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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Aiken County
The Honorable Doyet A. Early, Circuit Court Judge

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Appellate Case No. 2018-000358

THE STATE,

RESPONDENT,

V.

RASHAWN VERTEZ CARTER,

APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The fruits of an unreasonable search should be excluded if suppression's deterrence benefits outweigh its substantial social costs. Upon learning Carter was involved in a freshly-committed home-invasion burglary and armed robbery, police obtained real-time location data upon request to Carter's cell phone provider. Police tracked his location for approximately one hour, finding him in a public parking lot in Columbia. He voluntarily travelled back to Aiken for an interview. Should the interview have been suppressed?

II.

During the interview, police told Carter they did not believe his story, confronted him with contrary information, and encouraged him to tell the truth. The substance of the officers' representations was proved at trial through other evidence. Did the trial court err by admitting the recording of the interview?

STATEMENT OF THE CASE

An Aiken County grand jury indicted Appellant Rashawn Carter for first-degree burglary, armed robbery, kidnapping, first-degree assault and battery, possession of a firearm by a person convicted of a violent felony, and possession of a weapon during the commission of a violent crime. Carter proceeded to jury trial on February 12–16, 2018, before the Honorable Doyet A. Early. He was convicted of burglary, armed robbery, kidnapping, and both weapons offenses and sentenced to concurrent terms of 35, 30, 30, 5, and 5 years' incarceration, respectively. (R.p.599). In this direct appeal, Carter requests reversal of his convictions on the basis that the trial court erroneously denied his motion to exclude a video recording of his interview with police.

STATEMENT OF FACTS

On May 9, 2015, Elizabeth Miller was asleep in her home at the Hahn Village apartment complex in Aiken. (R.p.95). At around five o'clock in the morning, she was awakened by three masked African-American males with handguns demanding money. (R.p.98; 468). One of the men held her at gunpoint while the other two ransacked her apartment. (R.p.98–100). The men forced Miller to lie on her stomach and sexually assaulted her with a handgun. (R.p.102).

The assault stopped, and Miller heard one of the men exclaim "oh shit!" She got up from the bed and saw the body of one of the burglars lying in the bathroom doorway near the back door to the apartment. She ran through the front door to her neighbor's apartment and heard gunshots. (R.p.103–04). Minutes later, her boyfriend arrived. Miller ran to his vehicle and called 911 at 5:22 a.m. (R.p.105; 488).

Miller's neighbor, Keith Byrd, witnessed the burglars arrive in a car via a dirt path behind the apartment. (R.p.133). Byrd observed three men enter the home. He called Miller's boyfriend, Melvin Chandler, to alert him. (R.p.138). Shortly after, he heard a gunshot followed by a flurry of more gunshots. (R.p.139). Minutes later, Chandler showed up at Byrd's back door asking him to hold a plastic bag full of money. (R.p.140).

Police arrived and found a man lying unconscious near the back door with a shirt wrapped around his face and a gunshot wound to the head. He was later identified as Darius Scruggs, referred to throughout trial as "Black Boy." Officers rendered medical aid to Scruggs and secured the crime scene. (R.p.146–47; 150). They discovered a group of shell casings in the yard, a single shell casing by the back door, a bullet hole in the back screen door going inward, and a Taurus handgun on the floor near the back door. (R.p.178–85; State's Exhibits #25, 33).

Police did not find any physical evidence connecting any other suspects to the crime scene. (R.p.482). Miller's cell phone was discovered in Scruggs' pocket. (R.p.147; 470).

Officers interviewed Chandler, Miller, Byrd, and others at the scene. Chandler cooperated with police, even when they discovered a shoe box full of cocaine in Miller's closet. (R.p.190). Chandler testified he was a drug dealer and kept cocaine in the apartment. (R.p.428; 435). Miller testified she was unaware Chandler kept drugs there. (R.p.120).

Officers interviewed Miller's neighbor, Treasure Simpkins, and her daughter, Jasmine Hammond. (R.p.365–66; 163). Simpkins and Hammond testified they were awake at the time of the robbery because they were "looking for" Hammond's boyfriend, Rashawn Carter, who had been ignoring Hammond's calls. (R.p.362; 371; 374). They testified they witnessed a man they knew as "Trill" running from the apartment complex as police arrived. (R.p.362–64; 374–75).

Investigators went to the hospital where Scruggs was on life support. They encountered Scruggs' brother, Patrick Neely. Neely told police he had information about the robbery and gave police the names and phone numbers of others involved, including Rashawn Carter. (R.p.463). Neely testified at trial to the "same information" he told officers at the hospital. (R.p.294, line 19). He testified he was involved in planning the robbery, which was aimed at Chandler's stash of cocaine and money. (R.p.284). Others involved were Scruggs, Rick Jackson, Rodriguez Jackson, and Rashawn Carter. The group was riding in a silver Nissan driven by Carter, and their discussions took place in the early morning hours at an establishment called Club Climax. (R.p.277). According to Neely, he did not go with the others to carry out the robbery because his brother wouldn't allow him to participate. (R.p.286). Scruggs took Neely's 40 caliber handgun and gave it to Carter. (R.p.286). Neely stayed behind while the

others left to carry out the robbery. Neely estimated the group left him around five o'clock in the morning. (R.p.293-94).

Neely heard from Carter early the next morning. He met him at Carter's nephew's home, and Carter informed him that his brother was "gone." (R.p.302). Carter's nephew, Shaqueal Campbell, lived in the same apartment complex as Neely. (R.p.291). Also present was Campbell's girlfriend, Sanquesha Ramsey. Phone records verified Carter used Ramsey's phone to contact Neely. (R.p.315, line 22–24; p.288). Carter explained "It happened too fast and there wasn't nothing I could do." (R.p.291). Neely then spoke with his mother and learned that Scruggs had been shot in the head. Scruggs died from his wound. Neely testified he retrieved his gun from Carter and gave it to "somebody else." (R.p.292).

The State was able to corroborate much of Neely's testimony. Melvin Chandler testified he kept a "trap house" separate from Miller's apartment from which to sell drugs. (R.p.428). On the night of the robbery, Chandler met Rick Jackson, also known as "Massacre," at the trap house. (R.p.429; 280). Jackson was riding in a gray or silver car. (R.p.430). When Chandler left the trap house to visit a girlfriend (not Miller), he told Jackson where he was going. On the way to his second girlfriend's house, he got a call from Byrd alerting him to the three men entering Miller's apartment. (R.p.431). Chandler called his friend Trill and another friend named Gary for help. (R.p.432–43). Presumably, one of these men shot and killed Darius Scruggs through the back screen door. Chandler's testimony was corroborated with phone records. (State's Exhibit #21).

Police obtained Darius Scruggs' cell phone from his father and discovered text messages between Scruggs and Rick Jackson from the night of the robbery confirming that Rick Jackson served as an accomplice by alerting the other three of Chandler's location so they would know

when it was safe to carry out the robbery. (R.p.484; State's Exhibit#101). At 3:50 a.m., Jackson texts Scruggs to ask "where y'all parked at?" Later, at 5:03 a.m., Jackson texts Scruggs: "He leaving to fuck a bitch . . . I doubt if he come there but just be 050 . . . He said he coming back so go ahead." (R.p.486-87). Scruggs responds by asking "Is he leaving da house or what." Jackson texts back, "Go head fool." (R.p.487). At 5:16, Jackson texts Scruggs: "Tighten up, they know what's going on leave now." (R.p.488). Historical location data confirmed Jackson was in the area of Chandler's trap house when he sent the texts. (State's Exhibit #21).

After speaking with Neely and obtaining Carter's cell phone number, police shared the number with SLED. SLED agents used a "web-based data base" to identify names associated with the number based on information from third party vendors. (R.p.245). The program associated the number with the names "Vertes Parker" and Sanquesha Ramsey. Police asked Treasure Simpkins whether she recognized either of those names, and learned Carter's full legal name is Rashawn Vertez Carter. (R.p.246).

Police then contacted Carter's phone provider, T-Mobile. Police spoke with T-Mobile's "law enforcement representative" and submitted an "exigent request" to obtain the phone's real-time location data. (R.p.222–23; 248–49). This occurred "shortly . . . prior to lunchtime." (R.p.221, line 24). Investigator Jeremy Hembree testified he believed the exigent request for real-time phone location was necessary because "we had some unknown individuals who had committed a home invasion . . . while armed" and "there was a need to get them off the street as soon as possible."[1] (R.p.224). Hembree testified "it wasn't feasible for me necessarily to go away for a certain amount of time to obtain a search warrant, locate a judge, just for call detail records because [a] search warrant won't provide us with location information . . . at the time."

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[1] Police originally submitted an exigent request for Elizabeth Miller's phone, and learned it was the phone recovered from the body of Darius Scruggs. (R.p.242–43).

(R.p.230). T-Mobile eventually approved the request and began sending emails every 15–20 minutes with the GPS coordinates of Carter's cell phone. (R.p.226).

Police received a notification at 4:40 that afternoon and learned Carter's cell phone was in Batesburg-Leesville. (R.p.249). Officers headed in that direction, but received another notification that Carter's phone was moving again. Using the updates from T-Mobile, police were able to locate Carter at an apartment complex in Columbia at around "four or five" that afternoon. (R.p.249; 301). Officers saw Carter in the parking lot next to a silver Nissan Altima. (R.p.324–25). Jasmine Hammond was with him. When asked by police, Carter claimed they were driving a Dodge Cobalt, but Hammond admitted they were in the silver Nissan. (R.p.330). Officers asked Carter if he would be willing to come to police headquarters in Aiken for an interview, and Carter agreed. (R.p.326–28). Carter had two cell phones in his possession. He gave one of them, a Galaxy Note smart phone, to Hammond before going with police back to Aiken, along with approximately $800. (R.p.388–89). He told Hammond to get rid of the phone. (R.p.389). Police later found a text message (pursuant to a search warrant) from Carter to Treasure Simpkins instructing her to "take the phones up there, wash them with water, everything." (R.p.473).

In his interview with police, Carter claimed he was with Jasmine Hammond at his mother's house from 10:30 on the night of the incident until eleven or twelve the next morning. (State's Exhibit #9 at 14:20). He told police that "Black Boy" was his "very close friend," and admitted he knew Patrick Neely as well, but denied having spoken with Neely recently. However, Neely's phone records showed a call from Carter that morning. (State's Exhibit #21, slide 44). He pretended he didn't know Scruggs had been shot. When asked whether he was at Club Climax the night before, he denied it, claiming he didn't even know where Club Climax

was. One of the investigators told Carter that "some of his people" told them he was at the club at two o'clock that morning. (State's Exhibit #9 at 15:25). Carter continued to deny that he was there. When an investigator told Carter that Jasmine Hammond spoke with investigators at Hahn village at six o'clock that morning, he continued to insist she was in bed with him all night. Eventually, after investigators indicated they did not believe Carter, he changed his story. (State's Exhibit #9 at 25:00). He admitted he was with "Black Boy" at Club Climax around midnight that night, but claimed he dropped Black Boy off at his brother's house and went home. When confronted with the fact that security cameras at Hahn Village captured an image of his rental car, he repeatedly insisted he was "not in the car" at that time, and suggested it could have been his sister's boyfriend. (State's Exhibit #9 at 38:00; 50:00). After repeatedly insisting he was not at the scene of the crime, he terminated the interview and was allowed to leave.

That same day, Whitney Simpkins brought the rental car to the police station. (R.p.250). She allowed police to search the car, but they did not find anything of evidentiary value. The car appeared to have been wiped down in some areas. (R.p.254). Police discovered a box for a Verizon cell phone that was purchased at Walmart the same day, and obtained surveillance video from Walmart showing Carter purchasing a new cell phone hours after the burglary. Police also obtained surveillance video of Rodriguez Jackson purchasing a new cell phone at a Walmart in Aiken that same day. (R.p.480).

The State completed its case against Carter by using historical phone records and peripheral witness testimony to show Carter was with the others in the hours leading up to the burglary. (State's Exhibit #21). Whitney Simpkins, who was so close with Carter that she referred to him as her "brother," testified she rented the silver Nissan and allowed Carter to borrow the car on the night before the incident, and Carter returned it the next morning.

(R.p.306–09). Co-conspirator Rodriguez Jackson was with Carter both times. (R.p.308). Jasmine Hammond recounted Carter's confession to her that he participated in the burglary. She testified that on the way to Columbia, Carter told her "what happened with the home invasion." (R.p.381). Carter told her he drove the car and that Scruggs had been shot in the head. (R.p.387). She authenticated jail calls and a letter from Carter imploring her to retract her story and provide him with an alibi. (State's Exhibits #12A (R.p.600), 13A (R.p.610), and 14A (R.p. 623). Carter did not present a case.

ARGUMENT

I. Police use of real-time cell phone location data to locate Carter on the day of the burglary was reasonable because exigent circumstances justified the minimal intrusion into Carter's privacy. Even if a Fourth Amendment violation occurred, suppression was not appropriate because Carter's voluntary statement was not "fruit" of the search. Finally, any error was harmless because admission of the interview did not reasonably affect the result of trial.

Citing the Fourth Amendment, Carter asks this Court to suppress his recorded statement and overturn his convictions because police used real-time location data supplied by his cell phone provider to find him on the day of the incident. Carter claims he would not have spoken to police if they had not used the data to locate him and request an interview, and that his convictions hinged on the incriminating nature of his statement.

Perhaps the most difficult question raised in this case is whether the police use of real-time location data constitutes a Fourth Amendment search. But this Court doesn't have to answer that question to affirm Carter's convictions. The simplest course is to assume for argument's sake that a search occurred and address the reasonableness of the police conduct in the circumstances. Because exigent circumstances justified the officers' reasonable belief that immediate action was necessary, and because the intrusion on Carter's legitimate privacy expectations was minimal, police were not required to seek a warrant before obtaining the data. Even if this Court finds a Fourth Amendment violation occurred, it should nevertheless affirm because suppression was not an appropriate remedy. Carter freely, even obsequiously, cooperated with police after an opportunity for cool reflection, such that his statement is too attenuated from the search to justify suppression. Finally, admission of the statement is not grounds for reversal because the statement did not affect the outcome of trial. This Court should affirm.

A. Standard of review.

On appeal from a motion to suppress on Fourth Amendment grounds, the appellate court applies a deferential standard of review and will reverse only if there is clear error. State v. Counts, 413 S.C. 153, 160, 776 S.E.2d 59, 63 (2015). The appellate standard of review in Fourth Amendment search and seizure cases, including reasonableness determinations, is limited to determining whether any evidence supports the trial court's finding. State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2005). An appellate court should not "substitute its preferred findings" to those of the trial court, particularly in "highly fact-specific" reasonableness inquiries. State v. Tindall, 388 S.C. 518, 525, 698 S.E.2d 203, 207 (2010) (Kittredge, J., dissenting).

B. Police were not required to obtain a search warrant before requesting Carter's real-time cell phone location data from his service provider.

The State does not concede a search occurred in this case.[2] But assuming for argument's sake[3] that Carter's cell phone was searched by police when they requested and received real-time

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[2] Carter points to Carpenter v. United States, 138 S. Ct. 2206 (2018), to support his argument that a search occurred. In Carpenter, the government obtained 127 days of historical cell site location data and used it to prove Carpenter was present at the scenes of several bank robberies. Police obtained the records pursuant to the Stored Communications Act, which allowed the government access to historical cell phone location records pursuant to a court order issued on less than probable cause. The United States Supreme Court held the government was required to obtain a warrant based on probable cause in order to use the records as evidence. The Court declined to apply the "third-party doctrine," which holds that a person has no reasonable expectation of privacy in information shared with third parties, reasoning that consumers do not "assume the risk" that the cell phone companies' voluminous records of location data will be shared with the government. The Court held that Carpenter had a reasonable expectation of privacy in the company's comprehensive catalog of "the whole of his physical movements." Carpenter, 138 S. Ct. at 2219. However, the Carpenter court took care not to "express a view . . . on real-time [location data]," leaving open the question whether the government's short-term use of such data constitutes a Fourth Amendment search. Carpenter, 138 S. Ct. at 2220. While Carpenter's holdings regarding the third party doctrine are seemingly applicable to real-time data as well as historical data, the privacy interest at stake is very different. This case involved real-time location data collected for a short period of time at the request of law enforcement—not

historical data collected automatically for an extended time. The Carpenter court made clear: "this case is *not about 'using a phone' or a person's movement at a particular time*. It is about a detailed chronicle of a person's physical presence compiled every day, every moment, over several years." Carpenter, 138 S. Ct. at 2220 (emphasis added). Historical location data takes on a content-like character because its comprehensive record of a phone's every movement for months and years may reveal intimate details of one's private life. Id. By contrast, real-time data covers only the present. In this case, the real-time data was shared only long enough to allow the police to locate Carter (apparently for around an hour), during which time Carter could have easily kept his phone's location secret by simply turning off its cell signal. (R.p.301; 249). Because historic location data is automatically compiled whenever a cell phone is on, to keep one's location private for extended periods of time would destroy the utility of the phone, and most would say this is "no realistic alternative." Smith v. Maryland, 442 U.S. 735, 750 (1979) (Marshall, J. dissenting). By contrast, it is reasonable to expect a cell phone user to take affirmative steps to keep its location secret for short periods of time. If there are certain times during which the user wishes to keep his location truly private, he can easily accomplish that. One who fails to take this minimal action has not truly "sought to keep this information private" and thus is not justified in expecting privacy in that data. See Katz v. United States, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection."). Employing this logic and the precedent of United States v. Knotts, 460 U.S. 276, 281 (1983), the Sixth Circuit Court of Appeals has decided that police use of real-time location data is **not a search**. United States v. Riley, 858 F.3d 1012, 1018 (6th Cir. 2017), cert. denied, 138 S. Ct. 2705 (2018) (holding police use of real-time GPS location data to determine a suspect's location was not a search because individuals have no legitimate expectation of privacy in their public movements and tracking did not reveal movements within the home). The crucial distinction is between the privacy interest in one's location "at a particular time," and a comprehensive catalog of one's movements for years at a time. A second distinction from Carpenter is that T-Mobile was not ordered to deliver the data in this case. In Carpenter, police obtained historical location data pursuant to a court order issued on less than probable cause. The provider had no choice but to comply. In this case, T-Mobile did not deliver the data to police because they were required by law; they consensually handed them over upon mere request, as is the company's practice. Carter could have made himself aware of T-Mobile's privacy policy, and was free to buy service from a provider that more closely guards its customers' data. He had no reasonable expectation of privacy in data that he should have known his service provider voluntarily shares with others upon request. The Supreme Court may draw a distinction between the court ordered documents produced in Carpenter and the data in this case that was consensually shared without any official process from the government. T-mobile's privacy policy warning customers that it may share location information "in an emergency situation" is available at https://www.t-mobile.com/responsibility/privacy/privacy-policy (last visited 8/19/19).

[3] Rather than getting bogged down in a semantic argument over what to call the government's actions, the State will instead focus on the reasonableness of those actions. After all, the words "'Search' and 'seizure' are not talismans," and the "central inquiry under the Fourth Amendment" is "the reasonableness in all the circumstances of the governmental invasion." Terry v. Ohio, 392 U.S. 1, 19 (1968). This was the approach taken by federal appellate courts in

location data from his service provider, no warrant was required. Police reasonably believed immediate action was necessary to apprehend a dangerous felon and prevent the destruction of evidence. The intrusion on Carter's privacy was minimal, as he was in a public place, took no steps to keep his location secret, and police obtained a search warrant before obtaining any of his phone's content or historical location data. The limited search was reasonable in the circumstances.

Investigator Jeremy Hembree testified to the circumstances of the "exigent request":

> We had responded, obviously, to a home invasion where we had a deceased individual. We believed he was part of the group that had committed the home invasion. At that point we had some unknown individuals who had participated in a home invasion and were unsure if they had [participated] in the shooting, but they also had done the home invasion while armed. So we felt that there was a need to get them off the street as soon as possible.

(R.p.224).

As for the need to act immediately, Hembree testified:

> It was a fluid scene that morning. We were still actively investigating the scene. So it wasn't feasible for me necessarily to go away for a certain amount of time to obtain a search warrant . . . .

(R.p.230).

"[P]olice must, *whenever practicable*, obtain advance judicial approval of searches and seizures through the warrant procedure . . . ." Terry v. Ohio, 392 U.S. 1, 20 (1968) (emphasis

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United States v. Wallace, 885 F.3d 806, 810 (5th Cir. 2018) (assuming without deciding that police use of real-time cell phone GPS location data constituted a search but denying motion to suppress pursuant to good-faith exception to the exclusionary rule), United States v. Banks, 884 F.3d 998, 1012 (10th Cir.), cert. denied, 139 S. Ct. 638 (2018) (assuming without deciding that police use of real-time cell phone GPS location data constitutes a search but denying motion to suppress pursuant to exigent circumstances exception to warrant requirement), and United States v. Caraballo, 831 F.3d 95, 102 (2d Cir. 2016), cert. denied, 137 S. Ct. 654 (2017) (declining to address the "important and complex" question whether use of real-time location data constitutes a search because exigent circumstances justified the police conduct).

added). However, a warrant is not required "when 'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." Kentucky v. King, 563 U.S. 452, 460 (2011). Such exigencies include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence. King, 563 U.S. at 460 and n. 3; State v. Counts, 413 S.C. 153, 163, 776 S.E.2d 59, 65 (2015). To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, courts look to the totality of circumstances. Missouri v. McNeely, 569 U.S. 141, 149 (2013).

The exigent circumstances exception is, at its core, based on reasonableness. United States v. Caraballo, 831 F.3d 95, 103 (2d Cir. 2016) (explaining "the exigent-circumstances analysis is merely a 'finely tuned approach' to Fourth Amendment reasonableness") (quoting McNeely). When there is "a plausible claim of specially pressing or urgent law enforcement need" and the government action in question "was tailored to that need," courts should "balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable." Illinois v. McArthur, 531 U.S. 326, 331 (2001). A balancing test would be appropriate in this case, as it would allow the Court to pragmatically and honestly assess the reasonableness of a search enabled by technology the founders could not have anticipated. See Wyoming v. Houghton, 526 U.S. 295, 299–300 (1999) ("In determining whether a particular governmental action violates [the Fourth Amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it

intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.") (internal citations omitted).

"In the Fourth Amendment context, a court is concerned with determining whether a reasonable officer would be moved to take action." State v. Wright, 416 S.C. 353, 369, 785 S.E.2d 479, 487 (Ct. App. 2016). "A fairly perceived need to act on the spot may justify entry and search under the exigent circumstances exception to the warrant requirement." Id. Courts should give "indulgence to officers acting to deal with threats or crimes of violence which endanger life or security . . . ." Welsh v. Wisconsin, 466 U.S. 740, 751 (1984).

An important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made. Welsh, 466 U.S. at 753. Courts should also "make the scope of the particular intrusion, in light of all the exigencies of the case, a central element in the analysis of reasonableness. " Terry, 392 U.S. at 17; Missouri v. McNeely, 569 U.S. 141, 151 (2013). Police actions that constitute less than a "full search" may be justified on less than probable cause. Terry, 392 U.S. at 24. Courts should consider the duration of the intrusion and whether "police made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy." Illinois v. McArthur, 531 U.S. 326, 332 (2001).

The police actions in this case were objectively reasonable. Police had reliable information[4] that Carter was involved in a violent, nighttime home invasion, armed robbery, and

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[4] The State disputes Carter's assertion that no probable cause existed that he was involved in the crime. Neely's statements to investigators based on his own personal knowledge and corroborated by text messages and contacts in his cell phone raised a "fair probability" that Carter was involved. Simply because police had not yet obtained an arrest warrant does not mean they did not have probable cause. They were not required to obtain a warrant at the earliest possible opportunity. State v. Bultron, 318 S.C. 323, 333, 457 S.E.2d 616, 622 (Ct. App. 1995). Furthermore, the State disputes that probable cause was necessary. Police were only

sexual assault, and that he was driving the car used to carry out the robbery. Police got this information from Carter's co-conspirator, Patrick Neely, mere hours after the crime was committed, before the suspects had an opportunity to completely cover their tracks. They examined Neely's phone to corroborate his information, and were able to "make at least a very rough assessment of [his] reliability." Illinois v. McArthur, 531 U.S. 326, 332 (2001) (factoring degree of suspicion into exigent circumstances analysis).

Given the seriousness of the crime, police were justified in believing Carter posed an immediate public safety risk, and that any delay in apprehending him could result in the destruction of important evidence. See State v. Wright, 416 S.C. 353, 369–70, 785 S.E.2d 479, 488 (Ct. App. 2016) (holding warrantless search of hotel room was reasonable because "a potentially armed and dangerous murder suspect was attempting to flee, creating exigent circumstances"). The facts bore out this belief. On Carter's instructions, his girlfriend destroyed his cell phone, which contained potential evidence against him. Someone also wiped down the car Carter was driving before taking it to the police station, likely destroying biological evidence proving his co-defendants had been in the car. Carter was located halfway across the state in Columbia, raising the possibility he was in the process of fleeing. The State had a compelling need to ascertain his whereabouts and confirm or dispel their suspicions that he was a culprit in this heinous crime. See Wright, 416 S.C. at 369, 785 S.E.2d at 487; see also State v. Wyatt, 421

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required to have an objectively "reasonable belief" that immediate action was necessary to prevent the destruction of evidence or danger to the community. Schmerber v. California, 384 U.S. 757, 770 (1966) (holding warrantless search did not violate the Fourth Amendment because officer "might reasonably have believed that he was confronted with an emergency"). While "Some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure," United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976), "reasonable belief" does not necessarily mean probable cause. Even if the probable cause standard is more appropriate to justify warrantless emergency searches of a home, because the limited intrusion here was less than a full search, it was justified on reasonable suspicion, i.e. "specific, articulable facts" justifying a belief that Carter was involved in the burglary. See Terry, 392 U.S. at 17.

S.C. 306, 310, 806 S.E.2d 708, 710 (2017) (allowing suggestive identification procedures in emergency circumstances where they "may expedite the release of innocent suspects, and enable the police to determine whether to continue searching").

Not only was the government's need compelling in this case, the intrusion on Carter's privacy was minimal. Police pursued the least intrusive course, refraining from obtaining any content or historic location data from Carter's phone until obtaining a search warrant. The only information police learned about Carter by obtaining his cell phone's real-time location data was his current location in a public parking lot, information he took no steps to conceal and "voluntarily conveyed to anyone that wanted to look." United States v. Knotts, 460 U.S. 276, 281 (1983) (holding real-time electronic tracking of suspect did not violate Fourth Amendment because he had no reasonable expectation of privacy in his public movements); United States v. Riley, 858 F.3d 1012, 1018 (6th Cir. 2017), cert. denied, 138 S. Ct. 2705 (2018) (holding police use of real-time GPS location data to determine a suspect's location was not a search because individuals have no legitimate expectation of privacy in their public movements and tracking did not reach within the home). The real-time location data did not reveal a detailed chronicle of Carter's daily habits or associations, the privacy interest implicated by the long-term location data in Carpenter. It revealed nothing about Carter except the current location of his cell phone, which was sought only for the purpose of finding him, not as evidence. As the solicitor explained, the State was not using the data "to inculpate him in any way, it's just to explain how they . . . located him." (R.p.232). See Camara v. Mun. Court of City & Cty. of San Francisco, 387 U.S. 523, 537 (1967) (warrantless government inspection did not violate the Fourth Amendment in part because it was not "aimed at the discovery of evidence of crime").

Real-time location data lends itself naturally to use in exigent circumstances. Unlike historical cell-site data, it is typically not a useful tool for investigations into past crimes.[5] It does not involve "the sum of one's public movements" being "recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on." United States v. Jones, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring). However, it is extremely useful in emergency situations where police need to locate someone immediately.

The United States Supreme Court took care in Carpenter to make clear that cell phone location data is subject to an exigent circumstances analysis: "[I]f law enforcement is confronted with an urgent situation, such fact-specific threats will likely justify the warrantless collection of CSLI." Carpenter, 138 S. Ct. at 2223. In Carpenter, there was no emergency compelling the government to obtain the historical location data without first obtaining a warrant. The data would have been waiting on them after seeking a warrant because historical data is routinely collected and stored. Carpenter v. United States, 138 S. Ct. at 2218. By contrast, real-time data is not routinely stored by service providers, but must be specially requested by law enforcement. United States v. Caraballo, 831 F.3d 95, 99 (2d Cir. 2016) (explaining real-time GPS data is "generated only at the specific command of a [provider] operator"). Taking the time to go through the warrant procedure could defeat the purpose of obtaining the data—locating the suspect as soon as possible to prevent the destruction of evidence and danger to others. The

[5] Obviously, a person's current location does not prove his past whereabouts. To the extent real-time location data could be used to continually monitor a person's movements in an attempt to connect his current movements to a past crime, that scenario is not present here, where police tracked Carter's location for a short period of time, and not for an evidence-gathering purpose. "[I]f such . . . practices . . . should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." United States v. Knotts, 460 U.S. 276, 284 (1983).

circumstances justified the limited intrusion. See Commonwealth v. Almonor, 482 Mass. 35, 51, 120 N.E.3d 1183, 1198 (2019) (holding exigent circumstances justified warrantless "ping" of suspect's cell phone where police had reasonable grounds to believe that the defendant "posed an immediate risk to the safety of police and others" because he had committed a "brutal murder" and was armed, and there was a risk that the suspect would attempt to conceal or destroy the weapon); United States v. Banks, 884 F.3d 998, 1012 (10th Cir.), cert. denied, 139 S. Ct. 638 (2018) (holding exigent circumstances justified police use of real-time cell phone GPS location data); United States v. Caraballo, 831 F.3d 95, 98, 102 (2d Cir. 2016), cert. denied, 137 S. Ct. 654 (2017) (holding exigent circumstances justified police use of real-time cell phone GPS location data where they discovered the body of a woman who was the victim of a homicide and concluded "her assailant could still be armed" and in possession of potential evidence).

Because the severity of the underlying crime justified a reasonable belief that immediate action was needed to prevent the destruction of evidence, escape of a fleeing felon, and danger to others, and because the intrusion on Carter's privacy was minimal, police were not required to seek a warrant before utilizing the data supplied by T-Mobile.

C. The exclusionary rule does not apply because Carter's interview was not the fruit of the search, the police acted in good faith, and Carter would have been interviewed regardless.

Even if the Court finds a Fourth Amendment violation occurred, suppression of Carter's interview was not an appropriate remedy because the statement was not "fruit of the poisonous tree." Carter insists his statement to police was the product of the search of his cell phone's location because police would not have been able to interview him otherwise. This argument fails for three reasons. First, his statement was voluntary and occurred only after Carter coolly reflected on whether he wanted to speak to police; it was not "come at by the exploitation" of the

search. Second, the police acted in good faith. Third, police would have found and interviewed Carter by traditional methods even without the real-time data. The exclusionary rule does not apply.

Suppression is a last resort, not a first impulse. Hudson v. Michigan, 547 U.S. 586, 591(2006). The rule's costly toll upon truth-seeking and law enforcement objectives presents a "high obstacle for those urging its application." Id. The rule applies only where its deterrence benefits outweigh its substantial social costs. Id.

Verbal evidence may be excluded if it "derives . . . *immediately* from an unlawful entry and an unauthorized arrest." Wong Sun v. United States, 371 U.S. 471, 485 and n.12 (1963) (emphasis added). In Wong Sun, police made a warrantless, forcible entry into a suspect's home and "almost immediately handcuffed and arrested him." Id. While under the stress of this exciting event, the suspect made an incriminating statement to police. The Supreme Court held the statements were inadmissible because they were not "sufficiently an act of free will to purge the primary taint of the unlawful invasion." Wong Sun, 371 U.S. at 486. By contrast, a statement given later by a different suspect, after he had been arraigned and returned voluntarily to speak with police, was admissible because it was voluntary and "the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint.'" Id. at 491.

In subsequent cases, the Supreme Court has clarified the circumstances in which a statement should be excluded based upon its relationship to an illegal search or seizure. Most of the cases involve an unlawful, involuntary detention which gives rise shortly thereafter to an incriminating statement. See Brown v. Illinois, 422 U.S. 590 (1975); Dunaway v. New York, 442 U.S. 200 (1979); Taylor v. Alabama, 457 U.S. 687 (1982). The Brown court listed factors for courts to consider when deciding whether a statement is fruit of an unconstitutional search or

seizure or an act of free will that stands apart from its origins: "The temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct are all relevant." Brown v. Illinois, 422 U.S. 590, 603–04 (1975) (citing Johnson v. Louisiana, 406 U.S. 356, 365 (1972)) (internal citation omitted).

In this case, there was no illegal seizure; Carter went with the officers willingly. There was no coercion; he made his statement voluntarily after Miranda warnings. His statement was not the product of surprise or excitement resulting from a forcible, illegal search of his home, as in Wong Sun. Carter had an hour-long car ride from Columbia to Aiken during which "to consider carefully and objectively his options and to exercise his free will." Taylor v. Alabama, 457 U.S. 687, 691 (1982). Carter was friendly with the investigators, riding in the front passenger seat and talking about sports along the way. (R.p.49). His voluntary decision to take an hour-long trip with officers and then sit for an interview was an intervening circumstance between the alleged illegal search and the evidence sought to be excluded. See United States v. Seidman, 156 F.3d 542, 549 (4th Cir. 1998) (explaining suppression of a defendant's voluntary statement was not appropriate where "the brief intrusion into Seidman's home was at worst a minor and technical invasion of Seidman's rights" and "Seidman was neither arrested without probable cause, nor involuntarily transported to the police station and interrogated in the hope that something would turn up").

The official conduct was not flagrant. Officers did not seize Carter against his will or pressure him to give a statement. His cooperation was completely voluntary. The officers even allowed him to leave his cell phone and car with his girlfriend, and to leave the police station after the interview. Officers showed further restraint by not obtaining any of the phone's content

or historical location data until first obtaining a search warrant, despite not having the benefit of Carpenter's guidance. This is not a case where the "impropriety . . . was obvious" or "had a quality of purposefulness." Brown v. Illinois, 422 U.S. 590, 605 (1975). The "exigent request" was submitted pursuant to common practice and T-Mobile policy, and T-mobile handed the data over voluntarily. No binding precedents forbid their conduct. These facts bring this case within the purview of the "good faith exception" to the exclusionary rule. See Hamrick v. State, 426 S.C. 638, 828 S.E.2d 596, 604 (2019), reh'g denied (July 1, 2019) (explaining the exclusionary rule does not apply "when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful").

Finally, suppression was uncalled-for under the inevitable discovery doctrine. Police would have found and spoken with Carter through alternative means, as they did with other suspects in the case. (R.p.476). Because Carter's statement was voluntary and intelligent, there is no reason to believe he would have given a different story to police if the interview had taken place a few hours later. Accordingly, "the State and the accused [ended up] in the same positions they would have been in had the impermissible conduct not taken place," and suppression was not appropriate. Nix v. Williams, 467 U.S. 431, 447 (1984). This Court should affirm.

D. Harmless error

If even this Court finds the statement should have been excluded, its admission was harmless. An error is harmless if it did not reasonably affect the result of the trial. State v. Jenkins, 412 S.C. 643, 651, 773 S.E.2d 906, 910 (2015). To warrant reversal based on the wrongful admission of evidence, the complaining party must prove resulting prejudice. State v. Green, 397 S.C. 268, 287, 724 S.E.2d 664, 673 (2012). The burden is on the Appellant to satisfy

the court that there was prejudicial error. State v. Motley, 251 S.C. 568, 575, 164 S.E.2d 569, 572 (1968).

The State presented damning testimony from Carter's co-conspirator, Patrick Neely, laying out Carter's involvement in the crime. Neely testified Carter was involved in the planning of the robbery, Carter used Neely's gun, and Carter told Neely the next morning that his brother had been shot during the robbery. Neely's testimony was corroborated through phone records and other witness testimony.

The State also admitted Carter's own confession to his girlfriend admitting involvement. She further testified Carter instructed her to destroy their cell phones after police asked to interview him, and this was corroborated with phone records. Thus, the State introduced consciousness of guilt evidence independent from Carter's recorded statement.

Multiple witnesses testified Carter was in possession of the silver Nissan on the night of the incident and after, including Sanqueesha Ramsey, the person who rented the car. Phone records obtained pursuant to a search warrant proved Carter was at Club Climax with his co-conspirators in the hours leading up to the burglary. Phone records also definitively showed coordination between Darius Scruggs and Rick Jackson during the burglary, further corroborating Neely's testimony about the others involved. The case against Carter was strong even without his statement.

On the other hand, Carter's statement to police was not as important. It was not a confession. The interview mostly concerned Carter's whereabouts leading up to the robbery, not his presence at the scene of the crime. While Carter did lie about his whereabouts earlier that night, he steadfastly maintained his innocence. His lies didn't look good, but the statement was

not so damaging in relation to the other evidence that it tipped the scales in favor of conviction over acquittal. This Court should affirm.

II. The trial court correctly admitted Carter's recorded statement to police because the officers' questions and representations were not admitted for their truth, were cumulative to other evidence, did not imply Carter was required to prove himself innocent, and were not unfairly prejudicial to Carter.

Carter asserts the recording of his interview with police should have been excluded based on the officers' alleged hearsay statements concerning information gleaned from other witnesses that conflicted with Carter's statements to police. Contrary to his assertion, the officers' statements were not hearsay because they were not admitted for their truth. Even if the interview did contain hearsay, Carter suffered no prejudice because the substance of the officers' statements was admitted through other witnesses. The officers' statements were not burden-shifting because they did not imply Carter was required to prove himself innocent at trial. This Court should affirm.

A. 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. 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. State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012).

B. The alleged hearsay statements were not admitted for their truth, were cumulative to other evidence, and were not unfairly prejudicial.

Contrary to Carter's claims, the interview was not "replete with hearsay." Although the officers did indicate to Carter that they did not believe his story, and that it did not match with information they already had, they did not recite specific statements from individuals. The officers did make many statements such as "We know you were there," and "We know most of

what happened," and "We have information." These are not hearsay statements. They are assertions of knowledge gleaned from unknown sources, which could include non-testimonial sources such as surveillance. For example, the officers intimated to Carter that they had viewed relevant phone records and told Carter that security cameras captured an image of his car at Hahn Village. (State's Exhibit #9 at 37:20). Therefore, the officers' assertions did not imply their knowledge came from the hearsay statements of others.

The closest thing to a hearsay statement in the hour-long recording is the investigator's assertion that some of Carter's "people" saw him at Club Climax on the night of the robbery. Police did not recite any specific statements or name any names. This is different from Brewer, where the interrogating officer repeatedly "referenced and quoted" the statements of "many purported eyewitnesses." State v. Brewer, 411 S.C. 401, 406, 768 S.E.2d 656, 659 (2015). The statement was not hearsay because it was not offered for its truth. The State did not need the officer's statement to prove Carter was present at Club Climax. They heard that from Carter himself, who admitted the fact later in the interview.[6] They also heard it from Carter's co-conspirator, Patrick Neely. Neely testified he shared this information with investigators at the hospital on the morning of the incident. The jury would have easily been able to connect this testimony to understand that when the investigator referred to Carter's "people," he meant Neely— the same Neely who testified and was subject to cross-examination about the statement. Cf. State v. Brewer, 411 S.C. 401, 407, 768 S.E.2d 656, 659 (2015) (holding interview should not be used to "spread before juries *damning information* that is not subject to cross-examination"). The fact was further corroborated by phone records showing Carter was present

[6] Defense counsel conceded Carter's statements were admissible as admissions of a party-opponent. (R.p.640).

in the area. Thus, even if the officer's statement about Club Climax was hearsay, Carter suffered no prejudice because the statement was cumulative to other properly admitted evidence.

Another statement resembling hearsay was Investigator Cameron's assertion that Jasmine Hammond spoke with investigators at Hahn Village shortly after the incident, and could not have been in bed with Carter as he claimed. While Cameron did not personally interview Hammond, he knew that another officer did, and that knowledge can be imputed to Cameron. Even if the statements concerning Hammond's whereabouts were hearsay under a strict interpretation of the "personal knowledge" aspect of the rule, no prejudice resulted because the fact was conclusively proven and not disputed at trial. Hammond confirmed in her testimony that she spoke with investigators at Hahn Village shortly after the robbery. The officer who spoke with Hammond also testified, and his notes documenting the conversation were admitted without objection. (R.p.637). Accordingly, the statement was cumulative to other evidence and its admission was not prejudicial to Carter. State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006) (explaining "improper admission of hearsay evidence is reversible error only when the admission causes prejudice"); State v. Brewer, 411 S.C. 401, 409, 768 S.E.2d 656, 660 (2015) ("The admission of improper evidence is harmless where it is merely cumulative to other evidence.").

C. The officers' entreaties for Carter to tell the truth were not burden-shifting and were not prejudicial to Carter.

Carter further claims the officers' statements that he should "be honest" and "cut the bullshit" shifted the burden of proof. These comments were not burden-shifting. Rather, they were candid statements that the officers did not believe the stories Carter was telling them, stories Carter later admitted were false. The investigators were not required to feign agreement with his lies. Imploring a suspect to tell the truth is not the equivalent of saying that he must "prove himself innocent." Cf. State v. Brewer, 411 S.C. 401, 409, 768 S.E.2d 656, 660 (2015)

(holding trial court erred by admitting interview showing officer's "*ad nauseam*" insistence that a suspect prove himself innocent). The investigators never told Carter he should prove himself innocent. Carter has not identified any burden-shifting statements, much less any that were so prejudicial in relation to all the other evidence as to require reversal. This Court should affirm.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Appellant's conviction and sentence from the lower court be affirmed.

Respectfully submitted,

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October 8, 2019

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
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SC Court of Appeals

Appeal from Sumter County
The Honorable George M. McFaddin, Circuit Court Judge

Appellate Case No. 2018-001438

THE STATE,

RESPONDENT,

V.

RASHAWN VERTEZ CARTER,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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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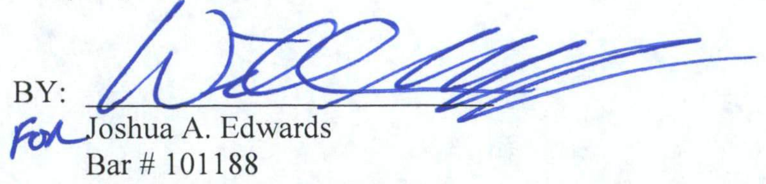

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