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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chester County

Honorable Donald B. Hocker, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GENE ALEXZANDER SCOTT,

APPELLANT.

APPELLATE CASE NO. 2024-000900

INITIAL BRIEF OF APPELLANT

JORDAN WAYBURN
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

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL1

STATEMENT OF THE CASE.....2

STATEMENT OF FACTS3

STANDARD OF REVIEW7

ARGUMENT

I. Agent Cullop's testimony was cumulative and appropriate only for closing arguments; it was also impermissible opinion testimony and hearsay not based on his personal knowledge.. 8

 a. Relevant Facts8

 i. Evidence Previously Presented and Cullop's Testimony8

 ii. Argument Below and Trial Court's Ruling11

 b. Cullop's testimony was impermissible lay opinion, and the trial court admitted the evidence based on the wrong legal standard.....12

 i. Cullop's testimony consisted almost solely of opinions; the state cannot suggest it was merely for "context" in the case12

 ii. The testimony required expertise, and the trial court applied the wrong standard in admitting the evidence14

 iii. Cullop did not testify about facts within his personal knowledge14

 c. Cullop's testimony was cumulative and not proper for a witness—he did not inform the jury but rather made a closing argument20

 i. Cullop's testimony was used to allow the state a second closing argument21

 ii. Cullop's testimony was inadmissible because it was all duplicative24

II. A victim's risk assessment is an opinion only an expert is qualified to give..... 26

 a. Relevant Facts26

 b. Clamp's testimony was improper lay opinion that required expertise to reach and was not based on personal knowledge.....28

III. Clamp's testimony discrediting Appellant's alibi was pitting and improper lay opinion about the credibility of a witness based on hearsay30

 a. Relevant Facts30

 b. Pitting and Opinions.....28

CONCLUSION.....34

TABLE OF AUTHORITIES

Cases

Asplundh Mfg. Div., a Div. of Asplundh Tree Expert Co. v. Benton Harbor Eng'g,
57 F.3d 1190 (3d Cir. 1995)..... 16

Gibbes v. McCraw, 45 S.C. 184, 22 S.E. 790 (1895) 18

Hamrick v. State, 426 S.C. 638, 828 S.E.2d 596 (2019)..... 29

Ledford v. Penn. Life Ins. Co., 267 S.C. 671, 230 S.E.2d 900 (1976)..... 15

Maybank v. BB&T Corp., 416 S.C. 541, 787 S.E.2d 498 (2016) 15

Seeger ex rel. K.S. v. Richland Sch. Dist. Two, 445 S.C. 111, 912 S.E.2d 240 (2025). 26

State v. Barrett, 299 S.C. 485, 386 S.E.2d 242, (1989) 23

State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018) 22

State v. Bottoms, 260 S.C. 187, 195 S.E.2d 116 (1973) 19

State v. Cartwright, 425 S.C. 81, 819 S.E.2d 756 (2018)..... 4

State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999)..... 15

State v. Daise, 421 S.C. 442, 807 S.E.2d 710 (Ct. App. 2017) 33

State v. Funderburke, 251 S.C. 536, 164 S.E.2d 309 (1968)..... 26

State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002)..... 7

State v. Gibbs, 438 S.C. 542, 885 S.E.2d 378 (2023) 19

State v. Hariott, 210 S.C. 290, 42 S.E.2d 385 (1947)..... 33

State v. James, 31 S.C. 218, 9 S.E. 844 (1889)..... 19

State v. Kelly, 285 S.C. 373, 329 S.E.2d 442 (1985) 19

State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017)..... 22

State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) 33

State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000) 7, 15

State v. Odom, 376 S.C. 330, 656 S.E.2d 748 (Ct. App. 2007) 7

State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006) 7, 15

State v. Pickrell, 443 S.C. 497, 905 S.E.2d 374 (2024) 22, 31, 33

State v. Sapps, 295 S.C. 484, 369 S.E.2d 145 (1988) 33

State v. Stockman, 82 S.C. 388, 64 S.E. 595 (1909) 28

State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012) 20, 29

State v. Warner, 430 S.C. 76, 842 S.E.2d 361 (Ct. App. 2020) 16, 20

State v. Warren, 207 S.C. 126, 35 S.E.2d 38 (1945) 33

State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009) 16

Thompson v. S.C. State Highway Dep't, 224 S.C. 338, 79 S.E.2d 160 (1953) 19

Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018) 24

Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010) 15

Rules

Rule 701, FRE, Notes of Advisory Committee on Proposed Rules 18

Rule 602, SCRE 18, 19

Rule 608, SCRE 33

Rule 701, SCRE passim

Rule 702, SCRE 14, 17, 20, 28, 29

Rule 703, SCRE 12, 14, 18, 19, 30

Other Authorities

22 Corpus Juris, *Evidence* (1920) 28, 30

70 Corpus Juris, *Witnesses* (1935) 18, 21, 33

D. Garrison Hill, *Lay Witness Opinions*, S.C. Law., Sept. 2007 18

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err by allowing SLED Agent Richard Cullop to testify without being qualified as an expert merely to repeat information previously presented by other witnesses, thus giving the state a second closing argument?
2. Did the trial court err by allowing Kimberly Clamp to opine these were "low risk" victims without being qualified as an expert?
3. Did the trial court err by overruling Appellant's objection that Clamp should not be permitted to give an opinion on whether she believed Appellant's alibi?

STATEMENT OF THE CASE

Gene Scott was indicted on October 21, 2021 by the Chester County grand jury for two counts of murder and one count of possession of a weapon during the commission of a violent crime. R. p. *. He went to trial before Judge Donald Hocker and a jury from May 13–23, 2021. Tr. 1. He was represented by Kay Boulware and William Frick; the state was represented by Candice Lively and Julia Soprano-Cesmat. Tr. 1. Ultimately, the jury convicted him as charged. Tr. 1991:16-22. Judge Hocker sentenced him to sixty years in prison for both murders and five years for the possession, all to run concurrently. Tr. 2005:20-2006:2.

This appeal follows.

STATEMENT OF FACTS

On June 21, 2020, just after noon, Appellant Gene Alexander Scott called 911 after he found the bodies of his grandfather, Gene Rogers, and great-grandmother, Billie Rogers, in Gene's trailer in Richburg, South Carolina.¹ Tr. 224:1-22, 1798:15-22, 1800:24-1801:17; State's Ex. 1, 139, R. p. *. They had been shot. Tr. 585:19-24, 593:18-594:5, 1798:21-22. Officer Claude Powell of the Chester County Sheriff's Office was the first to arrive on the scene. Tr. 237:9-13, 239:6-17. He saw Appellant "sitting there screaming, hollering, crying, distraught, punching the ground, saying that his grandparents had been shot, and they were inside." Tr. 239:9-12. He later had Appellant create a written statement describing what he saw, which was entered at trial as State's Exhibit 139. Tr. 247:24-248:17; State's Ex. 139, R. p. *. Powell's bodycam from the scene was introduced at trial as State's Exhibit 3. Tr. 267:7-268:25.

Broadly speaking, the state's theory at trial was Appellant killed Gene because he was a beneficiary on Gene's life insurance policy, and Billie just happened to be there at the same time. Tr. 208:16-24, 211:2-6, 1905:6-11, 1922:17-1923:9. Through Gene's life insurance company and employer, the state showed Appellant was a fifty-percent beneficiary of Gene's life insurance policy and stood to receive up to \$346,000 in the event of his death. Tr. 767:14-777:7, 867:8-868:4. The state's theory of the case was that Appellant needed the money because he had started a business that was not doing well. Tr. 208:16-21, 212:11-20.

After Appellant left the marines, he started a tactical equipment and private security company, Legion International. Tr. 869:8-870:12, 874:5-875:4, 1768:3-1769:9. Gene gave Appellant \$91,000 in January 2020 to help start the business, and by June 2020 almost all the

¹ For clarity, Appellant will refer to Gene Rogers as "Gene" and Billie Rogers as "Billie" because several witnesses are family members with similar names.

cash was gone. Tr. 871:2-872:21, 874:5-875:4. Appellant was "very forthcoming" on the day he discovered the bodies about receiving the money to start his business. Tr. 558:11-559:2. Appellant admitted at trial that his business did not work well, in part due to the Covid-19 pandemic upending the entire economy. Tr. 1772:12-1774:6. He also admitted to wasting money on strip clubs and video games—he was young and did "a lot of stupid things" with his finances. Tr. 1769:1-25, 880:22-881:22. Still, although he was cash-poor in June of 2020, he had inventory he intended to sell and then invest the proceeds. Tr. 1848:23-1849:15, 1825:9-21.

When Appellant began working on Legion International, he hired or recruited many of his friends to join him. Of particular importance, these included Ian Little, Evan Webb, and John Cravener. Little lived with Appellant in an apartment in Columbia along with Cravener and Cravener's wife. Tr. 1103:4-17, 1192:7-15, 1224:1-1225:24, 1772:1-6. Little committed suicide in November of 2020. Tr. 160:7-161:2. But for that fact, the state would have charged him as a codefendant. Tr. 127:5-11. Based on *State v. Cartwright*, 425 S.C. 81, 92, 819 S.E.2d 756, 761 (2018), the trial court ruled the state was not permitted to mention Little's suicide in front of the jury. Tr. 182:11-183:1.

Evan Webb testified he was close friends with Appellant when they were in the marines together. Tr. 1093:15-24. When he left the marines, Webb knew Appellant intended to start a business and talked to Appellant about working together on Legion International. Tr. 1101:17-1103:25. Webb testified Appellant picked him up from North Carolina and returned to Columbia on May 9, 2020. Tr. 1111:8-24. When they arrived at Appellant's apartment, it was the two of them, Ian Little, and another person he did not know. Tr. 1113:7-12. According to Webb, Appellant then revealed a plan to kill his grandfather. Tr. 1114:3-11. Webb testified he was "supposed to be part of an alibi" and say "everybody was still in the apartment" that day. Tr.

1112:18-22. He testified he used Appellant's and Little's phones and "ma[de] it look like everybody was there and having conversations with each other." Tr. 111:20-25. Webb testified Appellant and Little eventually returned and told them they cancelled the plan "because some animals had seen them and they were sure that other people had heard it." Tr. 1123:8-13. He testified Appellant then said they "would talk about it at a later date," seemingly to try again. Tr. 1123:10-16. Appellant drove him home the next morning. Tr. 1124:10-18.

Webb also testified that on June 20, 2020, Appellant called him and "basically just asked me if I was still good to go to be his alibi." Tr. 1125:2-21. Webb testified he did not come down from North Carolina that night. Tr. 1125:14-1126:15. At some point later, a detective called Webb, and Webb told him that he and Appellant were together at the time of the murders. Tr. 1130:16-25. At the time of his testimony, Webb had a proffer agreement for his felony charge of obstruction of justice based on his claimed lie to the police. Tr. 1134:13-1135:25.

John Cravener testified he was the other person in the apartment with Webb on May 9, 2020. Tr. 1237:1-9. Appellant described him as Little's friend he hired for the company as a favor to Little. Tr. 1782:11-22. He and his wife lived with Appellant and Little in a one-bedroom starting in April of 2020. Tr. 1222:15-1225:22. He testified that at the beginning of May 2020, Appellant told him there was a "business meeting" and that Webb joined them for the meeting. Tr. 1231:10-1232:14. He testified, "Scott told us that he was going to make a plan to kill his grandfather at the meeting." Tr. 1233:10-13. He testified the plan was to use Appellant's and Little's phones to make it appear like they were all hanging out together and that Little and Appellant left that night around 6:00 p.m. and returned around 1:00 or 2:00 a.m. Tr. 1235:14-1236:14. Cravener testified that on June 20, 2020, the night of the murders, he went to an Airbnb with his wife to be out of the apartment at Appellant's request because of a business

meeting. Tr. 1252:4-22, 1788:7-13. Cravener's credibility was challenged because he was given immunity for any role he played in the murders in exchange for testifying after officers threatened to arrest him for obstruction. Tr. 1271:1-171286:14-1287:3.

As will be further explained below, the state also called Eric Devlin, an expert in "digital forensics and analysis" and "cellphone location analysis." Tr. 979:3-8. Kimberly Clamp, who was not qualified as an expert, testified for the state and opined about the "victimology" of Gene and Billie. Tr. 1368:6-1370:7. She also asserted there were "inconsistencies" in Appellant's original version of events. Tr. 1372:24-1373:3. Agent Richard Cullop testified as the state's final witness and overviewed the entire case for "context." Tr. 1427:8-21, 1430:21-25, 1619:2-14, 1623:1-20, 1624:2-15, 1640:15-22. Also, Appellant called Anthony Gentile as an expert in "historical cell site location information, call detail records analysis, and mobile device forensics." Tr. 1718:2-1719:5.

Appellant testified at trial that he is innocent and did not kill Gene and Billie, so someone else must have killed them. Tr. 1829:18-1830:6. Appellant testified he did not "bring . . . everybody into the living room and say, hey, I'm gonna kill my grandparents," as Webb had described. Tr. 1780:21-1781:3. Rather, he invited Webb down to Columbia on May 9, 2020, to see his friend and perhaps talk about the business. Tr. 1777:25-1779:3. Appellant testified he did ask Webb to create a fake alibi on June 20, 2020, but he did so because he and Little wanted the apartment to themselves because they were sleeping together. Tr. 1788:7-1791:10. He testified they had a sexual relationship they kept secret from their romantic partners and which he did not want to reveal to a detective, so he created the fake alibis for his friends and lied to the detective about his activities the night of the murders. Tr. 1790:6-12. Appellant did not go to Gene's house on June 20, 2020. Tr. 1788:19-24.

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. Odom*, 376 S.C. 330, 334, 656 S.E.2d 748, 750 (Ct. App. 2007) (citing *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002)). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) (citing *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)).

ARGUMENT

I. Agent Cullop's testimony was cumulative and appropriate only for closing arguments; it was also impermissible opinion testimony and hearsay not based on his personal knowledge.

As its last witness the state called SLED Agent Richard Cullop to summarize and repeat all of the evidence it had presented. Despite the state's insistence (and the trial court's acceptance) that he was not an expert and did not need to be one, Cullop was allowed to give his opinions about technical matters, repeat testimony and hearsay as the basis for those opinions, and generally testify about the entire case despite lacking personal knowledge of the subject matter. In practice, his sole purpose was to allow the state to give two closing statements. That is why he was called. That is what he did. There is no basis in the law for such cumulative and improper testimony, particularly when the vast majority of the testimony was in the form of an opinion. Nonetheless, the trial court allowed the testimony after considering the issue using an incorrect standard for the admission of lay opinions.

a. Relevant Facts

i. Evidence Previously Presented and Cullop's Testimony

Prior to Cullop's testimony, the state called Eric Devlin, an expert in "digital forensics and analysis" and "cellphone location analysis." Tr. 979:3-8. For his analysis he reviewed a copy of Appellant's phone extraction, Appellant's iCloud and Facebook accounts, call records for several people, Little's iCloud account, and Billie's phone and Facebook account. Tr. 980:2-13, 983:7-24; State's Ex. 195, slide 2. From those sources, he developed a nearly two-hundred slide PowerPoint that was introduced as State's Exhibit 195, which is on file with this Court. Tr. 982:3-983:3. Devlin's testimony was extensive and his PowerPoint included dozens upon dozens of Appellant's texts and messages, Google searches, and call records. Tr. 999:1-1006:23, 1026:4-1037:13, 1009:13-1013:16; State's Ex. 195, slides 30-140. He also performed a location

analysis based on data from Appellant's phone and provider records for Appellant, Little, and Webb. Tr. 1054:7-1070:12; State's Ex. 195, slides 154-193. In his opinion, the data showed Appellant arriving at the scene of the murders around 12:15 p.m. on June 21, 2020 when he discovered the bodies. Tr. 1069:10-1070:10. The night before, his phone was at his apartment at 10:41 p.m. Tr. 1054:25-1055:5, 1065:16-21.

The state called SLED investigator Richard Cullop as its last witness. Tr. 1592:19-1593:5. Cullop and the solicitor repeated to the jury and the court that he was "not an expert." Tr. 1433:9-11, 1497:20-25, 1504:2-10, 1604:14-19, 1608:7-10, 1644:24-1645:5. He did no work on the case until February of 2024, three months before trial. Tr. 1593:20-23. Prior to February 13, 2024, he had no knowledge of the case at all. Tr. 1593:20-1594:1. In order "to become familiar" with the case he "copied over all the documentation and started to review everything." Tr. 1595:14-17. He then spent "weeks" looking through the extraction data from Appellant's phone. Tr. 1596:18-1597:2. Cullop did not perform the phone extraction.² Tr. 663:7-25. He used a PowerPoint during his testimony "for demonstrative purposes only." Tr. 1441:9-11, 1430:21-22. Cullop testified some of his slides were "straight from [Devlin's] presentation." Tr. 1641:17-25, 1499:16-20, 1506:7-9. Virtually all of Cullop's knowledge about the case came from other sources.

It is neither practical nor helpful to describe here all the evidence Cullop presented over fifty pages of transcript using over fifty detailed slides in his PowerPoint. However, his testimony can largely be grouped into a few broad categories. The vast majority of Cullop's

² Telly Crockett testified that on June 22, 2020, he collected Appellant's phone pursuant to a search warrant. Tr. 655:11-656:3, 659:15-660:20. Crockett then turned the phone over to Paula Stevens, an examiner with the Fort Mill Police Department. Tr. 660:18-661:4. Appellant stipulated Paula Stevens performed the data extraction on Appellant's phone. Tr. 663:7-25.

testimony concerned information obtained from Appellant's cellphone. This testimony included (1) location information and its reliability, Tr. 1605:1-1606:19; Cullop's PowerPoint, slides 11-13, 38-42, 45-46, 49-50; (2) numerous Google searches at various known and unknown dates and times, Tr. 1611:4-1622:13; Cullop's PowerPoint, slides 15-28, 52-53; and (3) details about various text messages and calls which, in Cullop's opinion, proved Appellant was lying about his alibi, Tr. 1621:19-1623:20, 1627:5-1628:14; Cullop's PowerPoint, slides 31-34, 47-50. His testimony also included details and opinion—all based on secondhand information and hearsay—intended to demonstrate that Gene and Billie were not likely killed by some other random criminal act, Tr. 1597:13-1600:23; Cullop's PowerPoint, slides 1-3; that Appellant lied about a business operation in Ukraine, Tr. 1609:1-24; Cullop's PowerPoint, slides 8-9; and that, according to Google Maps, Appellant's apartment is approximately an hour away from Gene's home, Tr. 1633:14-21; Cullop's PowerPoint, slide 51.

Two more detailed examples are helpful in demonstrating the type of opinions Cullop shared. First, Cullop described looking at Appellant's phone's location information as follows:

[T]here's a section on Cellebrite where it just says locations, I clicked on locations and then it brings up a timeline where you can drag to dates. From that information, I extracted the Excel spreadsheet that had dates and times, location information. . . . So, when I began looking at that, I saw a lot of location data that didn't make sense including Poland and other places. So, I actually reached out to our computer crimes division who deals with Cellebrite the most and asked if there was any way that I could use that information to verify the location. They actually provided me with this document that Cellebrite provides their users that gives you the pass and tables that are considered reliable.

Tr. 1494:23-1495:25. Part of his "analysis" included a spreadsheet he found online "and it showed what reliable information was versus unreliable or not reliable location information." Tr. 1605:20-22; Cullop's PowerPoint, slide 10. As the solicitor put it, that was "something that literally you could Google it and find out." Tr. 1606:3-6.

For another example, Cullop opined Appellant manually deleted all of his search history. Tr. 1615:13-1616:1. This was despite the fact—as Cullop recognized—Devlin did not give an opinion as to whether the information was manually deleted by Appellant or automatically and unintentionally deleted by the phone. Tr. 1030:15-1031:6.

ii. Argument Below and Trial Court's Ruling

Prior to Cullop's testimony, Appellant objected it was cumulative and requested the state first proffer the testimony. Tr. 1421:2-1422:15. He also argued all of Cullop's testimony was unnecessary and required him to be qualified as an expert. Tr.1433:6-19, 1435:23-1436:11, 1539:6-13. Appellant summarized his objection to Cullop's testimony as follows:

Agent Cullop did not analyze this. He didn't tag this stuff. He's interpreting it to make a conclusion to the jury I mean it's basically cherrypicking, interpreting. She says context. But this is her closing, judge. I mean this is every single thing she can bring up in his [sic] closing.

Tr. 1574:25-1575:8. He argued, "[The solicitor] can make these points in closing," and, "I don't understand why this couldn't be pulled out through individual witnesses." Tr. 1433:20, 1439:14-15.

The solicitor agreed "some of it" was testified to by the individual witnesses. Tr. 1439:14-20. The solicitor argued Cullop's testimony and PowerPoint were necessary "to show what he found and he's gonna put it in the context of what we know through testimony as well as . . . interviews that have been done in this particular case." Tr. 1430:21-1431:1. She argued, "what he's done is what Eric Devlin couldn't do, and that is, Eric Devlin, he did not investigate this case," and that "what he's doing is he's tying the information back to the relevance of this case and the evidence already in the case." Tr. 1431:2-23. The solicitor summarized,

[W]hat we've done is, based on [Appellant's phone] extraction and based on the call detail records, we have gone through it with a fine tooth[ed-]comb to come up with what is in evidence that

clearly ties everything together. That's all he's doing. We don't have anything new here. He's just put it in a nice package so he can testify about what he did in the investigation to bring context to this information. That's it.

Tr. 1435:10-17. The solicitor argued: "He's not interpreting the evidence. He is actually applying it to the timeline and the information to put it in context for the jury. That's it." Tr. 1444:15-18.

The court was clear its standard for expert testimony was as follows:

I will view the slides/pages placing myself in the juror's shoes. If I understand something then I will assume they do and not require an expert. If the reverse holds then will require [sic] an expert and not allow it in with Cullop.

Court's Ex. 2, R. p. *; Tr. 1580:11-16. The trial court believed Cullop could testify to the location information because "[h]e's just plugging in information to generate those documents." Tr. 1589:23-1590:1. Although the court sustained Appellant's objection on a narrow number of slides and sections of Cullop's testimony, it largely overruled Appellant's objections and allowed most of Cullop's proffered testimony. Court's Ex. 2, R. p. *.

- b. Cullop's testimony was impermissible lay opinion, and the trial court admitted the evidence based on the wrong legal standard.

Almost all of Cullop's testimony was improper for a lay witness because it consisted almost entirely of his opinions, despite the state's insistence to the contrary. Having established his testimony consisted of opinions, those opinions fail for two primary reasons rooted in Rule 703, SCRE. First, many of them did "require special knowledge, skill, experience or training" to reach, and the trial court misunderstood the standard to apply. Rule 701, SCRE. Second, *none* of his testimony was "rationally based on the perception of the witness." *Id.*

- i. *Cullop's testimony consisted almost solely of opinions; the state cannot suggest it was merely for "context" in the case.*

Cullop's testimony needed to satisfy Rule 701, SCRE, because all of it was his opinion about what the phone records and other information showed. He opined that Appellant's phone could be reliably placed at his apartment in Forest Acres on May 24, 2020, at 1:45PM, among other locations. Tr. 1607:10-1609:5; Cullop's PowerPoint, slides 11-12. Even though Devlin would not provide an opinion why certain search history records were missing from Appellant's phone—either through his deliberate choice or the phone's automatic processes—Cullop asserted the undated search data resulted from Appellant deleting that history. Tr. 1030:15-1031:6, 1615:9-1616:21. Based on having "reached out to the Chester County Sheriff's Office and the Kanawha County Sheriff's Office in West Virginia,"³ Cullop believed Gene and Billie had no active incident reports that could indicate other criminal actors killed them. Tr. 1597:21-1598:19; Cullop's PowerPoint, slide 2. Similarly, he believed Gene's home was not near the areas of significant violent crime, based on data and a map from SLED's South Carolina Incident Based Reporting System, which sends information to the FBI.⁴ Tr. 1598:21-1599:17; Cullop's PowerPoint, slide 3. Cullop asserted Appellant's alibi for the night of the murders was a lie

³ This is plainly and obviously hearsay of the most blatant variety.

⁴ Cullop also believed there was not "some sort of property crime motivation" for the murders, based on a map of the area around Gene's home:

So, I thought it was important to, to zoom out the map a little bit so you can get a little bit of context as far as -- the, the closest major road that I could find is that 901 which is over there on the far right. . . . All of these roads that come off of that to the left, they're all dead-ends. So it's not like through traffic coming through there and there's several larger houses, you know. So if it was gonna be some sort of property crime motivation, you would they would probably stop somewhere there first. But, essentially, I wanted to show it'd be hard to get to his house by random or by accident because, you know, you have to turn, turn, turn, turn, you know, to get to his trailer.

Tr. 1599:22-1600:11. This is unquestionably an opinion.

because, based on cellphone location history, Webb was at his home in Jacksonville, North Carolina, rather than at the apartment with Appellant and Little. Tr. 1630:5-1632:21.

Those are opinions, as is most of his testimony, and ones that needed to comply with Rules 701 and 702. Cullop's testimony consisted of his beliefs about what the data is, what it shows, and what it means. The state cannot circumvent the Rules by claiming Cullop is merely "applying [the information] in the context of the evidence." Tr. 1443:19-24. That is nonsense.

ii. The testimony required expertise, and the trial court applied the wrong standard in admitting the evidence.

The trial court erred in admitting this testimony and evidence because it used the wrong standard of decision for the admission of lay opinion. The court clearly expressed its method of analysis:

[I]f I look at one of these documents, and if I can understand what the document says, then I don't need expert interpretation. But if I look at a document and say -- and have no clue of what it's telling me, then I think it would require expert interpretation.

Tr. 1529:17-21; Court's Ex. 2, R. p. *. But the trial court's understanding—even the jury's understanding—is not the question. The question is whether his testimony satisfied Rule 701,

SCRE:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Thus, there are two initial errors under Rule 701. First, the trial court erred by analyzing the matter as solely one of expertise—whether it "can understand what the document says" without further explanation. That is not the standard under Rule 701, which instead prohibits non-expert opinions based on "special knowledge, skill, experience or training." Second, the trial court's

standard is not even a cogent test: a witness might give opinions that are perfectly understandable on their face, but that does not mean the witness did not require expertise to reach those opinions.

The trial court thought the expertise requirement in Rule 701 is about *understanding* the opinion when it is actually about *producing* the opinion. See *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010) ("[T]he trial court must evaluate the substance of the testimony and determine whether it is reliable."); *State v. Council*, 335 S.C. 1, 23-24, 515 S.E.2d 508, 519-20 (1999) (affirming exclusion of polygraph results because the method of producing a "deception detected" result is not reliable). Thus, admitting the testimony was an abuse of discretion because the decision was "controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) (citing *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000)); *Maybank v. BB&T Corp.*, 416 S.C. 541, 567, 787 S.E.2d 498, 511 (2016) (citing *Ledford v. Penn. Life Ins. Co.*, 267 S.C. 671, 674-75, 230 S.E.2d 900, 902 (1976).

Under the proper analysis—whether the opinion required "special knowledge, skill, experience or training" to reach—it should be clear almost all of Cullop's testimony failed Rule 701(c), SCRE. It requires special knowledge, skill, experience, or training to extract data from Cellebrite records, compare multiple phone logs and GPS data, collect and interpret search result history from a phone extraction, explain why information was deleted from a phone, and determine whether victims' had other risk-factors for becoming a victim of violent crime.. The state hired Devlin *because* this information requires an expert to understand, and at trial Appellant presented his own expert to interpret the phone data.

Lay opinion testimony under Rule 701 is not expansive: "The prototypical example of the type of evidence contemplated by the adoption of Rule 701 relates to the appearance of persons

or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences." *Asplundh Mfg. Div., a Div. of Asplundh Tree Expert Co. v. Benton Harbor Eng'g*, 57 F.3d 1190, 1196 (3d Cir. 1995). Those are the types of opinions that are helpful to the jury and do not require expertise. Cullop's testimony is plainly different.

For one specific example, Cullop had no legitimate basis for concluding location information for Appellant's cell phone was reliable. He testified that after he exported the phone extraction data to Excel,

I'm not an expert in this. So, I had to con -- I had to talk to people to -- and look up what is a reliable location because there's lots of location information in there. So, I was able to find this spreadsheet and it showed what reliable information was versus unreliable or not reliable location information.

Tr. 1605:14-22. The Cellebrite spreadsheet is slide 10 in his PowerPoint. The solicitor explained for him, and Cullop agreed, he searched Google to determine if the information "is what Cellebrite says is reliable." Tr. 1606:3-1607:4. Appellant specifically objected to this testimony during the proffer because it demonstrates that he needed to be an expert yet was not. Tr. 1541:22-25. Although it should not need stating, someone who fails to understand information cannot be allowed to Google away their confusion and then testify as if they have legitimate knowledge about a subject.

Further, on his initial review Cullop believed the location information showed Appellant had been in Poland—but he was wrong, and he only corrected it by consulting with others. Tr. 1494:23-1495:25. The use of actual experts and Cullop's own confusion clearly demonstrates this information requires expertise to interpret. *See State v. Warner*, 430 S.C. 76, 85, 842 S.E.2d 361, 365 (Ct. App. 2020) (citing *State v. White*, 382 S.C. 265, 274, 676 S.E.2d 684, 688 (2009))

("CSLI evidence . . . falls within Rule 702, SCRE, and must be screened for reliability."), *aff'd in part and remanded*, 436 S.C. 395, 872 S.E.2d 638 (2022).

Some other examples also illustrate the point that he needed to be an expert. First, he disagreed with the state's *actual* phone expert about the meaning of missing data for certain internet searches. Tr. 1615:13-1616:1. While Devlin "couldn't say" whether certain information was deleted manually by Appellant or automatically by the phone, Cullop testified "it wasn't a retention deletion" based on his analysis of the records. Tr. 1615:13-1616:1. Because he is not an expert, he can do no more than guess about why a phone might or might not delete certain information. Second, Cullop created a map based on "all the data for all crimes" with blatant hearsay from the South Carolina Incident Based Reporting System. Tr. 1597:21-1598:20; Cullop's PowerPoint, slide 2. Third, he opined the murders were not due to "some sort of property crime motivation" because of how far away Gene's home was from major roads. Tr. 1599:22-1600:8; Cullop's PowerPoint, slide 4. He provided a satellite image supposedly demonstrating this point: "I wanted to show it'd be hard to get to this house by random or by accident because, you know, you have to turn, turn, turn, turn, you know, to get to his trailer." Tr. 1600:6-11. Almost all of Cullop's testimony would fit in this category, and it should never have been allowed.

As a final note of context demonstrating expertise was required, State's Exhibit 167—which includes Appellant's phone extraction which Cullop relied upon—is on file with this Court. It indicates the extraction contains over 180 gigabytes of information, almost all of which is apparently inaccessible without specialized software. Even using the trial court's incorrect version of the test, it is not something where just anyone can "look at one of these documents

[and] understand what the document says." Rather, an expert with the proper software, experience, and knowledge was necessary before the data was of any meaningful utility.

iii. Cullop did not testify about facts within his personal knowledge

Because Cullop did not testify as an expert, his testimony should have been restricted to matters within his personal knowledge. *Compare* Rule 602, SCRE ("A witness may not testify to a matter unless . . . the witness has personal knowledge of the matter."), *with* Rule 703, SCRE ("If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."). One of the most basic principles of evidence is that, with limited exceptions, a witness may testify only to facts personally perceived and known by the witness. 70 Corpus Juris, *Witnesses* § 111, at 85-86 (1935) (footnotes omitted) ("[A] witness cannot be allowed to testify as to a fact of which he has no personal knowledge . . ."). After all, that is the purpose of a witness: to describe for the jury the facts and circumstances they perceived in order to "put[] the trier of fact in possession of an accurate reproduction of the facts." D. Garrison Hill, *Lay Witness Opinions*, S.C. Law., September 2007, at 34, 38 (quoting 701, FRE, Notes of Advisory Committee on Proposed Rules). Where a witness's knowledge is derived solely from records and data of others, his testimony based on that knowledge is inadmissible. *See Gibbes v. McCraw*, 45 S.C. 184, 22 S.E. 790, 790 (1895) (affirming nonsuit because where sole witness's knowledge was based on statements in a writing and thus was "incompetent" to support the verdict and correctly "withheld from the court and jury").⁵

⁵ The Court in *Gibbes* continued: "Of course, it was incompetent for this witness to state an indebtedness set out in that written contract, which alone gave the witness any knowledge thereof. It is idle to waste words upon such a contention." 45 S.C. 184, 22 S.E. at 790.

Cullop's testimony therefore fails Rule 701(a), SCRE, because it does not consist of "rational inferences" based on his "perception." *State v. Gibbs*, 438 S.C. 542, 548-49, 885 S.E.2d 378, 381 (2023) (plurality opinion) ("Rule 701 requires testimony that is based on the witness's 'perception,' i.e., things the witness observed firsthand in the factual underpinnings of the case."). Cullop was not involved with the investigation until almost four years after the murders, he had almost no first-hand knowledge, and therefore his testimony should have been excluded because a law enforcement officer "may only testify regarding his direct observations unless he is qualified as an expert." *State v. Kelly*, 285 S.C. 373, 374, 329 S.E.2d 442, 443 (1985) (citing *Thompson v. S.C. State Highway Dep't*, 224 S.C. 338, 342, 79 S.E.2d 160, 162-63 (1953)).

Rule 701(a) is not complicated:

[It] simply means that the lay witness seeking to proffer an opinion must have personal knowledge about the issue to which his opinion relates, and his opinion is reasonably connected to that knowledge. Rule 602, SCRE ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.") Thus, the lay opinion witness differs from the expert opinion witness, who is free under Rule 703 to testify based on hearsay and in response to hypotheticals. A lay witness, however, may not base his opinion on such non-personal knowledge. *State v. Bottoms*, 260 S.C. 187, 195 S.E.2d 116 (1973).

Hill, *supra*, at 36. This is why Appellant so consistently objected that Cullop needed to be qualified as an expert to give his opinions: because they are based on hearsay. *State v. James*, 31 S.C. 218, 9 S.E. 844, 850 (1889) ("[W]hen it appears that [an opinion is based] only from what he has heard one or the other say to himself or to third persons, it is nothing more than hearsay, and should be excluded upon that ground."). Cullop has no personal knowledge of the violent crime rates and locations in Chester County. He knows nothing about Appellant's location

except what the Cellebrite information reported, and even then he had to consult with others to determine if Appellant had been in Poland. These are not valid bases for lay opinion.

One of the reasons lay opinion testimony is excluded is that it is not reliable: "Lay opinion evidence that strays too far from the anchor of observed, concrete facts is nothing more than speculation." Hill, *supra*, at 38. Cullop has absolutely no idea—from his own perception—if Appellant's phone moved around his apartment on May 9, 2020. Yet he claimed, "[Appellant's] phone didn't move from 8:15 to 1:00 -- 1:05 in the morning. It physically sat still." Tr. 1626:12-17. Cullop did not see the phone that night. All Cullop has are records someone else told him came from Appellant's phone and a layperson's ability to interpret them. That is not an opinion based on his perception. It is an inference based on hearsay.

Legitimate expert opinions must be reliable, yet Cullop has no ability to inform the jury—or the court—whether the data or methods he used are reliable. *See State v. Warner*, 430 S.C. 76, 86, 842 S.E.2d 361, 365 (Ct. App. 2020) ("In South Carolina, a trial court minding the Rule 702 gate must assess not only (1) whether the expert's *method* is reliable (i.e., valid), but also (2) whether the *substance* of the expert's testimony is reliable."), *aff'd in relevant part and remanded*, 436 S.C. 395, 872 S.E.2d 638 (2022). Cullop should have been required to satisfy the court that his opinions are based on reliable methods and data before presenting them to the jury. *State v. Tapp*, 398 S.C. 376, 388, 728 S.E.2d 468, 474-75 (2012) ("The expertise, reliability, and the ability of the testimony to assist the trier of fact are all threshold determinations to be made prior to the admission of expert testimony").

In summary, all of Cullop's knowledge is second-hand. He pulled it from the phone data, he heard it from others during his investigation, he saw it on recorded interviews, or he read it in various records and other investigators' notes. He had no idea if it was reliable, and he should

not have been allowed to testify about that second-hand knowledge. *See* 70 Corpus Juris, *Witnesses* § 112, at 87 (1935) ("A witness cannot testify . . . as to facts of which his only knowledge is gained from what is told him by others, or from books, records, or other writings kept or made by others . . ."). The only permissible way for a witness to provide such testimony is to be qualified as an expert. Because Cullop was not an expert, his opinion testimony should have been excluded.

c. Cullop's testimony was cumulative and not proper for a witness—he did not inform the jury but rather made a closing argument.

Cullop's testimony was cumulative to the evidence already presented. The cumulative nature of the testimony is apparent because he used the exact same sources of information. However, the full scope of the error is that the solicitor was permitted to give two closing arguments: first through Cullop at the close of the state's case in chief, and again just prior to jury deliberations. Thus, Appellant objected, "this is her closing, judge. I mean this is every single thing she can bring up in his [sic] closing." Tr. 1575:7-8.

i. *Cullop's testimony was used to allow the state a second closing argument.*

In effect, when the state called Cullop to testify as he did, it was trying to cheat. The jury was told, as every jury is, that counsels' arguments are not evidence. Tr. 206:17-19. But the state wanted to have its cake and eat it too, so it used Cullop to make a second closing argument *as* evidence before Appellant was given a chance to present his side of the story.

In making closing arguments, counsel has many roles to play, and one of the most important is to summarize the evidence, repeat it, and interpret it in the context of the case to connect all the individual pieces together. This function is critical because it is often not clear to the jury how any individual witness's testimony relates to the bigger. In this way, closing arguments are "such an important phase of a criminal trial." *State v. Beaty*, 423 S.C. 26, 40, 813

S.E.2d 502, 509 (2018). Especially in a fact-intensive, complex trial like this one, closing arguments are of paramount importance for allowing the parties to show the jury how it can find in their favor and why it should. The state should not have been given two bites at that apple.

Consider Cullop's testimony about Appellant's alibi. He testified Appellant searched online "are alibis strong" on April 17, 2020 before texting Webb several hours later. Tr. 1622:12-25; Cullop's PowerPoint, slide 30. The solicitor then asked,

Okay. And then, in this particular text thread, I know that, that we've reviewed it and Mr. Webb came and testified about it. But how did the context of that or relevance of that really stick out to you?

Tr. 1623:1-5. It is absolutely unimportant if some detail "stuck out" to Cullop. There is no way for that information to assist the jury in deciding this case. *See State v. Pickrell*, 443 S.C. 497, 503, 905 S.E.2d 374, 376 (2024) ("Bailey's testimony that he had trouble understanding Pickrell's account [of self-defense] was not helpful to a clear understanding of Bailey's easily understood testimony . . . that the only entry wound was in Demary's back."). The state could not even suggest it was appropriate to show how the investigation progressed because Cullop was not part of the investigation. *Contra State v. King*, 422 S.C. 47, 68, 810 S.E.2d 18, 29 (2017) (discussing "investigative hearsay" that can sometimes be "couched in terms of explaining an officer's conduct during an investigation"). He was not a part of the investigation until three months before trial and years after the killings. The purpose of this testimony was to connect the pieces of evidence the jury already had, just like a closing argument.

Cullop's testimony, first and foremost, was a summary and repetition of what had come before. The solicitor expressly urged the trial court, "We don't have anything new here."⁶ Tr.

⁶ Appellant notes the solicitor was not accurate in this assertion to the court. For example, Devlin testified he found in Appellant's phone data a Google search for "are alibis strong" but he was unable to determine when the search occurred. Tr. 1034:2; State's Ex. 195, slide 97. Cullop,

1435:10-17. It argued he "is actually applying [the evidence] to the timeline" in order "to put it in context for the jury." Tr. 1444:15-18. But that is one of the purposes of closing argument—to tie the evidence together with context. No witness is necessary for "context" unless he provides new information, but little of Cullop's testimony was new. The solicitor was fully capable of pointing out the context of any individual piece of evidence. It was her responsibility to, as she described, "put it in a nice package" for the jury. Tr. 1435:10-17. She is not permitted to manufacture probative value under the guise of "providing context" *and* give another closing argument repeating everything again. This approach begs the jury to find a defendant guilty not because of the strength of the state's case but because of its mere repetition. It was not fair to Appellant who had but one chance to plead his case.

Even though Cullop's testimony was repetitive, that does not mean it was unimpactful because anything said often enough is more likely to be believed. This improper repetition is like those cases addressing prior consistent statements. For example, in *State v. Barrett*, 299 S.C. 485, 386 S.E.2d 242, (1989), our Supreme Court reversed where a witness was permitted to testify about a child victim's prior report of sexual abuse. 299 S.C. at 487, 386 S.E.2d at 243. The Court rejected the state's argument such testimony "was merely cumulative to Victim's" and therefore harmless because "it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." *Id.* Virtually all of Cullop's testimony functioned in this same way. Cullop's duplicative testimony repeated for the jury information it had already heard and improperly corroborate it in two ways. First it improperly corroborated the previous

on the other hand, opined that search occurred in April right before he contacted Webb to plan the state's alleged first attempt and fake alibi. Tr. 1513:11-25, 1622:12-1623:20; Cullop's PowerPoint, slide 30. Cullop also included several Google searches that Devlin had not. Tr. 1509:3-7.

testimony given, particularly of Devlin and Webb. Second it improperly corroborated the state's *theory* of the case, particularly that later given by the state in closing. Thus, the "devastating impact" of this duplicative testimony is "undeniably enhanced" due to the "cumulative effect" of Cullop's testimony. *Thompson v. State*, 423 S.C. 235, 249, 814 S.E.2d 487, 494 (2018).

Importantly, the state was allowed to use Cullop to explain and argue its theory of the case before Appellant was allowed to present any evidence to the contrary. There is a reason lawyers are not permitted to make argument before all of the evidence is received: because it risks the jury making its mind up before it has heard all of the facts. Yet Cullop was allowed to say everything the solicitor wanted him to before Appellant could present his case. That was extremely important in this case because Appellant eventually testified to explain many of the points Cullop addressed. His credibility was essential. The state recognized this, and the solicitor challenged Appellant when she later cross-examined him: "in order for us to believe your side of the what happened that weekend, we would have to also believe that Evan Webb and John Cravener . . . are gonna conspire to lie against you about this plan to kill your father?" App. 1865:25-1866:4. Appellant agreed with her, "After they received their immunity and proffer deal, yes." App. 1866:5-6. Yet the state was permitted to repeat its entire case under the guise of "context" and attack his credibility before he was permitted to explain himself. By the time his chance came it was too late because the jury had already listened to the same evidence over and over.

ii. Cullop's testimony was inadmissible because it was all duplicative.

The simple fact that some testimony has already been given will ordinarily not preclude a second witness from giving similar testimony. That unobjectionable principle is based on the premise that two witnesses can better explain—and be more compelling—than just one, and therefore the probative value of such testimony can be meaningful. This power comes from the

witnesses' testimony being based on different facts and experiences. Cullop's testimony is different. It should have been excluded under a traditional cumulativeness analysis because—as the Solicitor argued—it was not new. All of it was based on his review of the same evidence already addressed.

Cullop's testimony consisted entirely of material repackaged from Devlin (for example Appellant's Google searches⁷), from prior police interviews and other witnesses, and from the

⁷ In his testimony Devlin showed the jury numerous Google searches obtained from Appellant's phone extraction. Many of the slides in Cullop's presentation that contained this information were simply copies of Devlin's work. Tr. 1641:17-25, 1499:16-20, 1506:7-9; *compare* Cullop's PowerPoint, slides 15-16, 21, *with* State's Ex. 195, slides 82-83, 89. Even the seemingly randomly highlighted words are the same.

Appellant admitted at trial the searches could be seen as suspicious. Tr. 1824:13-20. But he maintains they are explained either by his personal interest in crime shows or occurred after the murders when law enforcement officers began to suspect him of the crimes, Tr. 1817:17-1822:13. For clarity, and to demonstrate the prejudicial impact of the duplication, some of those searches included:

- how long does it take life insurance to pay
- does life insurance cover murder
- can psychopaths like someone
- murder by gun caliber
- interrogation techniques
- rock hill murder solve rates
- what is needed for evidence of murder
- when is someone no longer a suspect
- stages of grief
- what do police look for in a murder investigation
- how solid are alibis
- how do people get caught after a murder
- why are people evil enough to murder?

Tr. 1030:2-1034:25; State's Ex. 195, slides 82-95, 105-06. In Devlin's presentation, all of these searches lacked date and time information because they had been deleted. Appellant testified that, to the best of his memory, all or most of the undated searches came from the night after he discovered the bodies and believed he was or could be a suspect, and so he deleted his search history. Tr. 1824:13-20, 1826:7-1827:1.

In Cullop's presentation, he omitted the searches that *actually* provided context (*e.g.* "stages of grief" and "why are people evil enough to murder?") and instead repeated for the jury those seemingly incriminating searches it had already seen—*e.g.* "what is needed for evidence of

investigative work of other law enforcement officers. This testimony is cumulative as a matter of law because it all stemmed from the same sources. If two eyewitnesses to a robbery can identify the perpetrator, there is clear value in allowing both to testify, even if the substance of their testimony is the same. The second witness's testimony is not cumulative because it is actually new information: another person from another perspective can identify the robber. Cullop's testimony, however, is cumulative because it was based on a review of the exact same records as had previously been addressed by Devlin and the other witnesses. *State v. Funderburke*, 251 S.C. 536, 540, 164 S.E.2d 309, 311 (1968) (citations omitted) ("Cumulative evidence has repeatedly been defined to be additional evidence *of the same kind to the same point.*" (emphasis added)). Simply repeating what can be found in documents—most of which were admitted at trial—is of scant value and thus this testimony should have been excluded.

The objection should have been sustained because the testimony was "repetitive evidence proving the same specific point." *Seeger ex rel. K.S. v. Richland Sch. Dist. Two*, 445 S.C. 111, 123, 912 S.E.2d 240, 246 (2025). For example, consider Cullop's testimony about Appellant's location and phone use. Eric Devlin had already testified extensively about where he had been, what he Googled, and what and whom he texted. Cullop did not—and could not, as it would be improper opinion testimony, *see infra*—offer any additional perspective on the issue. All he could do was repeat what was already said and show the jury what it already saw, even though his sources of information were exactly the same as Devlin's and the other witnesses. There was no legitimate probative value in this truly duplicative testimony.

II. A victim's risk assessment is an opinion only an expert is qualified to give.

murder"; "how long does it take for life insurance to pay"; "does life insurance cover murder." Tr. 1613:2-1614:13; Cullop's PowerPoint, slides 15-16, 21, 30. By omitting many of the searches, Cullop actually provided *less* context that Devlin had.

a. Relevant Facts

Agent Kimberly Clamp testified for the state about her investigation in this case. Tr. 1357:9-13. Although she worked in the "behavioral science unit" of the "investigation division" at SLED, she was not qualified as an expert because the solicitor expressly did not want to qualify her as such. Tr. 1357:13-16, 1379:12-16. Nonetheless, Clamp testified about the "victimology" of the decedents. Tr. 1368:6-1370:7. When asked to explain victimology, Clamp described her evaluation process:

So, whenever I get involved in a case, the very first thing I want to know is everything I possibly can about my victims, who they are, where they come from, what they do for money. Just anything and everything as far as that -- as far back as I can go.

Basically what I identify is [are] there any potential skeletons in somebody's closet, what is their public life, what is their personal life, who would potentially have anything against them. So this way we can then go from there as, you know, into the investigation that might be important to talk to.

Tr. 1368:6-20. The solicitor then asked if, based on the information she learned, Billie was "someone [Clamp] would consider like a high risk victim." Tr. 1368:21-24. Clamp opined, "Absolutely not. Neither one of them were high risk victims. They were very low risk victims." Tr. 1368:25-1369:1. Clamp explained the basis for her opinion: friends and family told her that Gene and Billie were not drug users or "partiers," and they did not "hang out in bars and clubs" but rather went to church and stayed home, which would not "elevate" their "risk level." Tr. 1369:8-1370:7. On cross-examination, Clamp testified she never went to the scene and did not collect or test any of the weapons, that in effect she had no personal knowledge about the case. Tr. 1416:3-15.

Appellant objected to the testimony in a side bar which was later put on the record. Tr. 1369:3-7, 1377:23-1378:2. Appellant argued the testimony "would require her being declared an expert to render such opinions." Tr. 1378:1-2. The trial court disagreed because it "did not

believe she had to be an expert to make that determination whether or not they were high risk victims or not based upon her experience in, in this field of criminal investigation." Tr. 1378:2-6, 1387:8-15.

The state also presented evidence tending to show that various other family members in the victims' lives were likely not the murderer. Appellant's uncle Aaron Scott was the beneficiary of the other fifty-percent of Gene's life insurance policy. Tr. 1327:1-3. Paul Rogers, Gene's brother, did not inherit anything from Gene or Billie, nor was he a life insurance beneficiary. Tr. 951:22-952:14. He was also in Georgia at the time of the murders. Tr. 952:15-17. Robin Furr, Gene's ex-wife, was removed as a beneficiary around the time of their divorce in 2016. Tr. 918:14-919:19, 1327:4-16. Clamp testified she "reviewed" interviews with Aaron Scott and Robin Furr because they were people of interest with potential motives. Tr. 1398:13-1399:25. Clamp testified she was able to "confirm" their alibis, so they were not investigated further. Tr. 1399:10-25.

- b. Clamp's testimony was improper lay opinion that required expertise to reach and was not based on personal knowledge.

In general, only expert witnesses are permitted to give opinion testimony. *See* Rule 702, SCRE. For non-expert testimony, the "function of a witness is merely to state facts within his personal knowledge, and under ordinary circumstances his opinion or conclusion with respect to matters in issue . . . cannot be received." 22 Corpus Juris, *Evidence* § 588, at 485 (1920). As explained above, Rule 701, SCRE, limits circumstances in which a lay witness can give an opinion: when the opinion is based on the witness's perception, it is helpful to the jury, and it did not require special skill or experience to reach. *See also State v. Stockman*, 82 S.C. 388, 64 S.E. 595, 598 (1909) (explaining nonexperts can provide opinions only "after detailing

circumstances," and providing examples, "as to time, distance, and such matters as cannot be made intelligible to the jury, except as interpreted by the [witness]").

Clamp's description of Gene and Billie as "very low risk victims" is an opinion. It is a conclusion based on her evaluation of their lives and lifestyles and the inferences she drew therefrom. She learned information—from others, rather than through personal experience—about the Gene and Billie's lives, and from there she drew inferences and developed an opinion about their "risk level." To be admissible, therefore, either Clamp needed to be qualified as an expert under Rule 702, or the testimony needed to satisfy the requirements of Rule 701. *See State v. Tapp*, 398 S.C. 376, 384, 388-89, 728 S.E.2d 468, 472, 474-75 (2012) (finding trial court erred by not determining reliability of expert testimony about victimology). Because the state expressly did not seek to qualify her as an expert and the testimony does not satisfy Rule 701, the trial court erred by overruling Appellant's objection.

The most important reason this testimony fails Rule 701 is that Clamp had no personal knowledge of the victims. She joined the investigation three days after the murders, and she reviewed "all of the information that [the Chester County Sheriff's Office had] in their case," which included crime scene photos and recorded interviews. Tr. 1359:22-1369:6. She then helped conduct several interviews, "just sitting down face-to-face with people asking questions." Tr. 1360:10-13. These interviews were the basis of her "victimology" for Gene and Billie. Tr. 1360:10-14. She asked questions like, "who are they, what do they do, what is their life-style like[?]" Tr. 1360:14-17. Clamp did not know these people personally—all of her information came from others. Thus, her opinion about their risk as victims was not "based on the perception of the witness." Rule 701, SCRE; *see Hamrick v. State*, 426 S.C. 638, 648, 828 S.E.2d 596, 601 (2019) (holding officer could not give his opinion about where an accident occurred because he

"arrived on the scene forty-eight minutes after the incident occurred, and thus, he clearly did not perceive the location of the impact"). Clamp's testimony therefore should not have been admitted. In the same way, she could testify about the statements of others only if she testified as an expert. *See* Rule 703, SCRE (emphasis added) ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by *or made known to the expert* at or before the hearing.").

In addition to failing under Rule 701(a), this testimony also fails Rule 701(c) because it was—according to the trial court—"based upon her experience in, in this field of criminal investigation." Tr. 1378:2-6. Lay opinion testimony cannot "require special knowledge, skill, experience or training." Rule 701, SCRE; *see also* 22 Corpus Juris, *Evidence* § 606, at 519 (explaining a "skilled witness" is one with "knowledge and experience which are not acquired by the ordinary person"). Yet Clamp's conclusion required the experience and skill she gained in SLED's behavior science unit as the court recognized. *See* Note, Rule 701, SCRE ("The language of subsection (c) . . . is intended to emphasize the fact that lay persons may not give expert opinions."). Therefore it should have been excluded.

This testimony was important in the case. Appellant's express defense was that he did not commit these crimes and someone else killed Gene and Billie. Describing the victims as "low risk" necessarily cut directly against his version of events. The jury could have been inclined to believe Appellant but because Clamp opined the victims were unlikely to have been killed by other actors, the jury might reasonably have concluded that only Appellant could have committed the crimes.

III. Clamp's testimony discrediting Appellant's alibi was pitting and improper lay opinion about the credibility of a witness based on hearsay.

a. Relevant Facts

Clamp also testified that she helped to investigate Appellant's alibi. Tr. 1372:11-1373:12. On the day of the murder, Randy St. Clair of the Chester County Sheriff's Office interviewed Appellant at the sheriff's office. Tr. 721:14-722:11, 724:3-13. That interview was recorded, and it was then introduced at trial as State's Exhibit 170, which was published for the jury and is on file with this Court. Tr. 726:3-6, 730:14-25. In the interview, Appellant told officers he was with Ian Little and Evan Webb the night before from 6:00 until 11:00 p.m. State's Ex. 170, at 1:19:55; Tr. 734:10-16.

According to Clamp, she "found multiple inconsistencies that rose to a high level of concern" in Appellant's recorded statement. Tr. 1372:24-1373:3. Clamp believed Appellant's and Webb's timelines for the night were inconsistent. Tr. 1373:4-12. Appellant objected the solicitor was "pitting" and then requested to further address the issue outside the jury's presence. Tr. 1373:13-1374:20. The trial court believed pitting "is when you have got a witness on the witness stand and you're bringing up what somebody else testified while this witness is testifying." Tr. 1380:18-23. With that definition, the trial court concluding Clamp was "just commenting on the basis of her investigation where she believes they're discrepancies," and therefore the testimony was admissible. Tr. 1380:23-25. Appellant continued and argued Clamp's testimony was improper because "what she's doing . . . is rendering an opinion on whether a witness is lying" Tr. 1381:14-18. Appellant argued the testimony was an improper opinion: "by using the word 'inconsistencies' she's implying what she thinks about it." Tr. 1384:25-1385:21. Clamp's interpretation of the alleged "discrepancies" is exactly like Investigator Bailey's opinion that he "had trouble understanding" the defendant's version of events: it is not helpful to give the jury these types of opinions. *State v. Pickrell*, 443 S.C. 497, 503, 905 S.E.2d 374, 376-77 (2024).

The trial court overruled the objection and decided to instruct the jury it is the ultimate arbiter of credibility. Tr. 1386:15-23, 1411:22-1412:17. In doing so, the trial court recognized these were opinions: "I'll . . . just remind the jury that, just because *this witness is rendering certain opinions* about what has been previously said by other people, the ultimate determination as to credibility lies solely with the jury." Tr. 1382:3-9 (emphasis added). Ultimately, the trial court decided to "allow her to point out where she believes are inconsistencies." Tr. 1386:15-16. Clamp's testimony continued, and she repeated that, in her opinion, the statements Appellant and Webb gave, along with another witness, meant "neither Alex nor Ian would have been transporting Evan to South Carolina." Tr. 1389:10-1390:21.

b. Pitting and Opinions

Clamp's testimony that Appellant's alibi was false is pitting and an inadmissible opinion.

Outside the presence of the jury, Clamp was asked to clearly state her intended testimony:

The discrepancies that we learned is Alex had told us that Evan was down in Columbia from 6:00 to 10:00PM on the 20th. Evan claimed that Ian is who picked him up from Jacksonville, North Carolina at 5:00PM. That would not be possible for him to make it back down from Jacksonville, which is a four hour drive, down to Columbia . . . to be there between 6:00 and 10:00.

. . . Ian, in his statement, claimed that Alex is who went and picked up Evan and then Alex claimed that Evan's friend picked him up to bring him back to Jacksonville, North Carolina. We also have Caroline [Deaton] who was there, and she was at the house while both Ian and Alex were present at the apartment and said Evan's 20 minutes out. So that would be indicative of both of them being there and neither one of them driving him.

Tr. 1375:12-19. This was all hearsay about which Clamp had absolutely no personal knowledge.

Clamp cannot testify as to what Ian Little or Evan Webb or Caroline Deaton told officers about their whereabouts. She certainly cannot then share her opinion that these statements are

"inconsistent" and thus imply Appellant must be lying. 70 Corpus Juris, *Witnesses* § 658, at 488

(1935) ("[A] witness may not, in giving his own version of a matter, characterize the version of another witness relating to the same incident as false."). Her opinion about the consistency of the statements "added nothing to [the jury's] determination." *Pickrell*, 443 S.C. at 503, 905 S.E.2d at 377. "Thus, the testimony did not meet the foundational requirements of Rule 701." *Id.* Rather, her testimony served only "to attack the veracity of another witness" and was therefore improper. *State v. Sapps*, 295 S.C. 484, 486, 369 S.E.2d 145, 145-46 (1988); *see also State v. Daise*, 421 S.C. 442, 458, 807 S.E.2d 710, 718 (Ct. App. 2017) ("[W]itnesses generally are 'not allowed to testify whether another witness is telling the truth.'" (quoting *State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 490, 499-500 (2013))).

The trial court admitted this evidence based on the wrong legal standard and incorrectly believed "pitting" is limited to those circumstances where "you have got a witness on the witness stand and you're bringing up what somebody else testified while this witness is testifying." Tr. 1380:18-23. While South Carolina jurisprudence has generally described pitting in this context,⁸ there is no reason it should be so limited because it is really a form of the prohibitions on lay opinions and testimony about credibility. For the same reason that a solicitor may not "cross-examine a witness in such a manner as to force him to attack the veracity of another witness," a solicitor is not permitted to *attack* the veracity of witness in a recorded statement. *Sapps*, 295 S.C. at 486, 369 S.E.2d at 145-46; *see* Rule 608, SCRE (providing limitations on impeachment evidence).

⁸ *See, e.g., State v. Hariott*, 210 S.C. 290, 297-98, 42 S.E.2d 385, 388-89 (1947) (citing *State v. Warren*, 207 S.C. 126, 133, 35 S.E.2d 38, 41 (1945)).

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Court reverse his convictions and remand his case for a new trial uninfected by these improper lay opinions and cumulative testimony.



Jordan Wayburn
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of July, 2025.