteristics should be visible and testable and perhaps even measurable." R. 895, ll. 4-11.

Fredericks went to the residence on Highway 814 and D&S Siteworks on Mill Pond Road and "reproduced the visual experience of the cameras" by placing the test vehicles in the same position as the "questioned vehicle" in the footage and ensuring the lighting levels were the

same. R. 895, l. 12 – 896, l. 24; See R. 45, l. 4 – 46, l. 8. He conducted his testing during the early morning hours around the same time the original videos were recorded. R. 46, ll. 19-21. He also used the same cameras that were used to record the original videos. R. 46, ll. 15-18. He then compared the videos of the unknown vehicle with the videos of the test vehicles.

Fredericks tested eleven other vehicles, some of a different class, some of the same class but different color, and then some in the same class, same color, and same make, model, and year as the Moorers' truck. R. 923, ll. 17-21. Specifically, he tested two different colored Chevrolet Silverados, a Dodge Ram 1500, a Dodge Ram Laramie, a GMC Denali, a Ford F-150 Four-by-Four, a Ford F-150 King Ranch, two different colored Ford F-150 Lariats, a Ford F-150 Platinum, and a Ford F-150 Limited. R. 923, ll. 10-16. Fredericks claimed that he was able to eliminate all of these test vehicles from being the unknown vehicle in the footage based on either the style of headlights, the physical position of the lights on the vehicles, or the headlight spread pattern, essentially the manner in which the headlights reflected light off the roadway. R. 923, l. 22 – 924, l. 6; See R. 924, l. 7 – 929, l. 24; R. 930, l. 8 – 940, l. 6. Significantly, Fredericks only tested one other Ford F-150 Limited, which was the same make, model, and year as the Moorers' truck. R. 950, l 10 – 951, l. 2.

Fredericks concluded that the Moorers' 2013 Ford F-150 Limited black pickup truck was the unknown vehicle seen in the footage from the residence on Highway 814 and D&S Siteworks on Mill Pond Road during the early morning hours of December 18, 2013 to the exclusion of all other vehicles. R. 947, l. 14 – 948, l. 8. He asserted, "[T]he questioned vehicle and the known vehicle are one in the same." R. 948, ll. 4-5.

Lastly, Fredericks testified he was "able to synchronize the times" using the location data from Elvis's phone and the videos of the unknown vehicle. R. 943, ll. 17-23. He claimed,

"[T]he vehicle that we've seen on the video is moving towards the landing area [the Peachtree Boat Landing] at the same time that . . . and just after [Elvis's] cell phone is pinging those areas, including the landing area. So they [Elvis's phone and the unknown vehicle] are converging on the same spot, towards the same area," at the same time. R. 944, l. 23 – 945, l. 9.

Standard of Review

"The decision to admit or exclude testimony from an expert witness is within trial court's sound discretion." State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006) (internal citations omitted). "The trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion." Id. "An abuse of discretion occurs when the conclusions of the trial court 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 State v. Douglas, 369 S.C. 424, 429-430, 632 S.E.2d 845, 848 (2006). "A trial court's ruling on the admissibility of an expert's testimony constitutes an 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)). "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (internal citations omitted).

Discussion

The trial judge abused his discretion by qualifying Grant Fredericks as an expert in forensic video analysis and by allowing Fredericks to testify that Appellant's Ford F-150 Limited pickup truck was the vehicle seen on surveillance footage driving towards and away from the

Peachtree Boat Landing where Elvis was allegedly kidnapped to the exclusion of all other vehicles when his conclusions were unreliable and not based on science.

The admission of expert testimony is governed by Rule 702, SCRE, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

"Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge. Stated differently, expert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge." Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010).

"[I]n executing its gatekeeping duties, the trial court must make three key preliminary findings which are fundamental to Rule 702 before the jury may consider expert testimony." Id. at 446, 699 S.E.2d at 175. "First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury." Id. (citing State v. Douglas, 380 S.C. 499, 671 S.E.2d 606 (2009)). "Next, while the expert need not be a specialist in the particular branch of the field, the trial court must find that the proffered expert has indeed acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. Id. (citing Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997)). "Finally, the trial court must evaluate the substance of the testimony and determine whether it is reliable." Id. (citing State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999)).

"Expert testimony is not admissible unless it satisfies *all* three requirements with respect to subject matter, expert qualifications, and reliability." Id. (emphasis added). "Thus, only after the trial court has found that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate." Id. at 446-447, 699 S.E.2d at 175 (citing State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009)).

While Fredericks may have been qualified to give an opinion as to the class of the unknown vehicle seen in the surveillance footage, his overall conclusion that the unknown vehicle was the Moorers' truck to the exclusion of all other vehicles based on the premise of the uniqueness of headlight spread pattern is simply not reliable and not based on science. He claimed *in his experience* no two vehicles have the same headlight spread pattern but he only tested one other Ford F-150 Limited. As Bruce Koenig asserted during the pretrial hearing, this assertion is not a "scientific principle." R. 110, ll. 7-11. No research in the forensic field or peer reviewed articles support the uniqueness of headlight spread pattern to each vehicle. R. 111, l. 13 – 112, l. 2; R. 113, ll. 1-5; R. 116, ll. 14-18. While headlight spread pattern analysis is an accepted scientific method to determine the class of a vehicle, it is not accepted "for uniqueness." R. 117, ll. 17-23. Consequently, the trial judge should have limited Fredericks' opinion and only permitted him to testify that the unknown vehicle was consistent with the class or make and model of the Moorers' truck.

Respectfully, this Court should hold the trial judge abused his discretion by qualifying Fredericks as an expert in forensic video analysis and allowing him to testify about the "uniqueness" of the Moorers' truck to the exclusion of every other vehicle. Given the

importance of this inadmissible opinion to the state's case, this Court should respectfully reverse Appellant Tammy Moorer's convictions and remand for a new trial.

4.

The trial judge abused his discretion by excluding the testimony of Appellant's children, Christian Moorer and Nikki Moorer, her sister, Ashley Caison, and her mother, Polly Caison, who would have testified Appellant was home during the timeframe of the alleged kidnapping, reasoning Appellant supposedly failed to comply with Rule 5(e)(1), SCRCrimP, by not notifying the prosecution at least ten days before trial of the names and addresses of her alibi witnesses, particularly where the state was not prejudiced since it was aware of these witnesses, had previously interviewed them, and had the witnesses under subpoena.

Relevant Facts

The state moved pretrial to exclude the testimony of Appellant's alibi witnesses, including her children, Christian Moorer and Nikki Moorer, her sister, Ashley Caison, and her mother, Polly Caison, because Appellant allegedly failed to comply with Rule 5, SCRCrimP. R. 150, l. 13 – 151, l. 14. The assistant solicitor said that the defense first notified the state of a potential alibi defense on Friday, September 28, 2018. R. 151, ll. 16-17. The defense sent the solicitor an email at 7:31 pm that read, "Hi Nancy, I'm sending you this email to give you Notice of Alibi Defense in the case of State vs. Tammy Moorer. Ms. Moorer may want to use her children during her trial as her alibi that she was home the night of the incident." R. 151, ll. 16-21; R. 2354. A follow up email was sent eight minutes later that provided the names of the children. R. 2354.

The solicitor responded on Monday, October 1, 2018 requesting the full names and addresses of the alibi witnesses and the specific place and address Appellant claimed to have been during the alleged offense. R. 151, l. 22 – 14, l. 1; R. 2354. Defense counsel replied that same day providing the names, addresses, and phone numbers for Appellant's two oldest

children, her sister, and her mother, along with the address for her home where she maintained she was during the time of the alleged kidnapping. R. 158, ll. 5-12; R. 2354.

The solicitor argued the state was prejudiced by the late disclosure because it did not have an opportunity prior to trial to interview the potential alibi witnesses, which was the purpose of the rule. R. 152, ll. 1-10. Defense counsel admitted he did not provide the contact information for the witnesses until October 1, 2018, seven days before trial. R. 158, ll. 5-12. However, he argued law enforcement knew of the children and actually interviewed the children during the initial investigation. R. 159, ll. 1-4.

He further asserted that Appellant had a fundamental right to present a defense "beyond the specific rule." In support of his argument, counsel cited to State v. Robbins, 275 S.C. 373, 271 S.E.2d 319 (1980), Gibbs v. State, 403 S.C. 484, 744 S.E.2d 170 (2013), and Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). R. 159, l. 8 – 160, l. 13.

The trial judge granted the state's motion to suppress the testimony of Appellant's alibi witnesses because the defense did not properly comply with Rule 5 since it did not provide the state with ten days' notice. R. 158, ll. 13-14. The judge asserted, "[T]he rule is pretty clear what you have to do, and you have to do it ten days prior to trial, and you didn't do it ten days prior. You may have given them the places where the defendant claimed to be, but you didn't give them the contact information for the supporting witnesses." R. 158, ll. 17-23. The judge made clear that Appellant would not be permitted "to call witnesses to say the defendant could not have done this because she was with me at this place . . . because they [the state] are entitled to ten days' notice to investigate and check with those witnesses." R. 160, l. 14 – 161, l. 1. He further maintained, "I think a good deal, if you are saying that she wasn't there, is going to be brought out by cross-examining the State's witnesses, number one, or if she takes the stand. I

don't know that this will prohibit her from testifying that way, but you are not going to be able to just ambush the State by calling another witness when you haven't given them adequate notice." R. 161, ll. 1-8.

Immediately thereafter, the trial judge granted Appellant's motion to sequester the witnesses. During the discussion on sequestering the witnesses, defense counsel emphasized that Appellant's alibi witnesses were subpoenaed by the state. R. 162, ll. 15-17. The trial judge informed the state that if it called any of these witnesses, "cross-examination is open game." R. 162, ll. 18-23.

After the state rested its case, the assistant solicitor requested the trial judge remind the defense of the judge's ruling granting the state's motion to suppress Appellant's alibi witnesses "for procedural reasons." R. 1690, l. 19 – 1691, l. 5. The solicitor brought up the issue "preemptively . . . because you can't unring the bell." R. 1691, ll. 5-7. The trial judge reaffirmed his pretrial ruling. He stated, "[C]ertainly the defendant can take the stand and say she wasn't there or was somewhere else, or whatever she wants to do. But the purpose behind the rule of notifying the State of an alibi defense is so that the State can investigate the witnesses who claim that she was somewhere else, so I sustained the State's objection to allow her to call any other witnesses that would place her somewhere else at the time the State says the crime was committed." R. 1691, ll. 8-17.

Defense counsel again emphasized that the state had subpoenaed Appellant's children, it knew who they were, it knew their addresses, and it had already interrogated them. R. 1792, ll. 19-25. However, the trial judge was firm that the defense "had a time limit to give it to them, and you didn't give it to them, so it doesn't come in." R. 1693, ll. 3-5.

Standard of Review

"The admission or exclusion of evidence is left to the sound discretion of the trial judge." State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005) (citing State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002)). "A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant." Id. (citing State v. Preslar, 364 S.C. 466, 613 S.E.2d 381 (Ct. App. 2005) and State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004)). "Error without prejudice does not warrant reversal." Id. (citing State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000)).

"The decision by the trial judge to exclude evidence for failure to comply with disclosure rules will not be reversed absent an abuse of discretion." Id. (citing State v. Kerr, 330 S.C. 132, 498 S.E.2d 212 (Ct.App.1998)); See State v. Davis, 309 S.C. 56, 63, 419 S.E.2d 820, 825 (Ct. App. 1992) ("Sanctions for noncompliance with disclosure rules are within the discretion of the trial judge and will not be disturbed absent an abuse of discretion."). "An abuse of discretion occurs when the decision by the trial judge is based on an error of law." Id. at 136, 623 S.E.2d at 867-868 (citing State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000)).

Discussion

The trial judge abused his discretion by excluding the testimony of Appellant's children, Christian Moorer and Nikki Moorer, her sister, Ashley Caison, and her mother, Polly Caison, who would have testified Appellant was home during the timeframe of the alleged kidnapping, because Appellant supposedly failed to comply with Rule 5(e)(1), SCRCrimP, by not notifying the prosecution at least ten days before trial of the names and addresses of her alibi witnesses. Despite the state's claim otherwise, it was not prejudiced by the late disclosure since it was

aware of these witnesses, had previously interviewed them, knew what they were going to say regarding the alibi, could have interviewed them again before they ultimately testified, and even had the witnesses under subpoena.

Rule 5, SCRCrimP

Rule 5(e) states in relevant part: "(1) Notice of Alibi By Defendant. Upon written request of the prosecution stating the date and place at which the alleged offense occurred, the defendant shall serve within ten days, or at such time as the court may direct, upon the prosecution a written notice of his intention to offer an alibi defense. The notice shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and address of the witnesses upon whom he intends to rely to establish such alibi." If either party fails to comply with the requirements of Rule 5(e), the trial judge "may exclude the testimony of any undisclosed witness offered by either party." Rule 5(e)(4), SCRCrimP.

Appellant notified the state ten days before trial that she intended to call her children as alibi witnesses as required by Rule 5(e). Seven days before the trial started, Appellant specifically informed the state that she intended to call Christian Moorer, Nikki Moorer, Ashley Caison, and Polly Caison as alibi witnesses and provided their contact information. The state was undisputedly aware of these witnesses before trial and was in no way prejudiced by the alleged late disclosure. Polly Caison, Appellant's mother, and Ashley Caison, Appellant's sister had lived in the same residence since the investigation began. Consequently, the state was obviously aware of where to contact them. Moreover, the state had previously interviewed all of these witnesses during its investigation and had them under subpoena for the trial.

There was also adequate time for the state to interview these witnesses before the defense presented its case. See R. 1691, ll. 8-17 (where the trial judge acknowledged "the purpose

behind the rule of notifying the State of an alibi defense is so that the State can investigate the witnesses who claim that she [Appellant] was somewhere else."). The state had an entire week before the trial even started. Pretrial matters and the state's presentation of its case in chief lasted eight days plus a weekend. There is no doubt that during this seventeen day period, someone from the state could have re-interviewed these witnesses if needed.

Because there was absolutely no prejudice to the state as a result of the supposed late disclose, the trial judge abused his discretion by excluding Appellant's four alibi witnesses from testifying in her defense. See State v. Kerr, 330 S.C. 132, 150, 498 S.E.2d 212, 221 (Ct. App. 1998) (Assuming the state did fail to properly produce photographs pursuant to Rule 5, SCRCrimP, the trial judge did not abuse his discretion by admitting the photographs when there was no prejudice to the appellant).

Due Process Right to Present Complete Defense

"The United States Constitution guarantees a criminal defendant the right 'to present a complete defense.'" State v. Burgess, 391 S.C. 15, 21, 703 S.E.2d 512, 515 (Ct. App. 2010) (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)). "This right is also guaranteed by our State constitution: 'Any person charged with an offense shall enjoy the right ... to be fully heard in his defense....'" Burgess, 391 S.C. at 21-22, 703 S.E.2d 512, 515-516 (quoting S.C. Const. art. I, § 14 (2009)); See S.C. Code Ann. § 17-2-60 (2003) ("Every person accused shall, at his trial, be allowed ... to produce witnesses and proofs in his favor...."); State v. Lyles, 379 S.C. 328, 341, 665 S.E.2d 201, 208 (Ct. App. 2008). Furthermore, in Chambers v. Mississippi, 410 U.S. 284, 302 (1973), the United States Supreme Court emphasized that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." See Burgess, 391 S.C. at 22, 703 S.E.2d at 516.

The solicitor acknowledged at trial that the judge excluded Appellant's alibi witnesses "for procedural reasons." R. 1690, l. 19 – 1691, l. 5. However, as defense counsel argued below, Appellant had a fundamental right to present a defense "beyond the specific rule." R. 160, ll. 1-13. The trial judge's exclusion of Appellant's alibi witnesses because she only provided the state with their contact information seven days before trial instead of ten eviscerated her defense and violated her constitutional and statutory right to present witnesses in her favor. The exclusion of these witnesses as a sanction was disproportionate to the supposed violation and the purpose of the rule.

Respectfully, this Court should hold the trial judge abused his discretion by excluding the alibi testimony of Christian Moorer, Nikki Moorer, Polly Caison, and Ashley Caison based on the alleged violation of Rule 5(e), SCRCrimP, and Appellant's right to present a complete defense. Appellant Tammy Moorer's convictions should therefore be reversed, and she should be granted a new trial.

5.

The trial judge abused his discretion by excluding the testimony of Appellant's children, Christian Moorer, Nikki Moorer, and Caison Moorer, and her mother, Polly Caison, because the witnesses allegedly violated the sequestration order by viewing the live feed of the trial where the witnesses denied they watched the feed, there was no evidence their testimony was tainted, and such an extreme sanction violated Appellant's due process right to present a complete defense.

Relevant Facts

On the morning of October 18, 2018, after the trial judge reaffirmed his ruling that Appellant could not present evidence of alibi because she failed to give the state ten days' notice, Appellant called her oldest son, Christian Moorer, as her first witness. R. 1694, ll. 12-15. Before Christian took the stand, the state indicated it had a matter of law and the jury was excused. R. 1694, l. 21 – 1695, l. 2. The assistant solicitor maintained that certain defense witnesses had violated the sequestration order by viewing a live feed of the trial. R. 1695, l. 7 – 1696, l. 6. He identified the witnesses as Christian Moorer, Nikki Moorer, and Caison Moorer, who are Appellant's three children, and Polly Caison, who is Appellant's mother. R. 1697, ll. 20-23.

The state called Jade Pike, a deputy with the Horry County Sheriff's Office, in support of its contention that these witnesses had violated the sequestration order. Pike testified that Christian, Nikki, Caison, and Polly were all sequestered in a side room off the courtroom. When court recessed for lunch on Monday, October 15, 2018, which was three days earlier, Pike escorted Appellant from the courtroom and walked her to the side room where her family was located. R. 1701, ll. 3-5; R. 1703, ll. 3-7. Pike claimed that when Appellant opened the door she

(Pike) saw "a laptop computer sitting on top of the table in the middle, and it had the live stream on it." R. 1801, ll. 12-17. Pike clarified that there was also a man in the room named Richard McGowan. McGowan admitted it was his computer. Pike ordered McGowan to put the computer away. R. 1700, ll. 18-21. She is not sure how long they were watching the live feed because she was in the courtroom during the trial. R. 1702, ll. 22-25.

The defense then proffered Christian Moorer's testimony concerning the allegations he violated the sequestration order. Christian testified that he, Nikki, Caison, and Polly all waited in a side room off the courtroom during the trial because they were sequestered. R. 1710, ll. 11-17. He denied watching the live stream. R. 1710, l. 18 – 1711, l. 1. He said he had headphones on and was listening to YouTube on his cellphone. R. 1711, ll. 2-9.

The previous Monday, Robert McGowan was also in the room with the family. McGowan had a laptop computer that he put on a table in the room. The laptop was on the edge of the table facing McGowan. Christian did not know if McGowan had the live stream playing on the laptop because he was not paying attention. Christian repeatedly denied watching the live feed or hearing any of the testimony. R. 1711, l. 16 – 1715, l. 10.

After Christian testified *in camera*, the trial judge ruled, "I think there was a violation of the sequestration order. I'm going to suppress any testimony from Christian Moorer, Nikki Moorer, Caison Moorer, [and] Polly Caison." R. 1720, ll. 8-11. The judge repeated that he was granting the state's motion to suppress the testimony of these witnesses over the defense's objection. R. 1721, ll. 3-6.

After the judge ruled, defense counsel requested to proffer the testimony of the witnesses. He stated, "Your Honor, I know we're trying to move forward, but I also know that . . . this is important. I would like to call the witnesses before the Court, and in the briefest way possible

just proffer their testimony." R. 1721, ll. 7-11. The judge denied the request and refused "to take up the Court's time doing that." He asserted, "If it turns out I'm wrong, the appellate court will say I was wrong, I should have let them testify. But I don't think I'm wrong in that regard so I'm not going to take up time." R. 1721, ll. 12-18.

Defense counsel made clear that he was "deeply troubled" about the defense's "inability to call witnesses." R. 1723, ll. 10-13. He later clarified that he was making a "due process argument" because the exclusion of defense witnesses prohibited Appellant from "putting on a defense." He cited to a United States Supreme Court case which stated the government "must prove that the violation of sequestration order shaped the testimony." R. 2162, ll. 12-24. The trial judge stood by his previous ruling.

Standard of Review

"Whether a witness should be exempted from a sequestration order is within the trial court's discretion." State v. Washington, 424 S.C. 374, 409, 818 S.E.2d 459, 477 (Ct. App. 2018) (quoting State v. Singleton, 395 S.C. 6, 15-16, 716 S.E.2d 332, 337 (Ct. App. 2011)) (internal quotation marks omitted); See State v. Tisdale, 338 S.C. 607, 616, 527 S.E.2d 389, 394 (Ct. App. 2000). "The decision whether to waive a sequestration order for witnesses present during the trial rests in the sound discretion of the trial judge." State v. Huckabee, 388 S.C. 232, 240, 694 S.E.2d 781, 785 (Ct. App. 2010) (quoting State v. Saltz, 346 S.C. 114, 126, 551 S.E.2d 240, 247 (2001)).

"The purpose of the exclusion rule is, of course, to prevent the possibility of one witness shaping his testimony to match that given by other witnesses at the trial; and if a witness violates the order he may be disciplined by the court." Huckabee, 388 S.C. at 241, 694 S.E.2d at 785 (quoting United States v. Leggett, 326 F.2d 613, 613-614 (4th Cir. 1964)). "The

question of the exclusion of the testimony of the offending witness, however, depends upon the particular circumstances and lies within the sound discretion of the trial court." Id. (quoting Leggett, 326 F.2d at 613-614).

Discussion

The trial judge abused his discretion by excluding the testimony of Appellant's children, Christian Moorer, Nikki Moorer, and Caison Moorer, and her mother, Polly Caison, because the witnesses allegedly violated the sequestration order by viewing the live feed of the trial during the morning of October 15, 2018.

"A circuit court may order the sequestration of any witness by order or by motion of a party." Id. (citing Rule 615, SCRE). "However a party is not entitled to have witnesses sequestered as a matter of right; instead, the decision to sequester a witness is within the sound discretion of the circuit court." Id. (citing State v. Simmons, 384 S.C. 145, 173, 682 S.E.2d 19, 33-34 (Ct. App. 2009)); See State v. Caldwell, 378 S.C. 268, 278, 662 S.E.2d 474, 480 (Ct. App. 2008); State v. Fulton, 333 S.C. 359, 375, 509 S.E.2d 819, 827 (Ct. App. 1998).

"The mere opportunity for witnesses to compare testimony is insufficient to compel sequestration." State v. Sullivan, 277 S.C. 35, 46, 282 S.E.2d 838, 844 (1981) (citing State v. Tyner, 273 S.C. 646, 258 S.E.2d 559 (1979)); State v. Carmack, 388 S.C. 190, 197, 694 S.E.2d 224, 227 (Ct. App. 2010); Caldwell, 378 S.C. at 279, 662 S.E.2d at 480. Where a sequestration order has been issued, its violation does not automatically result in disqualification of the witness to testify. In fact, our appellate courts have frequently approved allowing testimony from witnesses who had been sequestered but were in the courtroom during the testimony of one or more other witnesses. See, e.g., State v. Saltz, 346 S.C. 114, 126, 551 S.E.2d 240, 247 (2001);

Huckabee, 388 S.C. at 241-243, 694 S.E.2d at 785-786; Simmons, 384 S.C. at 173-174; 682 S.E.2d at 33-34; Fulton, 333 S.C. at 375, 509 S.E.2d at 827.

In this case, even if there was a violation of the sequestration order, it was minor. The proffered testimony established that Pike observed a laptop computer streaming the live feed in the room with the excluded witnesses when she escorted Appellant to the room after court recessed for lunch on Monday, October 15, 2018, the sixth day of trial.[5] Only two witnesses testified that morning. These witnesses were Dennis Hart (R. 999, l. 11 – 1013, l. 18) and Jill Domogauer (R. 1014, l. 8 – 1093, l. 19). Therefore, *at most*, the excluded witnesses heard the testimony of these two state witnesses.

Hart was the kitchen manager at the Tilted Kilt in 2013 at the same time Elvis was a hostess. R. 999, l. 20 – 1000, l. 5. Hart testified that he hired Sidney Moorer as a maintenance man because the restaurant had numerous "plumping issues." He would call Sidney as needed. R. 1001, ll. 2-23. Hart was aware of the relationship between Sidney and Elvis. R. 1001, l. 24 – 1002, l. 11. After the relationship ended, Hart called Sidney to see if he was available to perform some plumbing maintenance for the restaurant. R. 1002, ll. 12-20. Hart claimed Appellant barged "into the conversation and proceeded to tell me how Heather was causing problems for her and her family and spreading rumors that she was pregnant by her husband [Sidney], and she also asked me to fire her because Sidney was not allowed to work for me anymore if Heather was working there." R. 1002, l. 23 – 1003, l. 9. Hart testified that he never saw Sidney at the Tilted Kilt again after that conversation. R. 1003, ll. 13-15. Lastly, Hart maintained that he had never met Appellant and that Appellant had never come to work with Sidney before at the Tilted Kilt. R. 1005, l. 11 – 1006, l. 4; R. 1011, l. 25 – 1012, l. 8.

[5] The trial lasted twelve days.

Jill Domogauer, a crime scene investigator with the Horry County Police Department, testified about her search of Elvis's car on December 20, 2013 while the vehicle was parked at the Elvis family residence and her search of Elvis's apartment on that same day. See R. 1015, l. 19 – 1038, l. 23. Domogauer likewise testified about her role in the search of the Moorers' house in February 2014. R. 1039, ll. 3-5. She identified numerous electronic devices she seized from the home, including cell phones, iPads, and a computer tower. See R. 1039, l. 6 – 1055, l. 5.

It is difficult to see how Hart or Domogauer's testimony could have tainted or shaped the testimony of the excluded witnesses. Christian Moorer, Nikki Moorer, and Polly Caison were going to testify about Appellant's alibi, and other matters that are unknown since the trial judge refused to allow Appellant to proffer their testimony.

The Fourth Circuit Court of Appeals has referred to the "exclusion of a defense witness" as "an extreme remedy" because it "impinges upon the right to present a defense." United States v. Rhynes, 218 F.3d 310 (4th Cir. 2000) (citing United States v. Cropp, 127 F.3d 354, 363 (4th Cir. 1997)). In Rhynes, while the court found the defense did not violate the sequestration order, it held that even if it had, the court still would have held the exclusion of the defense witness "constituted reversible error." 218 F.3d at 320.

Exclusion of Appellant's witnesses eviscerated her ability to present a complete defense. See Burgess, 391 S.C. at 21, 703 S.E.2d at 515 (quoting Crane v. Kentucky, 476 U.S. at 690) ("The United States Constitution guarantees a criminal defendant the right 'to present a complete defense.'"); see also S.C. Const. art. I, § 14 (2009) ("Any person charged with an offense shall enjoy the right ... to be fully heard in his defense...."); S.C. Code Ann. § 17-2-60 (2003) ("Every person accused shall, at his trial, be allowed ... to produce witnesses and proofs in his favor....").

Christian, Nikki, Caison, and Polly were crucial witnesses for the defense. Without their testimony, Appellant was unable to refute much of the state's evidence. The extent of the prejudice is difficult to articulate since the trial judge erroneously refused to allow Appellant to proffer the testimony of these witnesses. Nonetheless, it was undisputed that they were Appellant's alibi witnesses. The refusal to allow a proffer of their testimony was further error.

Respectfully, this Court should hold the trial judge abused his discretion by excluding Appellant's witnesses based on a minor alleged violation of the sequestration order. This Court should respectfully therefore reverse Appellant Tammy Moorer's convictions, and remand this case for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court direct a verdict of acquittal on all charges. In the alternative, Appellant requests this Court reverse her convictions and remand her case for a new trial.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

This 26th day of October, 2020.

CERTIFICATE OF COUNSEL

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

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