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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Gerald C. Smoak, Jr., Family Court Judge

Honorable Carmen T. Mullen, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TERRANCE WING,

APPELLANT

APPELLATE CASE NO. 2024-000637

INITIAL BRIEF OF APPELLANT

JOANNA K. DELANY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred in admitting evidence, in violation of the Fourth Amendment, obtained from a search and seizure of Appellant, where Appellant and dozens of others were searched and seized during the execution of a search warrant for a residence and for “several people currently hanging out at the residence,” since the search or seizure of a person must be supported by probable cause particularized with respect to that person?

2.

Whether the court erred in admitting the testimony of Investigator Fazekas about what he learned from codefendant and State’s star witness Barnes during his interrogation, since hearsay is generally inadmissible, and since “investigative information” may not be used to circumvent the hearsay rules?

3.

Whether the court erred in admitting a “FARO” scan of bullet trajectories, where the evidence did not satisfy the *State v. Council* and *State v. Jones* factors,¹ where the evidence was inadmissible under Rule 702, SCRE, since the technique was not published and there was no known error rate for the end results?

¹ *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999); *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979).

4.

Whether the family court erred by transferring jurisdiction of the murder to the general sessions court, where the family court failed to adequately consider the *Kent v. United States*, 383 U.S. 541 (1966), factors, especially since the court did not address the critical factor of the minor Appellant's lack of a prior record?

5.

Whether the court of general sessions was without subject matter jurisdiction to try the minor Appellant on the possession of a weapon during the commission of a violent crime offense, since the family court had exclusive jurisdiction of that offense and it properly refused to waive the minor Appellant into general sessions on the offense?

STATEMENT OF THE CASE

On November 19, 2020, Terrance Wing, Appellant, appeared before the Honorable Gerald Smoak, Jr, in the Beaufort County Family Court for a juvenile transfer (waiver) hearing, on juvenile petitions for murder and possession of a weapon during the commission of a violent crime. Appellant was represented by Jared Newman. Christine Grefe prosecuted the case. Waiver Tr. 1; R. *(Order of Waiver to General Sessions at 1). The court took the matter under advisement. Waiver Tr. 50, ll. 22-24. On November 30, 2024, Judge Smoak issued an order transferring the murder to General Sessions Court. R. *(Order of Waiver to General Sessions, 1 – 3).

On July 15, 2021, a Beaufort County Grand Jury indicted Appellant for murder and possession of a weapon during the commission of a violent crime. R. *(indictments). Appellant was tried before the Honorable Carmen Mullen and a jury, from April 8 – 11, 2024. Sentencing took place on April 15, 2024. Appellant was represented by Jared Newman. Trasi Campbell and Sara Malone prosecuted the case. Tr. 1; Tr. 232; Tr. 468; Tr. 619; Tr. 631. Appellant was convicted as indicted. He was sentenced to serve consecutive terms of imprisonment of thirty-five years for murder and five years for the weapons offense. Tr. 622, ll. 9-15; Tr. 660, l. 22 – 661, l. 6.

This appeal follows.

ARGUMENT

1.

The court erred in admitting evidence, in violation of the Fourth Amendment, obtained from a search and seizure of Appellant, where Appellant and dozens of others were seized and searched during the execution of a search warrant for a residence and for “several people currently hanging out at the residence,” since the search or seizure of a person must be supported by probable cause particularized with respect to that person.

A. Standard of review

“[A]ppellate review of a motion to suppress based on the Fourth Amendment involves a two-step analysis. This dual inquiry means we review the trial court’s factual findings for any evidentiary support, but the ultimate legal conclusion—in this case whether reasonable suspicion exists—is a question of law subject to de novo review.” *State v. Frasier*, 437 S.C. 625, 633–34, 879 S.E.2d 762, 766 (2022).

B. The case against Appellant was thin.

On the afternoon of December 23, 2019, Trey Blackshear (Decedent), who was approximately eighteen or nineteen years old, was shot and killed during a botched robbery/drug deal. Decedent was sitting in the driver’s seat of his car at the time, which was parked outside a Lutheran church in Bluffton. Tr. 92, l. 20 – 96, l. 11; Tr. 123, l. 3 – 126, l. 16; Tr. 130, ll. 17-23; Tr. 246, l. 19 – 249, l. 16. Decedent’s passenger, seventeen-year-old Jordan Singleton (Singleton), called 911. When law enforcement arrived, Singleton came out from around a building and stated two black males shot Decedent. Singleton described the suspects as both wearing jeans, with one in a gray sweatshirt and one in a black sweatshirt. According to

Singleton, one suspect had “short dreads” and the other had “shorter hair.” Singleton stated the suspects left on foot and ran across the street. Tr. 126, l. 17 – 128, l. 13; Tr. 239, l. 15 – 249, l. 8.

Singleton originally reported that each of the suspects was holding two guns. However, Singleton later admitted that he also had a gun and fired shots. State’s Exhibit #1; Tr. 249, ll. 9-16; Tr. 259, l. 17 – 262, l. 6. Law enforcement was unable to recover Singleton’s gun, which he disposed of before police arrived on the scene. Tr. 210, ll. 6-16; Tr. 252, ll. 4-22. However, they found Decedent’s own 9 mm handgun at his feet. It had likely not been fired. Tr. 134, l. 21 – 137, l. 8. There was cash, including counterfeit bills, on the back seat of Decedent’s car. Tr. 141, l. 23 – 142, l. 12. One of the suspects had dropped a blue iPhone beside Decedent’s car. The lockscreen on the phone was a photograph of Xavier Barnes. Tr. 143, ll. 10-20.

A number of bullet holes, from shots fired within the car, were visible. Tr. 129, l. 20 – 130, l. 13. There were approximately eleven spent shell casings in the car. Tr. 145, l. 14 – 147, l. 4. All of the fired shell casings were 9 mm. Tr. 156, ll. 20-23. A pathologist would conclude that Decedent was shot three times: in the neck, head, and shoulder; with the fatal shot to the back of the head. Tr. 509, l. 15 – 510, l. 20; Tr. 513, l. 1 – 523, l. 21.

According to Singleton, Decedent asked him to ride along to sell marijuana to “X,” whom Decedent was messaging on “Snapchat.” Tr. 240, l. 11 – 242, l. 11. Singleton claimed Decedent gave him a gun. Tr. 242, ll. 12-24. Singleton stated they arrived at the church parking lot and two guys were standing in the parking lot; Decedent told them to “hop in.” Tr. 245, ll. 4-16. According to Singleton, the guy with “twists or short dreads” sat behind him and the guy with the short hair sat behind Decedent. Tr. 245, l. 19 – 246, l. 16. Singleton stated they showed the guys the marijuana, and the guy behind Decedent had money out. Singleton testified the guy behind him put a gun to his (Singleton’s) head and said: “Run that shit.” Singleton stated

Decedent began “fidgeting,” and shooting started. Singleton fired shots behind him and jumped out of the car. Tr. 246, l. 19 – 249, l. 16. Singleton identified the suspect with short hair as Xavier Barnes. Tr. 253, l. 4 – 254, l. 24. Singleton only got a “quick glance” at the second suspect and could not identify him. Tr. 254, l. 25 – 255, l. 2.

Law enforcement obtained surveillance video from businesses near the scene of the shooting, including the Blue Water Gas Station. The video showed two suspects running from the area of the church at the time of the murder and getting into a gold Toyota Camry. Tr. 97, l. 20 – 102, l. 12; State’s Exhibit #3; Tr. 191, l. 21 – 192, l. 24. They were able to determine the car belonged to Kionna “Lexy” Ferguson (Ferguson). They also learned Ferguson’s boyfriend was Jaesean “Fats” Redd (Redd), and that Redd’s former neighbor was Xavier Barnes (Barnes). Tr. 114, l. 17 – 119, l. 21; Tr. 158, l. 5 – 159, l. 1; Tr. 160, ll. 1-25. In addition, they received an anonymous tip that Barnes was a suspect. Tr. 159, ll. 2-22. They obtained a juvenile petition for the arrest of Barnes, who was fifteen or sixteen years old. R. *(court’s exhibit #1 at 6); Tr. 193, ll. 3-7; Tr. 268, ll. 4-5.

Law enforcement executed a search warrant at Ferguson’s home, where the gold Camry was located. A black Toyota Corolla rental car was also on the property. The Corolla had been leased to a man named Marquise Brown, and inside was a 9 mm pistol. Tr. 164, l. 15 – 165, l. 3; Tr. 214, ll. 4-9. SLED determined the pistol was one of three guns which fired shots inside Decedent’s car. All three of the guns fired inside Decedent’s car were the same caliber, 9 mm, and the fired casings were several different brands: Sellier & Bellot (“S&B”), “SIG,” Winchester, and “JAG.” Tr. 474, l. 4 – 485, l. 20; Tr. 490, l. 21 – 492, l. 14. SLED determined the gun found in the Corolla fired the spent Winchester casings found in Decedent’s car. Tr. 484, l. 9-13; Tr. 491, l. 25 – 492, l. 3.

Xavier Barnes's father brought him in to meet with law enforcement. Tr. 193, l. 3 – 194, l. 22. It was Barnes's blue iPhone that was on the ground at the crime scene. Officers found "Snapchat" messages between Barnes and Decedent from shortly before the shooting. Tr. 104, l. 1 – 108, l. 13; Tr. 199, ll. 8-24. As seen, Barnes was the suspect identified by Singleton as one of the two suspects. Barnes, who was charged with murder and possession of a weapon during the commission of a violent crime in this case, was the State's key witness in its case against Appellant. Barnes was testifying pursuant to a proffer. He admitted he contacted Decedent and asked to buy some marijuana. Tr. 267, l. 1 – 273, l. 21. Barnes claimed Appellant was with him when they went to the church, and he stated they got a ride there from Ferguson and Redd in Ferguson's Camry. Tr. 273, l. 25 – 274, l. 16; Tr. 269, ll. 6-24. (According to defense counsel, Barnes would not put his hand fully on the Bible when sworn in and was visibly shaking while he "barely touched it." Tr. 578, ll. 11-18.)

Barnes's testimony was objectively incredible in many regards. According to Barnes, he, a fifteen-year-old, was being driven by Redd at the time of the shooting because Redd wanted Barnes to go to a job interview with him. Tr. 291, l. 25 – 292, l. 19. Nevertheless, Barnes claimed he and Appellant went to the church parking lot and got into Decedent's car for a drug deal. Tr. 277, l. 19 – 278, l. 15. According to Barnes, they began to do the drug deal when two guns simply appeared in his face. Barnes claimed Appellant was holding a gun at Singleton's head and Singleton was pointing a gun at him, Barnes. Barnes stated he heard gunshots and put his head down. Tr. 278, l. 18 – 280, l. 19. Barnes denied he was involved with an attempt to rob anyone: he claimed he did not remember telling law enforcement about an attempted robbery. Tr. 280, ll. 2-4. Although Barnes was the one who set up the drug deal, Barnes claimed he did not have a gun but Appellant did. Tr. 290, ll. 3-11; Tr. 279, ll. 4-8.

Barnes alleged he and Appellant ran back to the Camry, and Barnes admitted he had blood on his clothes. Tr. 280, l. 20 – 282, l. 6. Barnes claimed Redd asked them what happened and Barnes claimed that Appellant stated: “He reached, so I had to put him down.” Tr. 283, ll. 2-12. According to Barnes, Appellant gave Redd a gun Appellant had taken from “them,” i.e., Decedent and Singleton. Tr. 283, l. 14-23. (As seen, Decedent’s gun was found by his feet. Singleton did not indicate that the suspects took a gun from him, and Singleton disposed of his own gun before police arrived.) Barnes alleged Redd told Ferguson to clean up the blood from the Camry, which Barnes had on his clothes. Tr. 284, ll. 4-9. Barnes claimed he never talked to Appellant about the events again. Tr. 285, ll. 3-4. Barnes admitted he burned his bloody clothes when he got home. Tr. 284, l. 22 – 285, l. 2. He denied that he hoped his testimony would lead to a favorable case outcome for him. Tr. 297, l. 16 – 298, l. 16.

Neither Redd nor Ferguson testified at trial. Decedent’s car was swabbed for DNA. Mixtures of touch DNA on both rear armrests were analyzed. An expert in DNA analysis testified Appellant’s DNA was a match for a contributor to the mixtures. Tr. 433, l. 21 – 434, l. 6; Tr. 449, l. 3 – 450, l. 7. The expert admitted Appellant’s DNA could have gotten on the car by transfer without Appellant having been in the car. Tr. 454, l. 4 – 459, l. 21.

C. Appellant, who was not a suspect or resident of the home, was one of approximately thirty people who were detained, photographed and searched at the home when the warrant was served.

Law enforcement obtained a search warrant for Ferguson’s home on December 27, 2019. The search warrant was made Court’s Exhibit #1 and is located at pp. * of the Record on Appeal. The search warrant affidavit stated the getaway car from the murder was the gold Camry at Ferguson’s address on Mink Point Boulevard, and the Camry had been at the residence multiple times. R. *(Court’s Exhibit #1 at 6). The warrant also stated it was for the person of Barnes,

who was the murder suspect, and it was believed Barnes “was/is” located at the residence. The affidavit noted that the getaway car belonged to Ferguson, who lived at the Mink Point Road address with Redd, and that Redd previously lived on the same street as Barnes. R. *(Court’s Exhibit #1 at 6).

The description of premises to be searched stated the following:

This search warrant is for the complete search of the residence at [redacted] Mink Point Blvd Burton, Beaufort County SC. The residence is described as a brick/stucco single family residence bearing the number [redacted] above the garage on the home. The residence is currently under surveillance by the BCSO. In addition there are multiple vehicles currently parked at the residence. This search warrant also includes the search of any vehicles or outbuildings on the property. **In addition there are several people currently hanging out at the residence. This search warrant is also to include those on the premise [sic].**

R. *(Court’s Exhibit #1 at 5) (emphasis added). There was nothing in the affidavit that indicated why unidentified people who were “hanging out” at the house might have evidence of the crime.

Law enforcement, including the Bluffton Police Department and the Beaufort County Sheriff’s Office, “SWAT” team, and Violent Crimes Task Force, executed the search warrant. Tr. 122, l. 22 – 123, l. 2; Tr. 161, ll. 1-11. Law enforcement called the people in the house to come out the front door, one by one. Each person was detained, handcuffed, photographed, and searched. There were approximately twenty-seven adults and six children in the home. Tr. 163, l. 12 – 164, l. 14; Tr. 177, ll. 21-23; Tr. 221, l. 23 – 222, l. 7. Appellant, who was sixteen, was one of the dozens of people who were searched. He had nine 9 mm unfired bullets in his pocket. The brand of the ammunition was “S&B” and “SIG.” He was photographed and so were the bullets, and he was released. Tr. 184, l. 17 – 187, l. 2. State’s Exhibit #65; State’s Exhibit #66; Tr. 306, l. 24 – 307, l. 1; Tr. 555, ll. 18-21.

Appellant moved to suppress the fruits of the search and seizure: testimony about the search and seizure, and the photographs of his person and of the bullets found on him. Tr. 169, l. 1 – 187, l. 2. Defense counsel cited *Ybarra v. Illinois*, 444 U.S. 85 (1979), and argued that Appellant did not consent to the search and the warrant was not specific as to him. Defense counsel argued there were twenty-seven adults on the property and there was no particularized suspicion as to Appellant. Tr. 169, l. 11 – 176, l. 22; Tr. 178, l. 9 – 179, l. 3. The court asked if Appellant objected to being searched at the scene. The solicitor stated Appellant did not. Tr. 176, l. 23 – 177, l. 9. The court noted the search warrant stated it was for several people currently on the premises. The court ruled the evidence admissible. Tr. 177, l. 10 – 179, l. 12.

The court later supplemented its ruling by stating that although there was no case law approving a search like this one, the court believed the South Carolina Supreme Court would approve a pat-down of people in a home that was subject to a search warrant for officer safety or exigent circumstances. The court cited to *State v. Wright*, 416 S.C. 353, 785 S.E.2d 479 (Ct. App. 2016), in support of its ruling. Defense counsel again noted this was a search, not a pat-down, that bullets were not weapons, and that Appellant was already detained and cuffed when he was searched. He reiterated the warrant offered no particularized suspicion as to Appellant. Tr. 426, l. 7 – 431, l. 3.

Given Barnes's credibility problems, the State relied heavily on the bullets found in Appellant's pocket as circumstantial evidence of guilt. Tr. 554, l. 4 – 555, l. 21. Although the unfired bullets in Appellant's pocket could not be linked directly to a gun used in the shooting, the headstamps on the bullet casings were the same brands of ammunition as some of the spent casings found in the decedent's car. Tr. 555, ll. 7-21; Tr. 490, l. 21 – 492, l. 15. The jury asked to see a photograph of the bullets during deliberations. Tr. 611, ll. 19-23.

D. The requirement that probable cause be particularized to the person searched or seized may not be undercut by the existence of probable cause to search or seize another or to search the premises where the person happened to be. The trial court should have suppressed the evidence.

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. amend. IV. The Fourth Amendment is applicable to the States through the Fourteenth Amendment. *Bailey v. United States*, 568 U.S. 186, 192 (2013).

Probable cause “mean[s] more than bare suspicion.” *Brinegar v. United States*, 338 U.S. 160, 175 (1949). The warrant clause of the Fourth Amendment was designed to prevent “wide-ranging, exploratory searches.” *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). Probable cause is evaluated under the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983). When all the circumstances set forth in the affidavit before the magistrate present a fair probability that evidence of a crime will be found in a particular place, then a search warrant may be issued.” *Id.*, 462 U.S. at 239. “Mere conclusory statements which give the magistrate no basis to make a judgment regarding probable cause are insufficient.” *State v. Smith*, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990) (internal quotations omitted) (quoting *Illinois v. Gates*, *supra*). “In determining whether a search warrant is supported by probable cause, the crucial element is not whether the target of the search is suspected of a crime, but whether it is reasonable to believe that the items to be seized will be found in the place to be searched.” *State v. Thompson*, 419 S.C. 250, 256–57, 797 S.E.2d 716, 719 (2017) (emphasis omitted).

Under the totality of the circumstances, the information presented to the magistrate in this case did not provide probable cause to believe that evidence of the crime would be found on

Appellant, nor on “several people currently hanging out at the premise[s]”: unspecified people suspected of no wrongdoing. There was no probable cause to search Appellant, who was one of approximately twenty-seven adults and six children at the address. The conclusory statement that “there are several people hanging out at the residence” did not provide probable cause to believe evidence of the crime would be found on Appellant’s person. *E.g.*, *Thompson*, 419 S.C. at 256–57, 797 S.E.2d at 719; *Smith*, 301 S.C. at 373, 392 S.E.2d at 183.

In *Ybarra v. Illinois*, 444 U.S. 85, 87–89 (1979), the Supreme Court addressed the propriety of the search of approximately a dozen patrons at a bar where the police had a search warrant which authorized them to search the bar and the bartender based on information from a confidential informant that drugs would be present. Upon executing the search warrant, “officers announced their purpose and advised all those present that they were going to conduct a ‘cursory search for weapons.’ One of the officers then proceeded to patdown each of the 9 – 13 customers present[.]” They frisked Ybarra and felt a cigarette pack with objects in it. A few minutes later, they retrieved the pack from his pocket and found heroin in it. *Id.*

The Supreme Court explained that “a person’s mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.” *Ybarra*, 444 U.S. at 91 (citing *Sibron v. New York*, 392 U.S. 40, 62–63 (1968)). “Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be.” *Id.* (citing *Rakas v. Illinois*, 439 U.S. 128, 138–143, 148–149 (1978); *Katz v. United States*, 389 U.S. 347, 351–352 (1967)). The Supreme Court concluded that although the search warrant gave the officers

authority to search the premises and to search the bartender, “it gave them no authority whatever to invade the constitutional protections possessed individually by the tavern’s customers.” *Ybarra*, 444 U.S. at 92.

The Supreme Court also addressed the government’s alternative argument, that the first patdown search of Ybarra was a reasonable frisk for weapons under *Terry v. Ohio*, 392 U.S. 1 (1968); that “the patdown yielded probable cause to believe that Ybarra was carrying narcotics, and that this probable cause constitutionally supported the second search, no warrant being required in light of the exigencies of the situation coupled with the ease with which Ybarra could have disposed of the illegal substance.” *Ybarra*, 444 U.S. at 92. The Supreme Court rejected this argument as well. “The initial frisk of Ybarra was simply not supported by a reasonable belief that he was armed and presently dangerous, a belief which this Court has invariably held must form the predicate to a patdown of a person for weapons.” *Id.*, 444 U.S. at 92–93. *See Terry v. Ohio*, 392 U.S. at 21; 26 (in order to justify a search for weapons in the absence of probable cause to arrest, “the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion;” and the search “must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby”).

In this case, like in *Ybarra*, Appellant’s mere presence at a location a warrant was being served, where dozens of other people were also present, was not probable cause to seize and search him that was particularized to him. There was no reason to suspect Appellant had evidence of the crime. *Ybarra*, 444 U.S. at 91. Nor was the search justified as a *Terry* frisk for weapons. The police did not specify any particular facts that caused them to believe Appellant was armed and dangerous; they searched everyone who came out of the residence as a matter of

course. Moreover, Appellant was not patted down, he was photographed and searched. *Cf. Terry v. Ohio*, 392 U.S. at 21.

Police were arguably permitted to detain Appellant during the execution of the warrant for officer safety and to facilitate orderly execution of the warrant, but they were not permitted to photograph and search him. A “warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted.” *Michigan v. Summers*, 452 U.S. 692, 705 (1981). The Supreme Court in *Summers* noted that detention is less intrusive than a search. *Id.*, 452 U.S. at 701. (Whether police were permitted to detain Appellant is arguable rather than certain because Appellant was not a resident of the home.)² Regardless, the detention of Appellant and the other nonresidents is as far as *Summers* arguably reached: *Summers* only permitted detention. *Summers* did not overrule *Ybarra*. There was still no probable cause to search or photograph Appellant.

Finally, exigent circumstances did not justify the search of Appellant. Exigent circumstances allow “police to respond to emergency situations.” *Mincey v. Arizona*, 437 U.S. 385, 392 (1978). As discussed above, the Supreme Court addressed and rejected the exigency rationale in *Ybarra*. *Ybarra*, 444 U.S. at 92-93. Multiple law enforcement agencies, task forces, and teams were present. Appellant was detained in handcuffs. There was no emergency that required photographing and searching him.

² *Summers* involved the detention of the homeowner. *Id.*, 452 U.S. at 693. While the Supreme Court has used the word “occupant” to describe who may be detained during the execution of a search warrant, it has applied this word to residents rather than visitors. *Id.*, 452 U.S. at 704-05. In *Bailey v. United States*, 568 U.S. 186, 198 (2013), the Supreme Court repeated that police “can prohibit an occupant from leaving the scene of the search.” (citing *Summers*, 452 U.S. at 702). However, *Bailey* too involved the detention of a resident. *Bailey v. United States*, 568 U.S. at 191. *See also Muehler v. Mena*, 544 U.S. 93, 95 (2005) (detention of resident, who was “occup[ying]” the home during execution of search warrant, did not violate Fourth Amendment).

The trial court's reliance on *State v. Wright*, 416 S.C. 353, 785 S.E.2d 479 (Ct. App. 2016), for exigent circumstances, was misplaced. In *Wright*, this Court addressed the admission of drugs and money seized after a warrantless entry of the hotel room of Wright and a second suspect, Powell. Law enforcement tracked Wright and Powell, who were suspects in a murder, to a hotel. When one of the suspects stepped out of the hotel room, officers identified themselves as police officers, and the suspect tried to close the door on them. The officers held the door open and forced their way into the room where they saw drugs and money. Then they obtained a search warrant. *State v. Wright*, 416 S.C. at 363, 785 S.E.2d at 484. This Court found the exigent circumstances doctrine permitted the officers to enter the hotel room without a warrant, since "a potentially armed and dangerous murder suspect was attempting to flee, creating exigent circumstances justifying the officers' warrantless entry into the motel room," and since a "reasonable officer would have entered the room to prevent the suspects from fleeing and to conduct a protective sweep for officer safety because both Wright and Powell were murder suspects." *Id.*, 416 S.C. at 369–70, 785 S.E.2d at 488. *Wright* was not on point—the issue was different: were the police justified in the warrantless entry of a residence where a murder suspect they were tracking had suddenly retreated into the residence after seeing them and after they announced themselves as police officers. In that case, Wright was a suspect at the time; in this case Appellant was not. In *Wright*, the issue was a warrantless entry of a residence. In this case, the issue was the search of a person not specified in a search warrant. Appellant did not try to flee like the suspect in *Wright*. This case deals with the *Ybarra* scenario. *Wright* dealt with a different scenario.

The "search or seizure of a person must be supported by probable cause particularized with respect to that person." *Ybarra*, 444 U.S. at 91; U.S. Const. amend. IV. The seizure and

search of Appellant was improper as it was not supported by probable cause. Thus, the evidence those procedures turned up should have been excluded. Evidence that is obtained from an unlawful search or seizure is to be excluded as “fruit of the poisonous tree.” *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). *See also Terry v. Ohio*, 392 U.S. at 29 (“evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation”); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (“evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court”); *State v. Khingratsaphon*, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002) (“Evidence seized in violation of the Fourth Amendment must be excluded from trial.”). The evidence at issue in this case: the testimony, bullets, and photographs regarding the search and seizure of Appellant, including State’s Exhibits #65 and #66, should have been suppressed. The search and seizure were in violation of Appellant’s Fourth Amendment rights. U.S. Const. amend. IV; U.S. Const. amend. XIV; *Wong Sun*, 371 U.S. at 488.

“Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. Thus, an insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.” *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) (cleaned up). The error was not harmless beyond a reasonable doubt. The case was thin as to Appellant. The State relied on the evidence in closing argument and showed the jury a demonstrative aid that contained a photograph of the bullets found in Appellant’s pocket. The jury asked to see it again during deliberations. *See* Tr. 554, l. 4 – 555, l. 21; Tr. 611, ll. 17-23. *Cf. State v. Blessingame*, 271 S.C. 44, 46-47, 244 S.E.2d 528, 530 (1978) (when a jury submits a

question to the court following a jury charge, it is reasonable to assume the jury is focusing its “critical attention” on the question asked).

The court erred in admitting the testimony of Investigator Fazekas about what he learned from codefendant and State's star witness Barnes during his interrogation, since hearsay is generally inadmissible, and since "investigative information" may not be used to circumvent the hearsay rules.

A. Standard of review

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* at 429–30, 632 S.E.2d at 848.

B. The State was permitted to bolster the credibility of its star witness through hearsay.

The State was able to bolster the credibility of its star witness Barnes by eliciting a prior consistent statement from Barnes through hearsay. Investigator Fazekas testified prior to Barnes. Appellant objected to portions of his testimony recounting what Barnes told Fazekas as improper hearsay. The testimony and objections were as follows.

Q And during the course of your interview with Xavier Barnes, did you identify your second suspect?

A Yes.

MR NEWMAN: Your Honor, I have an objection on hearsay. That witness is available.

THE COURT: Okay.

MR. NEWMAN: And I can't cross-examine the officers on what Xavier Barnes was thinking, did, or whatever. It's an improper question.

MS. CAMPBELL: I'm just moving on. He identified a second suspect.

THE COURT: Okay. Move past it.

MS. CAMPBELL: Thank you.

BY MS. CAMPBELL:

Q Okay. And so during your interview of Xavier Barnes, were you able to determine how he left the crime scene?

A Yes.

Q How did he leave?

A He left—

MR. NEWMAN: Your Honor, again, I can't cross-examine that. It's hearsay. Mr. Barnes is available to testify.

THE COURT: Okay. What did you learn in your investigation? So he is the lead investigator, correct?

MS. CAMPBELL: He is the lead investigator. This is information he learned during the course of his investigation.

MR. NEWMAN: From hearsay from a witness, Xavier Barnes, that I can't cross-examine—

THE COURT: Come here for a second.

MR. NEWMAN – under the confrontation clause.

THE COURT: Come here. He's the one that's allegedly running across the street into the blue [sic] car. That's who you believe it to be, right?

MS. CAMPBELL: Yes.

THE COURT: That's what he learned in his investigation. Okay. It's for him to testify to it.

MR. NEWMAN: You got my confrontation.

THE COURT: Got it. All right. Overruled. You can ask.

MS. CAMPBELL: Thank you, Your Honor.

BY MS. CAMPBELL:

Q During the course of your investigation, were you able to determine how Xavier Barnes left the crime scene?

A Yes, ma'am.

Q And how did he leave the crime scene?

A He said he got into Kionna Ferguson's vehicle.

Q He got into Kionna Ferguson's vehicle.

A Yes, ma'am.

Q Were you able to determine how he got to the crime scene?

A He was dropped off by Kionna Ferguson.

Q And who else was in Kionna Ferguson's car?

MR. NEWMAN: Your Honor, again, I object to that. This officer does not have firsthand knowledge of that.

THE COURT: But he learned in his investigation. He can testify as to what he learned in his investigation.

MR. NEWMAN: I also object under the confrontation clause.

BY MS. CAMPBELL:

Q And who else was in the vehicle?

A Jaesean Redd.

Q All right, thank you. So Kionna Ferguson was the driver?

A Yes, ma'am.

Q Jaesean Redd was the front seat passenger?

A Yes, ma'am.

Q Where was Barnes within that vehicle?

A He was in the back seat.

Q Behind?

A I don't recall who he stated he was behind.

Q That's fine. So, during the course of your investigation, you had identified, as we said previously, Terrance Wing as a second suspect, correct?

A Yes, ma'am.

Q All right. And so, were you able to identify what Xavier Barnes did in terms of himself when he got back to Beaufort County?

MR. NEWMAN: Your Honor, again, Sixth Amendment hearsay. I'm not able to cross-examine that. Mr. Kleiner (ph) is available. And it's just improper hearsay.

THE COURT: Overruled.

MR. NEWMAN: What he's basically doing is saying everything that—

THE COURT: Overruled.

MR. NEWMAN: Yes, ma'am.

BY MS. CAMPBELL:

Q What did Mr. Barnes do when he got back to Beaufort?

A He gave his clothes to Jaesean Redd, but I believe they got rid of all that stuff.

Tr. 195, l. 4 – 199, l. 7.

C. The testimony should not have been permitted since “investigative information” may not be used to do an end run around the hearsay rules.

Fazekas's testimony about these matters was inadmissible hearsay. “‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 801(c), SCRE. *See State v. Brockmeyer*, 406 S.C. 324, 351, 751 S.E.2d 645, 659 (2013) (same). “Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court of this State

or by statute.” Rule 802, SCRE. *See State v. Williams*, 285 S.C. 544, 550–51, 331 S.E.2d 354, 358 (Ct. App. 1985) (police officers’ testimony “amounted to their saying what they had been told outside of court and, even though they did not testify as to exactly what had been said, their testimony had no purpose other than to prove the truth of the matters asserted”).

“Investigative information” may not be used to circumvent the rules against hearsay. *State v. King*, 422 S.C. 47, 66–67, 810 S.E.2d 18, 28 (2017). “[W]e caution against the use and admission of ‘investigative information.’ While it may be couched in terms of explaining an officer’s conduct during an investigation, it may not be used to offer the substance of an out-of-court statement that would otherwise violate our state’s rules against hearsay.” *Id.*, 422 S.C. at 68, 810 S.E.2d at 29. *See also State v. Thompson*, 352 S.C. 552, 559, 575 S.E.2d 77, 81 (Ct. App. 2003) (officers’ testimony regarding statements made by bystander were not entered for truth but to explain and outline officers’ investigation and reasons for going to defendant’s home; thus, the evidence was not hearsay); *State v. Brown*, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994) (statements were not entered for their truth but rather to explain why the officers began their surveillance).

The challenged testimony in this case was not testimony about what actions Fazekas took after his interrogation of Barnes. Instead, Fazekas related information Barnes told him during the interrogation about the details of the crime. This was offered for the truth of the matter asserted—to show that the second suspect was Appellant, that Kionna Ferguson dropped Barnes off at the crime scene, that Barnes got back in Ferguson’s car with Ferguson and Redd, and that Barnes gave his bloody clothes to Redd to destroy. The evidence was improper “investigative information” that should not have been admitted. *King*, 422 S.C. at 66–67, 810 S.E.2d at 28; Rule 802, SCRE.

“Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. Thus, an insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.” *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) (cleaned up). The error was not harmless beyond a reasonable doubt. Barnes was the only person who put Appellant in the car at the time of the shooting, and the only person who identified Appellant as the shooter. Barnes was a codefendant who had not yet been sentenced. His testimony was objectively incredible in many regards. The trial court’s error allowed the State to bolster Barnes’s credibility with his prior consistent statement through the testimony of a witness who did not have Barnes’s credibility problems—Investigator Fazekas. *See, e.g., State v. Saltz*, 346 S.C. 114, 124, 551 S.E.2d 240, 246 (2001) (where witness’s testimony was weak and not particularly credible, improper corroboration was not harmless).

The court erred in admitting a “FARO” scan of bullet trajectories, where the evidence did not satisfy the *State v. Council* and *State v. Jones* factors,³ where the evidence was inadmissible under Rule 702, SCRE, since the technique was not published and there was no known error rate for the end results.

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.” *State v. Hatcher*, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” *Id.*; see also *State v. Brockmeyer*, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013).

B. The trial court admitted a “FARO” scan which the State used to show bullet trajectories but the technique was not published and there was no known error rate for the scan.

The State used an expert witness to show the bullet trajectories of some of the shots fired within the car. The witness had placed spheres inside the bullet holes; the spheres were detected by a scanner and a computer program that used the location of the spheres to create a three-dimensional diagram of bullet trajectories. The diagram it created was referred to as a “FARO” scan and was admitted over objection as State’s Exhibit #90, which is on file with this Court. No one ever explained what “FARO” meant. Tr. 375, ll. 12-21; Tr. 392, ll. 12-20; Tr. 398, l. 9 – 399, l. 6; Tr. 403, l. 12 – 410, l. 3.

³ *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999); *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979).

Appellant objected to the admissibility of this evidence, and the testimony of the witness, Todd Schenk, was proffered. Tr. 356, l. 24 – 363, l. 2; Tr. 364, l. 25 – 386, l. 23. Schenk stated he had been qualified as an expert once in a case which involved a “FARO scan,” in Chesterfield County. Tr. 365, l. 19 – 366, l. 9. Schenk’s report was admitted as Court’s Exhibit #2. Schenk testified he had taken “a four-day FARO operator and scene program operator class that’s external.” Tr. 368, ll. 15-16. He stated the “FARO scanner” had been around for ten plus years. Tr. 368, ll. 17-24. He stated he did these scans five or six times a year. Tr. 369, ll. 8-18. Schenk testified a computer program identifies the markers or spheres he places “and then the computer program itself finds the center of the spheres and draws outlines.” Tr. 372, ll. 6-20; Tr. 375, ll. 14-21. According to Schenk, the accuracy of the scan was tested by sending “the FAROs off for calibration back to the manufacturer” yearly. He also stated: “every quarter we do a reliability test to make sure that every scan is still within standards.” Tr. 374, ll. 16-24. Schenk said the general allowable margin of error for an angle in a “shooting incident reconstruction” is “usually about five degrees.” Tr. 376, ll. 13-18. Schenk admitted things like the movement of a seat or car door could cause error. Tr. 376, ll. 20-22. Schenk claimed the evidence was reliable because there are “tells” he could verify, such as looking at the actual bullet holes. Tr. 378, ll. 5-24.

Schenk stated he performed the scan after the decedent’s car had been impounded. He was unaware if anything about the car, like the seats, had been moved: “I can only testify about the vehicle as I found it.” Tr. 381, ll. 3-14. He did not know what the error rate would be if something in the car had been moved. Tr. 386, ll. 1-23. Schenk admittedly placed his markers after Investigator Fazekas had already been in the car and put flight path rods through the holes. Court’s Exhibit #2. Schenk stated the manufacturer of the equipment allowed a two-millimeter margin of error as to every measurement the scanner makes. Tr. 381, l. 22 – 382, l. 14. Schenk

was unaware of any national standards for the equipment. Tr. 381, l. 22 – 382, l. 3. Schenk was asked if his work was “peer reviewed,” and he stated that “the other person who signed off in FARO would have reviewed it.” Defense counsel noted that did not appear in Schenk’s report. Tr. 383, l. 23 – 384, l. 10.

Defense counsel argued the evidence failed the requirements of *State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999). He argued there were no national standards for the technology, there was no literature on it, the error rates could be as much as two millimeters and five degrees, the scene was not pristine, the technology had not been certified by the scientific community, and the testimony was speculative and prejudicial. Tr. 387, l. 6 – 388, l. 2.

The court ruled the evidence was admissible. Tr. 389, l. 19 – 391, l. 1.

Just going through with a *Counsel* [sic] analysis, it’s, ‘Whether the theory or technique in questions has been or be tested. The known or potential rate of error of a particular theory or technique and whether means exist for controlling its operation.’ We talked about the manufacturer had a five-degree allowance.

‘The extent to where the theory or technique has been accepted.’ I know he has said that he testified in one other case in Chesterfield County.

I do think any questions there is really go to weight as opposed to the admissibility. He stated that, you know, at least SLED here in South Carolina has used it for at least the last 10-and-a-half years since he—when I say ‘he,’ Lieutenant Schenk has been working for crime scene investigation for SLED.

I am just noting your objection for the record, Mr. Newman, but I’m going to go ahead and allow it.

Tr. 390, l. 24 – 391, l. 1. Although the court stated it was employing the *Council* test, it recited the *Daubert* test.⁴

⁴ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993).

Schenk was qualified as an expert in crime scene investigation. Tr. 398, l. 19 – 399, l. 6. In closing argument, the State relied on the “FARO scan” to show that shots into the front of the car came from the back seat area where Xavier Barnes claimed Appellant was sitting. Tr. 557, l. 12 – 558, l. 5; Tr. 562, ll. 19-23; Tr. 564, l. 24 – 566, l. 18.

C. The evidence did not satisfy Rule 702 and should have been excluded.

“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.” Rule 702, SCRE. “Scientific evidence is admissible under Rule 702, SCRE, if the trial judge determines: (1) the evidence will assist the trier of fact; (2) the expert witness is qualified; (3) the underlying science is reliable, applying the factors found in *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979); and (4) the probative value of the evidence outweighs its prejudicial effect.” *State v. Jones*, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001) (citing *State v. Council*, 335 S.C. at 19, 515 S.E.2d at 517) (hereinafter the *Council* factors). As to the third *Council* factor, *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120, requires that: (1) the technique be published and peer-reviewed; (2) the method has been applied to this type of evidence; and (3) the method be consistent with recognized scientific laws and proceedings. *State v. Jones*, 343 S.C. at 573, 541 S.E.2d at 819 (hereinafter the *Jones* factors). The *Jones* reliability factors also take into account the quality control procedures used to ensure reliability. *Id.*

“All expert testimony must satisfy the Rule 702 criteria, and that includes the trial court’s gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury’s ultimate consideration.” *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009). “[O]nly 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.” *Watson v. Ford Motor Co.*, 389 S.C. 434, 446-47, 699 S.E.2d 169, 175 (2010).

“Before any expert opinion may be admitted into evidence, the proponent of the opinion must convince the trial court that each element of the Rule 702 foundation has been established. In addition, when the opponent makes a Rule 403 objection, the proponent must demonstrate the probative value of the evidence.” *State v. Phillips*, 430 S.C. 319, 335, 844 S.E.2d 651, 659 (2020) (internal citations and quotations omitted). If an objection is made under Rule 702, the trial court must hold a *Council* “hearing, the proponent of the evidence must present the factual and scientific basis necessary to satisfy the foundational elements of Rule 702, and the trial court must conduct an on-the-record balancing of probative value against the applicable Rule 403 dangers. The trial court should make specific findings as to each contested element or issue.” *Id.*, 430 S.C. at 343, 844 S.E.2d at 663.

The FARO scan did not satisfy the *Council* and *Jones* factors. As seen, to satisfy the third *Council* factor (the reliability of the underlying science), pursuant to *Jones*, the technique must be published and peer-reviewed, the method must have been applied to this type of evidence, and the method must be consistent with recognized scientific laws and proceedings. The State did not show that the technique had been published. Defense counsel noted there was

no literature on it. *Cf. Council* 335 S.C. at 17, 515 S.E.2d at 516 (expert testified over 600 papers have been written about mtDNA research). The court did not make a finding on this.⁵

There was no showing what the error rate was for the overall scan—the witness stated that each angle could be off by up to five degrees and that each measurement made by the scanner could be off by up to two millimeters and still be considered acceptable. There was thus no known error rate for the exhibit—which was the end result of multiple measurements that could each be up to two millimeters and five degrees off. The accuracy of the evidence, which was a display of multiple angles and trajectories, was not established. The evidence failed to satisfy the reliability requirements of *Council* and *Jones*. *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120; *State v. Council*, 335 S.C. at 19, 515 S.E.2d at 517.

The failure to satisfy the third *Council* factor meant that other *Council* factors were not satisfied. Because the evidence was not reliable, it did not assist the trier of fact, and its probative value did not outweigh its prejudicial effect. The court erred in finding it was admissible. The court also failed to put a Rule 403 analysis on the record. The evidence should not have been admitted. Rule 702, SCRE.

⁵ The court also appears to have quoted from *Daubert* instead of *Council* and *Jones*. The standards are extremely similar. Regardless, both *Daubert* and *Council/Jones* require consideration of publication and error rate. “South Carolina has not adopted *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594–95, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), by name, nor has it revised Rule 702, SCRE, to incorporate the *Daubert* framework. Nevertheless, our approach is ‘extraordinarily similar’ to the federal test. Young, *How Do You Know What You Know?*, 15 S.C. Law. Rev. 28, 31 (2003).” *State v. Warner*, 430 S.C. 76, 86, 842 S.E.2d 361, 365–66 (Ct. App. 2020), *aff’d in part and remanded*, 436 S.C. 395, 872 S.E.2d 638 (2022). *See Daubert*, 509 U.S. at 593-95 (in ruling on admissibility under Rule 702, Fed. Rule Evid., trial court must consider whether the technique or theory in question can be, and has been tested; whether it has been subjected to publication and peer review; its known or potential error rate; the existence and maintenance of standards controlling its operation; and whether it has attracted widespread acceptance within a relevant scientific community).

“Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. Thus, an insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.” *State v. Pagan*, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006) (cleaned up). “A harmless error analysis is contextual and specific to the circumstances of the case: No definite rule of law governs a finding of harmless error; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial.” *State v. Byers*, 392 S.C. 438, 447–48, 710 S.E.2d 55, 60 (2011) (cleaned up).

Multiple shots were fired in the car from multiple guns. Singleton initially claimed both suspects each had two guns. Barnes claimed Appellant was sitting in the right rear passenger seat, behind Singleton. The State used the “FARO scan” to show shots likely came from the right rear passenger seat. As seen, the State relied on the evidence in closing argument. *See* Tr. 557, l. 12 – 558, l. 5; Tr. 562, ll. 19-23; Tr. 564, l. 24 – 566, l. 18. *Cf. Ard v. Catoe*, 372 S.C. 318, 335, 642 S.E.2d 590, 598 (2007) (“The State’s heavy reliance on defense counsel’s failure to challenge this gunshot residue evidence highlights both the deficiency by counsel and the resulting prejudice.”). Moreover, Schenk was qualified as an expert witness. *See State v. Kromah*, 401 S.C. 340, 357, 737 S.E.2d 490, 499 (2013) (“although an expert’s testimony theoretically is to be given no more weight by a jury than any other witness, it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts”). The error was not harmless; it could have affected the result of the trial. *E.g., Byers*, 392 S.C. at 447-48, 710 S.E.2d at 60.

The family court erred by transferring jurisdiction over the murder to the general sessions court, where the family court failed to adequately consider the *Kent v. United States*, 383 U.S. 541 (1966), factors, especially since the court did not address the critical factor of the minor Appellant's lack of a prior record.

A. Standard of review

The appellate court will affirm a transfer order unless the family court has abused its discretion. *State v. Miller*, 363 S.C. 635, 641, 611 S.E.2d 309, 312 (Ct. App. 2005) (citing *State v. Avery*, 333 S.C. 284, 292, 509 S.E.2d 476, 481 (1998)).

The term 'abuse of discretion' has no opprobrious implication and may be found if the conclusions reached by the lower court are without reasonable factual support. *State v. Corey D.*, 339 S.C. 107, 118, 529 S.E.2d 20, 26 (2000); *Engle v. Engle*, 343 S.C. 444, 449–50, 539 S.E.2d 712, 714 (Ct. App. 2000) (stating an abuse of discretion occurs when the court is controlled by an error of law or where the order, based upon the findings of fact, is without evidentiary support).

Miller, 363 S.C. at 641, 611 S.E.2d at 312.

B. Although the court was presented with evidence which supported retaining jurisdiction in family court, the court's waiver order did not reflect a meaningful consideration of that evidence.

Prior to trial in general sessions court, the family court held a waiver hearing pursuant to S.C. Code Ann. § 16-19-1210 and *Kent v. United States*, 383 U.S. 541 (1966), to determine whether to retain or transfer jurisdiction (i.e., whether to try Appellant as a juvenile or an adult). The court took testimony from two witnesses, Dr. Candice Dunn of the South Carolina Department of Juvenile Justice (DJJ), and Investigator Fazekas. The court had before it a copy of the pre-waiver evaluation report prepared by Dr. Dunn. It heard arguments from the prosecutor and defense counsel. Waiver Tr. 1 – 52; R. *(Order of Waiver to General Sessions at

1 – 3). Investigator Fazekas testified about the facts of the case. Waiver Tr. 4, l. 16 – 23, l. 16. Investigator Fazekas was of the opinion that, “but for Jasean Redd, we would not be here today.” R. *(Waiver hearing addendum).

Dr. Dunn testified about the waiver evaluation. Waiver Tr. 24, l. 11 – 38, l. 15. Dr. Dunn stated Appellant did not have a history of mental health problems. Waiver Tr. 28, ll. 1-5. She testified he was “polite” and “cooperative” with the evaluation process. Waiver Tr. 28, ll. 19-23. She stated that if adjudicated in family court, Appellant would receive rehabilitative services in a secure facility. Waiver Tr. 38, ll. 8-15.

The pre-waiver evaluation report (Evaluation Report) was prepared by Dr. Dunn and her supervisor, Dr. Miller-Green. A social summary was also provided DJJ employee Zephine Smalls. The report included the following information. Appellant’s only prior contact with the juvenile or criminal justice system was a 2018 referral for interfering with the operation of a school bus at age fifteen. The offense was diverted to juvenile arbitration and dismissed the following year. R. *(Evaluation Report at 3; 20). The report summarized the factual allegations against Appellant. R. *(Evaluation Report at 3 – 4). Dr. Dunn interviewed Appellant’s parents, who were separated. Both parents were employed. Neither parent had mental health or substance abuse problems. There was no history of abuse or social services involvement. Appellant had “positive and warm” relationships with his parents and his siblings. Appellant was not a disciplinary problem at home and he had never run away from home. R. *(Evaluation Report at 4 – 6; 17). The family’s religion was Baptist, and Appellant attended church regularly. R. *(Evaluation Report at 25 – 26).

Appellant was halfway through the tenth grade. His class rank was 367 out of 605 students. He was in the process of transferring from high school in Charlotte, where his father

lived, to Florida, where his mother lived. (The offenses occurred during Christmas break.) He was visiting family in Beaufort when the incident occurred. R. *(Evaluation Report at 4 – 5; 7). Appellant was employed at Bojangles. He was not in a gang. Evaluation Report at 8. Intelligence testing showed he had an IQ of 93. R. *(Evaluation Report at 13). Appellant had a standard level of maturity for a sixteen-year-old. R. *(Evaluation Report at 17). These were positive factors for the likelihood of rehabilitation. R. *(Evaluation Report at 17). The report noted that if Appellant’s case remained in family court, he could be incarcerated until the age of twenty-two. R. *(Evaluation Report at 18). The report also cited research that “most youth, even those who commit violent offenses, do not continue to engage in such behaviors in adulthood.” R. *(Evaluation Report at 18).

The court took the matter under advisement and subsequently issued an order transferring jurisdiction over the murder to the circuit court. The order was three pages long and it did not reflect a careful consideration of the evidence and the *Kent* factors. For instance, although the seventh *Kent* factor requires the family court to consider the record and previous criminal or adjudicative history of the juvenile, the court did not address this factor. R. *(Order of Waiver to General Sessions at 1 – 3). Notably, this factor weighed in favor of retaining jurisdiction in the family court, since Appellant had no prior adjudications.

The waiver order stated its findings and conclusions that: 1) Appellant was seventeen years old; 2) he was charged with murder and possession of a firearm during the commission of a violent crime; 3) the offenses occurred when Appellant was sixteen years old. R. *(Order of Waiver to General Sessions at 1). The waiver order stated its findings as to the *Kent* factors were as follows.

4. There is probable cause to believe that the Defendant committed the crimes for which he has been charged.

5. The seriousness of the offenses is against persons and is of such gravity as to require waiver for the protection of the community.
6. The alleged offenses are of a violent, aggressive, willful, and premeditated nature.
7. There is sufficient merit to warrant the Grand Jury to return a true bill on the charges.
8. There are adult codefendants.
9. Testimony indicated that the Defendant has an average level of sophistication and maturity.
10. The crimes for which the Defendant is charged are of a serious nature and if found guilty, would suggest he is capable of acting without regard for others.
11. It is not likely that the Defendant could be rehabilitated within the Juvenile Justice System.

R. *(Order of Waiver to General Sessions at 2).

The order concluded that 1) the court had jurisdiction over the matter by statute; 2) “Based upon the factors outlined above, the Court concludes that there is little likelihood that Terrance Wing can be rehabilitated in the Juvenile Justice System;” 3) “It is in the best interest of Terrance Wing that he be waived to the Court of General Sessions for proceedings on the Murder charge alleged in [the petition];” and 4) the State has dismissed the accompanying weapons charge. Thus, “jurisdiction of this matter shall be transferred to the Court of General Sessions.” R. *(Order of Waiver to General Sessions at 2 – 3).

C. The failure to adequately consider the *Kent* factors was error.

The criteria for determining whether to waive jurisdiction to the circuit court was established in *Kent v. United States*, 383 U.S. 541 (1966). *State v. Corey D.*, 339 S.C. at 118, 529 S.E.2d at 26.

In *Kent*, the United States Supreme Court noted the following criteria for determining whether jurisdiction should be waived under the District of Columbia Juvenile Court Act:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
2. Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner.
3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if injury resulted.
4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment....
5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime....
6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
7. The record and previous [criminal or adjudicative] history of the juvenile....
8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

Corey D., 339 S.C. at 117, 529 S.E.2d at 26 (citing *Kent*, 383 U.S. at 566-67). “The serious nature of the offense is a major factor in the transfer decision.” *State v. Kelsey*, 331 S.C. 50, 65, 502 S.E.2d 63, 71 (1998).

“It is the responsibility of the family court to include in its waiver of jurisdiction order a sufficient statement of reasons for, and considerations leading to, that decision. Conclusory statements, or a mere recitation of statutory requirements, without further explanation will not

suffice.” *Id.* (citing *In re Sullivan*, 274 S.C. 544, 265 S.E.2d 527 (1980)). See also *State v. Corey D.*, 339 S.C. at 117, 529 S.E.2d at 26 (“The waiver hearing indeed was extensive and the family court’s order reflects that the evidence presented at the hearing was duly considered.”); *State v. Avery*, 374 S.C. 524, 536, 649 S.E.2d 102, 108 (Ct. App. 2007) (no abuse of discretion where “the family court carefully considered the eight factors enumerated by the United States Supreme Court in *Kent*” before transferring jurisdiction); *State v. Jones*, 392 S.C. 647, 654, 709 S.E.2d 696, 700 (Ct. App. 2011) (“[W]e find the family court properly considered all of the *Kent* factors in deciding to waive jurisdiction. It made specific findings as to each of the eight factors.”).

In this case, the court did not make findings as to each of the eight *Kent* factors—it did not address the seventh *Kent* factor at all (the prior record of the juvenile). Appellant had no prior adjudications or convictions. His only contact with the family court was for the offense of interfering with the operation of a school bus, and the offense was dismissed when Appellant completed juvenile arbitration. The order reflected no consideration of this evidence or this factor. There was no indication this factor was “duly considered” by the family court. *State v. Corey D.*, 339 S.C. at 117, 529 S.E.2d at 26.

As to the eighth *Kent* factor, the order simply contained the conclusory statement that it is not likely Appellant could be rehabilitated within the juvenile justice system—without giving any basis for that conclusion. Dr. Dunn’s report noted that if Appellant’s case remained in family court, he could be incarcerated until the age of twenty-two. The report noted a number of positive facts regarding Appellant’s likelihood of rehabilitation. For example, he did not have mental health problems, and he had strong and supportive family relationships. He was not a behavior problem at home, and he had a work history. The report also noted that most juveniles,

even those who commit violent offenses, do not recidivate as adults. R. *(Evaluation Report at 17 – 18). The court’s finding on the eighth *Kent* factor did not reflect a meaningful consideration of the evidence.

Several of the other statements presented in the order as “findings” are also simply conclusory statements or a mere recitation of statutory requirements without further explanation, which is impermissible. *State v. Kelsey*, 331 S.C. at 65, 502 S.E.2d at 70–71. For example, the finding regarding the second *Kent* factor was: “The alleged offenses are of a violent, aggressive, willful, and premeditated nature.” While a shooting is violent, the allegation by the State was that Appellant shot the decedent after the decedent began fidgeting (the decedent’s gun was found at his feet). Codefendant Barnes left his iPhone at the scene. This evidence indicated the shooting was likely not premeditated. This finding did not reflect a meaningful consideration of the second *Kent* factor. Similarly, the court’s finding on the fifth factor simply stated that: “There are adult codefendants.”

These conclusory statements and mere recitation of statutory requirements, without further explanation, were insufficient to support the waiver determination. *State v. Kelsey*, 331 S.C. at 65, 502 S.E.2d at 70–71. The court’s transfer decision did not comply with the requirements of *Kent*. *Kent v. United States*, 383 U.S. at 566-67.

The court of general sessions was without subject matter jurisdiction to try the minor Appellant on the possession of a weapon during the commission of a violent crime offense, since the family court had exclusive jurisdiction of that offense and it properly refused to waive the minor Appellant into general sessions on the offense.

A. Standard of review

“The question of subject matter jurisdiction is a question of law, which we review de novo.” *U.S. Bank Nat’l Ass’n as Tr. to U.S. Bank Tr. Nat’l Ass’n v. Mack*, 445 S.C. 103, 107, 912 S.E.2d 236, 238 (2025).

B. The family court transferred jurisdiction of the murder charge but it did not transfer jurisdiction of the weapons offense. Nevertheless, Appellant was tried and sentenced for the offense in circuit court.

At the conclusion of the waiver hearing, the juvenile solicitor asked the court to transfer jurisdiction of the murder charge to general sessions. However, juvenile solicitor stated that if the family court decided to transfer jurisdiction of the murder charge, “the murder petition would be the only charge that moves forward. The weapons charge will be dismissed, and of course, if Your Honor keeps the [case] in family court we have both of the petitions that we will be looking at for trial.” Waiver Tr. 42, l. 17 – 43, l. 2.

In its Order of Waiver to General Sessions, the family court’s conclusions of law included the following: 3) “It is in the best interest of Terrance Wing that he be waived to the Court of General Sessions for proceedings on the Murder charge alleged in petition number 2020-JU-07-08.” 4) “The State has dismissed petition number 2020-JU-07-09, Possession of a Firearm during the Commission of a Violent Crime.” R. *(Order of Waiver to General Sessions at 3).

Notwithstanding the family court judge's and juvenile solicitor's correct understanding that the weapons offense could not and would not be transferred to general sessions court, as noted in the Statement of the Case, Appellant was tried and sentenced for the weapons offense in circuit court. Notably, Appellant was sentenced to a consecutive term of imprisonment for the weapons offense. Although there was no objection or motion by defense counsel about this matter in the general sessions proceeding, subject matter jurisdiction may be raised at any time.

C. Section 63-3-510 gave exclusive jurisdiction over the offense to the family court and the offense was non-waivable under section 63-19-1210. This was a juvenile delinquency case and the circuit court lacked subject matter jurisdiction.

“Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong.” *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237–38, 442 S.E.2d 598, 600 (1994) (quotations omitted). “[S]ubject matter jurisdiction is not implicated when the court possesses the power to hear and determine cases of the general class to which the proceedings in question belong.” *Williams v. Jeffcoat*, 444 S.C. 224, 239, 906 S.E.2d 588, 596 (2024). *See In re Stephen W.*, 409 S.C. 73, 78, 761 S.E.2d 231, 233 (2014) (“family court juvenile adjudication is an inherently different process than a typical criminal prosecution”). The general sessions court does not have subject matter jurisdiction over juvenile delinquency proceedings except where jurisdiction is transferred by the family court in accordance with statute, and the case then becomes an adult criminal case. “Lack of subject matter jurisdiction may be raised at any time, and may be raised for the first time on appeal.” *Gantt v. Selph*, 423 S.C. 333, 338, 814 S.E.2d 523, 525–26 (2018).

Appellant was a child alleged to have violated state law. The family court had subject matter jurisdiction over actions involving children alleged to have violated state law. Title 63 is the South Carolina Children's Code. S.C. Code Ann. § 63-1-10. The South Carolina Children's

Code applies to “all children who have needed of services including . . . those who by their circumstance or action violate the laws of this State and are found to be in need of treatment or rehabilitation.” S.C. Code Ann. § 63-1-20(A). When used in Title 63 and unless otherwise defined or the specific context indicates otherwise: “‘Child’ means a person under the age of eighteen.” S.C. Code Ann. § 63-1-40(1). “‘Court’ means the family court.” S.C. Code Ann. § 63-1-40(2). The South Carolina Children’s Code gives the family court exclusive jurisdiction over actions involving a child alleged to have violated state law. “Except as otherwise provided herein, the court shall have exclusive original jurisdiction and shall be the sole court for initiating action: (1) Concerning any child living or found within the geographical limits of its jurisdiction: . . . (d) who is alleged to have violated or attempted to violate any state or local law or municipal ordinance, regardless of where the violation occurred except as provided in Section 63-3-530 [i.e., traffic and wildlife jurisdiction]”. S.C. Code Ann. § 63-3-510.

Jurisdiction over the weapons offense belonged to the family court because Appellant was sixteen years old, and the offense was a Class F felony which carried five years’ imprisonment if committed by an adult. Chapter 19 of Title 63 is the Juvenile Justice Code. S.C. Code Ann. § 63-19-10. A person less than eighteen years of age charged with a Class F felony or an offense which carries less than fifteen years’ imprisonment if committed by an adult is a “child” or “juvenile” when those terms are used in Chapter 19. S.C. Code Ann. § 63-19-20(1). *See* section 16-23-490(A) (“If a person is in possession of a firearm . . . during the commission of a violent crime” and the person is convicted of the violent crime, “he must be imprisoned five years, in addition to the punishment provided for the principal crime.”); section 16-1-20(A)(6) (a Class F felony carries a term of imprisonment of not more than five years).

In certain delineated circumstances, jurisdiction may be transferred to the circuit court.

Waiver or transfer of juvenile offenses is governed by section 63-19-1210. Waiver is permitted in the following circumstances.

(4) If a child **seventeen years of age or older** is charged with an offense which, if committed by an adult, would be a **misdemeanor, a Class E or F felony** as defined in Section 16-1-20, **or a felony which provides for a maximum term of imprisonment of ten years or less**, and if the court, after full investigation, considers it contrary to the best interest of the child or of the public to retain jurisdiction, the court, in its discretion, acting as committing magistrate, may bind over the child for proper criminal proceedings to a court which would have trial jurisdiction of the offense if committed by an adult.

(5) If a child **fourteen, fifteen, or sixteen years of age** is charged with an offense which, if committed by an adult, would be a **Class A, B, C, or D felony** as defined in Section 16-1-20 **or a felony which provides for a maximum term of imprisonment of fifteen years or more**, the court, after full investigation and hearing, may determine it contrary to the best interest of the child or of the public to retain jurisdiction. The court, acting as committing magistrate, may bind over the child for proper criminal proceedings to a court which would have trial jurisdiction of the offenses if committed by an adult.

(6) Within thirty days after the filing of a petition in the family court alleging the child has committed the offense of **murder or criminal sexual conduct**, the person executing the petition may request in writing that the case be transferred to the court of general sessions with a view to proceeding against the child as a criminal rather than as a child coming within the purview of this chapter. The judge of the family court is authorized to determine this request. If the request is denied, the petitioner may appeal within five days to the circuit court. Upon the hearing of the appeal, the judge of the circuit court is vested with the discretion of exercising and asserting the jurisdiction of the court of general sessions or of relinquishing jurisdiction to the family court. If the circuit judge elects to exercise the jurisdiction of the general sessions court for trial of the case, he shall issue an order to that effect, and then the family court has no further jurisdiction in the matter

...

(9) If a child **fourteen years of age or older** is charged with a **violation of Section 16-23-430** [carrying weapon on school property], **Section 16-23-20** [unlawful carrying of handgun], or **Section 44-53-445** [distribution of controlled substance within proximity of school], the court, after full investigation and hearing, if it considers it contrary to the best interest of the child or the public to retain jurisdiction, acting as committing magistrate, may bind over the child for proper criminal proceedings to a court which would have trial jurisdiction of the offenses if committed by an adult.

(10) If a child **fourteen years of age or older** is charged with an **offense which, if committed by an adult, provides for a term of imprisonment of ten years or more and the child previously has been adjudicated delinquent in family court or convicted in circuit court for two prior offenses which, if committed by an adult, provide for a term of imprisonment of ten years or more**, the court, after full investigation and hearing, if it considers it contrary to the best interest of the child or the public to retain jurisdiction, acting as committing magistrate, may bind over the child for proper criminal proceedings to a court which would have trial jurisdiction of the offense if committed by an adult . . .

(emphasis added).

As seen, Appellant was sixteen and the offense was a Class F felony that carried five years. The general sessions court only obtains jurisdiction over juvenile delinquency actions when those cases are transferred to it pursuant to section 63-19-1210 and become adult criminal cases. The combination of Appellant's age and the offense did not fall within the categories listed in the statute that allow jurisdiction to be transferred. The family court judge did not transfer jurisdiction over the offense.⁶ Subject matter jurisdiction over the weapons offense

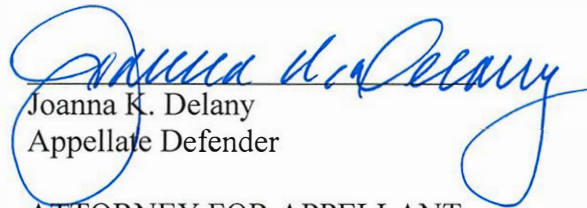
⁶ This was not a situation like that discussed in *State v. Rice*, 401 S.C. 330, 333, 737 S.E.2d 485, 486 (2013), where an "erroneous order transferring a juvenile to general sessions court would be a judicial error—not a jurisdictional error." In this case, there was no erroneous order transferring the weapons offense to circuit court: the family court did not transfer jurisdiction over that offense to the circuit court. The family court specified in its order it was transferring the murder and the solicitor had dismissed the weapons offense.

remained with the family court. *See Johnson v. State*, 312 S.C. 556, 558, 437 S.E.2d 20, 22 (1993) (“only those offenses specifically enumerated in § 20–7–430(5) [prior statute governing transfer] may be waived up to the court of general sessions”). *See also State v. Corey D.*, 339 S.C. at 120, 529 S.E.2d at 27 (“Although it may seem illogical that respondent will be treated as a juvenile in family court for the CSC and burglary charges, while being treated as an adult in general sessions court for the murder charges, it is beyond this Court’s power to effect a change in the statutes enacted by the Legislature . . . Therefore, we hold that jurisdiction over the CSC and burglary charges must be retained in the family court.”). The family court had exclusive jurisdiction over the offense pursuant to section 63-3-510.

The “proceedings of a court lacking jurisdiction are a nullity, and its judgment has no effect.” *In Int. of Terrence M.*, 317 S.C. 212, 215, 452 S.E.2d 626, 627 (Ct. App. 1994) (citing *DeWitt v. S.C. Dep’t of Highways & Pub. Transp.*, 274 S.C. 184, 187, 262 S.E.2d 28, 30 (1980)). As seen, Appellant received a consecutive sentence for the weapons offense. The weapons offense was a juvenile delinquency matter. The circuit court lacked subject matter jurisdiction over the offense, and Appellant’s conviction and sentence for that offense should be reversed.

CONCLUSION

Based on the foregoing argument, as to Issues 1 – 3, Appellant respectfully requests this Court reverse his convictions and sentences and remand to the general sessions court for a new trial. As to Issue 4, Appellant respectfully requests this Court reverse his convictions and sentences and remand to the family court for adjudication. As to Issue 5, Appellant respectfully requests this Court reverse his conviction and sentence for possession of a weapon during the commission of a violent crime.


Joanna K. Delany
Appellate Defender
ATTORNEY FOR APPELLANT

This 26th day of June, 2025.